Hawaiian Law Reference Material

Document A. Hawaiian Homes Commission Act, 1920, ch. 42, 42 Stat. 108 (1921) (formerly codified as amended at 48 U.S.C. §§ 691-704, 705-716); an Act of Congress establishing the HHL as a trust to be administered by the then Territory of Hawaii.

Document B. The Hawaii Admission Act, Pub. L. 86-3, 73 Stat. 4 (1959); Section 4 of this Act provides that, "As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, … subject to amendment or repeal only with the consent of the United States, and in no other manner [with some exceptions]."

Document C. Hawaii Constitution, Article XII, which adopts the Hawaiian Homes Commission Act, 1920, as a law of the State, and accepts the terms of the compact with the United States as provided in the Admission Act.

Document D. Hawaii Rev. Stat. § 26-17, which establishes the Hawaiian Homes Commission as a State agency, appointed by the Governor, and authorizes this commission to administer the Hawaiian Homes Commission Act, 1920 as adopted into State law.

Document E. *Rice v. Cayetano*, 528 U.S. 495 (2000), a U.S. Supreme Court decision finding unconstitutional a State law giving certain voting rights exclusively to persons of Hawaiian descent.

Document F. S. Rep. 112-251 (Dec. 17, 2012), report to accompany S. 675, a bill to express the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process for the recognition by the United States of the Native Hawaiian governing entity.

Document G. 157 Cong. Rec. 1,978-84 (2011) (statement of Sen. Akaka)

Document H. 157 Cong. Rec. 2,045-46 (2011) (statement of Rep. Hirono)

Document I. *Application of Sandwich Isles Communications, Inc. for Authorization to Provide IntraLATA and Intrastate Telecommunications Services Within and Between Hawaiian Home Lands Throughout the State of Hawaii Pursuant to Haw. Rev. Stat. Section 269-16.9*, Docket No. 96-0026, Order No. 16078 (Haw. Pub. Util. Comm'n 1997).

DOCUMENT A

Hawaiian Homes Commission Act, 1920, ch. 42, 42 Stat. 108 (1921) (formerly codified as amended at 48 U.S.C. §§ 691-704, 705-716).

HAWAIIAN HOMES COMMISSION ACT, 1920

(Act of July 9, 1921, c 42, 42 Stat 108)

Note

This Act is now part of the State Constitution and is subject to amendment or repeal as prescribed in Article XII of the Constitution.

Consent of Congress

Consent of Congress, see Pub. L. 99-557 (October 27, 1986); H. J. Res. 32, 105th Cong. 1st Sess., Pub. L. No. 105-21, 111 Stat. 235 (June 27, 1997), for §§209 and 219.1; and S.J. Res. 23, 102nd Cong. 2nd Sess., Pub. L. No. 102-398, 106 Stat. 1953 (October 6, 1992), for §§202, 203, 204, 208, 209, 213, 214, 215, 220, 221, 222, and 227.

Law Journals and Reviews

The Native Hawaiian Trusts Judicial Relief Act: The First Step in an Attempt to Provide Relief. 14 UH L. Rev. 889.

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Note

Amendment of Act and funding for Native Hawaiian roll commission. L 2011, c 195, §§3, 4.
Public land trust information system. L 2011, c 54.

Cross References

Native Hawaiian recognition, see chapter 10H.

Attorney General Opinions

Threatened and endangered plants are protected on Hawaiian home lands under the provisions of chapter 195D, as well as under the provisions of the federal Endangered Species Act of 1973, to the same extent that the plants are protected elsewhere in Hawaii. Anyone who "takes" threatened or endangered plants on Hawaiian home lands is subject to state and federal civil and criminal penalties. Att. Gen. Op. 95-5.

Law Journals and Reviews

Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue. 16 UH L. Rev. 1.

Native Hawaiian Homestead Water Reservation Rights: Providing Good Living Conditions for Native Hawaiian Homesteaders. 25 UH L. Rev. 85.

Case Notes

Claims under Act arise exclusively under state law; hence, Eleventh Amendment bars federal court from deciding claims against state officials based solely on this Act. 45 F.3d 333.

Appellant who claimed article XII's (of the state constitution) implementation of this Act violated the Fourteenth Amendment because government benefits, leases to public lands, are available only to native Hawaiians, lacked standing. 342 F.3d 934.

Lessee defendants' motion to dismiss granted, where plaintiffs claimed native Hawaiian lessee defendants violated this Act, as well as plaintiffs' rights under 42 U.S.C. §1983 by subleasing Hawaiian home lands to non-native Hawaiians. 824 F. Supp. 1480.

To the extent plaintiffs sought redress for violations of the Hawaii constitution or this Act, the Eleventh Amendment barred the state law claims; thus, state defendants' motion for summary judgment granted on all state law claims against state officials brought in their official capacities; state defendants sued in personal capacities were entitled to qualified immunity. 824 F. Supp. 1480.

Association that included native Hawaiian beneficiaries asserted viable claim under 42 U.S.C. §1983 alleging breach of trust duties by appellees under this Act via Admission Act. 78 H. 192, 891 P.2d 279.

Act is part of Hawai‘i constitution and does not constitute federal law; thus, federal preemption principles did not apply to case where there was no relevant federal law at issue and conflict between Act and state statute was matter of state constitutional law. 87 H. 91, 952 P.2d 379.

Chapter 343 does not conflict with this Act, has only

incidental impact on Hawaiian home lands, and is not inconsistent with interests of the beneficiaries; thus, chapter applies to Hawaiian home lands. 87 H. 91, 952 P.2d 379.

For Hawaiian home lands, the department of Hawaiian home lands is the accepting authority for applicant proposals under §343-5 (c); because the governor is not involved, there is no conflict with this Act. 87 H. 91, 952 P.2d 379.

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TITLE 1: DEFINITIONS

§1. That this Act may be cited as the "Hawaiian Homes Commission Act, 1920."

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§2. That when used in this Act the term "Hawaiian Organic Act" means the Act entitled "An Act to provide a government for the Territory of Hawaii," approved April 30, 1900, as amended.

Attorney General Opinions

This Act construed as a state constitutional provision rather than an Act of Congress. Att. Gen. Op. 81-4.

Case Notes

The Hawaii Admission Act transferred complete responsibility of the Hawaiian Homes Commission Act program and the homelands to Hawaii and claims based on that Act do not "arise under" federal laws. 588 F.2d 1216.

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[TITLE 1A: PURPOSE]

[§101. Purpose.] *[Text of section subject to consent of Congress.]* (a) The Congress of the United States and the State of Hawaii declare that the policy of this Act is to enable native Hawaiians to return to their lands in order to fully support self-sufficiency for native Hawaiians and the self-determination of native Hawaiians in the administration of this Act, and the preservation of the values, traditions, and culture of native Hawaiians.

(b) The principal purposes of this Act include but are not limited to:

(1) Establishing a permanent land base for the benefit and use of native Hawaiians, upon which they may live, farm, ranch, and otherwise engage in commercial or industrial or any other activities as authorized in this Act;

(2) Placing native Hawaiians on the lands set aside under this Act in a prompt and efficient manner and assuring long-term tenancy to beneficiaries of this Act and their successors;

(3) Preventing alienation of the fee title to the lands set aside under this Act so that these lands will always be held in trust for continued use by native Hawaiians in perpetuity;

(4) Providing adequate amounts of water and supporting infrastructure, so that homestead lands will always be usable and accessible; and

(5) Providing financial support and technical assistance to native Hawaiian beneficiaries of this Act so that by pursuing strategies to enhance economic self-sufficiency and promote community-based development, the traditions, culture and quality of life of native Hawaiians shall be forever self-sustaining.

(c) In recognition of the solemn trust created by this Act, and the historical government to government relationship between the United States and Kingdom of Hawaii, the United States and the State of Hawaii hereby acknowledge the trust established under this Act and affirm their fiduciary duty to faithfully administer the provisions of this Act on behalf of

the native Hawaiian beneficiaries of the Act.

(d) Nothing in this Act shall be construed to:

(1) Affect the rights of the descendants of the indigenous citizens of the Kingdom of Hawaii to seek redress of any wrongful activities associated with the overthrow of the Kingdom of Hawaii; or

(2) Alter the obligations of the United States and the State of Hawaii to carry out their public trust responsibilities under section 5 of the Admission Act to native Hawaiians and other descendants of the indigenous citizens of the Kingdom of Hawaii. [L 1990, c 349, §1]

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TITLE 2: HAWAIIAN HOMES COMMISSION

§201. Definitions. (a) When used in this title:

"Commission" means the Hawaiian homes commission.

"Fund" means the Hawaiian home loan fund.

"Hawaiian home lands" means all lands given the status of Hawaiian home lands under the provisions of section 204 of this title.

"Irrigated pastoral land" means land not in the description of the agricultural land but which, through irrigation, is capable of carrying more livestock the year through than first-class pastoral land.

"Native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.

"Public land" has the same meaning as defined in paragraph (3) of subdivision (a) of section 73 of the Hawaiian Organic Act.

"State" means the State of Hawaii.

"Tract" means any tract of Hawaiian home lands leased, as authorized by section 207 of this title, or any portion of the tract.

(b) Any term defined or described in section 347 or 351 of the Revised Laws of Hawaii of 1915, except a term defined in subsection (a) of this section, shall, whenever used in this title, have the same meaning as given by such definition or description. [Am Jun. 8, 1954, c 321, §2, 68 Stat 263; am L 1963, c 207, §5(a); am L 1997, c 197, §1]

Revision Note

Definitions rearranged pursuant to §23G-15.

Law Journals and Reviews

The Lum Court and Native Hawaiian Rights. 14 UH L. Rev. 377.

Case Notes

Native Hawaiians have no standing to challenge

constitutionality of Act on equal protection grounds as they would be asserting the rights of non-Hawaiian third parties. 795 F. Supp. 1009.

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[§201.5.] Federal reaffirmation. *[Text of section subject to consent of Congress.]* The United States and State of Hawaii hereby reaffirm and recognize that:

(1) The native Hawaiian people are a distinct native, indigenous people who have maintained their own language, culture, and traditions, and have established Hawaiian home lands areas protected under federal and state law;

(2) The United States has a unique trust responsibility to promote the welfare of the aboriginal, indigenous people of the State, and the federal government has delegated broad authority to the State to act for their betterment; and

(3) The aboriginal, indigenous people of the State retain their inherent sovereign authority and their right to organize for their common welfare. [L 2001, c 302, pt of §2]

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[§201.6.] Community based governance on Hawaiian home lands. *[Text of section subject to consent of Congress.]* It is the policy of the State to support participation in governance by promoting the empowerment of democratically-elected Hawaiian homestead community self-governance organizations.

In furtherance of this policy, and with the consent of the Congress of the United States, the State may delegate to a democratically-elected organization representing a Hawaiian homestead community or communities the authorities delegated to the State by the United States relating to the administration of the Hawaiian Homes Commission Act, 1920, as amended.

The commission may establish a working relationship with a democratically-elected Hawaiian homestead community self-governance organization to promote community welfare. The selection of authorities to be delegated shall be left to the Hawaiian homes commission's discretion. The commission may establish criteria to determine the boundaries and location of a Hawaiian homestead community and whether a Hawaiian homestead community organization is eligible for delegation. Criteria for eligibility shall include but not be limited to the following:

(1) The organization and its leadership is a bona fide representative body of native Hawaiian residents, homestead lessees, qualified successors residing within the homestead community, and native Hawaiians who have designated that homestead community as their primary choice of residence with the department of Hawaiian home lands and who are awaiting an award of a lease under this Act;

(2) The organization is governed by free and fair elections; and

(3) The organization demonstrates sufficient capacity to implement the authorities that are delegated.

The commission may contract with and delegate authority to a Hawaiian homestead community self-governance organization to perform governmental services for the homestead community represented by that homestead organization. Any such contract shall include a requirement that the government service shall be performed at a level and quality comparable to the services that

would otherwise be provided by the department of Hawaiian home lands.

The department of Hawaiian home lands may adopt rules in accordance with chapter 91, Hawaii Revised Statutes, to implement this section. [L 2001, c 302, pt of §2]

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§202. Department officers, staff, commission, members, compensation. (a) There shall be a department of Hawaiian home lands which shall be headed by an executive board to be known as the Hawaiian homes commission. The members of the commission shall be nominated and appointed in accordance with section 26-34, Hawaii Revised Statutes. The commission shall be composed of nine members, as follows: three shall be residents of the city and county of Honolulu; two shall be residents of the county of Hawaii one of whom shall be a resident of east Hawaii and the other a resident of west Hawaii; two shall be residents of the county of Maui one of whom shall be a resident from the island of Molokai; one shall be a resident of the county of Kauai; and the ninth member shall be the chairman of the Hawaiian homes commission. All members shall have been residents of the State at least three years prior to their appointment and at least four of the members shall be descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. The members of the commission shall serve without pay, but shall receive actual expenses incurred by them in the discharge of their duties as such members. The governor shall appoint the chairman of the commission from among the members thereof.

The commission may delegate to the chairman such duties, powers, and authority or so much thereof, as may be lawful or proper for the performance of the functions vested in the commission. The chairman of the commission shall serve in a full-time capacity. He shall, in such capacity, perform such duties, and exercise such powers and authority, or so much thereof, as may be delegated to him by the commission as herein provided above.

(b) The provisions of section 76-16, Hawaii Revised Statutes, shall apply to the positions of first deputy and private secretary to the chairman of the commission. The department may hire temporary staff on a contractual basis not subject to chapters 76 and 78, Hawaii Revised Statutes, when the services to be performed will assist in carrying out the purposes of the Act. These positions may be funded through appropriations for capital improvement program projects and by the administration account, operating fund, or native Hawaiian rehabilitation fund. No contract shall be for a period longer

than two years, but individuals hired under contract may be employed for a maximum of six years; provided that the six-year limitation shall not apply if the department, with the approval of the governor, determines that such contract individuals are needed to provide critical services for the efficient functioning of the department. All other positions in the department shall be subject to chapter 76, Hawaii Revised Statutes.

All vacant and new civil service positions covered by chapter 76, Hawaii Revised Statutes, shall be filled in accordance with section 76-22.5, Hawaii Revised Statutes; provided that the provisions of these sections shall be applicable first to qualified persons of Hawaiian extraction. [Am Jul. 26, 1935, c 420, §1, 49 Stat 504; May 31, 1944, c 216, §1, 58 Stat 260; Jul. 9, 1952, c 618, 66 Stat 515; am L 1963, c 207, §1; am imp L 1965, c 223, §§5, 8; am L 1977, c 174, §1; am L 1983, c 147, §2; am L 1984, c 199, §2; am L 1985, c 295, §1; am L 1986, c 249, §1; am L 1989, c 265, §2; am L 2002, c 148, §48]

Cross References

Acting board members, see §26-36.
Membership on other boards prohibited, see §78-4.
Public agency meetings and records, see chapter 92.

Attorney General Opinions

Provision conferring employment preference to Hawaiians conflicts with Title VII of the Civil Rights Act of 1964 and is invalid. Att. Gen. Op. 81-4.

Law Journals and Reviews

Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts. 14 UH L. Rev. 519.

§203. Certain public lands designated "available lands." All public lands of the description and acreage, as follows, excluding (a) all lands within any forest reservation, (b) all cultivated sugar-cane lands, and (c) all public lands held under a certificate of occupation, homestead lease, right of purchase lease, or special homestead agreement, are hereby designated, and hereinafter referred to, as "available lands":

(1) On the island of Hawaii: Kamaoa-Puueo (eleven thousand acres, more or less), in the district of Kau; Puukapu (twelve thousand acres, more or less), Kawaihae 1 (ten thousand acres, more or less), and Pauahi (seven hundred and fifty acres, more or less), in the district of South Kohala; Kamoku-Kapulena (five thousand acres, more or less), Waimanu (two hundred acres, more or less), Nienie (seven thousand three hundred and fifty acres, more or less), in the district of Hamakua; fifty-three thousand acres to be selected by the department from the lands of Humuula Mauka, in the district of North Hilo; Panaewa, Waiakea (two thousand acres, more or less), Waiakea-kai, or Keaukaha (two thousand acres, more or less), and two thousand acres of agricultural lands to be selected by the department from the lands of Piihonua, in the district of South Hilo; and two thousand acres to be selected by the department from the lands of Kaohe-Makuu, in the district of Puna; land at Keaukaha, Hawaii, more particularly described as follows:

PARCEL I

Now set aside as Keaukaha Beach Park by Executive Order Numbered 421, and being a portion of the Government land at Waiakea, South Hilo, Hawaii.

Beginning at the southeast corner of this parcel of land, on the north side of Kalanianaole Road, the coordinates of said point of beginning referred to Government survey triangulation station "Halai" being five thousand six hundred and eighty-one and twelve one-hundredths feet north and seventeen thousand nine hundred and thirty-three and fifteen one-hundredths feet east, as shown on Government Survey Registered Map Numbered 2704, and running by true azimuths.

1. Sixty-one degrees fifty-eight minutes one thousand three hundred and fifty-one and seventy-three one-hundredths

feet along the north side of Kalanianaole Road (fifty feet wide);

2. One hundred and fifty-one degrees fifty-eight minutes eight hundred and forty feet along United States military reservation for river and harbor improvements (Executive Order Numbered 176);

Thence along the seashore at high-water mark, the direct azimuths and distances between points at seashore being:

3. Two hundred and eighty-two degrees no minutes four hundred and sixty-eight and fifty one-hundredths feet;

4. Three hundred and thirteen degrees twenty minutes four hundred and forty-one feet;

5. Two hundred and sixty degrees twenty minutes one hundred and forty feet;

6. Two hundred and forty-two degrees twenty minutes two hundred and fifty feet;

7. One hundred and eighty-eight degrees forty minutes sixty feet;

8. Two hundred and seventy-two degrees twenty minutes one hundred and seventy feet;

9. Two hundred and five degrees no minutes sixty feet;

10. One hundred and ten degrees twenty minutes two hundred and twenty feet;

11. Ninety degrees fifty minutes eighty feet;

12. One hundred and sixty-two degrees no minutes one hundred and seventy feet;

13. Two hundred and fifty degrees thirty minutes four hundred and thirty feet;

14. Three hundred and thirty-one degrees fifty-eight minutes three hundred and eighty feet along parcel II of Government land to the point of beginning and containing an area of eleven and twenty one-hundredths acres, more or less.

PARCEL II

Being a portion of the Government land of Waiakea, South Hilo, Hawaii, and located on the north side of Kalanianaole Road and adjoining parcel I, hereinbefore described.

Beginning at the south corner of this parcel of land, on the north side of Kalanianaole Road, the coordinates of said

point of beginning referred to Government survey triangulation station "Halai," being five thousand six hundred and eighty-one and twelve one-hundredths feet north and seven thousand nine hundred and thirty-three and fifteen one-hundredths feet east and running by true azimuths:

1. One hundred and fifty-one degrees fifty-six minutes three hundred and eighty feet along the east boundary of parcel I;

2. Two hundred and twenty-nine degrees forty-five minutes thirty seconds one hundred and ninety-one and one one-hundredths feet;

3. One hundred and ninety-eight degrees no minutes two hundred and thirty feet to a one-and-one-half inch pipe set in concrete;

4. Three hundred and seven degrees thirty-eight minutes five hundred and sixty-two and twenty-one one-hundredths feet to a one-and-one-half inch pipe set in concrete;

5. Twenty-eight degrees no minutes one hundred and twenty-one and thirty-seven one-hundredths feet to the north side of Kalanianaole Road;

6. Sixty-one degrees fifty-eight minutes four hundred and eighty-three and twenty-two one-hundredths feet along the north side of Kalanianaole Road to the point of beginning and containing an area of five and twenty-six one-hundredths acres, more or less.

(2) On the island of Maui: Kahikinui (twenty-five thousand acres, more or less) in the district of Kahikinui, and the public lands (six thousand acres, more or less) in the district of Kula;

(3) On the island of Molokai: Palaau (eleven thousand four hundred acres, more or less), Kapaakea (two thousand acres, more or less), Kalamaula (six thousand acres, more or less), Hoolehua (three thousand five hundred acres, more or less), Kamiloloa I and II (three thousand six hundred acres, more or less), and Makakupaia (two thousand two hundred acres, more or less) and Kalaupapa (five thousand acres, more or less);

(4) On the island of Oahu: Nanakuli (three thousand acres, more or less), and Lualualei (two thousand acres, more or less), in the District of Waianae; and Waimanalo (four thousand acres, more or less), in the District of Koolaupoko, excepting

therefrom the military reservation and the beach lands; and those certain portions of the lands of Auwaiolimu, Kewalo, and Kalawahine described by metes and bounds as follows, to-wit:

(I) Portion of the Government land at Auwaiolimu, Punchbowl Hill, Honolulu, Oahu, described as follows:

Beginning at a pipe at the southeast corner of this tract of land, on the boundary between the lands of Kewalo and Auwaiolimu, the coordinates of said point of beginning referred to Government Survey triangulation station "Punchbowl," being one thousand one hundred and thirty-five and nine-tenths feet north and two thousand five hundred and fifty-seven and eight-tenths feet east as shown on Government Survey Registered Map Numbered 2692, and running by true azimuths:

1. One hundred and sixty-three degrees thirty-one minutes two hundred and thirty-eight and eight-tenths feet along the east side of Punchbowl-Makiki Road;

2. Ninety-four degrees eight minutes one hundred and twenty-four and nine-tenths feet across Tantalus Drive and along the east side of Puowaina Drive;

3. One hundred and thirty-one degrees thirteen minutes two hundred and thirty-two and five-tenths feet along a twenty-five foot roadway;

4. One hundred and thirty-nine degrees fifty-five minutes twenty and five-tenths feet along same;

5. One hundred and sixty-eight degrees seventeen minutes two hundred and fifty-seven and eight-tenths feet along Government land (old quarry lot);

6. One hundred and fifty-six degrees thirty minutes three hundred and thirty-three feet along same to a pipe;

7. Thence following the old Auwaiolimu stone wall along L. C. Award Numbered 3145, to Laenui, grant 5147 (lot 8 to C.W. Booth), L.C. Award Numbered 1375, to Kapule, and L.C. Award Numbered 1355, to Kekuanoni, the direct azimuth and distance being two hundred and forty-nine degrees forty-one minutes one thousand three hundred and three and five-tenths feet;

8. Three hundred and twenty-one degrees, twelve minutes, six hundred and ninety-three feet along the remainder of the land of Auwaiolimu;

9. Fifty-one degrees, twelve minutes, one thousand and four hundred feet along the land of Kewalo to the point of

beginning, containing an area of twenty-seven acres, excepting and reserving therefrom Tantalus Drive and Auwaiolimu Street crossing this land.

(II) Portion of the land of Kewalo, Punchbowl Hill, Honolulu, Oahu, being part of the lands set aside for the use of the Hawaii Experiment Station of the United States Department of Agriculture by proclamation of the Acting Governor of Hawaii, dated June 10, 1901, and described as follows:

Beginning at the northeast corner of this lot, at a place called "Puu Ea" on the boundary between the lands of Kewalo and Auwaiolimu, the coordinates of said point of beginning referred to Government survey triangulation station "Punchbowl," being three thousand two hundred and fifty-five and six-tenths feet north and five thousand two hundred and forty-four and seven-tenths feet east, as shown on Government Survey Registered Map Numbered 2692 of the State of Hawaii, and running by true azimuths:

1. Three hundred and fifty-four degrees thirty minutes nine hundred and thirty feet along the remainder of the land of Kewalo, to the middle of the stream which divides the lands of Kewalo and Kalawahine;

2. Thence down the middle of said stream along the land of Kalawahine, the direct azimuth and distance being forty-nine degrees sixteen minutes one thousand five hundred and twelve and five-tenths feet;

3. One hundred and forty-one degrees twelve minutes eight hundred and sixty feet along the remainder of the land of Kewalo;

4. Two hundred and thirty-one degrees twelve minutes five hundred and fifty-two and six-tenths feet along the land of Auwaiolimu to "PUU IOLE";

5. Thence still along the said land of Auwaiolimu following the top of the ridge to the point of beginning, the direct azimuth and distance being two hundred and thirty-two degrees twenty-six minutes one thousand four hundred and seventy feet and containing an area of thirty acres; excepting and reserving therefrom Tantalus Drive crossing this land;

(III) Portion of the land of Kalawahine makai of Tantalus Drive consisting of twelve acres, more or less, said parcel described more specifically in tax map key 2-4-34-8, which

includes certain parcels adjoining the Ewa portion of Kalawahine Place currently occupied by short-term land dispositions if the persons residing on those parcels meet the qualifications established by the Legislature of the State of Hawaii and elect to have the land under their homes transferred to the department, and certain portions of the Ewa portion of the parcel, but excluding the hillside side portions of the southeast parcel, with metes and bounds designated by the department and approved by the department of land and natural resources; provided that persons now residing on portion of the land described, be given first opportunity to lease the lands on which they now reside, for a term of 99 years, whether or not they be native Hawaiians as defined in the Hawaiian Homes Commission Act of 1920, as amended.

(IV) Portion of the Hawaii Experiment Station under the control of the United States Department of Agriculture, situated on the northeast side of Auwaiolimu Street.

KEWALO-UKA, HONOLULU, OAHU

Being a portion of the land of Kewalo-uka conveyed by the Territory of Hawaii to the United States of America by proclamations of the Acting Governor of Hawaii, Henry E. Cooper, dated June 10, 1901, and August 16, 1901, and a portion of the United States Navy Hospital reservation described in Presidential Executive Order Numbered 1181, dated March 25, 1910.

Beginning at the west corner of this parcel of land, on the Auwaiolimu-Kewalo-uka boundary and on the northeast side of Auwaiolimu Street, the coordinates of said point of beginning referred to Government survey triangulation station "Punchbowl," being one thousand two hundred and thirty and fifty-eight one-hundredths feet north and two thousand six hundred and seventy-five and six one-hundredths feet east as shown on Government Survey Registered Map Numbered 2985 and running by azimuths measured clockwise from true south:

1. Two hundred and thirty-one degrees twelve minutes one thousand two hundred and forty-eight and twenty-six one-hundredths feet along the land of Auwaiolimu;

2. Three hundred and twenty-one degrees twelve minutes

eight hundred and sixty feet along Hawaiian home land as described in Presidential Executive Order Numbered 5561;

3. Thence down along the middle of stream in all its turns and windings along the land of Kalawahine to the north corner of Roosevelt High School lot, the direct azimuth and distance being thirty-three degrees forty-eight minutes forty seconds one thousand one hundred and twelve and twenty one-hundredths feet;

Thence still down along the middle of stream for the next seven courses along the Roosevelt High School premises, the direct azimuth and distances between points in middle of said stream being:

4. Twenty-three degrees forty minutes twenty-eight and ninety one-hundredths feet;

5. Eight degrees no minutes one hundred and fifteen feet;

6. Three hundred and thirty-seven degrees fifty minutes forty-eight feet;

7. Two degrees thirty minutes sixty feet;

8. Forty-nine degrees forty minutes fifty-two feet;

9. Forty-six degrees six minutes ninety and seventy one-hundredths feet;

10. Ninety-two degrees forty-three minutes ninety-five and sixty one-hundredths feet; thence

11. Eighty-three degrees thirty-eight minutes seventy-one and sixty-three one-hundredths feet along state land to the northeast side of Auwaiolimu Street;

12. Thence on a curve to the left with a radius of one thousand one hundred and seventy-six and twenty-eight one-hundredths feet along the northeast side of Auwaiolimu Street along land described in Presidential Executive Order Numbered 1181, dated March 25, 1910, the direct azimuth and distance being one hundred and seventy-two degrees twenty-nine minutes thirty-five seconds one hundred and sixty-four and thirty-nine one-hundredths feet;

13. Thence continuing on a curve to the left with a radius of one thousand one hundred and seventy-six and twenty-eight one-hundredths feet along the northeast side of Auwaiolimu Street, the direct azimuth and distance being one hundred and sixty degrees fifty minutes forty-eight seconds three hundred and twelve and seventy-five one-hundredths feet;

14. Two hundred and twenty-four degrees fifty-three minutes

six hundred and seventy and sixty-five one-hundredths feet along the Quarry Reservation (State of Hawaii, owner);

15. One hundred and ten degrees six minutes two hundred and thirty-nine and twenty one-hundredths feet along same;

16. Ninety-two degrees five minutes two hundred and two and twenty one-hundredths feet along same;

17. Fifty-three degrees twenty minutes three hundred and forty and thirty-four one-hundredths feet along same;

18. One hundred and forty-two degrees thirty minutes four hundred and twenty-four and sixty-eight one-hundredths feet along the northeast side of Auwaiolimu Street to the point of beginning and containing an area of twenty-seven and ninety one-hundredths acres; excepting and reserving therefrom that certain area included in Tantalus Drive, crossing this land.

(V) Portion of Kewalo-uka Quarry Reservation. Situate on the northeast side of Auwaiolimu Street.

KEWALO-UKA, HONOLULU, OAHU

Being land reserved by the State of Hawaii within the Hawaii Experiment Station under the control of the United States Department of Agriculture, as described in proclamations of the Acting Governor of Hawaii, Henry E. Cooper, dated June 10, 1901.

Beginning at the northwest corner of this parcel of land and on the northeast side of Auwaiolimu Street, the coordinates of said point of beginning referred to Government survey triangulation station "Punchbowl," being eight hundred and ninety-three and sixty-six one-hundredths feet north and two thousand nine hundred and thirty-three and fifty-nine one-hundredths feet east as shown on Government Survey Registered Map Numbered 2985 and running by azimuths measured clockwise from true south:

1. Two hundred and thirty-three degrees twenty minutes three hundred and forty and thirty-four one-hundredths feet along the Hawaii Experiment Station under the control of the United States Department of Agriculture;

2. Two hundred and seventy-two degrees five minutes two hundred and two and twenty one-hundredths feet along same;

3. Two hundred and ninety degrees six minutes two hundred and thirty-nine and twenty one-hundredths feet along same;

4. Forty-four degrees fifty-three minutes six hundred and seventy and sixty-five one-hundredths feet along same to the northeast side of Auwaiolimu Street;

5. Thence on a curve to the left with a radius of one thousand one hundred and seventy-six and twenty-eight one-hundredths feet along the northeast side of Auwaiolimu Street, the direct azimuth and distance being one hundred and forty-seven degrees fifty-one minutes thirteen seconds two hundred and nineteen and fifty one-hundredths feet;

6. One hundred and forty-two degrees thirty minutes one hundred and thirty-four and fifty-five one-hundredths feet along the northeast side of Auwaiolimu Street;

7. Two hundred and thirty-two degrees thirty minutes twenty feet along same;

8. One hundred and forty-two degrees thirty minutes seventy-one and fifty-seven one-hundredths feet along same to the point of beginning and containing an area of four and six hundred and forty-six one-thousandths acres.

(VI) Being a portion of government land of Auwaiolimu, situated on the northeast side of Hawaiian home land of Auwaiolimu and adjacent to the land of Kewalo-uka at Pauoa Valley, Honolulu, Oahu, State of Hawaii. Beginning at a pipe in concrete at the south corner of this parcel of land, being also the east corner of Hawaiian home land, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Punchbowl," being two thousand twelve and seventy-five one-hundredths feet south and three thousand six hundred forty-seven and eighty-seven one-hundredths feet east, and thence running by azimuths measured clockwise from true south:

1. One hundred and forty-one degrees twelve minutes six hundred and ninety-three feet along Hawaiian home land;

2. Thence along middle of stone wall along L.C.Aw. 1356 to Kekuanoni, Grant 5147, Apana 1 to C.W.Booth, L.C.Aw. 1351 to Kamakainau, L.C.Aw. 1602 to Kahawai, Grant 4197 to Keauloa, L.C. Aw. 5235 to Kaapuiki and Grant 2587 to Haalelea;

3. Two hundred and ninety-five degrees thirty minutes three hundred and twenty feet along the remainder of government land of Auwaiolimu;

4. Twenty-four degrees sixteen minutes thirty seconds one thousand five hundred seventy-nine and thirty-six one-hundredths

feet along the remainder of government land of Auwaiolimu;

5. Thence along middle of ridge along the land of Kewalo-uka to a point called "Puu Iole" (pipe in concrete monument), the direct azimuth and distance being fifty-six degrees no minutes eight hundred and thirty feet;

6. Fifty-two degrees twelve minutes five hundred fifty-two and sixty one-hundredths feet along the land of Kewalo-uka to the point of beginning and containing an area of thirty-three and eighty-eight one-hundredths acres, more or less.

(VII) Being portions of government lands of Kewalo-uka and Kalawahine situated on the east side of Tantalus Drive at Pauoa Valley, Honolulu, Oahu, State of Hawaii. Beginning at the west corner of this parcel of land, the true azimuth and distance to a point called "Puu Ea" (pipe in concrete monument) being one hundred and seventy-four degrees thirty minutes four hundred one and ninety-nine one-hundredths feet, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Punchbowl" being two thousand eight hundred fifty-five and ten one-hundredths feet north and five thousand two hundred eighty-two and twenty-five one-hundredths feet east and thence running by azimuths measured clockwise from true south:

1. Two hundred and forty-eight degrees nineteen minutes forty seconds eight hundred fifty and fifty-four one-hundredths feet along the land of Kewalo-uka;

2. Sixteen degrees thirty minutes five hundred feet along the land of Kewalo-uka, along the land of Kalawahine;

3. Twenty-five degrees no minutes five hundred feet along the land of Kalawahine;

4. Thirty-five degrees no minutes three hundred and twenty feet along the land of Kalawahine;

5. Fifty degrees forty-six minutes ninety-six and seventy one-hundredths feet along Makiki Forest Ridge lots;

6. Seventy-three degrees twenty minutes two hundred fifty-five and ninety one-hundredths feet along Makiki Forest Ridge lots;

7. Eighty-six degrees thirty-two minutes one hundred sixty-three and forty one-hundredths feet along Makiki Forest Ridge lots;

8. Thence along the south side of Tantalus Drive on a curve to the right with a radius of two hundred and seventy

feet, the direct azimuth and distance being two hundred and twenty-one degrees twelve minutes nineteen seconds ninety-eight and thirty-six one-hundredths feet;

9. Two hundred and thirty-one degrees forty-two minutes one hundred ninety-three and thirty-five one-hundredths feet along the south side of Tantalus Drive;

10. Still along Tantalus Drive on a curve to the left with a radius of one hundred eighty and seventy-eight one-hundredths feet, the direct azimuth and distance being one hundred and eighty-one degrees forty-five minutes fifty-five seconds two hundred seventy-six and seventy-two one-hundredths feet;

11. Two hundred and forty-two degrees fifteen minutes sixty-two and thirty-two one-hundredths feet along the land of Kewalo-uka;

12. One hundred and seventy-four degrees thirty minutes five hundred twenty-eight and one one-hundredths feet along the land of Kewalo-uka to the point of beginning and containing an area of five hundred and seventy-four thousand seven hundred and thirty square feet or thirteen and one hundred ninety-four one-thousandths acres.

(5) On the island of Kauai: Upper land of Waimea, above the cultivated sugar cane lands, in the district of Waimea (fifteen thousand acres, more or less); and Moloaa (two thousand five hundred acres, more or less), and Anahola and Kamalomalo (five thousand acres, more or less).

Wailuku, Maui: That parcel of government land, situate in the District of Wailuku, Island and County of Maui, comprising twelve and four hundred and fifty-five one-thousandths acres of the ILI OF KOU and being a portion of the land covered by General Lease Numbered 2286 to Wailuku Sugar Company, Limited, notwithstanding the fact that said parcel is cultivated sugar cane land, subject, however, to the terms of said lease.

Cultivated Sugar Cane Lands: That parcel of Anahola, Island of Kauai, comprising four hundred and one and four hundred and twenty-three one-thousandths acres, hereinafter described and being portion of the land covered by general lease numbered 2724 to the Lihue Plantation Company, Limited, notwithstanding the fact that said parcel is cultivated sugar cane land, subject however, to the terms of said lease, said parcel being more particularly described as follows:

Being a portion of land described in general lease numbered 2724 to the Lihue Plantation Company situate in the district of Anahola, Kauai, State of Hawaii, beginning at the northwest corner of this parcel of land, the coordinates of which referred to government triangulation station south base are three thousand and forty-nine and sixty-two one-hundredths feet south, one thousand nine hundred and thirty-two and twenty-five one-hundredths feet west, and running thence by azimuths measured clockwise from true south two hundred and eighty-four degrees thirty minutes two hundred and fifty feet, thence on the arc of circular curve to the left, with a radius of eight hundred and ninety feet and a central angle of thirty-five degrees fifteen minutes, the direct azimuth and distance being two hundred and sixty-six degrees fifty-two minutes thirty seconds five hundred and thirty-eight and ninety-six one-hundredths feet, thence two hundred and forty-nine degrees fifteen minutes one thousand eight hundred and nine and twenty-five one-hundredths feet, thence two hundred and twenty-four degrees fifteen minutes three thousand fifty-six feet, thence one hundred and thirty-four degrees fifteen minutes two hundred and seven feet, to the seashore at Anahola Bay, thence along the seashore around Kahala Point, the direct azimuth and distance being two hundred and thirty-seven degrees six minutes seven seconds one thousand and sixty and fourteen one-hundredths feet, thence along the seashore, the direct azimuth and distance being three hundred and thirty-two degrees no minutes one thousand eight hundred and twenty-seven feet, thence along the seashore, the direct azimuth and distance being three hundred and fifty-five degrees no minutes one thousand eight hundred and twenty-seven feet, thence eighty-seven degrees twenty minutes seven hundred and forty feet, thence fifty-nine degrees no minutes two thousand seven hundred and fifteen feet, thence sixty-nine degrees fifteen minutes one thousand eight hundred and eighty-seven and thirty-six one-hundredths feet, thence on the arc of a circular curve to the right with a radius of three thousand and twelve feet, and a central angle of thirty-five degrees fifteen minutes the direct azimuth and distance being eighty-six degrees fifty-two minutes thirty seconds one thousand eight hundred and twenty-three and ninety-eight one-hundredths feet, thence one hundred and four degrees thirty minutes two hundred and fifty feet,

thence one hundred and ninety-four degrees thirty minutes one thousand and thirty-one feet, thence on the arc of a circular curve to the left with a radius of six hundred and seven and ninety-five one-hundredths feet and a central angle of fifty-three degrees three minutes thirty seconds the direct azimuth and distance being seventy-seven degrees fifty-eight minutes fifteen seconds five hundred and forty-three and nine one-hundredths feet to the government road, thence two hundred and thirty-one degrees twenty-six minutes thirty seconds one hundred and thirteen and sixty-one one-hundredths feet along the government road, thence along the government road on the arc of a circular curve to the left with a radius of four hundred and seventy-seven feet and a central angle of forty-four degrees twenty-six minutes thirty seconds, the direct azimuth and distance being two hundred and nine degrees thirteen minutes fifteen seconds three hundred and sixty and seventy-eight one-hundredths feet, thence one hundred and eighty-seven degrees no minutes one hundred and sixty-nine and fifty-four one-hundredths feet along the government road, thence on the arc of a circular curve to the left with a radius of three hundred and fifty-one and eight one-hundredths feet and a central angle of eighty-two degrees thirty minutes the direct azimuth and distance being three hundred and twenty-five degrees forty-five minutes four hundred and sixty-two and ninety-seven one-hundredths feet, thence one hundred and ninety-four degrees thirty minutes five hundred and seventy-nine feet, thence one hundred and four degrees thirty minutes three hundred feet, thence one hundred and ninety-four degrees thirty minutes two hundred feet, thence two hundred eighty-four degrees thirty minutes three hundred feet, thence one hundred and ninety-four degrees thirty minutes two hundred and fifty-two feet to the point of beginning containing an area of four hundred and one and four hundred and twenty-three one-thousandths acres more or less. [Am May 16, 1934, c 290, §1, 48 Stat 777; Aug. 29, 1935, c 810, §1, 49 Stat 966; Jul. 10, 1937, c 482, 50 Stat 497; Nov. 26, 1941, c 544, §1, 55 Stat 782; May 31, 1944, c 216, §2, 58 Stat 260; Jun. 3, 1948, cc 384, 397, 62 Stat 295, 303; Jul. 9, 1952, c 614, §§1, 2, 66 Stat 511; am L 1963, c 207, §§2, 5; am L 1990, c 150, §7]

WITHDRAWALS OF AVAILABLE LAND

The Act of May 31, 1944, c 216, §2, 58 Stat 260, repealed so much of the above section as designates the lands hereinafter described as "available lands," and restored such lands to their previous status under the control of the Territory of Hawaii. The lands so restored on the island of Hawaii are:

Those portions of Keaukaha tract 1, being additions to the Hilo airplane landing field, comprising several parcels of land as follows:

Parcel 1. Land situated at Keaukaha, tract 1, Waiakea, South Hilo, island of Hawaii, State of Hawaii, being portions of lots 96, 97, 182, 183, 184, 185, Desha Avenue, and twenty-five foot alley, of the Keaukaha residence lots, as shown on government survey registered maps 2723 and 3017, on file in the department of accounting and general services at Honolulu.

Beginning at the south corner of this piece of land and on the west boundary of the Hawaiian home land, the true azimuth and distance from the northwest corner of the Hilo airport addition, as shown on government survey registered maps 2723 and 3017 on file in the department of accounting and general services at Honolulu, and on the south side of Kamehameha Avenue, being one hundred and eighty degrees no minutes four hundred and three and thirty-one one-hundredths feet, and the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halai" being two thousand five hundred and twenty and thirty-one one-hundredths feet north and fifteen thousand five hundred and fifty-three one-hundredths feet east, thence running by azimuths measured clockwise from true south:

1. One hundred and eighty degrees no minutes six hundred and fifteen and ninety-five one-hundredths feet along Government land and tract A of grant deeded by Territory of Hawaii to Hilo Railroad Company;

2. Three hundred and ten degrees forty-two minutes four hundred and one and sixty-six one-hundredths feet along the remainders of Desha Avenue, lots 96, 97, twenty-five-foot alley, and lot 182 of the Keaukaha residence lots; and

3. Forty degrees forty-two minutes four hundred and sixty-six and ninety-seven one-hundredths feet along the remainders of lots 182, 183, 184, 185, and Desha Avenue and the Keaukaha residence lots to the point of beginning, and containing an area

of two and one hundred and fifty-five one-thousandths acres, more or less.

Parcel 2. Land situated on the south side of Kamehameha Avenue, at Keaukaha, tract 1, Waiakea, South Hilo, Island of Hawaii, State of Hawaii, being all of lots 449 to 486, inclusive, all of lots 546 to 564, inclusive, and portions of Kauhane, Spencer, Pua, and Kamaka Avenues of the Keaukaha residence lots, as shown on Government Survey Registered Maps 2723 and 3017, on file in the department of accounting and general services at Honolulu.

Beginning at the northwest corner of this piece of land; being also the southwest corner of Kamehameha and Kauhane Avenues, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halai" being two thousand one hundred and seventeen feet north and sixteen thousand eight hundred and eighty feet east, thence running by azimuths measured clockwise from true south:

1. Two hundred and seventy degrees no minutes two thousand and seventeen and eighty-five one-hundredths feet along the south side of Kamehameha Avenue;
2. Three hundred and sixty degrees no minutes four hundred and fifty feet along lots 448 and 487 of the Keaukaha residence lots;
3. Three hundred and sixty degrees no minutes fifty feet across Kamaka Avenue;
4. Three hundred and sixty degrees no minutes two hundred and twenty-five feet along lot 545 of the Keaukaha residence lots;
5. Ninety degrees no minutes three hundred and ninety-two and forty-eight one-hundredths feet along lots 583, 582, 581, and 580 of the Keaukaha residence lots;
6. Ninety degrees no minutes fifty feet across Pua Avenue;
7. Ninety degrees no minutes eight hundred and one and fifteen one-hundredths feet along lots 579, 578, 577, 576, 575, 574, 573, and 572, of the Keaukaha residence lots;
8. Ninety degrees no minutes fifty feet across Spencer Avenue;
9. Ninety degrees no minutes six hundred and seventy-four and twenty-two one-hundredths feet along lots 571, 570, 569, 568, 567, 566, and 565, of the Keaukaha residence lots;
10. Ninety degrees no minutes fifty feet across Kauhane

Avenue; and

11. One hundred and eight degrees no minutes seven hundred and twenty-five feet along Puuhala Reserve and the present Hilo airport addition, as shown on Government Survey Registered Maps 2723 and 3017 on file in the department of accounting and general services at Honolulu, to the point of beginning, and containing an area of thirty-three and five hundred and eighty-five one-thousandths acres, more or less.

Parcel 3. As returned to the Commissioner of Public Lands of the Territory of Hawaii by resolution numbered 78 of the Hawaiian Homes Commission, dated May 13, 1942. Land situated at Keaukaha, tract 1, Waiakea, South Hilo, Island of Hawaii, State of Hawaii, being the whole of lots 446, 447, 448, 487, 488, 489, 543, 544, 545, 584, 585, and 586 and portions of lots 581, 582, and 583, and a portion of Kamaka Avenue, of the Keaukaha residence lots, as shown on Government Survey Registered Maps 2723 and 3017, more particularly described as follows:

Beginning at the northeast corner of this piece of land, being also the northeast corner of lot 446 and the southwest corner of Kamehameha and Baker Avenues, the true azimuth and distance from the northwest corner of Hilo airport addition (of twenty and fifty-four one-hundredths acres and on the south side of Kamehameha Highway), as shown on Government Survey Registered Maps 2723 and 3017, being two hundred and seventy degrees no minutes and three thousand six hundred and eighty-eight and seventy one-hundredths feet, and the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halai" being two thousand one hundred and seventeen feet north and nineteen thousand one hundred and ninety-two and twenty-three one-hundredths feet east, thence running by azimuths measured clockwise from true south:

1. Three hundred and sixty degrees no minutes four hundred and fifty feet along the west side of Baker Avenue;

2. Three hundred and sixty degrees no minutes fifty feet across Kamaka Avenue;

3. Three hundred and sixty degrees no minutes four hundred and fifty feet along the west side of Baker Avenue;

4. Ninety degrees no minutes two hundred and ninety-four and thirty-eight one-hundredths feet along the north side of Kawika Avenue;

5. One hundred and eighty degrees no minutes one hundred and twelve and fifty one-hundredths feet along lot 583 of the Keaukaha residence lots;

6. One hundred and ten degrees fifty-five minutes three hundred and fifteen and thirteen one-hundredths feet along the remainders of lots 583, 582, and 581 of the Keaukaha residence lots;

7. Two hundred and seventy degrees no minutes two hundred and ninety-four and thirty-six one-hundredths feet along lots 548, 547, and 546 of the Keaukaha residence lots;

8. One hundred and eighty degrees no minutes two hundred and twenty-five feet along lot 546 of the Keaukaha residence lots;

9. One hundred and eighty degrees no minutes fifty feet across Kamaka Avenue;

10. One hundred and eighty degrees no minutes four hundred and fifty feet along lots 486 and 449 of the Keaukaha lots to the south side of Kamehameha Avenue; and

11. Two hundred and seventy degrees no minutes two hundred and ninety-four and thirty-eight one-hundredths feet along the south side of Kamehameha Avenue to the point of beginning and containing an area of six and eighty one-hundredths acres.

Parcel 4. As returned to the Commissioner of Public Lands of the Territory of Hawaii by resolution numbered 78 of the Hawaiian Homes Commission, dated May 13, 1942. Land situated at Keaukaha, tract 1, Waiakea, South Hilo, Island of Hawaii, State of Hawaii, being the whole of lots 93, 94, 95, 98, 99, 100, 101, and 102 and portions of lots 92, 96, 97, and 103 and a portion of Desha Avenue of the Keaukaha residence lots, as shown on Government Survey Registered Maps 2723 and 3017, more particularly described as follows:

Beginning at the northwest corner of this piece of land, being also the northwest corner of lot 94 and on the southeast side of twenty-five-foot road, the true azimuth and distance from the northwest corner of Hilo airport addition (of twenty and fifty-four one-hundredths acres and on the south side of Kamehameha Highway), as shown on Government Survey Registered Maps 2723 and 3017, being one hundred and eighty degrees no minutes one thousand seven hundred and fifty-one and eighty-seven one-hundredths feet, and the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halai"

being three thousand eight hundred and sixty-eight and eighty-seven one-hundredths feet north and fifteen thousand five hundred and three and fifty-three one-hundredths feet east, thence running by azimuths measured clockwise from true south:

1. Two hundred and forty-three degrees fifty minutes one hundred and seventy-seven and ninety-three one-hundredths feet along the southeast side of twenty-five-foot road;
2. Three hundred and thirty-three degrees fifty minutes two hundred and thirty-five and sixty one-hundredths feet along lot 92 of the Keaukaha residence lots;
3. Two hundred and forty-three degrees fifty minutes one hundred feet along the remainder of lot 92 of the Keaukaha residence lots;
4. Three hundred and thirty-three degrees fifty minutes two hundred feet along lot 91 of the Keaukaha residence lots;
5. Three hundred and thirty-three degrees fifty minutes fifty feet across Desha Avenue;
6. Two hundred and forty-three degrees fifty minutes one hundred feet along the southeast side of Desha Avenue;
7. Three hundred and thirty-three degrees fifty minutes two hundred and thirty-five and sixty one-hundredths feet along lot 103 of the Keaukaha residence lots;
8. Two hundred and forty-three degrees fifty minutes one hundred feet along the remainder of lot 103 of the Keaukaha residence lots;
9. Three hundred and thirty-three degrees fifty minutes two hundred feet along the southwest side of Kauhane Avenue;
10. Sixty-three degrees fifty minutes six hundred and eighty-eight and thirty-six one-hundredths feet along the northwest side of twenty-five-foot road;
11. One hundred and thirty degrees forty-two minutes two hundred and eighty-six and seventy-three one-hundredths feet along the remainders of lots 97 and 96 and Desha Avenue of the Keaukaha residence lots; and
12. One hundred and eighty degrees no minutes seven hundred and thirty-two and sixty-one one-hundredths feet along Government land and tract A of grant deed by the Territory of Hawaii to Hilo Railroad Company to the point of beginning and containing an area of ten and eight hundred and forty-nine one-thousandths acres.

The Act of June 12, 1948, c 458, 62 Stat 387, withdrew certain land as available land. The Act provided:

"That the portion of Hawaiian Homes Commission land of Waiakea-kai or Keaukaha, South Hilo, Hawaii, Territory of Hawaii, more fully described as follows, is withdrawn as 'available land' within the meaning of the Hawaiian Homes Commission Act of 1920 (42 Stat. 108), as amended, and is hereby restored to its previous status under the control of the Territory of Hawaii:

"Portion of Hawaiian home land of Keaukaha, tract 2, Waiakea, South Hilo, Island of Hawaii, Territory of Hawaii, as returned to the Commissioner of Public Lands of the Territory of Hawaii by Resolution numbered 85 of the Hawaiian Homes Commission, dated July 18, 1944, and more particularly described as follows:

"Beginning at a spike at the northwest corner of this tract of land and on the southeast corner of the intersection of Nene and Akepa Streets, the coordinates of said point of beginning referred to Government Survey Triangulation Station 'Halai' being five thousand two hundred and eight and twenty-one one-hundredths feet north and twenty-four thousand eight hundred and eighteen and six one-hundredths feet east, and running by azimuths measured clockwise from true south:

"1. Two hundred and ninety degrees eleven minutes five hundred and sixty-one and eighty-two one-hundredths feet along the south side of Nene Street;

"2. Thence along same on a curve to the left with a radius of one thousand four hundred and sixty-five and four-tenths feet, the chord azimuth and distance being two hundred and sixty-eight degrees thirty-seven minutes one thousand and seventy-seven and thirty one-hundredths feet;

"3. Two hundred and forty-seven degrees three minutes five hundred and ninety-six and sixty-two one-hundredths feet along same;

"4. Three hundred and sixty degrees no minutes one thousand two hundred and thirty-seven and eighty-five one-hundredths feet;

"5. Ninety degrees no minutes two thousand one hundred and fifty-three and sixty-nine one-hundredths feet;

"6. One hundred and eighty degrees no minutes one thousand one hundred and seventy-three and four one-hundredths feet along the east side of the proposed extension of Akepa Street to the

point of beginning, and containing an area of fifty acres, more or less.

"Section 2. Notwithstanding the foregoing provisions of this Act, if, at any time, in the opinion of the Commissioner of Public Lands, use of the above described lands has been discontinued by the Department of Commerce, upon the making of such a determination by the Commissioner of Public Lands such lands shall become available lands within the meaning of Section 203 of title II of the Hawaiian Homes Commission Act, 1920, as amended."

The Act of August 29, 1935, c 819, §1, 49 Stat 966, and the Act of May 31, 1944, c 216, §2, 58 Stat 260, repealed so much of the above section as designates the lands hereinafter described as "available lands", and restored such lands to their previous status under the control of the Territory of Hawaii. The lands so restored on the Island of Molokai as of August 29, 1935 are:

Those portions of Hoolehua, apana 2, and Palaau, apana 2, comprising the Molokai airplane landing field as set aside for public purposes by Executive Order Numbered 307 of the Governor of the Territory of Hawaii, dated December 15, 1927, consisting of two hundred four and nine-tenths acres, more or less, and particularly described as follows:

Beginning at a point on the southeast corner of the said land, from which the azimuth (measured clockwise from true south) and distance to United States Coast and Geodetic Survey Triangulation Station "Middle Hill" (Kualapuu) is two hundred and seventy-two degrees twenty-three minutes thirty-nine seconds, twelve thousand seven hundred twenty and nine-tenths feet, thence from said point of beginning by metes and bounds, eighty-five degrees ten minutes thirty seconds, three thousand four hundred and twenty-seven feet; one hundred and eighty degrees fifty-six minutes thirty seconds, two thousand six hundred thirty and two-tenths feet; two hundred and seventy-nine degrees fifty-five minutes thirty seconds, four thousand nine hundred seven and three-tenths feet; three hundred and forty-six degrees twenty minutes, three hundred forty-two and three-tenths feet near west edge of Kakainapahao Gulch; three degrees twenty-six minutes, four hundred twenty-seven and one-tenth feet; eighty-three degrees twenty-four minutes, one thousand four hundred sixty-eight and two tenths feet; five degrees fifty-

eight minutes, five hundred seventy-one and three-tenths feet to the point of beginning.

The land so restored on the Island of Molokai as of May 31, 1944 is:

That portion of Palaau, Apana 2, being an addition to the Molokai airplane landing field, as follows:

Parcel 1. As returned to the Commissioner of Public Lands of the Territory of Hawaii by resolution numbered 68 of the Hawaiian Homes Commission, dated March 3, 1941, and consisting of thirteen and five hundred and twenty-seven one-thousandths acres, more or less, more particularly described as follows:

Beginning at the southeast corner of this piece of land, on the west boundary of the present Molokai airport, the true azimuth and distance from the northwest corner of the Molokai airport (Executive Order Numbered 809) being no degrees fifty-six minutes thirty seconds two hundred and forty-two feet, and the coordinates of said point of beginning referred to Government Survey Triangulation Station "Middle Hill" being one and fifteen one-hundredths feet north and sixteen thousand one hundred and twenty-eight and one one-hundredths feet west, thence running by true azimuths measured clockwise from south:

(1) Sixty degrees twenty-five minutes eight hundred and forty-one and seventy-four one-hundredths feet along the remainders of fifty-foot road and lot 170 of the Hawaiian Homes land;

(2) One hundred and eighty degrees fifty-six minutes thirty seconds eight hundred and twelve and sixty-two one-hundredths feet along the remainder of lot 170 of the Hawaiian Homes land;

(3) Two hundred and forty degrees twenty-five minutes eight hundred and forty-one and seventy-four one-hundredths feet along the remainders of Lot 170, Pine Avenue, lot 158 and fifty-foot road of the Hawaiian Homes land, to the west side of the Molokai airport; and

(4) No degrees fifty-six minutes thirty seconds eight hundred and twelve and sixty-two one-hundredths feet along the west side of the present Molokai airport to the point of beginning.

Attorney General Opinions

The term "available lands" does not include land already set apart by Presidential Executive Order at time of enactment of

this Act. Att. Gen. Op. 64-44.

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§204. Control by department of "available lands," return to board of land and natural resources, when; other lands, use of. (a) Upon the passage of this Act, all available lands shall immediately assume the status of Hawaiian home lands and be under the control of the department to be used and disposed of in accordance with the provisions of this Act, except that:

(1) In case any available land is under lease by the Territory of Hawaii, by virtue of section 73 of the Hawaiian Organic Act, at the time of the passage of this Act, such land shall not assume the status of Hawaiian home lands until the lease expires or the board of land and natural resources withdraws the lands from the operation of the lease. If the land is covered by a lease containing a withdrawal clause, as provided in section 73(d) of the Hawaiian Organic Act, the board of land and natural resources shall withdraw such lands from the operation of the lease whenever the department gives notice to the board that the department is of the opinion that the lands are required by it for the purposes of this Act; and such withdrawal shall be held to be for a public purpose within the meaning of that term as used in section 73(d) of the Hawaiian Organic Act.

(2) Any available land, including lands selected by the department out of a larger area, as provided by this Act, not leased as authorized by section 207(a) of this Act, may be returned to the board of land and natural resources as provided under section 212 of this Act, or may be retained for management by the department. Any Hawaiian home lands general lease issued by the department after June 30, 1985, shall contain a withdrawal clause allowing the department to withdraw the land leased at any time during the term of the lease for the purposes of this Act.

In the management of any retained available lands not required for leasing under section 207(a), the department may dispose of those lands or any improvements thereon to the public, including native Hawaiians, on the same terms, conditions, restrictions, and uses applicable to the disposition of public lands

in chapter 171, Hawaii Revised Statutes; provided that the department may not sell or dispose of such lands in fee simple except as authorized under section 205 of this Act; provided further that the department is expressly authorized to negotiate, prior to negotiations with the general public, the disposition of Hawaiian home lands or any improvements thereon to a native Hawaiian, or organization or association owned or controlled by native Hawaiians, for commercial, industrial, or other business purposes, in accordance with the procedures set forth in chapter 171, Hawaii Revised Statutes.

(3) The department, with the approval of the Secretary of the Interior, in order to consolidate its holdings or to better effectuate the purposes of this Act, may exchange the title to available lands for land, privately or publicly owned, of an equal value. All lands so acquired by the department shall assume the status of available lands as though the land were originally designated as available lands under section 203 of this Act, and all lands so conveyed by the department shall assume the status of the land for which it was exchanged. The limitations imposed by section 73 (l) of the Hawaiian Organic Act and the land laws of Hawaii as to the area and value of land that may be conveyed by way of exchange shall not apply to exchanges made pursuant hereto. No such exchange of land publicly owned by the State shall be made without the approval of two-thirds of the members of the board of land and natural resources. For the purposes of this paragraph, lands "publicly owned" means land owned by a county or the State or the United States.

(b) Unless expressly provided elsewhere in this Act, lands or an interest therein acquired by the department pursuant to section [213(e)], 221(c), or 225(b), or any other section of this Act authorizing the department to acquire lands or an interest therein, may be managed and disposed of in the same manner and for the same purposes as Hawaiian home lands. [Am Mar. 27, 1928, c 142, §1, 45 Stat 246; Jul. 10, 1937, c 482, 50 Stat 503; Feb. 20, 1954, c 10, §1, 68 Stat 16; Jun. 18, 1954, c

319, §1, 68 Stat 262; am L 1963, c 207, §§2, 5(b); am L 1965, c 271, §1; am L 1976, c 24, §1; am Const Con 1978 and election Nov 7, 1978; am L 1985, c 60, §1; am L 1990, c 14, §1; am L 2000, c 119, §1]

Revision Note

In subsection (b), "section 213(e)" substituted for "section 213(b)(1)".

Cross References

As to last two sentences of subsection (a)(3), compare §§171-5 and 171-50.

Attorney General Opinions

Hawaiian home lands needed for purposes of the Act are to be used and disposed of in accordance with the Act and are not subject to county zoning requirements. Att. Gen. Op. 72-21.

Threatened and endangered plants are protected on Hawaiian home lands under the provisions of chapter 195D, as well as under the provisions of the federal Endangered Species Act of 1973, to the same extent that the plants are protected elsewhere in Hawaii. Anyone who "takes" threatened or endangered plants on Hawaiian home lands is subject to state and federal civil and criminal penalties. Att. Gen. Op. 95-5.

Law Journals and Reviews

The Lum Court and Native Hawaiian Rights. 14 UH L. Rev. 377.

Case Notes

In dealing with eligible native Hawaiians, department of Hawaiian home lands must adhere to high fiduciary duties normally owed by a trustee to its beneficiaries. 64 H. 327, 640 P.2d 1161.

Commission may lease lands in accordance with §207(a) to the government because it is a member of the public. 69 H. 538, 751

P.2d 81.

Section not violated by application of chapter 343. 87 H. 91, 952 P.2d 379.

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§204.5. Additional powers. In addition and supplemental to the powers granted to the department by law, and notwithstanding any law to the contrary, the department may:

(1) With the approval of the governor, undertake and carry out the development of any Hawaiian home lands available for lease under and pursuant to section 207 of this Act by assembling these lands in residential developments and providing for the construction, reconstruction, improvement, alteration, or repair of public facilities therein, including, without limitation, streets, storm drainage systems, pedestrian ways, water facilities and systems, sidewalks, street lighting, sanitary sewerage facilities and systems, utility and service corridors, and utility lines, where applicable, sufficient to adequately service developable improvements therein, sites for schools, parks, off-street parking facilities, and other community facilities;

(2) With the approval of the governor, undertake and carry out the development of available lands for homestead, commercial, and multipurpose projects as provided in section 220.5 of this Act, as a developer under this section or in association with a developer agreement entered into pursuant to this section by providing for the construction, reconstruction, improvement, alteration, or repair of public facilities for development, including, without limitation, streets, storm drainage systems, pedestrian ways, water facilities and systems, sidewalks, street lighting, sanitary sewerage facilities and systems, utility and service corridors, and utility lines, where applicable, sufficient to adequately service developable improvements therein, sites for schools, parks, off-street parking facilities, and other community facilities;

(3) With the approval of the governor, designate by resolution of the commission all or any portion of a development or multiple developments undertaken pursuant to this section an "undertaking" under part III of chapter 39, Hawaii Revised Statutes; and

(4) Exercise the powers granted under section 39-53, Hawaii Revised Statutes, including the power to issue revenue bonds from time to time as authorized by the legislature.

All provisions of part III of chapter 39, Hawaii Revised Statutes, shall apply to the department and all revenue bonds issued by the department shall be issued pursuant to the provisions of that part, except these revenue bonds shall be issued in the name of the department, and not in the name of the State.

As applied to the department, the term "undertaking" as used in part III of chapter 39 shall include a residential development or a development of homestead, commercial, or multipurpose projects under this Act. The term "revenue" as used in part III of chapter 39, shall include all or any portion of the rentals derived from the leasing of Hawaiian home lands or available lands, whether or not the property is a part of the development being financed. [L 1989, c 283, pt of §2; ree L 1997, c 197, §2]

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§205. Sale or lease, limitations on. Available lands shall be sold or leased only:

(1) In the manner and for the purposes set out in this title; or

(2) As may be necessary to complete any valid agreement of sale or lease in effect at the time of the passage of this Act;

except that such limitations shall not apply to the unselected portions of lands from which the department has made a selection and given notice thereof, or failed so to select and give notice within the time limit, as provided in paragraph (3) of section 204 of this title. [Am L 1963, c 207, §2; am L 1997, c 197, §3]

Note

The reference was to paragraph (3) of section 204 as originally enacted, which fixed a period of eight years after the first meeting of the commission [department]. The first meeting was held September 20, 1921.

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§206. Other officers not to control Hawaiian home lands; exception. The powers and duties of the governor and the board of land and natural resources, in respect to lands of the State, shall not extend to lands having the status of Hawaiian home lands, except as specifically provided in this title. [Am L 1963, c 207, §5(a), (b); ree L 1997, c 197, §4]

Note

The Act of July 10, 1937, c 484, 50 Stat 508, provides in part: "That the legislature of the Territory of Hawaii may create a public corporate authority to engage in slum clearance, or housing undertakings, or both, within such Territory.... The legislature.... may, without regard to any federal acts restricting the disposition of public lands of the Territory, authorize the commissioner of public lands, the Hawaiian homes commissioner, and any other officers of the Territory having power to manage and dispose of its public lands, to grant, convey, or lease to such authority parts of the public domain, and may provide that any of the public domain or other property acquired by such authority may be mortgaged by it as security for its bonds...."

Attorney General Opinions

Governor's power to set aside public lands by executive order does not extend to Hawaiian home lands. Att. Gen. Op. 75-3.

Threatened and endangered plants are protected on Hawaiian home lands under the provisions of chapter 195D, as well as under the provisions of the federal Endangered Species Act of 1973, to the same extent that the plants are protected elsewhere in Hawaii. Anyone who "takes" threatened or endangered plants on Hawaiian home lands is subject to state and federal civil and criminal penalties. Att. Gen. Op. 95-5.

Law Journals and Reviews

Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts. 14 UH L. Rev. 519.

Case Notes

Absent demonstrable intent to restrict government's authority to enforce state and county criminal laws on Hawaiian home lands, section does not preclude enforcement of such laws. 80 H. 168, 907 P.2d 754.

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§207. Leases to Hawaiians, licenses. (a) The department is authorized to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands within the following acreage limits per each lessee: (1) not more than forty acres of agriculture lands or lands used for aquaculture purposes; or (2) not more than one hundred acres of irrigated pastoral lands and not more than one thousand acres of other pastoral lands; or (3) not more than one acre of any class of land to be used as a residence lot; provided that in the case of any existing lease of a farm lot in the Kalanianaole Settlement on Molokai, a residence lot may exceed one acre but shall not exceed four acres in area, the location of such area to be selected by the department; provided further that a lease granted to any lessee may include two detached farm lots or aquaculture lots, as the case may be, located on the same island and within a reasonable distance of each other, one of which, to be designated by the department, shall be occupied by the lessee as the lessee's home, the gross acreage of both lots not to exceed the maximum acreage of an agricultural, pastoral, or aquacultural lot, as the case may be, as provided in this section.

(b) The title to lands so leased shall remain in the State. Applications for tracts shall be made to and granted by the department, under such regulations, not in conflict with any provisions of this title, as the department may prescribe. The department shall, whenever tracts are available, enter into such a lease with any applicant who, in the opinion of the department, is qualified to perform the conditions of such lease.

(c)(1) The department is authorized to grant licenses as easements for railroads, telephone lines, electric power and light lines, gas mains, and the like. The department is also authorized to grant licenses for lots within a district in which lands are leased under the provisions of this section, for:

(A) Churches, hospitals, public schools, post offices, and other improvements for public purposes; and

(B) Theaters, garages, service stations, markets, stores, and other mercantile establishments

(all of which shall be owned by native Hawaiians or by organizations formed and controlled by native Hawaiians).

(2) The department is also authorized to grant licenses to the United States for reservations, roads, and other rights-of-way, water storage and distribution facilities, and practice target ranges.

(3) Any license issued under this subsection shall be subject to such terms, conditions, and restrictions as the department shall determine and shall not restrict the areas required by the department in carrying on its duties, nor interfere in any way with the department's operation or maintenance activities. [Am Feb. 3, 1923, c 56, §1, 42 Stat 1222; May 16, 1934, c 290, §2, 48 Stat 779; Jul. 10, 1937, c 482, 50 Stat 504; May 31, 1944, c 216, §§3, 4, 58 Stat 264; Jun. 14, 1948, c 464, §§1, 2, 62 Stat 390; Jun. 18, 1954, c 321, §1, 68 Stat 263; Aug. 23, 1958, Pub L 85-733, 72 Stat 822; am L 1963, c 207, §2; am L 1981, c 90, §1; am L 1983, c 125, §2; am L 1984, c 27, §1 and c 37, §2; am L 1985, c 69, §1 and c 159, §2; am L 1997, c 196, §2]

Note

In addition to the provisions herein made for leases to native Hawaiians, the Act of June 20, 1938, c 530, §3, 52 Stat 781, after providing for the Kalapana extension to the Hawaii National Park, authorized the Secretary of the Interior to lease home sites herein to native Hawaiians under certain circumstances.

Homesteaders Cooperative Association use of Hoolehua Store building free of rent, subject to certain conditions. L 1959, JR 17.

Revision Note

In subsection (b), "State" substituted for "United States" in view of section 5(b) of Hawaii Admission Act.

Attorney General Opinions

Section does not authorize the commission to grant a permit to occupy Hawaiian homes premises from month to month on a monthly charge basis. Att. Gen. Op. 61-64.

Commission has no authority to permit a lessee to subdivide homestead tract and sublease a portion thereof to daughter. Att. Gen. Op. 61-65.

Neither the department nor any lessee is authorized to develop multi-unit dwellings. Att. Gen. Op. 62-9.

Lands not needed for purposes of Act could be subjected to county zoning regulations. Att. Gen. Op. 72-21.

Law Journals and Reviews

The Lum Court and Native Hawaiian Rights. 14 UH L. Rev. 377.

Case Notes

As subsection (c)(1)(A) of this Act does not provide a "statutory entitlement" to any entity which may be granted a license pursuant to it, plaintiff energy producer failed to establish that plaintiff's exclusive telecommunications service license issued under this subsection constituted "property" which would entitle plaintiff to due process protection. 110 H. 419, 134 P.3d 585.

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[§207.5.] Housing development. The department is authorized to develop and construct single-family and multifamily units for housing native Hawaiians. The method of disposition, including rentals, as well as the terms, conditions, covenants, and restrictions as to the use and occupancy of such single-family and multifamily units shall be prescribed by rules adopted by the department pursuant to chapter 91. [L 1997, c 196, §1]

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§208. Conditions of leases. Each lease made under the authority granted the department by section 207 of this Act, and the tract in respect to which the lease is made, shall be deemed subject to the following conditions, whether or not stipulated in the lease:

(1) The original lessee shall be a native Hawaiian, not less than eighteen years of age. In case two lessees either original or in succession marry, they shall choose the lease to be retained, and the remaining lease shall be transferred, quitclaimed, or canceled in accordance with the provisions of succeeding sections.

(2) The lessee shall pay a rental of $1 a year for the tract and the lease shall be for a term of ninety-nine years; except that the department may extend the term of any lease; provided that the approval of any extension shall be subject to the condition that the aggregate of the initial ninety-nine year term and any extension granted shall not be for more than one hundred ninety-nine years.

(3) The lessee may be required to occupy and commence to use or cultivate the tract as the lessee's home or farm or occupy and commence to use the tract for aquaculture purposes, as the case may be, within one year after the commencement of the term of the lease.

(4) The lessee thereafter, for at least such part of each year as the department shall prescribe by rules, shall occupy and use or cultivate the tract on the lessee's own behalf.

(5) The lessee shall not in any manner transfer to, or otherwise hold for the benefit of, any other person or group of persons or organizations of any kind, except a native Hawaiian or Hawaiians, and then only upon the approval of the department, or agree so to transfer, or otherwise hold, the lessee's interest in the tract; except that the lessee, with the approval of the department, also may transfer the lessee's interest in the tract to the following qualified relatives of the lessee who are at least one-quarter Hawaiian: husband, wife, child, or grandchild. A lessee who is at least one-quarter Hawaiian who has received an interest in the

tract through succession or transfer may, with the approval of the department, transfer the lessee's leasehold interest to a brother or sister who is at least one-quarter Hawaiian. Such interest shall not, except in pursuance of such a transfer to or holding for or agreement with a native Hawaiian or Hawaiians or qualified relative who is at least one-quarter Hawaiian approved of by the department or for any indebtedness due the department or for taxes or for any other indebtedness the payment of which has been assured by the department, including loans from other agencies where such loans have been approved by the department, be subject to attachment, levy, or sale upon court process. The lessee shall not sublet the lessee's interest in the tract or improvements thereon; provided that a lessee may be permitted, with the approval of the department, to rent to a native Hawaiian or Hawaiians, lodging either within the lessee's existing home or in a separate residential dwelling unit constructed on the premises.

(6) Notwithstanding the provisions of paragraph (5), the lessee, with the consent and approval of the commission, may mortgage or pledge the lessee's interest in the tract or improvements thereon to a recognized lending institution authorized to do business as a lending institution in either the State or elsewhere in the United States; provided the loan secured by a mortgage on the lessee's leasehold interest is insured or guaranteed by the Federal Housing Administration, Department of Veterans Affairs, or any other federal agency and their respective successors and assigns, which are authorized to insure or guarantee such loans, or any acceptable private mortgage insurance as approved by the commission. The mortgagee's interest in any such mortgage shall be freely assignable. Such mortgages, to be effective, must be consented to and approved by the commission and recorded with the department.

Further, notwithstanding the authorized purposes of loan limitations imposed under section 214 of this Act and the authorized loan amount limitations

imposed under section 215 of this Act, loans made by lending institutions as provided in this paragraph, insured or guaranteed by the Federal Housing Administration, Department of Veterans Affairs, or any other federal agency and their respective successors and assigns, or any acceptable private mortgage insurance, may be for such purposes and in such amounts, not to exceed the maximum insurable limits, together with such assistance payments and other fees, as established under section 421 of the Housing and Urban Rural Recovery Act of 1983 which amended Title II of the National Housing Act of 1934 by adding section 247, and its implementing regulations, to permit the Secretary of Housing and Urban Development to insure loans secured by a mortgage executed by the homestead lessee covering a homestead lease issued under section 207(a) of this Act and upon which there is located a one to four family single family residence.

(7) The lessee shall pay all taxes assessed upon the tract and improvements thereon. The department may pay such taxes and have a lien therefor as provided by section 216 of this Act.

(8) The lessee shall perform such other conditions, not in conflict with any provision of this Act, as the department may stipulate in the lease; provided that an original lessee shall be exempt from all taxes for the first seven years after commencement of the term of the lease. [Am Jul. 10, 1937, c 482, 50 Stat 504; Nov. 26, 1941, c 544, §2, 55 Stat 783; Aug. 21, 1958, Pub L 85-710, 72 Stat 706; am L 1963, c 207, §2; am L 1967, c 146, §§1, 2; am L 1973, c 66, §1; am L 1974, c 175, §1; am L 1978, c 229, §5; am L 1981, c 90, §2; am L 1985, c 60, §2 and c 284, §1; am L 1990, c 305, §1; am L 1997, c 196, §3; am L 1999, c 17, §1; am L 2002, c 12, §1; am L 2005, c 53, §1]

Attorney General Opinions

Lessee is prohibited from subdividing homestead tract and subleasing a portion thereof to lessee's daughter. Att. Gen.

Op. 61-65.

Bank of Hawaii is not an eligible mortgagee; improvements may not be treated as personalty. Att. Gen. Op. 65-15.

Case Notes

Tax on the tract is the tax on the fee simple estate and not on lessee's leasehold interest. 60 H. 487, 591 P.2d 607.

Third party agreements with non-Hawaiians which transferred portion of lessees' interest in homesteads void ab initio as violative of paragraph (5). 81 H. 474, 918 P.2d 1130.

Approval of home loan did not constitute approval of department for transfer of lease. 4 H. App. 446, 667 P.2d 839.

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§209. Successors to lessees. (a) Upon the death of the lessee, the lessee's interest in the tract or tracts and the improvements thereon, including growing crops and aquacultural stock (either on the tract or in any collective contract or program to which the lessee is a party by virtue of the lessee's interest in the tract or tracts), shall vest in the relatives of the decedent as provided in this paragraph. From the following relatives of the lessee who are (1) at least one-quarter Hawaiian, husband, wife, children, grandchildren, brothers, or sisters, or (2) native Hawaiian, father and mother, widows or widowers of the children, widows or widowers of the brothers and sisters, or nieces and nephews,--the lessee shall designate the person or persons to whom the lessee directs the lessee's interest in the tract or tracts to vest upon the lessee's death. The Hawaiian blood requirements shall not apply to the descendants of those who are not native Hawaiians but who were entitled to the leased lands under section 3 of the Act of May 16, 1934 (48 Stat. 777, 779), as amended, or under section 3 of the Act of July 9, 1952 (66 Stat. 511, 513). In all cases that person or persons need not be eighteen years of age. The designation shall be in writing, may be specified at the time of execution of the lease with a right in the lessee in similar manner to change the beneficiary at any time and shall be filed with the department and approved by the department in order to be effective to vest the interests in the successor or successors so named.

In case of the death of any lessee, except as hereinabove provided, who has failed to specify a successor or successors as approved by the department, the department may select from only the following qualified relatives of the decedent:

(1) Husband or wife; or

(2) If there is no husband or wife, then the children; or

(3) If there is no husband, wife, or child, then the grandchildren; or

(4) If there is no husband, wife, child, or grandchild, then brothers or sisters; or

(5) If there is no husband, wife, child, grandchild, brother, or sister, then from the following relatives of the lessee who are native Hawaiian: father

and mother, widows or widowers of the children, widows or widowers of the brothers and sisters, or nieces and nephews.

The rights to the use and occupancy of the tract or tracts may be made effective as of the date of the death of the lessee.

In the case of the death of a lessee leaving no designated successor or successors, husband, wife, children, grandchildren, or relative qualified to be a lessee of Hawaiian home lands, the land subject to the lease shall resume its status as unleased Hawaiian home lands and the department is authorized to lease the land to a native Hawaiian as provided in this Act.

Upon the death of a lessee who has not designated a successor and who leaves a spouse not qualified to succeed to the lease or children not qualified to succeed to the lease, or upon the death of a lessee leaving no relative qualified to be a lessee of Hawaiian home lands, or the cancellation of a lease by the department, or the surrender of a lease by the lessee, the department shall appraise the value of all the improvements and growing crops or improvements and aquacultural stock, as the case may be, and shall pay to the nonqualified spouse or the nonqualified children as the lessee shall have designated prior to the lessee's death, or to the legal representative of the deceased lessee, or to the previous lessee, as the case may be, the value thereof, less any indebtedness to the department, or for taxes, or for any other indebtedness the payment of which has been assured by the department, owed by the deceased lessee or the previous lessee. These payments shall be made out of the Hawaiian home loan fund and shall be considered an advance therefrom and shall be repaid by the successor or successors to the tract involved. If available cash in the Hawaiian home loan fund is insufficient to make these payments, payments may be advanced from the Hawaiian home general loan fund and shall be repaid by the successor or successors to the tract involved; provided that any repayment for advances made from the Hawaiian home general loan fund shall be at the interest rate established by the department for loans made from the Hawaiian home general loan fund. The successor or successors may be required by the commission to obtain private financing in accordance with section 208(6) to pay off the amount advanced from the Hawaiian home loan fund or Hawaiian home general loan fund.

(b) The appraisal of improvements and growing crops, or stock, if any, shall be made by any one of the following methods:

(1) By a disinterested appraiser hired by the department; provided that the previous lessee or deceased lessee's legal representative shall not be charged for the cost of the appraisal; or

(2) By one disinterested appraiser mutually agreeable to both the department and the previous lessee or the deceased lessee's legal representative, with the cost of appraisal borne equally by the two parties; or

(3) By not more than three disinterested appraisers of which the first shall be contracted for and paid by the department. If the previous lessee or the deceased lessee's legal representative does not agree with the appraised value, the previous lessee or the deceased lessee's legal representative shall contract with and pay for the services of a second appraiser whose appraisal report shall be submitted to the department not later than ninety days from the date of the first appraisal report; provided that the first appraisal shall be used if the second appraiser is not hired within thirty days from the date the department transmits the first appraisal report to the previous lessee or the deceased lessee's representative. If the appraisal values are different and a compromise value between the two appraisals is not reached, a third appraisal shall be made by an appraiser appointed by the first two appraisers not later than ninety days from the date of the second appraisal report and the third appraiser shall determine the final value. The cost of the third appraisal shall be borne equally by the department and the previous lessee or the deceased lessee's legal representative.

The department may adopt rules not in conflict with this section to establish appraisal procedures, including the time period by which the department and the previous lessee or the deceased lessee's legal representative shall act on appraisal matters.

(c) If a previous lessee has abandoned the tract or tracts

or cannot be located after at least two attempts to contact the previous lessee by certified mail, the department by public notice published at least once in each of four successive weeks in a newspaper of general circulation in the State shall give notice to the previous lessee that the lease will be canceled in accordance with sections 210 and 216 of this title and the department will appraise the value of the improvements and growing crops and stock, if any, if the previous lessee does not present himself or herself within one hundred and twenty days from the first day of publication of the notice. Following cancellation of the lease and appraisal of the improvements and growing crops and stock, if any, the department shall make the payout as provided in subsection (a).

(d) After the cancellation of a lease by the department in accordance with sections 210 and 216 of this title, or the surrender of a lease by a lessee, the department may transfer the lease or issue a new lease to any qualified native Hawaiian regardless of whether or not that person is related in any way by blood or marriage to the previous lessee.

(e) If any successor or successors to a tract is a minor or minors, the department may appoint a guardian therefor, subject to the approval of the court of proper jurisdiction. The guardian shall be authorized to represent the successor or successors in all matters pertaining to the leasehold; provided that the guardian, in so representing the successor or successors, shall comply with this title and the stipulations and provisions contained in the lease, except that the guardian need not be a native Hawaiian as defined in section 201 of this title. [Am Jul. 10, 1937, c 482, 50 Stat 504; Nov. 26, 1941, c 544, §3, 55 Stat 783; Jul. 9, 1952, c 614, §4, 66 Stat 514; am L 1963, c 207, §2; am L 1981, c 90, §3 and c 112, §1; am L 1982, c 272, §1; am L 1985, c 137, §1; am L 1987, c 36, §§2, 3; am L 1990, c 150, §8; am L 1992, c 92, §1; am L 1993, c 147, §1; am L 1994, c 37, §1 and c 109, §1; am L 2001, c 122, §1; am L 2005, c 16, §1]

Attorney General Opinions

A lessee surrendering a lease is entitled to payment for appraised value of pineapple crops growing on tract at date of

surrender less deduction for indebtedness. Att. Gen. Op. 61-66.

On discretion of commission in the selection of a successor to a lessee who dies without designating the lessee's own successor. Att. Gen. Op. 61-75.

Distribution of "pineapple money" which includes "advances" for expenditures. Att. Gen. Op. 61-88.

Person claiming to be common-law wife under relationship established in Hawaii is not a qualified successor to lessee. Att. Gen. Op. 73-5.

"Children" construed. Att. Gen. Op. 73-18.

Case Notes

Native Hawaiians have no standing to challenge constitutionality of Act on equal protection grounds as they would be asserting the rights of non-Hawaiian third parties. 795 F. Supp. 1009.

Lessee has right to change designated successor at any time and successor's interest vests only upon lessee's death; private agreement cannot alter that right. 4 H. App. 446, 667 P.2d 839.

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§210. Cancellation of leases. Whenever the department has reason to believe that any condition enumerated in section 208, or any provision of section 209, of this title has been violated, the department shall give due notice and afford opportunity for a hearing to the lessee of the tract in respect to which the alleged violation relates or to the successor of the lessee's interest therein, as the case demands. If upon such hearing the department finds that the lessee or the lessee's successor has violated any condition in respect to the leasing of such tract, the department may declare the lessee's interest in the tract and all improvements thereon to be forfeited and the lease in respect thereto canceled, and shall thereupon order the tract to be vacated within a reasonable time. The right to the use and occupancy of the Hawaiian home lands contained in such tract shall thereupon revest in the department and the department may take possession of the tract and the improvements thereon. [Am L 1963, c 207, §2; am L 1997, c 197, §5]

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§210.5. REPEALED. L 1987, c 36, §2.

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§211. Community pastures. The department shall, when practicable, provide from the Hawaiian home lands a community pasture adjacent to each district in which agricultural lands are leased, as authorized by the provisions of section 207 of this title. [Am L 1963, c 207, §2; ree L 1997, c 197, §6]

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§212. Lands returned to control of board of land and natural resources. The department may return any Hawaiian home lands not leased as authorized by the provisions of section 207 of this Act to the control of the board of land and natural resources. Any Hawaiian home lands so returned shall, until the department gives notice as hereinafter in this section provided, resume and maintain the status of public lands in accordance with the provisions of the [Hawaii Revised Statutes]; provided that such lands may not be sold, leased, set aside, used, transferred or otherwise disposed of except under a general lease only. Any lease by the board of land and natural resources hereafter entered into shall contain a withdrawal clause, and the lands so leased shall be withdrawn by the board, for the purpose of this Act, upon the department giving at its option, not less than one nor more than five years' notice of such withdrawal; provided, that the minimum withdrawal-notice period shall be specifically stated in such lease. Each such lease, whether or not stipulated therein, shall be deemed subject to the right and duty of the board of land and natural resources to terminate the lease and return the lands to the department whenever the department gives notice to the board that the department is of the opinion that the lands are required.

Notwithstanding the provisions of section 171-95, Hawaii Revised Statutes, in the leasing of Hawaiian home lands by the board to a public utility or other governmental agency, where such use directly benefits the department of Hawaiian home lands or the homestead lessees, the rental may be nominal; in all other instances, the lease rental shall be no less than the value determined in accordance with section 171-17(b), Hawaii Revised Statutes.

Any general lease of Hawaiian home lands hereafter entered into by the board shall be void unless prior to the disposition of such lease by public auction, direct negotiation or otherwise, approval shall be obtained from the department of Hawaiian home lands. [Am L 1963, c 207, §§2, 5(b); am Const Con 1978 and election Nov. 7, 1978]

Revision Note

In the first paragraph, "Hawaii Revised Statutes" substituted for "the Hawaiian Organic Act and the Revised Laws of Hawaii 1915".

Attorney General Opinions

Governor does not have power to set aside by executive order any of the returned Hawaiian home lands. Att. Gen. Op. 75-3.

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§213. Funds and accounts. (a) There are established in the treasury of the State two revolving funds, to be known respectively as the Hawaiian home loan fund and the Hawaiian home general loan fund.

(b) Hawaiian home loan fund. The moneys in this fund shall be available for the purposes enumerated in section 214 and for payments provided in section 209 and shall not be expended for any other purpose except as provided in subsection (e).

Any interest or other earnings arising out of investments from this fund shall be credited to and deposited into the Hawaiian home operating fund.

(c) Hawaiian home general loan fund. Moneys appropriated by the legislature for the construction of homes but not otherwise set aside for a particular fund, for construction of replacement homes, for home repairs or additions, or for the development and operation of a farm, ranch, or aquaculture operation; moneys transferred from other funds; and installments of principal paid by the lessees upon loans made to them from this fund, or as payments representing reimbursements on account of advances, but not including interest on such loans or advances, shall be deposited into this fund. The moneys in the fund shall be used for purposes enumerated in section 214 and for payments provided in section 209; provided that, in addition to the conditions enumerated in section 215, farm loans shall be subject to the following conditions:

(1) To be eligible for a farm loan the applicant shall derive, or present an acceptable plan to derive, a major portion of the applicant's income from farming;

(2) Farm loans made for the purpose of soil and water conservation shall not exceed $20,000 and shall be for a term not to exceed ten years;

(3) Subsidies and grants or cost-sharing funds entitled and received by the lessee for soil and water conservation purposes shall be assigned to the department for the repayment of the outstanding farm indebtedness; and

(4) The lessee shall carry out recommended farm management practices approved by a qualified agricultural agency.

The department may create an account within this fund to support the guarantee of repayment of loans made by government agencies or private lending institutions to a holder of a lease under section 207(a) or license issued under section 207(c)(1)(B).

The department may create an account within this fund for moneys borrowed from government agencies or private lending institutions to be used for any of the purposes enumerated in section 214. Installments of principal and that part of the interest equal to the interest charged to the department by the lender paid by the lessees on the loans made to them from this account shall be deposited into the same account. Any additional interest or other earnings arising out of investments from this account shall be credited to and deposited into the Hawaiian home receipts fund.

(d) There are established in the treasury of the State four trust funds, to be known respectively as the Hawaiian home operating fund, the Hawaiian home receipts fund, the Hawaiian home trust fund, and the native Hawaiian rehabilitation fund and one special fund to be known as the Hawaiian home administration account.

(e) Hawaiian home operating fund. The interest transferred from the Hawaiian home loan fund, all moneys received by the department from any other source, and moneys transferred from the Hawaiian home receipts fund, shall be deposited into the Hawaiian home operating fund. The moneys in this fund, without the prior written approval of the governor, shall be available:

(1) For construction and reconstruction of revenue-producing improvements intended to serve principally occupants of Hawaiian home lands, including acquisition or lease therefor of real property and interests therein, such as water rights or other interests;

(2) For payment into the treasury of the State of such amounts as are necessary to meet the interest and principal charges for state bonds issued for such revenue-producing improvements;

(3) For operation and maintenance of such improvements constructed from such funds or other funds;

(4) For the purchase of water or other utilities,

goods, commodities, supplies, or equipment needed for services, or to be resold, rented, or furnished on a charge basis to occupants of Hawaiian home lands; and

(5) For appraisals, studies, consultants (including architects and engineers), or any other staff services including those in section 202(b) required to plan, implement, develop, or operate these projects.

The moneys in this fund may be supplemented by other funds available for or appropriated by the legislature for the same purposes. In addition to such moneys, this fund, with the approval of the governor, may be supplemented by transfers, made on a loan basis from the Hawaiian home loan fund for a period not exceeding ten years; provided that the aggregate amount of such transfers outstanding at any one time shall not exceed $500,000.

In addition, moneys of this fund shall be made available with the prior written approval of the governor for offsite improvements and development necessary to serve present and future occupants of Hawaiian home lands; for improvements, additions, and repairs to all assets owned or leased by the department excluding structures or improvements that the department is obligated to acquire under section 209; for engineering, architectural, and planning services to maintain and develop properties; for such consultant services as may be contracted for under this Act; for purchase or lease of necessary equipment; for acquisition or lease of real property and interest therein; and for improvements constructed for the benefit of beneficiaries of this Act and not otherwise permitted in the various loan funds or the administration account.

(f) Hawaiian home administration account. The entire receipts derived from any leasing or other disposition of the available lands pursuant to section [204(a)(2)] and transfers from the Hawaiian home receipts fund shall be deposited into this account. Any interest or other earnings arising out of investments from this fund shall be credited to and deposited into this fund. The moneys in this account shall be expended by the department for salaries and other administration expenses of the department in conformity with general law applicable to all departments of the State, and no sums shall be expended for structures and other permanent improvements. This account shall

be subject to the following conditions and requirements:

(1) The department, when required by the governor but not later than November 15 preceding each regular session of the legislature, shall submit to the state director of finance its budget estimates of expenditures for the next fiscal period in the manner required by general law;

(2) The department's budget as approved by the governor shall be included in the governor's budget report and shall be transmitted to the legislature for its approval;

(3) Upon legislative approval of a budget, the amount appropriated shall be made available to the department. If no budget is approved by the legislature prior to its adjournment, sums accruing to this account shall not be expended for any other purpose but shall remain available for future use. Any amount in this account which is in excess of the amount approved by the legislature or made available for the fiscal period may be transferred to the Hawaiian home operating fund.

(g) Hawaiian home receipts fund. All interest moneys from loans or investments received by the department from any fund except as provided for in each respective fund, shall be deposited into this fund. At the end of each quarter, all moneys in this fund may be transferred to the Hawaiian home operating fund, the Hawaiian home administration account, the Hawaiian home trust fund, and any loan fund in accordance with rules adopted by the department.

(h) Hawaiian home trust fund. Except for gifts, bequests, and other moneys given for designated purposes, moneys deposited into this fund shall be available for transfers into any other fund or account authorized by the Act or for any public purpose deemed by the commission to further the purposes of the Act. Public purpose, as used herein, includes the formation of an account within the Hawaiian home trust fund as a reserve for loans insured or guaranteed by the Federal Housing Administration, Department of Veterans Affairs, or any other federal agency and their respective successors and assigns, which are authorized to insure or guarantee loans. Notwithstanding any other law to the contrary, the department is

expressly authorized to deposit the reserve for loans in any duly organized bank in the State or elsewhere in the United States with automatic fund transfer capabilities and at such reserve amounts as shall be reasonably required by the federal agencies as a condition for participation in their respective insurance or guarantee programs.

(i) Native Hawaiian rehabilitation fund. Pursuant to Article XII, Section 1, of the Hawaii Constitution, thirty per cent of the state receipts, derived from lands previously cultivated as sugarcane lands under any other provision of law and from water licenses, and fifteen per cent of all revenues from lease agreements granted lease extensions pursuant to section 228, shall be deposited into this fund. The department shall use this money for the rehabilitation of native Hawaiians, native Hawaiian families, and Hawaiian homestead communities, which shall include the educational, economic, political, social, and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved and perpetuated.

The native Hawaiian rehabilitation fund shall be subject to the following conditions:

(1) All moneys received by the fund shall be deposited into the state treasury and kept separate and apart from all other moneys in the state treasury;

(2) The director of finance shall serve as a custodian of the fund. All payments from the fund shall be made by the director of finance only upon vouchers approved by the commission;

(3) The commission shall develop guidelines for the investment of moneys in the fund;

(4) The commission may invest and reinvest in investments authorized by chapter 88, Hawaii Revised Statutes. The commission may hold, purchase, sell, assign, transfer, or dispose of any securities and investments in which any of the moneys shall have been invested, as well as the proceeds of such investments; and

(5) The commission may pay out of any of the moneys held for investment, a reasonable amount to any person for supplying investment advisory or consultive

services; and to meet such other costs incident to the prudent investment of moneys as the commission may approve.

Any payment of principal, interest, or other earnings arising out of the loan or investment of money from this fund shall be credited to and deposited into this fund.

Sections 214, 215, 216, and 217 shall not apply to administration of this fund. The department is authorized to adopt rules under chapter 91, Hawaii Revised Statutes, necessary to administer and carry out the purposes of this fund.

The department shall submit an annual report to the legislature and the United States Department of the Interior, no later than twenty days prior to the convening of each regular session of the legislature, beginning with the regular session of 2011, on expenditures from this fund that are derived from the amounts deposited from commercial and multipurpose project lease extensions pursuant to section 228(e), including the amount expended, the recipient of the moneys expended, and the purpose of the expenditure. [Am Feb. 3, 1923, c 56, §2, 42 Stat 1222; Mar. 7, 1928, c 142, §2, 45 Stat 246; Nov. 26, 1941, c 544, §4, 55 Stat 784; Jun. 14, 1948, c 464, §3, 62 Stat 390; Jul. 9, 1952, c 615, §§1, 2, 66 Stat 514; Aug. 21, 1958, Pub L 85-708, 72 Stat 705; am L 1959 1st, c 13, §2; am L 1961, c 183, §2; am L 1963, c 114, §5 and c 207, §§2, 5(a); am L 1965, c 4, §§1, 2; am L 1967, c 146, §3; am L 1969, c 114, §1 and c 259, §1; am L 1972, c 76, §1; am L 1973, c 130, §1 and c 220, §1; am L 1974, c 170, §1, c 172, §1, c 174, §1, c 175, §§2, 3, and c 176, §2; am L 1976, c 72, §1; am L 1978, c 229, §1; am Const Con 1978 and election Nov. 7, 1978; am L 1981, c 90, §4, c 158, §1, c 192, §1, and c 203, §1; am L 1982, c 274, §2; am L 1983, c 143, §1; am L 1984, c 260, §2; am L 1985, c 284, §2; am L 1986, c 249, §2; am L 1987, c 36, §4; am L 1993, c 145, §1; am L 1994, c 152, §§2, 6; am L 1998, c 27, §§1, 2; am L 2002, c 117, §1; am L 2010, c 187, §7]

Revision Note

"Annual" and "fiscal period" substituted for "biennial" and "biennium" to conform to budgetary requirements under the Constitution. L Sp 1959 1st, c 13, made similar changes to

sections of RLH 1955.

In subsection (f), "204(a)(2)" substituted for "204(2)".

Attorney General Opinions

Funds may not be used to subsidize nursery schools. Att. Gen. Op. 62-6.

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§213.5. Establishment of special fund. A separate special fund of the department shall be established for each undertaking or part thereof financed from the proceeds of revenue bonds equally secured. Each fund shall be designated "department of Hawaiian home lands revenue bond special fund" and bear any additional designation the department deems appropriate to properly identify the fund. Any law to the contrary notwithstanding, including any provision of this Act, from and after the issuance of revenue bonds under and pursuant to the provisions of this Act and part III of chapter 39, Hawaii Revised Statutes, to finance an undertaking, all rentals, income, receipts, and other revenues derived by the department from the particular undertaking for which financing is undertaken shall be paid into the special fund established pursuant to this Act and applied in the manner and for the purposes set forth in part III of chapter 39, Hawaii Revised Statutes, and the proceedings authorizing the issuance of revenue bonds. [L 1989, c 283, pt of §2; ree L 1997, c 197, §7]

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§213.6. Hawaiian home lands trust fund. There is established a trust fund to be known as the Hawaiian home lands trust fund, into which shall be deposited all appropriations by the state legislature specified to be deposited therein. Moneys of the Hawaiian home lands trust fund shall be expended by the department, as provided by law, upon approval by the commission and shall be used for capital improvements and other purposes undertaken in furtherance of the Act. The department shall have a fiduciary responsibility toward the trust fund and shall provide annual reports therefor to the legislature and to the beneficiaries of the trust.

The commission may deposit moneys from the trust fund into depositories other than the state treasury and may manage, invest, and reinvest moneys in the trust fund. The commission may hold, purchase, sell, assign, transfer, or dispose of any securities and investments in which any of the moneys have been invested, as well as the proceeds of the investments. Moneys from the trust fund that are deposited into depositories other than the state treasury shall be exempt from the requirements of chapters 36 and 38. Any interest or other earnings arising out of investments from the trust fund shall be credited to and deposited into the trust fund. [L Sp 1995, c 14, §7; am L 2006, c 177, §1]

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§214. Purposes of loans; authorized actions. (a) The department may make loans from revolving funds to any lessee or native Hawaiian to whom, or any cooperative association to which, a lease has been issued under section 207(a) of this Act or a license has been issued under section 207(c)(1)(B) of this Act. Such loans may be made for the following purposes:

(1) The repair or maintenance or purchase or erection of dwellings on any tract, and the undertaking of other permanent improvements thereon;

(2) The purchase of livestock, swine, poultry, fowl, aquaculture stock, and farm and aquaculture equipment;

(3) Otherwise assisting in the development of tracts and of farm, ranch, and aquaculture operations, including:

(A) The initial and on-going development, improvement, operation, and expansion of homestead farms, ranches, and aquaculture enterprises;

(B) The liquidation of indebtedness incurred for any of the foregoing purposes relating to farm loans aged less than five years;

(C) The payment of normal and reasonable living expenses of a full-time farmer;

(D) The planning, layout, and installation of soil and water conservation practices; and

(E) Providing relief and rehabilitation to homestead farmers and ranchers due to damage by rain and windstorms, droughts, tidal wave, earthquake, volcanic eruption, and other natural catastrophes, and for livestock disease, epidemics, crop blights, and serious effects of prolonged shipping and dock strikes;

(4) The cost of breaking up, planting, and cultivating land and harvesting crops, the cost of excavating or constructing aquaculture ponds and tanks, the purchase of seeds, fertilizers, feeds, insecticides, medicines, and chemicals for disease and pest control for animals, fish, shellfish, and crops, and the related supplies required for farm, ranch, and aquaculture operations, the erection of fences and other permanent

improvements for farm, ranch, and aquaculture purposes and the expense of marketing; and

(5) To assist licensees in the operation or erection of theaters, garages, service stations, markets, stores, and other mercantile establishments, all of which shall be owned by native Hawaiians or by organizations formed and controlled by native Hawaiians.

(b) In addition the department may:

(1) Use moneys in the Hawaiian home operating fund, with the prior approval of the governor, to match federal, state, or county funds available for the same purposes and to that end, enter into an undertaking, agree to conditions, transfer funds therein available for expenditure, and do and perform other acts and things, as may be necessary or required, as a condition to securing matching funds for the department's projects or works;

(2) Loan or guarantee the repayment of or otherwise underwrite any authorized loan or portion thereof to lessees in accordance with section 215;

(3) Loan or guarantee the repayment of or otherwise underwrite any authorized loan or portion thereof to a cooperative association in accordance with section 215;

(4) Permit and approve loans made to lessees by government agencies or private lending institutions, where the department assures the payment of these loans; provided that upon receipt of notice of default in the payment of the assured loans, the department may, upon failure of the lessee to cure the default within sixty days, cancel the lease and pay the outstanding balance in full or may permit the new lessee to assume the outstanding debt; and provided further that the department shall reserve the following rights:

(A) The right of succession to the lessee's interest and assumption of the contract of loan;

(B) The right to require that written notice be given to the department immediately upon default or delinquency of the lessee; and

(C) Any other rights enumerated at the time of assurance necessary to protect the monetary and other interests of the department;

(5) Secure, pledge, or otherwise guarantee the repayment of moneys borrowed by the department from government agencies or private lending institutions and pay the interim interest or advances required for loans; provided that the State's liability, contingent or otherwise, either on moneys borrowed by the department or on departmental guarantees of loans made to lessees under this paragraph and paragraphs (2), (3), and (4) of this subsection, shall at no time exceed $100,000,000; the department's guarantee of repayment shall be adequate security for a loan under any state law prescribing the nature, amount, or form of security or requiring security upon which loans may be made;

(6) Use available loan fund moneys or other funds specifically available for guarantee purposes as cash guarantees when required by lending agencies;

(7) Exercise the functions and reserved rights of a lender of money or mortgagee of residential property in all direct loans made by government agencies or by private lending institutions to lessees the repayment of which is assured by the department. The functions and reserved rights shall include but not be limited to, the purchasing, repurchasing, servicing, selling, foreclosing, buying upon foreclosure, guaranteeing the repayment, or otherwise underwriting, of any loan, the protecting of security interest, and after foreclosures, the repairing, renovating, or modernization and sale of property covered by the loan and mortgage;

(8) Pledge receivables of loan accounts outstanding as collateral to secure loans made by government agencies or private lending institutions to the department, the proceeds of which shall be used by the department to make new loans to lessees or to finance the development of available lands for purposes permitted by this Act; provided that any loan agreement entered into under this paragraph by the department shall include a provision that the money borrowed by the

department is not secured directly or indirectly by the full faith and credit or the general credit of the State or by any revenues or taxes of the State other than the receivables specifically pledged to repay the loan; provided further that in making loans or developing available lands out of money borrowed under this paragraph, the department may establish, revise, charge, and collect fees, premiums, and charges as necessary, reasonable, or convenient, to assure repayment of the funds borrowed, and the fees, premiums, and charges shall be deposited into the Hawaiian home trust fund; and provided further that no moneys of the Hawaiian home loan fund may be pledged as security under this paragraph; and

(9) Notwithstanding any other provisions of this Act to the contrary, transfer into the Hawaiian home trust fund any available and unpledged moneys from any loan funds, the Hawaiian loan guarantee fund, or any fund or account succeeding thereto, except the Hawaiian home loan fund, for use as cash guarantees or reserves when required by a federal agency authorized to insure or guarantee loans to lessees. [Am L 1962, c 14, §3; am L 1963, c 207, §2; am L 1969, c 259, §2; am L 1972, c 76, §2; am L 1978, c 229, §2; am L 1979, c 209, §2; am L 1981, c 90, §5 and c 203, §2; am L 1986, c 85, §1 and c 249, §3; am L 1987, c 283, §1; am L 1989, c 28, §1; am L 1996, c 232, §1; am L 2011, c 114, §1]

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§215. Conditions of loans. *[See also amendment of section below.]* Except as otherwise provided in section 213 (c), each contract of loan with the lessee or any successor or successors to the lessee's interest in the tract or with any agricultural, mercantile, or aquacultural cooperative association composed entirely of lessees shall be held subject to the following conditions whether or not stipulated in the contract loan:

(1) At any time, the outstanding amount of loans made to any lessee, or successor or successors in interest, for the repair, maintenance, purchase, and erection of a dwelling and related permanent improvements shall not exceed fifty per cent of the maximum single residence loan amount allowed in Hawaii by the United States Department of Housing and Urban Development's Federal Housing Administration (FHA), for the development and operation of a farm, ranch, or aquaculture operation shall not exceed $200,000, except that when loans are made to an agricultural or aquacultural cooperative association for the purposes stated in section 214(a)(4), the loan limit shall be determined by the department on the basis of the proposed operations and the available security of the association, and for the development and operation of a mercantile establishment shall not exceed the loan limit determined by the department on the basis of the proposed operations and the available security of the lessee or of the organization formed and controlled by lessees; provided that upon the death of a lessee leaving no relative qualified to be a lessee of Hawaiian home lands, or the cancellation of a lease by the department, or the surrender of a lease by the lessee, the department shall make the payment provided for by section 209(a), the amount of any such payment shall be considered as part or all, as the case may be, of any such loan to the successor or successors, without limitation as to the above maximum amounts; provided further that in case of the death of a lessee, or cancellation of a lease by the department, or the surrender of a lease by the lessee, the successor or

successors to the tract shall assume any outstanding loan or loans thereon, if any, without limitation as to the above maximum amounts but subject to paragraph (3).

(2) The loans shall be repaid in periodic installments, such installments to be monthly, quarterly, semiannual, or annual as may be determined by the department in each case. The term of any loan shall not exceed thirty years. Payments of any sum in addition to the required installments, or payment of the entire amount of the loan, may be made at any time within the term of the loan. All unpaid balances of principal shall bear interest at the rate of two and one-half per cent a year for loans made directly from the Hawaiian home loan fund, or at the rate of two and one-half per cent or higher as established by law for other loans, payable periodically or upon demand by the department, as the department may determine. The payment of any installment due shall be postponed in whole or in part by the department for such reasons as it deems good and sufficient and until such later date as it deems advisable. Such postponed payments shall continue to bear interest on the unpaid principal at the rate established for the loan.

(3) In the case of the death of a lessee the department shall, in any case, permit the successor or successors to the tract to assume the contract of loan subject to paragraph (1). In case of the cancellation of a lease by the department or the surrender of a lease by the lessee, the department may, at its option declare all installments upon the loan immediately due and payable, or permit the successor or successors to the tract to assume the contract of loan subject to paragraph (1). The department may, in such cases where the successor or successors to the tract assume the contract of loan, waive the payment, wholly or in part, of interest already due and delinquent upon the loan, or postpone the payment of any installment thereon, wholly or in part, until such later dates as it deems advisable. Such postponed payments shall, however, continue to bear interest on the unpaid principal at the

rate established for the loan. Further, the department may, if it deems it advisable and for the best interests of the lessees, write off and cancel, wholly or in part, the contract of loan of the deceased lessee, or previous lessee, as the case may be, where such loans are delinquent and deemed uncollectible. Such write off and cancellation shall be made only after an appraisal of all improvements and growing crops or improvements and aquaculture stock, as the case may be, on the tract involved, such appraisal to be made in the manner and as provided for by section 209(a). In every case, the amount of such appraisal, or any part thereof, shall be considered as part or all, as the case may be, of any loan to such successor or successors, subject to paragraph (1).

(4) No part of the moneys loaned shall be devoted to any purpose other than those for which the loan is made.

(5) The borrower or the successor to the borrower's interest shall comply with such other conditions, not in conflict with any provision of this Act, as the department may stipulate in the contract of loan.

(6) The borrower or the successor to the borrower's interest shall comply with the conditions enumerated in section 208, and with section 209 of this Act in respect to the lease of any tract.

(7) Whenever the department shall determine that a borrower is delinquent in the payment of any indebtedness to the department, it may require such borrower to execute an assignment to it, not to exceed, however, the amount of the total indebtedness of such borrower, including the indebtedness to others the payment of which has been assured by the department of all moneys due or to become due to such borrower by reason of any agreement or contract, collective or otherwise, to which the borrower is a party. Failure to execute such an assignment when requested by the department shall be sufficient ground for cancellation of the borrower's lease or interest therein. [Am Feb. 3,

1923, c 56, §3, 42 Stat 1222; Jul. 10, 1937, c 482, 50 Stat 505; Nov. 26, 1941, c 544, §5, 55 Stat 785; Jun. 14, 1948, c 464, §§4, 5, 62 Stat 392; Jul. 9, 1952, c 615, §§3, 4, 66 Stat 514; am L 1962, c 14, §4 and c 18, §2; am L 1963, c 207, §§2, 3; am L 1968, c 29, §2; am L 1972, c 76, §3; am L 1974, c 173, §1; am L 1976, c 72, §2; am L 1981, c 90, §6, c 112, §3, and c 203, §3; am L 1982, c 274, §3; am L 1987, c 36, §2; am L 1989, c 28, §2; am L 1997, c 197, §8; am L 2008, c 85, §1]

Revision Note

"Section 213(c)" substituted for "section 213(a)(2)".

§215. Conditions of loans. *[Text of section as amended subject to consent of Congress. L 2000, c 107, §3. For current provisions, see above.]* Except as otherwise provided in section 213(c), each contract of loan with the lessee or any successor or successors to the lessee's interest in the tract or with any agricultural, mercantile, or aquacultural cooperative association composed entirely of lessees shall be held subject to the following conditions whether or not stipulated in the contract loan:

(1) At any1 time, the outstanding amount of loans made to any lessee, or successor or successors in interest, for the repair, maintenance, purchase, and erection of a dwelling and related permanent improvements shall not exceed fifty per cent of the maximum single residence loan amount allowed in Hawaii by the United States Department of Housing and Urban Development's Federal Housing Administration (FHA), for the development and operation of a farm, ranch, or aquaculture operation shall not exceed $50,000, except that when loans are made to an agricultural or aquacultural cooperative association for the purposes stated in section 214(a)(4), the loan limit shall be determined by the department on the basis of the proposed operations and the available security of the association, and for the development and operation of a mercantile establishment shall not exceed the loan limit

determined by the department on the basis of the proposed operations and the available security of the lessee or of the organization formed and controlled by lessees; provided that upon the death of a lessee leaving no relative qualified to be a lessee of Hawaiian home lands, or the cancellation of a lease by the department, or the surrender of a lease by the lessee, the department shall make the payment provided for by section 209(a), the amount of any such payment shall be considered as part or all, as the case may be, of any such loan to the successor or successors, without limitation as to the above maximum amounts; provided further that in case of the death of a lessee, or cancellation of a lease by the department, or the surrender of a lease by the lessee, the successor or successors to the tract shall assume any outstanding loan or loans thereon, if any, without limitation as to the above maximum amounts but subject to paragraph (3).

(2) The loans shall be repaid in periodic installments, such installments to be monthly, quarterly, semiannual, or annual as may be determined by the department in each case. The term of any loan shall not exceed thirty years. Payments of any sum in addition to the required installments, or payment of the entire amount of the loan, may be made at any time within the term of the loan. All unpaid balances of principal shall bear interest at the rate of two and one-half per cent or higher as established by rule adopted by the department, payable periodically or upon demand by the department, as the department may determine. The payment of any installment due shall be postponed in whole or in part by the department for such reasons as it deems good and sufficient and until such later date as it deems advisable. Such postponed payments shall continue to bear interest on the unpaid principal at the rate established for the loan.

(3) In the case of the death of a lessee the department shall, in any case, permit the successor or successors to the tract to assume the contract of loan subject to paragraph (1). In case of the cancellation

of a lease by the department or the surrender of a lease by the lessee, the department may, at its option declare all installments upon the loan immediately due and payable, or permit the successor or successors to the tract to assume the contract of loan subject to paragraph (1). The department may, in such cases where the successor or successors to the tract assume the contract of loan, waive the payment, wholly or in part, of interest already due and delinquent upon the loan, or postpone the payment of any installment thereon, wholly or in part, until such later dates as it deems advisable. Such postponed payments shall, however, continue to bear interest on the unpaid principal at the rate established for the loan. Further, the department may, if it deems it advisable and for the best interests of the lessees, write off and cancel, wholly or in part, the contract of loan of the deceased lessee, or previous lessee, as the case may be, where such loans are delinquent and deemed uncollectible. Such write off and cancellation shall be made only after an appraisal of all improvements and growing crops or improvements and aquaculture stock, as the case may be, on the tract involved, such appraisal to be made in the manner and as provided for by section 209(a). In every case, the amount of such appraisal, or any part thereof, shall be considered as part or all, as the case may be, of any loan to such successor or successors, subject to paragraph (1).

(4) No part of the moneys loaned shall be devoted to any purpose other than those for which the loan is made.

(5) The borrower or the successor to the borrower's interest shall comply with such other conditions, not in conflict with any provision of this Act, as the department may stipulate in the contract of loan.

(6) The borrower or the successor to the borrower's interest shall comply with the conditions enumerated in section 208, and with section 209 of this Act in respect to the lease of any tract.

(7) Whenever the department shall determine that a borrower is delinquent in the payment of any indebtedness to the department, it may require such borrower to execute an assignment to it, not to exceed, however, the amount of the total indebtedness of such borrower, including the indebtedness to others the payment of which has been assured by the department of all moneys due or to become due to such borrower by reason of any agreement or contract, collective or otherwise, to which the borrower is a party. Failure to execute such an assignment when requested by the department shall be sufficient ground for cancellation of the borrower's lease or interest therein. [Am Feb. 3, 1923, c 56, §3, 42 Stat 1222; Jul. 10, 1937, c 482, 50 Stat 505; Nov. 26, 1941, c 544, §5, 55 Stat 785; Jun. 14, 1948, c 464, §§4, 5, 62 Stat 392; Jul. 9, 1952, c 615, §§3, 4, 66 Stat 514; am L 1962, c 14, §4 and c 18, §2; am L 1963, c 207, §§2, 3; am L 1968, c 29, §2; am L 1972, c 76, §3; am L 1974, c 173, §1; am L 1976, c 72, §2; am L 1981, c 90, §6, c 112, §3, and c 203, §3; am L 1982, c 274, §3; am L 1987, c 36, §2; am L 1989, c 28, §2; am L 1997, c 197, §8; am L 2000, c 107, §1]

Note

The L 2008, c 85, §1 amendment to this section shall not be repealed when L 2000, c 107 takes effect with the consent of Congress. L 2008, c 85, §3.

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§216. Insurance by borrowers; acceleration of loans; lien and enforcement thereof. (a) The department may require the borrower to insure, in such amount as the department may prescribe, any livestock, aquaculture stock, swine, poultry, fowl, machinery, equipment, dwellings, and permanent improvements purchased or constructed out of any moneys loaned or assured by the department; or, in lieu thereof, the department may directly take out such insurance and add the cost thereof to the amount of principal payable under the loan.

(b) Whenever the department has reason to believe that the borrower has violated any condition enumerated in paragraph (2), (4), (5), or (6) of section 215 of this Act, the department shall give due notice and afford opportunity for a hearing to the borrower or the successor or successors to his interest, as the case demands. If upon such hearing the department finds that the borrower has violated the condition, the department may declare all principal and interest of the loan immediately due and payable notwithstanding any provision in the contract of loan to the contrary.

(c) The department shall have a first lien upon the borrower's or lessee's interest in any lease, growing crops, aquacultural stock, either on his tract or share in any collective contract or program, livestock, swine, poultry, fowl, aquaculture stock, machinery, and equipment purchased with moneys loaned by the department, and in any dwellings or other permanent improvements on any leasehold tract, to the amount of all principal and interest due and unpaid and of all taxes and insurance and improvements paid by the department, and any other indebtedness of the borrower, the payment of which has been assured by the department. Such lien shall have priority over any other obligation for which the property subject to the lien may be security.

(d) The department may, subject to this Act and procedures established by rule, enforce any lien by declaring the borrower's interest in the property subject to the lien to be forfeited, any lease held by the borrower canceled, and shall thereupon order such leasehold premises vacated and the property subject to the lien surrendered within a reasonable time. The right to the use and occupancy of the Hawaiian home lands contained in such lease shall thereupon revest in the

department, and the department may take possession of the premises covered therein and the improvements and growing crops or improvements and aquaculture stock thereon; provided that the department shall pay to the borrower any difference which may be due him after the appraisal provided for in section 209 has been made. [Am Jul. 10, 1937, c 482, 50 Stat 506; Jun. 14, 1948, c 464, §6, 62 Stat 393; am L 1962, c 14, §5; am L 1963, c 207, §2; am L 1967, c 146, §4; am L 1978, c 229, §3; am L 1981, c 90, §7]

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§217. Ejectment, when; loan to new lessee for improvements. In case the lessee or borrower or the successor to an interest in the tract, as the case may be, fails to comply with any order issued by the department under the provisions of section 210 or 216 of this title, the department may:

(1) Bring action of ejectment or other appropriate proceeding; or

(2) Invoke the aid of the circuit court of the State for the judicial circuit in which the tract designated in the department's order is situated. Such court may thereupon order the lessee or the lessee's successor to comply with the order of the department. Any failure to obey the order of the court may be punished by it as contempt thereof. Any tract forfeited under the provisions of section 210 or 216 of this title may be again leased by the department as authorized by the provisions of section 207 of this title, except that the value, in the opinion of the department, of all improvements made in respect to such tract by the original lessee or any successor to an interest therein shall constitute a loan by the department to the new lessee. Such loan shall be subject to the provisions of this section and sections 215, except paragraph (1), and 216 to the same extent as loans made by the department from the Hawaiian loan fund. [Am L 1963, c 207, §§2, 5 (a); am L 1997, c 197, §9]

Case Notes

Cannot be construed to authorize seizure of lessee's property without service of summons, time to answer, and opportunity to present evidence and be heard. 68 H. 466, 719 P.2d 397.

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§218. REPEALED. L 1967, c 146, §5.

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§219. Agricultural and aquacultural experts. The department is authorized to employ agricultural and aquacultural experts at such compensation and in such number as it deems necessary. It shall be the duty of such agricultural and aquacultural experts to instruct and advise the lessee of any tract or the successor to the lessee's interest therein as to the best methods of diversified farming and stock raising and aquaculture operations and such other matters as will tend successfully to accomplish the purposes of this title. [Am L 1963, c 207, §2; am L 1981, c 90, §8; am L 1982, c 275, §1]

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§219.1. General assistance. (a) The department is authorized to carry on any activities it deems necessary to assist the lessees in obtaining maximum utilization of the leased lands, including taking any steps necessary to develop these lands for their highest and best use commensurate with the purposes for which the land is being leased as provided for in section 207, and assisting the lessees in all phases of farming, ranching, and aquaculture operations and the marketing of their agricultural [or] aquacultural produce and livestock.

(b) Notwithstanding any law to the contrary, the department either alone or together with any other governmental agency, may:

(1) Form an insurance company, association (nonprofit or otherwise), pool, or trust;

(2) Acquire an existing insurance company;

(3) Enter into arrangements with one or more insurance companies; or

(4) Undertake any combination of the foregoing; upon such terms and conditions and for such periods, as the commission shall approve, to provide homeowner protection, including hurricane coverage, for lessees participating in such undertaking. Such undertaking shall be subject to the provisions of chapter 431P, including but not limited to section 431P-10(b), and chapter 431.

(c) The department, if experiencing any of the power as authorized under subsection (b) may:

(1) Issue revenue bonds under and pursuant to part III of chapter 39, Hawaii Revised Statutes, to establish necessary reserves to provide for the payment of claims in excess of reserves and for other related purposes; or to pay any liability incurred that is self-insured or uninsured by the commission including without limitations, liabilities for damage to property, comprehensive liability, environmental, or other losses; and

(2) Invest funds held in reserve, which are not required for immediate disbursement, in property or securities in which savings banks may legally invest funds subject to their control or as the commission may

authorize by resolution. [L 1962, c 14, §6; am imp L 1963, c 207, §2; am L 1981, c 90, §9; am L 1993, c 339, §7]

Revision Note

In subsection (a), "or" substituted for "of".

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§220. Development projects; appropriations by legislature; bonds issued by legislature; mandatory reservation of water. (a) Subject to subsection (d), the department is authorized directly to undertake and carry on general water and other development projects in respect to Hawaiian home lands and to undertake other activities having to do with the economic and social welfare of the homesteaders, including the authority to derive revenue from the sale, to others than homesteaders, of water and other products of such projects or activities, or from the enjoyment thereof by others than homesteaders, where such sale of products or enjoyment of projects or activities by others does not interfere with the proper performance of the duties of the department; provided that roads through or over Hawaiian home lands, other than federal-aid highways and roads, shall be maintained by the county in which the particular road or roads to be maintained are located.

(b) The legislature is authorized to appropriate out of the treasury of the State such sums as it deems necessary to augment the funds of the department and to provide the department with funds sufficient to execute and carry on such projects and activities. The legislature is further authorized to issue bonds to the extent required to yield the amount of any sums so appropriated for the payment of which, if issued for revenue-producing improvements, the department shall provide, as set forth in section 213.

(c) To enable the construction of irrigation projects which will service Hawaiian home lands, either exclusively or in conjunction with other lands served by such projects, the department is authorized, with the approval of the governor, and subject to subsection (d), to:

(1) Grant to the board of land and natural resources, or to any other agency of the government of the State or the United States undertaking the construction and operation of such irrigation projects, licenses for rights-of-way for pipelines, tunnels, ditches, flumes, and other water conveying facilities, reservoirs, and other storage facilities, and for the development and use of water appurtenant to Hawaiian home lands;

(2) Exchange available lands for public lands, as

provided in section 204 of this Act, for sites for reservoirs and subsurface water development wells and shafts;

(3) Request any such irrigation agency to organize irrigation projects for Hawaiian home lands and to transfer irrigation facilities constructed by the department to any such irrigation agency;

(4) Agree to pay the tolls and assessments made against community pastures for irrigation water supplied to such pastures; and

(5) Agree to pay the costs of construction of projects constructed for Hawaiian home lands at the request of the department, in the event the assessments paid by the homesteaders upon lands are not sufficient to pay such costs;

provided that licenses for rights-of-way for the purposes and in the manner specified in this section may be granted for a term of years longer than is required for amortization of the costs of the project or projects requiring use of such rights-of-way only if authority for such longer grant is approved by an act of the legislature of the State. Such payments shall be made from, and be a charge against the Hawaiian home operating fund.

(d) For projects pursuant to this section, sufficient water shall be reserved for current and foreseeable domestic, stock water, aquaculture, and irrigation activities on tracts leased to native Hawaiians pursuant to section 207(a). [Am Jul. 10, 1937, c 482, 50 Stat 507; Nov. 26, 1941, c 544, §6, 55 Stat 786; Jun. 14, 1948, c 464, §7, 62 Stat 393; Aug. 1, 1956, c 855, §1, 70 Stat 915; am L 1963, c 207, §§2, 5(a); am L 1986, c 249, §4; am L 1991, c 325, §2]

Cross References

Bond issues, see Organic Act, §55 and HRS chapters 39, 47, and 49.

Water or irrigation projects, see §§167-13, 167-14; §174-13.

Attorney General Opinions

Lien on lands as security for improvement bonds is not

authorized. Att. Gen. Op. 63-25.

Law Journals and Reviews

Native Hawaiian Homestead Water Reservation Rights: Providing Good Living Conditions for Native Hawaiian Homesteaders. 25 UH L. Rev. 85.

Case Notes

Pursuant to article XI, §§1 and 7 of the Hawaii constitution, subsection (d) of this Act, and §174C-101(a), a reservation of water constitutes a public trust purpose. 103 H. 401, 83 P.3d 664.

Where commission on water resource management failed to render the requisite findings of fact and conclusions of law with respect to whether applicant had satisfied its burden as mandated by the state water code, it violated its public trust duty to protect the department of Hawaiian home lands' reservation rights under the Hawaiian Homes Commission Act, the state water code, the state constitution, and the public trust doctrine in balancing the various competing interests in the state water resources trust. 103 H. 401, 83 P.3d 664.

Where commission on water resource management refused to permit cross examination of water use applicant's oceanography expert regarding the limu population along the shoreline, in effect precluding the commission from effectively balancing the applicant's proposed private commercial use of water against an enumerated public trust purpose, the commission failed adequately to discharge its public trust duty to protect native Hawaiians' traditional and customary gathering rights, as guaranteed by this section, article XII, §7 of the Hawaii constitution, and §174C-101. 103 H. 401, 83 P.3d 664.

§220.5. Development by contract; development by project developer agreement. (a) Notwithstanding any law to the contrary, the department is authorized to enter into and carry out contracts to develop available lands for homestead, commercial, and multipurpose projects; provided that the department shall not be subject to the requirements of competitive bidding if no state funds are to be used in the development of the project.

(b) Notwithstanding any law to the contrary, the department is authorized to enter into project developer agreements with qualified developers for, or in connection with, any homestead, commercial, or multipurpose project, or portion of any project; provided that prior to entering into a project developer agreement with a developer, the department shall:

(1) Set by appraisal the minimum rental of the lands to be disposed of on the basis of the fair market value of the lands;

(2) Give notice of the proposed disposition in accordance with applicable procedures and requirements of section 171-60(a)(3), Hawaii Revised Statutes;

(3) Establish reasonable criteria for the selection of the private developer; and

(4) Determine within forty-five days of the last day for filing applications the applicant or applicants who meet the criteria for selection, and notify all applicants of its determination within seven days of such determination. If only one applicant meets the criteria for selection as the developer, the department then may negotiate the details of the project developer agreement with the developer; provided that the terms of the project developer agreement shall not be less than those proposed by the developer in the application. If two or more applicants meet the criteria for selection, the department shall consider all of the relevant facts of the disposition or contract, the proposals submitted by each applicant, and the experience and financial capability of each applicant and, within forty-five days from the date of selection of the applicants that met the criteria, shall select the applicant who submitted the best proposal. The department then may negotiate

the details of the disposition with the developer, including providing benefits to promote native Hawaiian socio-economic advancement; provided that the terms of the project developer agreement shall not be less than those proposed by the developer in the application.

(c) Any project developer agreement entered into pursuant to this section shall include the following terms and conditions, wherever appropriate:

(1) A requirement that the developer file with the department a good and sufficient bond conditioned upon the full and faithful performance of all the terms, covenants, and conditions of the project developer agreement;

(2) The use or uses to which the land will be put;

(3) The dates on which the developer must submit to the department for approval preliminary plans and final plans and specifications for the total development. No construction shall commence until the department has approved the final plans and specifications; provided that construction on an incremental basis may be permitted by the department;

(4) The date of completion of the total development, including the date of completion of any permitted incremental development;

(5) The minimum requirements for off-site and on-site improvements that the developer must install, construct, and complete by the date of completion of the total development. The department may permit incremental development and establish the minimum requirements for off-site and on-site improvements that must be installed, constructed, and completed prior to the date of completion of the total development; and

(6) Any other terms and conditions deemed necessary by the department to protect the interests of the State and the department.

(d) Any project developer agreement entered into pursuant to this section may provide for options for renewal of the term of the project developer agreement; provided that:

(1) The term of any one project developer agreement shall not exceed sixty-five years;

(2) Any lands disposed of under a project developer agreement shall be subject to withdrawal at any time during the term of the agreement, with reasonable notice; and

(3) The rental shall be reduced in proportion to the value of the portion withdrawn and the developer shall be entitled to receive from the department the proportionate value of the developer's permanent improvements so taken in the proportion that they bear to the unexpired term of the agreement, with the value of the permanent improvements determined on the basis of fair market value or depreciated value, whichever is less; or the developer, in the alternative, may remove and relocate the developer's improvements to the remainder of the lands occupied by the developer.

(e) The project developer agreement may permit the developer, after the developer has completed construction of any required off-site improvement, to assign or sublease with the department's approval portions of the leased lands in which the construction of any required off-site improvement has been completed to a purchaser or sublessee who shall assume the obligations of the developer relative to the parcel being assigned or subleased, including the construction of any on-site improvement. The department may permit a developer to share in the lease rent from the assigned lease for a fixed period in order to recover costs and profit.

(f) Whenever the department enters into a project developer agreement to develop a homestead project, the department shall provide for the purchase of the completed project or that portion of a completed project developed for disposition to native Hawaiians, and shall dispose of the lands in accordance with this Act; provided that the project developer agreement shall not encumber any existing homestead lease in the project area.

(g) As used in this section, the following words and terms shall have the following meanings unless the context indicates another or different meaning or intent:

"Commercial project" means a project or that portion of a multipurpose project, including single-family or multiple-family residential, agricultural, pastoral, aquacultural, industrial,

business, hotel and resort, or other commercial uses designed and intended to generate revenues as authorized by this Act;

"Developer" means any person, partnership, cooperative, firm, nonprofit or for-profit corporation, or public agency possessing the competence, expertise, experience, and resources, including financial, personal, and tangible resources, required to carry out a project;

"Homestead project" means a project or that portion of a multipurpose project, including residential, agricultural, pastoral, or aquacultural uses designed and intended for disposition to native Hawaiians under this Act; provided that this term shall also include community facilities for homestead areas;

"Multipurpose project" means a combination of a commercial project and a homestead project;

"Project" means a specific undertaking to develop, construct, reconstruct, rehabilitate, renovate, or to otherwise improve or enhance land or real property;

"Project developer agreement" means any lease, sublease, conditional leasing agreement, disposition agreement, financing agreement, or other agreement or combination of agreement, entered into under this section by the department, for the purpose of developing one or more projects.

(h) The department is authorized to adopt rules in accordance with chapter 91, Hawaii Revised Statutes, to implement and carry out the purposes of this section. [L 1986, c 84, §1; am L 1993, c 146, §1]

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§221. Water. (a) When used in this section:

(1) The term "water license" means any license issued by the board of land and natural resources granting to any person the right to the use of government-owned water; and

(2) The term "surplus water" means so much of any government-owned water covered by a water license or so much of any privately owned water as is in excess of the quantity required for the use of the licensee or owner, respectively.

(b) All water licenses issued after the passage of this Act shall be deemed subject to the condition, whether or not stipulated in the license, that the licensee shall, upon the demand of the department, grant to it the right to use, free of all charge, any water which the department deems necessary adequately to supply the livestock, aquaculture operations, agriculture operations, or domestic needs of individuals upon any tract.

(c) In order adequately to supply livestock, the aquaculture operations, the agriculture operations, or the domestic needs of individuals upon any tract, the department is authorized (1) to use, free of all charge, government-owned water not covered by any water license or covered by a water license issued after the passage of this Act or covered by a water license issued previous to the passage of this Act but containing a reservation of such water for the benefit of the public, and (2) to contract with any person for the right to use or to acquire, under eminent domain proceedings similar, as near as may be, to the proceedings provided in respect to land by sections 101-10 to 101-34, Hawaii Revised Statutes, the right to use any privately owned surplus water or any government-owned surplus water covered by a water license issued previous to the passage of this Act, but not containing a reservation of such water for the benefit of the public. Any such requirement shall be held to be for a public use and purpose. The department may institute the eminent domain proceedings in its own name.

(d) The department is authorized, for the additional purpose of adequately irrigating any tract, to use, free of all charge, government-owned surplus water tributary to the Waimea river upon the island of Kauai, not covered by a water license

or covered by a water license issued after July 9, 1921. Any water license issued after that date and covering any such government-owned water shall be deemed subject to the condition, whether or not stipulated therein, that the licensee shall, upon the demand of the department, grant to it the right to use, free of all charge, any of the surplus water tributary to the Waimea river upon the island of Kauai, which is covered by the license and which the department deems necessary for the additional purpose of adequately irrigating any tract.

Any funds which may be appropriated by Congress as a grant-in-aid for the construction of an irrigation and water utilization system on the island of Molokai designed to serve Hawaiian home lands, and which are not required to be reimbursed to the federal government, shall be deemed to be payment in advance by the department and lessees of the department of charges to be made to them for the construction of such system and shall be credited against such charges when made.

(e) All rights conferred on the department by this section to use, contract for, or acquire the use of water shall be deemed to include the right to use, contract for, or acquire the use of any ditch or pipeline constructed for the distribution and control of such water and necessary to such use by the department.

(f) Water systems in the exclusive control of the department shall remain under its exclusive control; provided that the department may negotiate an agreement to provide for the maintenance of the water system and the billing and collection of user fees. If any provision or the application of that provision is inconsistent with provisions contained in this section, this section shall control.

Water systems include all real and personal property together with all improvements to such systems acquired or constructed by the department for the distribution and control of water for domestic or agricultural use. [Am Aug. 1, 1956, c 855, §§2, 3, 70 Stat 915; am L 1963, c 207, §§2, 5(b); am Const Con 1978 and election Nov. 7, 1978; am L 1981, c 90, §10; am L 1984, c 36, §1; am L 1990, c 24, §1]

Cross References

Board of land and natural resources empowered to prepare irrigation plans, see §§174-5, 174-6.

Law Journals and Reviews

Native Hawaiian Homestead Water Reservation Rights: Providing Good Living Conditions for Native Hawaiian Homesteaders. 25 UH L. Rev. 85.

Case Notes

Although the Hawaii administrative rules denominate aquifer-specific reservations of water to the department of Hawaiian home lands, such a limitation for purposes of water resource management does not divest the department of its right to protect its reservation interests from interfering water uses in adjacent aquifers. 103 H. 401, 83 P.3d 664.

Insofar as the commission on water resource management, as the agency authorized to administer the state water code, determines the contents of the Hawaii water plan, which includes the designation of hydrologic units and sustainable yields, and the commission's "interpretation of its own rules is entitled to deference unless it is plainly erroneous or inconsistent with the underlying legislative purpose", it is within the commission's authority to limit reservations of water to specific aquifers. 103 H. 401, 83 P.3d 664.

Where commission on water resource management failed to render the requisite findings of fact and conclusions of law with respect to whether applicant had satisfied its burden as mandated by the state water code, it violated its public trust duty to protect the department of Hawaiian home lands' reservation rights under the Hawaiian Homes Commission Act, the state water code, the state constitution, and the public trust doctrine in balancing the various competing interests in the state water resources trust. 103 H. 401, 83 P.3d 664.

Where commission on water resource management's findings supporting its conclusion that the proposed use of water would not interfere with department of Hawaiian home lands' reservation rights under this section failed to address whether the proposed user had adduced sufficient evidence with respect to the impact of the proposed use on the department's

reservation in the adjacent aquifer system, commission erred in concluding that proposed user had met its burden under §174C-49 to obtain a water use permit. 103 H. 401, 83 P.3d 664.

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§222. Administration. (a) The department may make such expenditures and shall adopt rules in accordance with chapter 91, Hawaii Revised Statutes, as are necessary for the efficient execution of the functions vested in the department by this Act. All expenditures of the department and all moneys necessary for loans made by the department, in accordance with the provisions of this Act, shall be allowed and paid upon the presentation of itemized vouchers approved by the chairman of the commission or the chairman's designated representative. The department shall make an annual report to the legislature of the State upon the first day of each regular session and such special reports as the legislature may from time to time require. The chairman and members of the commission shall give bond as required by law. The sureties upon the bond and the conditions thereof shall be approved annually by the governor.

(b) When land originally leased by the department in accordance with chapter 171, Hawaii Revised Statutes, is, in turn, subleased by the department's lessee or sublessee, the department shall submit, upon the first day of the convening of any regular session, a written report to the legislature which shall cover the sublease transactions occurring in the fiscal year prior to the regular session and shall contain the names of the persons involved in the transaction, the size of the area under lease, the purpose of the lease, the land classification of the area under lease, the tax map key number, the lease rental, the reason for approval of the sublease by the department, and the estimated net economic result accruing to the department, lessee, and sublessee. [Am Nov. 26, 1941, c 544, §7, 55 Stat 787; Jun. 14, 1948, c 464, §8, 62 Stat 394; am L 1963, c 207, §4; am L 1972, c 173, §1; am L 1977, c 174, §2; am L 1986, c 249, §5; am L 2001, c 110, §1]

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§223. [Right of amendment, etc.] The Congress of the United States reserves the right to alter, amend, or repeal the provisions of this title.

Cross References

Amendment, see state const. art. XII.

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The Lum Court and Native Hawaiian Rights. 14 UH L. Rev. 377.

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§224. Sanitation and reclamation expert. The Secretary of the Interior shall designate from his Department someone experienced in sanitation, rehabilitation, and reclamation work to reside in the State and cooperate with the department in carrying out its duties. The salary of such official so designated by the Secretary of the Interior shall be paid by the department while he is carrying on his duties in the State. [Add Jul. 26, 1935, c 420, §2, 49 Stat 505; am imp L 1963, c 207, §5 (a); am L 1976, c 120, §1]

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§225. Investment of funds; disposition. (a) The department shall have the power and authority to invest and reinvest any of the moneys in any of its funds, not otherwise immediately needed for the purposes of the funds, in such bonds and securities as authorized by state law for the investment of state sinking fund moneys.

(b) (1) The department may receive, manage, and invest moneys or other property, real, personal or mixed, or any interest therein, which may be given, bequeathed, or devised, or in any manner received from sources other than the legislature or any federal appropriation, for the purposes of the Act.

(2) All moneys received by or on behalf of the department shall be deposited into the state treasury to be expended according to law and for purposes in accordance with the terms and conditions of the gift. All moneys shall be appropriated for purposes enumerated in such gifts and if no specific purpose is enumerated, shall be appropriated to the Hawaiian home trust fund.

(3) The department is authorized to sell, lease, or in any way manage such real, personal, or mixed property or any interest therein, in the manner and for the purposes enumerated in the gift. If no conditions are enumerated, the gift may be sold, leased, managed, or disposed of and the income or proceeds therefrom shall be deposited into the Hawaiian home trust fund.

(4) The real property or any interest therein received by the department through contributions or grants shall not attain the status of Hawaiian home lands as defined in section [201(a)].

(5) The department shall cause to be kept suitable books of account wherein shall be recorded each gift, the essential facts of the management thereof, and the expenditure of income.

(6) Any action to be taken with respect to gifts shall be made in a public meeting where any pertinent information and reasons for any decisions shall be fully disclosed. [Add Nov. 26, 1941, c 544, §8, 55 Stat 787; Jun. 14, 1948, c 464, §9, 62 Stat 394; am L 1963, c 207, §5(a); am L 1965, c 30, §1; am L 1978, c 229, §4; am L

1981, c 192, §2; am L 1983, c 143, §2]

Revision Note

In subsection (a)(4), reference to "201(a)" substituted for "201(a)(5)".

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§226. Qualification for federal programs. The department shall be qualified to participate in any federal program that renders assistance in program areas that the department is mandated by the Act to implement. [L 1978, c 204, §1]

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§227. Enterprise zones. The department is authorized to participate in any federal or state program that permits the establishment of one or more enterprise zones on available lands, provided that participation in the program will result in economic benefits to native Hawaiians. The administration of the program shall be governed by rules adopted by the department in accordance with chapter 91, Hawaii Revised Statutes. [L 1986, c 16, §2; ree L 1997, c 197, §10]

Cross References

State enterprise zones, see chapter 209E.

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[§228.] Commercial and multipurpose project leases; extension of term. (a) Notwithstanding any law to the contrary, the procedures under this section shall apply to commercial and multipurpose projects under section 204 or 220.5, and shall be in addition to any other procedures required by law.

(b) Prior to the disposition of available land through a request for proposals for an initial lease for a commercial or multipurpose project, the department shall consult with beneficiaries of the trust in the master planning of the available lands. The process of beneficiary consultation shall be as established by the department and shall:

(1) Engage beneficiaries and beneficiary-serving organizations;

(2) Provide for the timely dissemination of information about the proposed project and the gathering of input; and

(3) Allow for a reasonable time and reasonable access to relevant information for evaluation and consideration.

(c) Notwithstanding section 220.5(d)(1), the department may extend the term of a lease of Hawaiian home lands for commercial or multipurpose projects and with the approval by the department of a written agreement proposed by the lessee, or the lessee and developer, to:

(1) Make improvements to the leased property; or

(2) Obtain financing for the improvement of the leased lands.

The extension of the lease pursuant to this section shall be based upon the improvements made or to be made, shall be no longer than twenty years, and shall be granted only once.

(d) Before the written agreement is approved, the lessee, or the lessee and developer, shall submit to the department the plans and specifications for the proposed development. The department shall review the plans, specifications, and the written agreement and determine:

(1) Whether the development is of sufficient value and meets the priorities of the commission to justify an extension of the lease;

(2) The estimated time needed to complete the

improvements and expected date of completion of the improvements; and

(3) The minimum revised annual rent based on the fair market value of the lands to be developed, as determined by an appraiser for the department, and percentage rent where gross receipts exceed a specified amount.

The commission shall adopt and publish a policy pursuant to chapter 91, Hawaii Revised Statutes, which shall be used to evaluate any request for a lease extension, including the terms of the lease, prospective payments, and renegotiation, and shall be used by the commission for any final determination on a lease extension request.

(e) Upon the extension of a lease term pursuant to subsection (c), the department shall deposit fifteen per cent of all revenues generated from the lease from the time the lease extension is granted, into the native Hawaiian rehabilitation fund under section 213(i).

(f) The department shall submit an annual report to the legislature and the United States Department of the Interior, no later than twenty days prior to the convening of each regular session, beginning with the regular session of 2011, of all leases of available lands for commercial and multipurpose projects, including the following:

(1) The total number of leases;

(2) Acreage of each lease;

(3) Terms of each lease;

(4) Whether the lessee is a beneficiary or beneficiary controlled organization; and

(5) Whether the lease was for retained available lands not required for leasing under section 207(a), and was negotiated with a native Hawaiian, or organization or association owned or controlled by native Hawaiians, under section 204(a)(2).

(g) As used in this section, "improvements" means any renovation, rehabilitation, reconstruction, or construction of the property, including minimum requirements for off-site and on-site improvements. [L 2010, c 187, §6]

Note

Deposits of revenue into lands trust fund and rehabilitation fund. L 2010, c 187, §9.

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TITLE 3: AMENDMENTS TO HAWAIIAN ORGANIC ACT

[See the Organic Act.]

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TITLE 4: MISCELLANEOUS PROVISIONS

§401. All Acts or parts of Acts, either of the Congress of the United States or of the State of Hawaii, to the extent that they are inconsistent with the provisions of this Act, are hereby repealed.

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§402. If any provision of this Act, or the application of such provision to certain circumstances, is held unconstitutional, the remainder of the Act and the application of such provision to circumstances other than those as to which it is held unconstitutional shall not be held invalidated thereby.

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TITLE 5: HOMESTEAD GENERAL LEASING PROGRAM

§§501 to 516. REPEALED. L 1986, c 75, §2.

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HAWAIIAN HOMES COMMISSION ACT, 1920

(Act of July 9, 1921, c 42, 42 Stat 108)

Note

This Act is now part of the State Constitution and is subject to amendment or repeal as prescribed in Article XII of the Constitution.

Consent of Congress

Consent of Congress, see Pub. L. 99-557 (October 27, 1986); H. J. Res. 32, 105th Cong. 1st Sess., Pub. L. No. 105-21, 111 Stat. 235 (June 27, 1997), for §§209 and 219.1; and S.J. Res. 23, 102nd Cong. 2nd Sess., Pub. L. No. 102-398, 106 Stat. 1953 (October 6, 1992), for §§202, 203, 204, 208, 209, 213, 214, 215, 220, 221, 222, and 227.

Law Journals and Reviews

The Native Hawaiian Trusts Judicial Relief Act: The First Step in an Attempt to Provide Relief. 14 UH L. Rev. 889.

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Title 5: Homestead General Leasing Program

501 to 516 Repealed

Note

Amendment of Act and funding for Native Hawaiian roll commission. L 2011, c 195, §§3, 4.
Public land trust information system. L 2011, c 54.

Cross References

Native Hawaiian recognition, see chapter 10H.

Attorney General Opinions

Threatened and endangered plants are protected on Hawaiian home lands under the provisions of chapter 195D, as well as under the provisions of the federal Endangered Species Act of 1973, to the same extent that the plants are protected elsewhere in Hawaii. Anyone who "takes" threatened or endangered plants on Hawaiian home lands is subject to state and federal civil and criminal penalties. Att. Gen. Op. 95-5.

Law Journals and Reviews

Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue. 16 UH L. Rev. 1.

Native Hawaiian Homestead Water Reservation Rights: Providing Good Living Conditions for Native Hawaiian Homesteaders. 25 UH L. Rev. 85.

Case Notes

Claims under Act arise exclusively under state law; hence, Eleventh Amendment bars federal court from deciding claims against state officials based solely on this Act. 45 F.3d 333.

Appellant who claimed article XII's (of the state constitution) implementation of this Act violated the Fourteenth Amendment because government benefits, leases to public lands, are available only to native Hawaiians, lacked standing. 342 F.3d 934.

Lessee defendants' motion to dismiss granted, where plaintiffs claimed native Hawaiian lessee defendants violated this Act, as well as plaintiffs' rights under 42 U.S.C. §1983 by subleasing Hawaiian home lands to non-native Hawaiians. 824 F. Supp. 1480.

To the extent plaintiffs sought redress for violations of the Hawaii constitution or this Act, the Eleventh Amendment barred the state law claims; thus, state defendants' motion for summary judgment granted on all state law claims against state officials brought in their official capacities; state defendants sued in personal capacities were entitled to qualified immunity. 824 F. Supp. 1480.

Association that included native Hawaiian beneficiaries asserted viable claim under 42 U.S.C. §1983 alleging breach of trust duties by appellees under this Act via Admission Act. 78 H. 192, 891 P.2d 279.

Act is part of Hawai‘i constitution and does not constitute federal law; thus, federal preemption principles did not apply to case where there was no relevant federal law at issue and conflict between Act and state statute was matter of state constitutional law. 87 H. 91, 952 P.2d 379.

Chapter 343 does not conflict with this Act, has only

incidental impact on Hawaiian home lands, and is not inconsistent with interests of the beneficiaries; thus, chapter applies to Hawaiian home lands. 87 H. 91, 952 P.2d 379.

For Hawaiian home lands, the department of Hawaiian home lands is the accepting authority for applicant proposals under §343-5 (c); because the governor is not involved, there is no conflict with this Act. 87 H. 91, 952 P.2d 379.

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DOCUMENT B

Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959).

70 Stat. 512.
21 USC 342.

proviso of section 402(c) of the Federal Food, Drug, and Cosmetic Act is amended by striking out "March 1, 1959," and inserting in lieu thereof "May 1, 1959,".

(b) The third proviso of section 402(c) of such Act is amended to read as follows: "*And provided further*, That, without regard to the requirements of sections 406(b) and 701(e), the Secretary shall promptly establish, and may from time to time amend, regulations (1) prescribing the conditions (including quantitative tolerance limitations) under which the coal-tar color known as Citrus Red No. 2 (more particularly to be defined in such regulations) may be safely used in coloring the skins of oranges which are not intended or used for processing (or, if so used, are oranges designated in the trade as 'packing house elimination'), and which meet minimum maturity standards established by or under the laws of the States in which the oranges are grown, (2) providing for separately listing such color solely for such use on such oranges, and (3) providing for the certification of batches of such color, with or without harmless diluents, for such restricted use; and such oranges, if colored prior to September 1, 1961, and to the enactment by the Congress (subsequent to the date of enactment of this proviso) of general legislation for the listing and certification of food color additives under safe tolerances, in conformity with this proviso and such regulations, with Citrus Red No. 2 from a batch certified in accordance with such regulations, shall not be deemed to be adulterated within the meaning of this paragraph."

21 USC 346, 371.

Approved March 17, 1959.

Public Law 86-3

March 18, 1959
[S. 50]

AN ACT

To provide for the admission of the State of Hawaii into the Union.

Hawaii, statehood.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 7(c) of this Act, the State of Hawaii is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Hawaii entitled "An Act to provide for a constitutional convention, the adoption of a State constitution, and the forwarding of the same to the Congress of the United States, and appropriating money therefor", approved May 20, 1949 (Act 334, Session Laws of Hawaii, 1949), and adopted by a vote of the people of Hawaii in the election held on November 7, 1950, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

Territory.

SEC. 2. The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of enactment of this Act, except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters, but said State shall not be deemed to include the Midway Islands, Johnston Island, Sand Island (offshore from Johnston Island), or Kingman Reef, together with their appurtenant reefs and territorial waters.

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
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SEC. 3. The constitution of the State of Hawaii shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

Constitution.

SEC. 4. As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: *Provided*, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

Compact with U. S.
42 Stat. 108.
48 USC 691.

SEC. 5. (a) Except as provided in subsection (c) of this section, the State of Hawaii and its political subdivisions, as the case may be, shall succeed to the title of the Territory of Hawaii and its subdivisions in those lands and other properties in which the Territory and its subdivisions now hold title.

Title to property.

(b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

Land grants.

(c) Any lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawaii shall remain the property of the United States subject only to the limitations, if any, imposed under (1), (2), (3), or (4), as the case may be.

U.S. property reservation.

(d) Any public lands or other public property that is conveyed to the State of Hawaii by subsection (b) of this section but that, immediately prior to the admission of said State into the Union, is controlled by the United States pursuant to permit, license, or permission, written or verbal, from the Territory of Hawaii or any department thereof may, at any time during the five years following the admission of Hawaii into the Union, be set aside by Act of Congress or by Executive order of the President, made pursuant to law, for the use of the United States, and the lands or property so set aside shall, subject only to valid rights then existing, be the property of the United States.

Report to President; conveyance.

(e) Within five years from the date Hawaii is admitted into the Union, each Federal agency having control over any land or property that is retained by the United States pursuant to subsections (c) and (d) of this section shall report to the President the facts regarding its continued need for such land or property, and if the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii.

Public trust. Use.

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part, out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

48 USC 691.

Schools and colleges.

"Definitions."

(g) As used in this Act, the term "lands and other properties" includes public lands and other public property, and the term "public lands and other public property" means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded.

48 USC 661.

Repeals.

(h) All laws of the United States reserving to the United States the free use or enjoyment of property which vests in or is conveyed to the State of Hawaii or its political subdivisions pursuant to subsection (a), (b), or (e) of this section or reserving the right to alter, amend, or repeal laws relating thereto shall cease to be effective upon the admission of the State of Hawaii into the Union.

Submerged lands.

43 USC 1301 note, 1331 note.

(i) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) and the Outer Continental Shelf Lands Act of 1953 (Public Law 212, Eighty-third Congress, first session, 67 Stat. 462) shall be applicable to the State of Hawaii, and the said State shall have the same rights as do existing States thereunder.

Certification by President.

SEC. 6. As soon as possible after the enactment of this Act, it shall be the duty of the President of the United States to certify such fact to the Governor of the Territory of Hawaii. Thereupon the Governor of the Territory shall, within thirty days after receipt of the official notification of such approval, issue his proclamation for the elections, as hereinafter provided, for officers of all State elective offices provided for by the constitution of the proposed State of Hawaii, and for two Senators and one Representative in Congress. In the first election of Senators from said State the two senatorial offices shall be separately identified and designated, and no person may be a candidate for both offices. No identification or designation of either of

the two senatorial offices, however, shall refer to or be taken to refer to the term of that office, nor shall any such identification or designation in any way impair the privilege of the Senate to determine the class to which each of the Senators elected shall be assigned.

Election of officers; date, etc.

SEC. 7. (a) The proclamation of the Governor of Hawaii required by section 6 shall provide for the holding of a primary election and a general election and at such elections the officers required to be elected as provided in section 6 shall be chosen by the people. Such elections shall be held, and the qualifications of voters thereat shall be, as prescribed by the constitution of the proposed State of Hawaii for the election of members of the proposed State legislature. The returns thereof shall be made and certified in such manner as the constitution of the proposed State of Hawaii may prescribe. The Governor of Hawaii shall certify the results of said elections, as so ascertained, to the President of the United States.

(b) At an election designated by proclamation of the Governor of Hawaii, which may be either the primary or the general election held pursuant to subsection (a) of this section, or a Territorial general election, or a special election, there shall be submitted to the electors qualified to vote in said election, for adoption or rejection, the following propositions:

"(1) Shall Hawaii immediately be admitted into the Union as a State?

"(2) The boundaries of the State of Hawaii shall be as prescribed in the Act of Congress approved _____ (Date of approval of this Act), and all claims of this State to any areas of land or sea outside the boundaries so prescribed are hereby irrevocably relinquished to the United States.

"(3) All provisions of the Act of Congress approved _____ (Date of approval of this Act) reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people."

In the event the foregoing propositions are adopted at said election by a majority of the legal votes cast on said submission, the proposed constitution of the proposed State of Hawaii, ratified by the people at the election held on November 7, 1950, shall be deemed amended as follows: Section 1 of article XIII of said proposed constitution shall be deemed amended so as to contain the language of section 2 of this Act in lieu of any other language; article XI shall be deemed to include the provisions of section 4 of this Act; and section 8 of article XIV shall be deemed amended so as to contain the language of the third proposition above stated in lieu of any other language, and section 10 of article XVI shall be deemed amended by inserting the words "at which officers for all state elective offices provided for by this constitution and two Senators and one Representative in Congress shall be nominated and elected" in lieu of the words "at which officers for all state elective offices provided for by this constitution shall be nominated and elected; but the officers so to be elected shall in any event include two Senators and two Representatives to the Congress, and unless and until otherwise required by law, said Representatives shall be elected at large".

In the event the foregoing propositions are not adopted at said election by a majority of the legal votes cast on said submission, the provisions of this Act shall cease to be effective.

Certification of voting results by Governor.

The Governor of Hawaii is hereby authorized and directed to take such action as may be necessary or appropriate to insure the submission of said propositions to the people. The return of the votes cast

on said propositions shall be made by the election officers directly to the Secretary of Hawaii, who shall certify the results of the submission to the Governor. The Governor shall certify the results of said submission, as so ascertained, to the President of the United States.

Proclamation by President.

(c) If the President shall find that the propositions set forth in the preceding subsection have been duly adopted by the people of Hawaii, the President, upon certification of the returns of the election of the officers required to be elected as provided in section 6 of this Act, shall thereupon issue his proclamation announcing the results of said election as so ascertained. Upon the issuance of said proclamation by the President, the State of Hawaii shall be deemed admitted into the Union as provided in section 1 of this Act.

Until the said State is so admitted into the Union, the persons holding legislative, executive, and judicial office in, under, or by authority of the government of said Territory, and the Delegate in Congress thereof, shall continue to discharge the duties of their respective offices. Upon the issuance of said proclamation by the President of the United States and the admission of the State of Hawaii into the Union, the officers elected at said election, and qualified under the provisions of the constitution and laws of said State, shall proceed to exercise all the functions pertaining to their offices in, under, or by authority of the government of said State, and officers not required to be elected at said initial election shall be selected or continued in office as provided by the constitution and laws of said State. The Governor of said State shall certify the election of the Senators and Representative in the manner required by law, and the said Senators and Representative shall be entitled to be admitted to seats in Congress and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States.

Representative.

SEC. 8. The State of Hawaii upon its admission into the Union shall be entitled to one Representative until the taking effect of the next reapportionment, and such Representative shall be in addition to the membership of the House of Representatives as now prescribed by law: *Provided*, That such temporary increase in the membership shall not operate to either increase or decrease the permanent membership of the House of Representatives as prescribed in the Act of August 8, 1911 (37 Stat. 13), nor shall such temporary increase affect the basis of apportionment established by the Act of November 15, 1941 (55 Stat. 761; 2 U.S.C., sec. 2a), for the Eighty-third Congress and each Congress thereafter.

Judicial and criminal provisions.

SEC. 9. Effective upon the admission of the State of Hawaii into the Union—

(a) the United States District Court for the District of Hawaii established by and existing under title 28 of the United States Code shall thenceforth be a court of the United States with judicial power derived from article III, section 1, of the Constitution of the United States: *Provided, however*, That the terms of office of the district judges for the district of Hawaii then in office shall terminate upon the effective date of this section and the President, pursuant to sections 133 and 134 of title 28, United States Code, as amended by this Act, shall appoint, by and with the advice and consent of the Senate, two district judges for the said district who shall hold office during good behavior;

(b) the last paragraph of section 133 of title 28, United States Code, is repealed; and

(c) subsection (a) of section 134 of title 28, United States Code, is amended by striking out the words "Hawaii and". The second sentence of the same section is amended by striking out the words "Hawaii and", "six and", and "respectively".

U. S. District Court.

SEC. 10. Effective upon the admission of the State of Hawaii into the Union the second paragraph of section 451 of title 28, United States Code, is amended by striking out the words "including the district courts of the United States for the districts of Hawaii and Puerto Rico," and inserting in lieu thereof the words "including the United States District for the District of Puerto Rico,".

SEC. 11. Effective upon the admission of the State of Hawaii into the Union—

(a) the last paragraph of section 501 of title 28, United States Code, is repealed;

(b) the first sentence of subsection (a) of section 504 of title 28, United States Code, is amended by striking out at the end thereof the words ", except in the district of Hawaii, where the term shall be six years";

(c) the first sentence of subsection (c) of section 541 of title 28, United States Code, is amended by striking out at the end thereof the words ", except in the district of Hawaii where the term shall be six years"; and

(d) subsection (d) of section 541 of title 28, United States Code, is repealed.

Continuation of suits.

SEC. 12. No writ, action, indictment, cause, or proceeding pending in any court of the Territory of Hawaii or in the United States District Court for the District of Hawaii shall abate by reason of the admission of said State into the Union, but the same shall be transferred to and proceeded with in such appropriate State courts as shall be established under the constitution of said State, or shall continue in the United States District Court for the District of Hawaii, as the nature of the case may require. And no writ, action, indictment, cause or proceeding shall abate by reason of any change in the courts, but shall be proceeded with in the State or United States courts according to the laws thereof, respectively. And the appropriate State courts shall be the successors of the courts of the Territory as to all cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne or final process therein, and all the files, records, indictments, and proceedings relating to any such writ, action, indictment, cause or proceeding shall be transferred to such appropriate State courts and the same shall be proceeded with therein in due course of law.

All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said State, but as to which no writ, action, indictment or proceeding shall be pending at the date of such admission, shall be subject to prosecution in the appropriate State courts or in the United States District Court for the District of Hawaii in like manner, to the same extent, and with like right of appellate review, as if said State had been created and said State courts had been established prior to the accrual of such causes of action or the commission of such offenses. The admission of said State shall effect no change in the substantive or criminal law governing such causes of action and criminal offenses which shall have arisen or been committed; and such of said criminal offenses as shall have been committed against the laws of the Territory shall be tried and punished by the appropriate courts of said State, and such as shall have been committed against the laws of the United States shall be tried and punished in the United States District Court for the District of Hawaii.

Appeals.

SEC. 13. Parties shall have the same rights of appeal from and appellate review of final decisions of the United States District Court for the District of Hawaii or the Supreme Court of the Territory of Hawaii in any case finally decided prior to admission of said State into the Union, whether or not an appeal therefrom shall have been perfected prior to such admission, and the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the United States shall have the same jurisdiction therein, as by law provided prior to admission of said State into the Union, and any mandate issued subsequent to the admission of said State shall be to the United States District Court for the District of Hawaii or a court of the State, as may be appropriate. Parties shall have the same rights of appeal from and appellate review of all orders, judgments, and decrees of the United States District Court for the District of Hawaii and of the Supreme Court of the State of Hawaii as successor to the Supreme Court of the Territory of Hawaii, in any case pending at the time of admission of said State into the Union, and the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the United States shall have the same jurisdiction therein, as by law provided in any case arising subsequent to the admission of said State into the Union.

Judicial and criminal code provisions.

SEC. 14. Effective upon the admission of the State of Hawaii into the Union—

(a) title 28, United States Code, section 1252, is amended by striking out "Hawaii and" from the clause relating to courts of record;

(b) title 28, United States Code, section 1293, is amended by striking out the words "First and Ninth Circuits" and by inserting in lieu thereof "First Circuit", and by striking out the words, "supreme courts of Puerto Rico and Hawaii, respectively" and inserting in lieu thereof "supreme court of Puerto Rico";

(c) title 28, United States Code, section 1294, as amended, is further amended by striking out paragraph (4) thereof and by renumbering paragraphs (5) and (6) accordingly;

(d) the first paragraph of section 373 of title 28, United States Code, as amended, is further amended by striking out the words "United States District Courts for the districts of Hawaii or Puerto Rico," and inserting in lieu thereof the words "United States District Court for the District of Puerto Rico,"; and by striking out the words "and any justice of the Supreme Court of the Territory of Hawaii": *Provided*, That the amendments made by this subsection shall not affect the rights of any judge or justice who may have retired before the effective date of this subsection: *And provided further*, That service as a judge of the District Court for the Territory of Hawaii or as a judge of the United States District Court for the District of Hawaii or as a justice of the Supreme Court of the Territory of Hawaii or as a judge of the circuit courts of the Territory of Hawaii shall be included in computing under section 371, 372, or 373 of title 28, United States Code, the aggregate years of judicial service of any person who is in office as a district judge for the District of Hawaii on the date of enactment of this Act;

Repeal.

(e) section 92 of the Act of April 30, 1900 (ch. 339, 31 Stat. 159), as amended, and the Act of May 29, 1928 (ch. 904, 45 Stat. 997), as amended, are repealed;

Repeal.

(f) section 86 of the Act approved April 30, 1900 (ch. 339, 31 Stat. 158), as amended, is repealed;

(g) section 3771 of title 18, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words "Supreme Courts of Hawaii and Puerto Rico" and inserting in lieu thereof the words "Supreme Court of Puerto Rico";

(h) section 3772 of title 18, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words "Supreme Courts of Hawaii and Puerto Rico" and inserting in lieu thereof the words "Supreme Court of Puerto Rico";

(i) section 91 of title 28, United States Code, as heretofore amended, is further amended by inserting after "Kure Island" and before "Baker Island" the words "Palmyra Island,"; and

(j) the Act of June 15, 1950 (64 Stat. 217; 48 U.S.C., sec. 644a), is amended by inserting after "Kure Island" and before "Baker Island" the words "Palmyra Island,".

Laws in effect.

SEC. 15. All Territorial laws in force in the Territory of Hawaii at the time of its admission into the Union shall continue in force in the State of Hawaii, except as modified or changed by this Act or by the constitution of the State, and shall be subject to repeal or amendment by the Legislature of the State of Hawaii, except as provided in section 4 of this Act with respect to the Hawaiian Homes Commission Act, 1920, as amended; and the laws of the United States shall have the same force and effect within the said State as elsewhere within the United States: *Provided*, That, except as herein otherwise provided, a Territorial law enacted by the Congress shall be terminated two years after the date of admission of the State of Hawaii into the Union or upon the effective date of any law enacted by the State of Hawaii which amends or repeals it, whichever may occur first. As used in this section, the term "Territorial laws" includes (in addition to laws enacted by the Territorial Legislature of Hawaii) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Hawaii prior to its admission into the Union, and the term "laws of the United States" includes all laws or parts thereof enacted by the Congress that (1) apply to or within Hawaii at the time of its admission into the Union, (2) are not "Territorial laws" as defined in this paragraph, and (3) are not in conflict with any other provision of this Act.

Definitions.

Hawaii National Park.

SEC. 16. (a) Notwithstanding the admission of the State of Hawaii into the Union, the United States shall continue to have sole and exclusive jurisdiction over the area which may then or thereafter be included in Hawaii National Park, saving, however, to the State of Hawaii the same rights as are reserved to the Territory of Hawaii by section 1 of the Act of April 19, 1930 (46 Stat. 227), and saving, further, to persons then or thereafter residing within such area the right to vote at all elections held within the political subdivisions where they respectively reside. Upon the admission of said State all references to the Territory of Hawaii in said Act or in other laws relating to Hawaii National Park shall be deemed to refer to the State of Hawaii. Nothing contained in this Act shall be construed to affect the ownership and control by the United States of any lands or other property within Hawaii National Park which may now belong to, or which may hereafter be acquired by, the United States.

16 USC 395.

Military, naval, etc., lands.

(b) Notwithstanding the admission of the State of Hawaii into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by the Congress of the United States of the power of exclusive legislation, as provided by

USC prec. Title 1.

article I, section 8, clause 17, of the Constitution of the United States, in all cases whatsoever over such tracts or parcels of land as, immediately prior to the admission of said State, are controlled or owned by the United States and held for Defense or Coast Guard purposes, whether such lands were acquired by cession and transfer to the United States by the Republic of Hawaii and set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Hawaii for the use of the United States, or were acquired by the United States by purchase, condemnation, donation, exchange, or otherwise: *Provided*, (i) That the State of Hawaii shall always have the right to serve civil or criminal process within the said tracts or parcels of land in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed within the said State but outside of the said tracts or parcels of land; (ii) that the reservation of authority in the United States for the exercise by the Congress of the United States of the power of exclusive legislation over the lands aforesaid shall not operate to prevent such lands from being a part of the State of Hawaii, or to prevent the said State from exercising over or upon such lands, concurrently with the United States, any jurisdiction whatsoever which it would have in the absence of such reservation of authority and which is consistent with the laws hereafter enacted by the Congress pursuant to such reservation of authority; and (iii) that such power of exclusive legislation shall vest and remain in the United States only so long as the particular tract or parcel of land involved is controlled or owned by the United States and used for Defense or Coast Guard purposes: *Provided, however*, That the United States shall continue to have sole and exclusive jurisdiction over such military installations as have been heretofore or hereafter determined to be critical areas as delineated by the President of the United States and/or the Secretary of Defense.

Federal Reserve System.

SEC. 17. The next to last sentence of the first paragraph of section 2 of the Federal Reserve Act (38 Stat. 251) as amended by section 19 of the Act of July 7, 1958, (72 Stat. 339, 350) is amended by inserting after the word "Alaska" the words "or Hawaii."

Maritime matters.

SEC. 18. (a) Nothing contained in this Act shall be construed as depriving the Federal Maritime Board of the exclusive jurisdiction heretofore conferred on it over common carriers engaged in transportation by water between any port in the State of Hawaii and other ports in the United States, or possessions, or is conferring on the Interstate Commerce Commission jurisdiction over transportation by water between any such ports.

(b) Effective on the admission of the State of Hawaii into the Union—

49 Stat. 1999.

(1) the first sentence of section 506 of the Merchant Marine Act, 1936, as amended (46 U.S.C., sec. 1156), is amended by inserting before the words "an island possession or island territory", the words "the State of Hawaii, or";

49 Stat. 2003.

(2) section 605(a) of the Merchant Marine Act, 1936, as amended (46 U.S.C., sec. 1175), is amended by inserting before the words "an island possession or island territory", the words "the State of Hawaii, or"; and

49 Stat. 2011.

(3) the second paragraph of section 714 of the Merchant Marine Act, 1936, as amended (46 U.S.C., sec. 1204), is amended by inserting before the words "an island possession or island territory" the words "the State of Hawaii, or".

Nationality.

SEC. 19. Nothing contained in this Act shall operate to confer United States nationality, nor to terminate nationality heretofore lawfully acquired, or restore nationality heretofore lost under any law of the United States or under any treaty to which the United States is or was a party.

SEC. 20. (a) Section 101(a)(36) of the Immigration and Nationality Act (66 Stat. 170, 8 U.S.C., sec. 1101(a)(36)) is amended by deleting the word "Hawaii,". Immigration and Nationality.

(b) Section 212(d)(7) of the Immigration and Nationality Act (66 Stat. 188, 8 U.S.C. 1182(d)(7)) is amended by deleting from the first sentence thereof the word "Hawaii," and by deleting the proviso to said first sentence.

(c) The first sentence of section 310(a) of the Immigration and Nationality Act, as amended (66 Stat. 239, 8 U.S.C. 1421(a), 72 Stat. 351) is further amended by deleting the words "for the Territory of Hawaii, and".

(d) Nothing contained in this Act shall be held to repeal, amend, or modify the provisions of section 305 of the Immigration and Nationality Act (66 Stat. 237, 8 U.S.C. 1405).

SEC. 21. Effective upon the admission of the State of Hawaii into the Union, section 3, subsection (b), of the Act of September 7, 1957 (71 Stat. 629), is amended by substituting the words "State of Hawaii" for the words "Territory of Hawaii". 49 USC 425.

SEC. 22. If any provision of this Act, or any section, subsection, sentence, clause, phrase, or individual word, or the application thereof in any circumstance is held invalid, the validity of the remainder of the Act and of the application of any such provision, section, subsection, sentence, clause, phrase, or individual word in other circumstances shall not be affected thereby. Separability clause.

SEC. 23. All Acts or parts of Acts in conflict with the provisions of this Act, whether passed by the legislature of said Territory or by Congress, are hereby repealed. Repeals.

Approved March 18, 1959.

Public Law 86-4

AN ACT

To extend the induction provisions of the Universal Military Training and Service Act, and for other purposes.

March 23, 1959 [H. R. 2260]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 17(c) of the Universal Military Training and Service Act, as amended (50 App. U.S.C. 467(c)), is amended by striking out the words "July 1, 1959" and inserting the words "July 1, 1963" in place thereof. Draft extension, etc. 69 Stat. 224.

SEC. 2. Section 1 of the Act of August 3, 1950, chapter 537, as amended (71 Stat. 208), is amended by striking out the words "July 1, 1959" and inserting the words "July 1, 1963" in place thereof. 10 U S C 3201 note.

SEC. 3. Section 16 of the Dependents Assistance Act of 1950, as amended (50 App. U.S.C. 2216), is amended by striking out the words "July 1, 1959" and inserting the words "July 1, 1963" in place thereof. 69 Stat. 224.

SEC. 4. Section 9 of the Act of June 27, 1957, Public Law 85-62 (71 Stat. 208), is amended by striking out the words "July 1, 1959" and inserting the words "July 1, 1963" in place thereof. 50 USC app. 454 note.

SEC. 5. Section 203 of the Career Compensation Act of 1949, as amended, is amended by striking out "July 1, 1959" wherever such date appears therein and inserting "July 1, 1963" in lieu thereof. 69 Stat. 225. 37 USC 234.

Approved March 23, 1959.

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THE CONSTITUTION OF THE STATE OF HAWAII

ARTICLE XII

HAWAIIAN AFFAIRS

HAWAIIAN HOMES COMMISSION ACT

Section 1. Anything in this constitution to the contrary notwithstanding, the Hawaiian Homes Commission Act, 1920, enacted by the Congress, as the same has been or may be amended prior to the admission of the State, is hereby adopted as a law of the State, subject to amendment or repeal by the legislature; provided that if and to the extent that the United States shall so require, such law shall be subject to amendment or repeal only with the consent of the United States and in no other manner; provided further that if the United States shall have been provided or shall provide that particular provisions or types of provisions of such Act may be amended in the manner required for ordinary state legislation, such provisions or types of provisions may be so amended. The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms and spirit of such Act. The legislature shall make sufficient sums available for the following purposes: (1) development of home, agriculture, farm and ranch lots; (2) home, agriculture, aquaculture, farm and ranch loans; (3) rehabilitation projects to include, but not limited to, educational, economic, political, social and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved; (4) the administration and operating budget of the department of Hawaiian home lands; in furtherance of (1), (2), (3) and (4) herein, by appropriating the same in the manner provided by law.

Thirty percent of the state receipts derived from the leasing of cultivated sugarcane lands under any provision of law or from water licenses shall be transferred to the native Hawaiian rehabilitation fund, section 213 of the Hawaiian Homes Commission Act, 1920, for the purposes enumerated in that section. Thirty percent of the state receipts derived from the leasing of lands cultivated as sugarcane lands on the effective date of this section shall continue to be so transferred to the native Hawaiian rehabilitation fund whenever such lands are sold, developed, leased, utilized, transferred, set aside or otherwise disposed of for purposes other than the cultivation of sugarcane. There shall be no ceiling established for the aggregate amount transferred into the native Hawaiian rehabilitation fund. [Ren and am Const Con 1978 and election Nov 7, 1978]

ACCEPTANCE OF COMPACT

Section 2. The State and its people do hereby accept, as a compact with the United States, or as conditions or trust provisions imposed by the United States, relating to the management and disposition of the Hawaiian home lands, the requirement that section 1 hereof be included in this constitution, in whole or in part, it being intended that the Act or acts of the Congress pertaining thereto shall be definitive of the extent and nature of such compact, conditions or trust provisions, as the case may be. The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out. [Ren and am Const Con 1978 and election Nov 7, 1978]

COMPACT ADOPTION; PROCEDURES AFTER ADOPTION

Section 3. As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the constitution of this State, as provided in section 7, subsection (b), of the Admission Act, subject to amendment or repeal only with the consent of the United States, and in no other manner; provided that (1) sections 202, 213, 219, 220,

222, 224 and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 2l2 and other provisions relating to the powers and duties of officers other than those charged with the administration of such Act, may be amended in the constitution, or in the manner required for state legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for state legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of such Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for state legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands," as defined by such Act, shall be used only in carrying out the provisions of such Act. [Add 73 Stat 4 and election June 27, 1959; ren and am Const Con 1978 and election Nov 7, 1978]

PUBLIC TRUST

Section 4. The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public. [Add Const Con 1978 and election Nov 7, 1978]

OFFICE OF HAWAIIAN AFFAIRS; ESTABLISHMENT OF BOARD OF TRUSTEES

Section 5. There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members. [Add Const Con 1978 and election Nov 7, 1978]

POWERS OF BOARD OF TRUSTEES

Section 6. The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board. [Add Const Con 1978 and election Nov 7, 1978]

TRADITIONAL AND CUSTOMARY RIGHTS

Section 7. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights. [Add Const Con 1978 and election Nov 7, 1978]

DOCUMENT D

Haw. Rev. Stat. § 26-17.

§26-17 Department of Hawaiian home lands. The department of Hawaiian home lands shall be headed by an executive board to be known as the Hawaiian homes commission.

The commission shall be composed of nine members. The appointment, tenure, and removal of the members and the filling of vacancies on the commission shall be in accordance with section 26-34 and section 202(a) of the Hawaiian Homes Commission Act of 1920, as amended. The governor shall appoint the chairperson of the commission from among the members thereof.

The commission may delegate to the chairperson such duties, powers, and authority, or so much thereof as may be lawful or proper, for the performance of the functions vested in the commission.

The chairperson of the board shall serve in a full-time capacity and shall perform such duties, and exercise such powers and authority, or so much thereof as may be delegated to the chairperson by the board.

The department shall administer the Hawaiian Homes Commission Act of 1920 as set forth in the Constitution of the State and by law.

The functions and authority heretofore exercised by the Hawaiian homes commission as heretofore constituted are transferred to the department of Hawaiian home lands established by this chapter. [L Sp 1959 2d, c 1, §24; am L 1963, c 207, §6; am L 1965, c 223, §8(d); Supp, §14A-23; HRS §26-17; am L 1982, c 147, §2 superseded by c 273, §2; gen ch 1985; am L 1989, c 265, §3; gen ch 1993]

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Rice v. Cayetano, 528 U.S. 495 (2000).

RICE *v.* CAYETANO, GOVERNOR OF HAWAII

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98–818. Argued October 6, 1999—Decided February 23, 2000

The Hawaiian Constitution limits the right to vote for nine trustees chosen in a statewide election. The trustees compose the governing authority of a state agency known as the Office of Hawaiian Affairs, or OHA. The agency administers programs designed for the benefit of two subclasses of Hawaiian citizenry, "Hawaiians" and "native Hawaiians." State law defines "native Hawaiians" as descendants of not less than one-half part of the races inhabiting the islands before 1778, and "Hawaiians"—a larger class that includes "native Hawaiians"—as descendants of the peoples inhabiting the Hawaiian Islands in 1778. The trustees are chosen in a statewide election in which only "Hawaiians" may vote. Petitioner Rice, a Hawaiian citizen without the requisite ancestry to be a "Hawaiian" under state law, applied to vote in OHA trustee elections. When his application was denied, he sued respondent Governor (hereinafter State), claiming, *inter alia*, that the voting exclusion was invalid under the Fourteenth and Fifteenth Amendments. The Federal District Court granted the State summary judgment. Surveying the history of the islands and their people, it determined that Congress and Hawaii have recognized a guardian-ward relationship with the native Hawaiians, which is analogous to the relationship between the United States and Indian tribes. It examined the voting qualifications with the latitude applied to legislation passed pursuant to Congress' power over Indian affairs, see *Morton* v. *Mancari*, 417 U. S. 535, and found that the electoral scheme was rationally related to the State's responsibility under its Admission Act to utilize a part of the proceeds from certain public lands for the native Hawaiians' benefit. The Ninth Circuit affirmed, finding that Hawaii "may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be." 146 F. 3d 1075, 1079.

Held: Hawaii's denial of Rice's right to vote in OHA trustee elections violates the Fifteenth Amendment. Pp. 511–524.

(a) The Amendment's purpose and command are set forth in explicit and comprehensive language. The National Government and the States may not deny or abridge the right to vote on account of race. The Amendment reaffirms the equality of races at the most basic level

of the democratic process, the exercise of the voting franchise. It protects all persons, not just members of a particular race. Important precedents give instruction in the instant case. The Amendment was quite sufficient to invalidate a grandfather clause that did not mention race but instead used ancestry in an attempt to confine and restrict the voting franchise, *Guinn* v. *United States*, 238 U. S. 347, 364–365; and it sufficed to strike down the white primary systems designed to exclude one racial class (at least) from voting, see, *e. g.*, *Terry* v. *Adams*, 345 U. S. 461, 469–470. The voting structure in this case is neither subtle nor indirect; it specifically grants the vote to persons of the defined ancestry and to no others. Ancestry can be a proxy for race. It is that proxy here. For centuries Hawaii was isolated from migration. The inhabitants shared common physical characteristics, and by 1778 they had a common culture. The provisions at issue reflect the State's effort to preserve that commonality to the present day. In interpreting the Reconstruction Era civil rights laws this Court has observed that racial discrimination is that which singles out "identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics." *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604, 613. The very object of the statutory definition here is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The history of the State's definition also demonstrates that the State has used ancestry as a racial definition and for a racial purpose. The drafters of the definitions of "Hawaiian" and "native Hawaiian" emphasized the explicit tie to race. The State's additional argument that the restriction is race neutral because it differentiates even among Polynesian people based on the date of an ancestor's residence in Hawaii is undermined by the classification's express racial purpose and its actual effects. The ancestral inquiry in this case implicates the same grave concerns as a classification specifying a particular race by name, for it demeans a person's dignity and worth to be judged by ancestry instead of by his or her own merit and essential qualities. The State's ancestral inquiry is forbidden by the Fifteenth Amendment for the further reason that using racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions. The State's electoral restriction enacts a race-based voting qualification. Pp. 511–517.

(b) The State's three principal defenses of its voting law are rejected. It argues first that the exclusion of non-Hawaiians from voting is permitted under this Court's cases allowing the differential treatment of Indian tribes. However, even if Congress had the authority, delegated

to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of the sort created here. Congress may not authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians to the exclusion of all non-Indian citizens. The elections for OHA trustee are elections of the State, not of a separate quasi sovereign, and they are elections to which the Fifteenth Amendment applies. *Morton* v. *Mancari*, *supra*, distinguished. The State's further contention that the limited voting franchise is sustainable under this Court's cases holding that the one-person, one-vote rule does not pertain to certain special purpose districts such as water or irrigation districts also fails, for compliance with the one-person, one-vote rule of the Fourteenth Amendment does not excuse compliance with the Fifteenth Amendment. Hawaii's final argument that the voting restriction does no more than ensure an alignment of interests between the fiduciaries and the beneficiaries of a trust founders on its own terms, for it is not clear that the voting classification is symmetric with the beneficiaries of the programs OHA administers. While the bulk of the funds appears to be earmarked for the benefit of "native Hawaiians," the State permits both "native Hawaiians" and "Hawaiians" to vote for trustees. The argument fails on more essential grounds; it rests on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. There is no room under the Amendment for the concept that the right to vote in a particular election can be allocated based on race. Pp. 517–524.

146 F. 3d 1075, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in the result, in which SOUTER, J., joined, *post*, p. 524. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined as to Part II, *post*, p. 527. GINSBURG, J., filed a dissenting opinion, *post*, p. 547.

Theodore B. Olson argued the cause for petitioner. With him on the briefs were *Douglas R. Cox* and *Thomas G. Hungar*.

John G. Roberts, Jr., argued the cause for respondent. With him on the brief were *Earl I. Anzai*, Attorney General of Hawaii, *Girard D. Lau*, *Dorothy Sellers*, and *Charleen M. Aina*, Deputy Attorneys General, and *Gregory G. Garre*.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Schiffer*, *Deputy Solicitor General Underwood*, *Irving L. Gornstein*, and *Elizabeth Ann Peterson.**

JUSTICE KENNEDY delivered the opinion of the Court.

A citizen of Hawaii comes before us claiming that an explicit, race-based voting qualification has barred him from voting in a statewide election. The Fifteenth Amendment to the Constitution of the United States, binding on the National Government, the States, and their political subdivisions, controls the case.

The Hawaiian Constitution limits the right to vote for nine trustees chosen in a statewide election. The trustees com-

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*Briefs of *amici curiae* urging reversal were filed for the Campaign for a Color-Blind America et al. by *Richard K. Willard* and *Shannen W. Coffin;* and for the Center for Equal Opportunity et al. by *Brett M. Kavanaugh*, *Robert H. Bork*, and *Roger Clegg.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, and *Thomas F. Gede*, Special Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *John F. Tarantino* of Guam, *Frankie Sue Del Papa* of Nevada, *Patricia A. Madrid* of New Mexico, *Maya B. Kara* of the Northern Mariana Islands, *W. A. Drew Edmondson* of Oklahoma, and *Hardy Myers* of Oregon; for the Alaska Federation of Natives et al. by *Jeffrey L. Bleich;* for the Kamehameha Schools Bishop Estate Trust by *Carter G. Phillips*, *Virginia A. Seitz*, and *C. Michael Hare;* for the National Congress of American Indians by *Kim Jerome Gottschalk* and *Steven C. Moore;* for the State Council of Hawaiian Homestead Associations et al. by *Paul Alston*, *William M. Tam*, *Lea Hong*, and *David M. Forman;* and for the Office of Hawaiian Affairs et al. by *Harry R. Sachse*, *Reid Peyton Chambers*, *Arthur Lazarus, Jr.*, *Sherry P. Broder*, and *Jon M. Van Dyke.*

Briefs of *amici curiae* were filed for the Hawai'i Congressional Delegations by *Patricia M. Zell*, *Jennifer M. L. Chock*, and *Janet Erickson;* for the Hou Hawaiians et al. by *Walter R. Schoettle;* and for the Pacific Legal Foundation by *John H. Findley* and *Sharon L. Browne.*

pose the governing authority of a state agency known as the Office of Hawaiian Affairs, or OHA. Haw. Const., Art. XII, § 5. The agency administers programs designed for the benefit of two subclasses of the Hawaiian citizenry. The smaller class comprises those designated as "native Hawaiians," defined by statute, with certain supplementary language later set out in full, as descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778. Haw. Rev. Stat. § 10–2 (1993). The second, larger class of persons benefited by OHA programs is "Hawaiians," defined to be, with refinements contained in the statute we later quote, those persons who are descendants of people inhabiting the Hawaiian Islands in 1778. *Ibid.* The right to vote for trustees is limited to "Hawaiians," the second, larger class of persons, which of course includes the smaller class of "native Hawaiians." Haw. Const., Art. XII, § 5.

Petitioner Rice, a citizen of Hawaii and thus himself a Hawaiian in a well-accepted sense of the term, does not have the requisite ancestry even for the larger class. He is not, then, a "Hawaiian" in terms of the statute; so he may not vote in the trustee election. The issue presented by this case is whether Rice may be so barred. Rejecting the State's arguments that the classification in question is not racial or that, if it is, it is nevertheless valid for other reasons, we hold Hawaii's denial of petitioner's right to vote to be a clear violation of the Fifteenth Amendment.

I

When Congress and the State of Hawaii enacted the laws we are about to discuss and review, they made their own assessments of the events which intertwine Hawaii's history with the history of America itself. We will begin with a very brief account of that historical background. Historians and other scholars who write of Hawaii will have a different purpose and more latitude than do we. They may draw judgments either more laudatory or more harsh than the

ones to which we refer. Our more limited role, in the posture of this particular case, is to recount events as understood by the lawmakers, thus ensuring that we accord proper appreciation to their purposes in adopting the policies and laws at issue. The litigants seem to agree that two works in particular are appropriate for our consideration, and we rely in part on those sources. See L. Fuchs, Hawaii Pono: An Ethnic and Political History (1961) (hereinafter Fuchs); 1–3 R. Kuykendall, The Hawaiian Kingdom (1938); (1953); (1967) (hereinafter Kuykendall).

The origins of the first Hawaiian people and the date they reached the islands are not established with certainty, but the usual assumption is that they were Polynesians who voyaged from Tahiti and began to settle the islands around A. D. 750. Fuchs 4; 1 Kuykendall 3; see also G. Daws, Shoal of Time: A History of the Hawaiian Islands xii–xiii (1968) (Marquesas Islands and Tahiti). When England's Captain Cook made landfall in Hawaii on his expedition in 1778, the Hawaiian people had developed, over the preceding 1,000 years or so, a cultural and political structure of their own. They had well-established traditions and customs and practiced a polytheistic religion. Agriculture and fishing sustained the people, and, though population estimates vary, some modern historians conclude that the population in 1778 was about 200,000–300,000. See Fuchs 4; R. Schmitt, Historical Statistics of Hawaii 7 (1977) (hereinafter Schmitt). The accounts of Hawaiian life often remark upon the people's capacity to find beauty and pleasure in their island existence, but life was not altogether idyllic. In Cook's time the islands were ruled by four different kings, and intra-Hawaiian wars could inflict great loss and suffering. Kings or principal chieftains, as well as high priests, could order the death or sacrifice of any subject. The society was one, however, with its own identity, its own cohesive forces, its own history.

In the years after Cook's voyage many expeditions would follow. A few members of the ships' companies remained on

the islands, some as authorized advisers, others as deserters. Their intermarriage with the inhabitants of Hawaii was not infrequent.

In 1810, the islands were united as one kingdom under the leadership of an admired figure in Hawaiian history, Kamehameha I. It is difficult to say how many settlers from Europe and America were in Hawaii when the King consolidated his power. One historian estimates there were no more than 60 or so settlers at that time. 1 Kuykendall 27. An influx was soon to follow. Beginning about 1820, missionaries arrived, of whom Congregationalists from New England were dominant in the early years. They sought to teach Hawaiians to abandon religious beliefs and customs that were contrary to Christian teachings and practices.

The 1800's are a story of increasing involvement of westerners in the economic and political affairs of the Kingdom. Rights to land became a principal concern, and there was unremitting pressure to allow non-Hawaiians to use and to own land and to be secure in their title. Westerners were not the only ones with pressing concerns, however, for the disposition and ownership of land came to be an unsettled matter among the Hawaiians themselves.

The status of Hawaiian lands has presented issues of complexity and controversy from at least the rule of Kamehameha I to the present day. We do not attempt to interpret that history, lest our comments be thought to bear upon issues not before us. It suffices to refer to various of the historical conclusions that appear to have been persuasive to Congress and to the State when they enacted the laws soon to be discussed.

When Kamehameha I came to power, he reasserted suzerainty over all lands and provided for control of parts of them by a system described in our own cases as "feudal." *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 232 (1984); *Kaiser Aetna* v. *United States*, 444 U. S. 164, 166 (1979). A well-known description of the King's early decrees is con-

tained in an 1864 opinion of the Supreme Court of the Kingdom of Hawaii. The court, in turn, drew extensively upon an earlier report which recited, in part, as follows:

> "'When the islands were conquered by Kamehameha I., he followed the example of his predecessors, and divided out the lands among his principal warrior chiefs, retaining, however, a portion in his own hands to be cultivated or managed by his own immediate servants or attendants. Each principal chief divided his lands anew and gave them out to an inferior order of chiefs or persons of rank, by whom they were subdivided again and again after (often) passing through the hands of four, five or six persons from the King down to the lowest class of tenants. All these persons were considered to have rights in the lands, or the productions of them, the proportions of which rights were not clearly defined, although universally acknowledged. . . . The same rights which the King possessed over the superior landlords and all under them, the several grades of landlords possessed over their inferiors, so that there was a joint ownership of the land, the King really owning the allodium, and the person in whose hands he placed the land, holding it in trust.'" *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 718–719 (quoting Principles Adopted by the Board of Commissioners to Quiet Land Titles, 2 Stat. Laws 81–82 (Haw. Kingdom 1847)).

Beginning in 1839 and through the next decade, a successive ruler, Kamehameha III, approved a series of decrees and laws designed to accommodate demands for ownership and security of title. In the words of the Hawaiian Supreme Court, "[t]he subject of rights in land was one of daily increasing importance to the newly formed Government, for it was obvious that the internal resources of the country could not be developed until the system of undivided and undefined ownership in land should be abolished." 2 Haw., at 721.

Arrangements were made to confer freehold title in some lands to certain chiefs and other individuals. The King retained vast lands for himself, and directed that other extensive lands be held by the government, which by 1840 had adopted the first Constitution of the islands. Thus was effected a fundamental and historic division, known as the Great Mahele. In 1850, foreigners, in turn, were given the right of land ownership.

The new policies did not result in wide dispersal of ownership. Though some provisions had been attempted by which tenants could claim lands, these proved ineffective in many instances, and ownership became concentrated. In 1920, the Congress of the United States, in a Report on the bill establishing the Hawaiian Homes Commission, made an assessment of Hawaiian land policy in the following terms:

> "Your committee thus finds that since the institution of private ownership of lands in Hawaii the native Hawaiians, outside of the King and the chiefs, were granted and have held but a very small portion of the lands of the Islands. Under the homestead laws somewhat more than a majority of the lands were homesteaded to Hawaiians, but a great many of these lands have been lost through improvidence and inability to finance farming operations. Most frequently, however, the native Hawaiian, with no thought of the future, has obtained the land for a nominal sum, only to turn about and sell it to wealthy interests for a sum more nearly approaching its real value. The Hawaiians are not business men and have shown themselves unable to meet competitive conditions unaided. In the end the speculators are the real beneficiaries of the homestead laws. Thus the tax returns for 1919 show that only 6.23 per centum of the property of the Islands is held by native Hawaiians and this for the most part is lands in the possession of approximately a thousand wealthy Hawaiians, the

descendents of the chiefs." H. R. Rep. No. 839, 66th Cong., 2d Sess., 6 (1920).

While these developments were unfolding, the United States and European powers made constant efforts to protect their interests and to influence Hawaiian political and economic affairs in general. The first "articles of arrangement" between the United States and the Kingdom of Hawaii were signed in 1826, 8 Department of State, Treaties and Other International Agreements of the United States of America 1776–1949, p. 861 (C. Bevans comp. 1968), and additional treaties and conventions between the two countries were signed in 1849, 1875, and 1887, see Treaty with the Hawaiian Islands, 9 Stat. 977 (1849) (friendship, commerce, and navigation); Convention between the United States of America and His Majesty the King of the Hawaiian Islands, 19 Stat. 625 (1875) (commercial reciprocity); Supplementary Convention between the United States of America and His Majesty the King of the Hawaiian Islands, 25 Stat. 1399 (1887) (same). The United States was not the only country interested in Hawaii and its affairs, but by the later part of the century the reality of American dominance in trade, settlement, economic expansion, and political influence became apparent.

Tensions intensified between an anti-Western, pro-native bloc in the government on the one hand and western business interests and property owners on the other. The conflicts came to the fore in 1887. Westerners forced the resignation of the Prime Minister of the Kingdom of Hawaii and the adoption of a new Constitution, which, among other things, reduced the power of the monarchy and extended the right to vote to non-Hawaiians. 3 Kuykendall 344–372.

Tensions continued through 1893, when they again peaked, this time in response to an attempt by the then-Hawaiian monarch, Queen Liliuokalani, to promulgate a new constitution restoring monarchical control over the House of Nobles and limiting the franchise to Hawaiian subjects. A so-called

Committee of Safety, a group of professionals and businessmen, with the active assistance of John Stevens, the United States Minister to Hawaii, acting with United States Armed Forces, replaced the monarchy with a provisional government. That government sought annexation by the United States. On December 18 of the same year, President Cleveland, unimpressed and indeed offended by the actions of the American Minister, denounced the role of the American forces and called for restoration of the Hawaiian monarchy. Message of the President to the Senate and House of Representatives, reprinted in H. R. Rep. No. 243, 53d Cong., 2d Sess., 3–15 (1893). The Queen could not resume her former place, however, and, in 1894, the provisional government established the Republic of Hawaii. The Queen abdicated her throne a year later.

In 1898, President McKinley signed a Joint Resolution, sometimes called the Newlands Resolution, to annex the Hawaiian Islands as territory of the United States. 30 Stat. 750. According to the Joint Resolution, the Republic of Hawaii ceded all former Crown, government, and public lands to the United States. *Ibid.* The resolution further provided that revenues from the public lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Ibid.* Two years later the Hawaiian Organic Act established the Territory of Hawaii, asserted United States control over the ceded lands, and put those lands "in the possession, use, and control of the government of the Territory of Hawaii . . . until otherwise provided for by Congress." Act of Apr. 30, 1900, ch. 339, § 91, 31 Stat. 159.

In 1993, a century after the intervention by the Committee of Safety, the Congress of the United States reviewed this history, and in particular the role of Minister Stevens. Congress passed a Joint Resolution recounting the events in some detail and offering an apology to the native Hawaiian people. 107 Stat. 1510.

Before we turn to the relevant provisions two other important matters, which affected the demographics of Hawaii, must be recounted. The first is the tragedy inflicted on the early Hawaiian people by the introduction of western diseases and infectious agents. As early as the establishment of the rule of Kamehameha I, it was becoming apparent that the native population had serious vulnerability to diseases borne to the islands by settlers. High mortality figures were experienced in infancy and adulthood, even from common illnesses such as diarrhea, colds, and measles. Fuchs 13; see Schmitt 58. More serious diseases took even greater tolls. In the smallpox epidemic of 1853, thousands of lives were lost. *Ibid.* By 1878, 100 years after Cook's arrival, the native population had been reduced to about 47,500 people. *Id.*, at 25. These mortal illnesses no doubt were an initial cause of the despair, disenchantment, and despondency some commentators later noted in descendents of the early Hawaiian people. See Fuchs 13.

The other important feature of Hawaiian demographics to be noted is the immigration to the islands by people of many different races and cultures. Mostly in response to the demand of the sugar industry for arduous labor in the cane fields, successive immigration waves brought Chinese, Portuguese, Japanese, and Filipinos to Hawaii. Beginning with the immigration of 293 Chinese in 1852, the plantations alone drew to Hawaii, in one estimate, something over 400,000 men, women, and children over the next century. *Id.*, at 24; A. Lind, Hawaii's People 6–7 (4th ed. 1980). Each of these ethnic and national groups has had its own history in Hawaii, its own struggles with societal and official discrimination, its own successes, and its own role in creating the present society of the islands. See E. Nordyke, The Peopling of Hawai'i 28–98 (2d ed. 1989). The 1990 census figures show the resulting ethnic diversity of the Hawaiian population. U. S. Dept. of Commerce, Bureau of Census, 1990 Census of Popu-

lation, Supplementary Reports, Detailed Ancestry Groups for States (Oct. 1992).

With this background we turn to the legislative enactments of direct relevance to the case before us.

II

Not long after the creation of the new Territory, Congress became concerned with the condition of the native Hawaiian people. See H. R. Rep. No. 839, at 2–6; Hearings on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii before the House Committee on the Territories, 66th Cong., 2d Sess. (1920). Reciting its purpose to rehabilitate the native Hawaiian population, see H. R. Rep. No. 839, at 1–2, Congress enacted the Hawaiian Homes Commission Act, which set aside about 200,000 acres of the ceded public lands and created a program of loans and long-term leases for the benefit of native Hawaiians. Act of July 9, 1921, ch. 42, 42 Stat. 108. The Act defined "native Hawaiian[s]" to include "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *Ibid.*

Hawaii was admitted as the 50th State of the Union in 1959. With admission, the new State agreed to adopt the Hawaiian Homes Commission Act as part of its own Constitution. Pub. L. 86–3, §§ 4, 7, 73 Stat. 5, 7 (Admission Act); see Haw. Const., Art. XII, §§ 1–3. In addition, the United States granted Hawaii title to all public lands and public property within the boundaries of the State, save those which the Federal Government retained for its own use. Admission Act §§ 5(b)–(d), 73 Stat. 5. This grant included the 200,000 acres set aside under the Hawaiian Homes Commission Act and almost 1.2 million additional acres of land. Brief for United States as *Amicus Curiae* 4.

The legislation authorizing the grant recited that these lands, and the proceeds and income they generated, were to

be held "as a public trust" to be "managed and disposed of for one or more of" five purposes:

> "[1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public use." Admission Act § 5(f), 73 Stat. 6.

In the first decades following admission, the State apparently continued to administer the lands that had been set aside under the Hawaiian Homes Commission Act for the benefit of native Hawaiians. The income from the balance of the public lands is said to have "by and large flowed to the department of education." Hawaii Senate Journal, Standing Committee Rep. No. 784, pp. 1350, 1351 (1979).

In 1978 Hawaii amended its Constitution to establish the Office of Hawaiian Affairs, Haw. Const., Art. XII, § 5, which has as its mission "[t]he betterment of conditions of native Hawaiians . . . [and] Hawaiians," Haw. Rev. Stat. § 10–3 (1993). Members of the 1978 constitutional convention, at which the new amendments were drafted and proposed, set forth the purpose of the proposed agency:

> "Members [of the Committee of the Whole] were impressed by the concept of the Office of Hawaiian Affairs which establishes a public trust entity for the benefit of the people of Hawaiian ancestry. Members foresaw that it will provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race, and that it will unite Hawaiians as a people." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Committee of the Whole Rep. No. 13, p. 1018 (1980).

Implementing statutes and their later amendments vested OHA with broad authority to administer two categories of funds: a 20 percent share of the revenue from the 1.2 million acres of lands granted to the State pursuant to § 5(b) of the Admission Act, which OHA is to administer "for the betterment of the conditions of native Hawaiians," Haw. Rev. Stat. § 10–13.5 (1993), and any state or federal appropriations or private donations that may be made for the benefit of "native Hawaiians" and/or "Hawaiians," Haw. Const., Art. XII, § 6. See generally Haw. Rev. Stat. §§ 10–1 to 10–16. (The 200,000 acres set aside under the Hawaiian Homes Commission Act are administered by a separate agency. See Haw. Rev. Stat. § 26–17 (1993).) The Hawaiian Legislature has charged OHA with the mission of "[s]erving as the principal public agency . . . responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians," "[a]ssessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians," "conducting advocacy efforts for native Hawaiians and Hawaiians," "[a]pplying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services," and "[s]erving as a receptacle for reparations." § 10–3.

OHA is overseen by a nine-member board of trustees, the members of which "shall be Hawaiians" and—presenting the precise issue in this case—shall be "elected by qualified voters who are Hawaiians, as provided by law." Haw. Const., Art. XII, § 5; see Haw. Rev. Stat. §§ 13D–1, 13D–3(b)(1) (1993). The term "Hawaiian" is defined by statute:

> " 'Hawaiian' means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." § 10–2.

The statute defines "native Hawaiian" as follows:

> "'Native Hawaiian' means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." *Ibid.*

Petitioner Harold Rice is a citizen of Hawaii and a descendant of preannexation residents of the islands. He is not, as we have noted, a descendant of pre-1778 natives, and so he is neither "native Hawaiian" nor "Hawaiian" as defined by the statute. Rice applied in March 1996 to vote in the elections for OHA trustees. To register to vote for the office of trustee he was required to attest: "I am also Hawaiian and desire to register to vote in OHA elections." Affidavit on Application for Voter Registration, Lodging by Petitioner, Tab 2. Rice marked through the words "am also Hawaiian and," then checked the form "yes." The State denied his application.

Rice sued Benjamin Cayetano, the Governor of Hawaii, in the United States District Court for the District of Hawaii. (The Governor was sued in his official capacity, and the Attorney General of Hawaii defends the challenged enactments. We refer to the respondent as "the State.") Rice contested his exclusion from voting in elections for OHA trustees and from voting in a special election relating to native Hawaiian sovereignty which was held in August 1996. After the District Court rejected the latter challenge, see *Rice* v. *Cayetano*, 941 F. Supp. 1529 (1996) (a decision not before us), the parties moved for summary judgment on the claim that the Fourteenth and Fifteenth Amendments to the United States Constitution invalidate the law excluding Rice from the OHA trustee elections.

The District Court granted summary judgment to the State. 963 F. Supp. 1547 (Haw. 1997). Surveying the history of the islands and their people, the District Court determined that Congress and the State of Hawaii have recognized a guardian-ward relationship with the native Hawaiians, which the court found analogous to the relationship between the United States and the Indian tribes. *Id.*, at 1551–1554. On this premise, the court examined the voting qualification with the latitude that we have applied to legislation passed pursuant to Congress' power over Indian affairs. *Id.*, at 1554–1555 (citing *Morton* v. *Mancari*, 417 U. S. 535 (1974)). Finding that the electoral scheme was "rationally related to the State's responsibility under the Admission Act to utilize a portion of the proceeds from the § 5(b) lands for the betterment of Native Hawaiians," the District Court held that the voting restriction did not violate the Constitution's ban on racial classifications. 963 F. Supp., at 1554–1555.

The Court of Appeals affirmed. 146 F. 3d 1075 (CA9 1998). The court noted that Rice had not challenged the constitutionality of the underlying programs or of OHA itself. *Id.*, at 1079. Considering itself bound to "accept the trusts and their administrative structure as [it found] them, and assume that both are lawful," the court held that Hawaii "may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be." *Ibid.* The court so held notwithstanding its clear holding that the Hawaii Constitution and implementing statutes "contain a racial classification on their face." *Ibid.*

We granted certiorari, 526 U. S. 1016 (1999), and now reverse.

III

The purpose and command of the Fifteenth Amendment are set forth in language both explicit and comprehensive.

The National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race. Color and previous condition of servitude, too, are forbidden criteria or classifications, though it is unnecessary to consider them in the present case.

Enacted in the wake of the Civil War, the immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote, lest they be denied the civil and political capacity to protect their new freedom. Vital as its objective remains, the Amendment goes beyond it. Consistent with the design of the Constitution, the Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment. The Amendment grants protection to all persons, not just members of a particular race.

The design of the Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise. A resolve so absolute required language as simple in command as it was comprehensive in reach. Fundamental in purpose and effect and self-executing in operation, the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race. "[B]y the inherent power of the Amendment the word white disappeared" from our voting laws, bringing those who had been excluded by reason of race within "the generic grant of suffrage made by the State." *Guinn* v. *United States*, 238 U. S. 347, 363 (1915); see also *Neal* v. *Delaware*, 103 U. S. 370, 389 (1881). The Court has acknowledged the Amendment's mandate of neutrality in straightforward terms: "If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is." *United States* v. *Reese*, 92 U. S. 214, 218 (1876).

Though the commitment was clear, the reality remained far from the promise. Manipulative devices and practices were soon employed to deny the vote to blacks. We have cataloged before the "variety and persistence" of these techniques. *South Carolina* v. *Katzenbach*, 383 U. S. 301, 311–312 (1966) (citing, *e. g.*, *Guinn*, *supra* (grandfather clause); *Myers* v. *Anderson*, 238 U. S. 368 (1915) (same); *Lane* v. *Wilson*, 307 U. S. 268 (1939) ("procedural hurdles"); *Terry* v. *Adams*, 345 U. S. 461 (1953) (white primary); *Smith* v. *Allwright*, 321 U. S. 649 (1944) (same); *United States* v. *Thomas*, 362 U. S. 58 (1960) *(per curiam)* (registration challenges); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960) (racial gerrymandering); *Louisiana* v. *United States*, 380 U. S. 145 (1965) ("interpretation tests")). Progress was slow, particularly when litigation had to proceed case by case, district by district, sometimes voter by voter. See 383 U. S., at 313–315.

Important precedents did emerge, however, which give instruction in the case now before us. The Fifteenth Amendment was quite sufficient to invalidate a scheme which did not mention race but instead used ancestry in an attempt to confine and restrict the voting franchise. In 1910, the State of Oklahoma enacted a literacy requirement for voting eligibility, but exempted from that requirement the "'lineal descendant[s]'" of persons who were "'on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation.'" *Guinn*, *supra*, at 357. Those persons whose ancestors were entitled to vote under the State's previous, discriminatory voting laws were thus exempted from the eligibility test. Recognizing that the test served only to perpetuate those old laws and to effect a transparent racial exclusion, the Court invalidated it. 238 U. S., at 364–365.

More subtle, perhaps, than the grandfather device in *Guinn* were the evasions attempted in the white primary cases; but the Fifteenth Amendment, again by its own terms, sufficed to strike down these voting systems, systems de-

signed to exclude one racial class (at least) from voting. See *Terry*, *supra*, at 469–470; *Allwright*, *supra*, at 663–666 (overruling *Grovey* v. *Townsend*, 295 U. S. 45 (1935)). The Fifteenth Amendment, the Court held, could not be so circumvented: "The Amendment bans racial discrimination in voting by both state and nation. It thus establishes a national policy . . . not to be discriminated against as voters in elections to determine public governmental policies or to select public officials, national, state, or local." *Terry*, *supra*, at 467.

Unlike the cited cases, the voting structure now before us is neither subtle nor indirect. It is specific in granting the vote to persons of defined ancestry and to no others. The State maintains this is not a racial category at all but instead a classification limited to those whose ancestors were in Hawaii at a particular time, regardless of their race. Brief for Respondent 38–40. The State points to theories of certain scholars concluding that some inhabitants of Hawaii as of 1778 may have migrated from the Marquesas Islands and the Pacific Northwest, as well as from Tahiti. *Id.*, at 38–39, and n. 15. Furthermore, the State argues, the restriction in its operation excludes a person whose traceable ancestors were exclusively Polynesian if none of those ancestors resided in Hawaii in 1778; and, on the other hand, the vote would be granted to a person who could trace, say, one sixty-fourth of his or her ancestry to a Hawaiian inhabitant on the pivotal date. *Ibid.* These factors, it is said, mean the restriction is not a racial classification. We reject this line of argument.

Ancestry can be a proxy for race. It is that proxy here. Even if the residents of Hawaii in 1778 had been of more diverse ethnic backgrounds and cultures, it is far from clear that a voting test favoring their descendants would not be a race-based qualification. But that is not this case. For centuries Hawaii was isolated from migration. 1 Kuykendall 3. The inhabitants shared common physical character-

istics, and by 1778 they had a common culture. Indeed, the drafters of the statutory definition in question emphasized the "unique culture of the ancient Hawaiians" in explaining their work. Hawaii Senate Journal, Standing Committee Rep. No. 784, at 1354; see *ibid.* ("Modern scholarship also identified such race of people as culturally distinguishable from other Polynesian peoples"). The provisions before us reflect the State's effort to preserve that commonality of people to the present day. In the interpretation of the Reconstruction era civil rights laws we have observed that "racial discrimination" is that which singles out "identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics." *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604, 613 (1987). The very object of the statutory definition in question and of its earlier congressional counterpart in the Hawaiian Homes Commission Act is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.

The history of the State's definition demonstrates the point. As we have noted, the statute defines "Hawaiian" as

> "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." Haw. Rev. Stat. § 10–2 (1993).

A different definition of "Hawaiian" was first promulgated in 1978 as one of the proposed amendments to the State Constitution. As proposed, "Hawaiian" was defined as "any descendant of the races inhabiting the Hawaiian Islands, previous to 1778." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Committee of the Whole Rep. No. 13, at 1018. Rejected as not ratified in a valid manner, see *Kahalekai* v. *Doi*, 60 Haw. 324, 342, 590 P. 2d 543, 555 (1979),

the definition was modified and in the end promulgated in statutory form as quoted above. See Hawaii Senate Journal, Standing Committee Rep. No. 784, at 1350, 1353–1354; *id.*, Conf. Comm. Rep. No. 77, at 998. By the drafters' own admission, however, any changes to the language were at most cosmetic. Noting that "[t]he definitions of 'native Hawaiian' and 'Hawaiian' are changed to substitute 'peoples' for 'races,' " the drafters of the revised definition "stress[ed] that this change is non-substantive, and that 'peoples' does mean 'races.' " *Ibid.;* see also *id.*, at 999 ("[T]he word 'peoples' has been substituted for 'races' in the definition of 'Hawaiian'. Again, your Committee wishes to emphasize that this substitution is merely technical, and that 'peoples' does mean 'races' ").

The next definition in Hawaii's compilation of statutes incorporates the new definition of "Hawaiian" and preserves the explicit tie to race:

> " 'Native Hawaiian' means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." Haw. Rev. Stat. § 10–2 (1993).

This provision makes it clear: "[T]he descendants . . . of [the] aboriginal peoples" means "the descendants . . . of the races." *Ibid.*

As for the further argument that the restriction differentiates even among Polynesian people and is based simply on the date of an ancestor's residence in Hawaii, this too is insufficient to prove the classification is nonracial in purpose and operation. Simply because a class defined by ancestry does not include all members of the race does not suffice to

make the classification race neutral. Here, the State's argument is undermined by its express racial purpose and by its actual effects.

The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name. One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.

The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943). Ancestral tracing of this sort achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name. The State's electoral restriction enacts a race-based voting qualification.

IV

The State offers three principal defenses of its voting law, any of which, it contends, allows it to prevail even if the classification is a racial one under the Fifteenth Amendment. We examine, and reject, each of these arguments.

A

The most far reaching of the State's arguments is that exclusion of non-Hawaiians from voting is permitted under our cases allowing the differential treatment of certain members of Indian tribes. The decisions of this Court, interpreting the effect of treaties and congressional enactments on the subject, have held that various tribes retained some elements of quasi-sovereign authority, even after cession of their lands to the United States. See *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 425 (1989) (plurality opinion); *Oliphant* v. *Suquamish Tribe*, 435 U. S. 191, 208 (1978). The retained tribal authority relates to self-governance. *Brendale*, *supra*, at 425 (plurality opinion). In reliance on that theory the Court has sustained a federal provision giving employment preferences to persons of tribal ancestry. *Mancari*, 417 U. S., at 553–555. The *Mancari* case, and the theory upon which it rests, are invoked by the State to defend its decision to restrict voting for the OHA trustees, who are charged so directly with protecting the interests of native Hawaiians.

If Hawaii's restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State—and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993—has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. Compare Van Dyke, The Political Status of the Native Hawaiian People, 17 Yale L. & Pol'y Rev. 95 (1998), with Benjamin, Equal Protection and the Special Re-

lationship: The Case of Native Hawaiians, 106 Yale L. J. 537 (1996). We can stay far off that difficult terrain, however.

The State's argument fails for a more basic reason. Even were we to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort.

Of course, as we have established in a series of cases, Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 673, n. 20 (1979) (treaties securing preferential fishing rights); *United States* v. *Antelope*, 430 U. S. 641, 645–647 (1977) (exclusive federal jurisdiction over crimes committed by Indians in Indian country); *Delaware Tribal Business Comm.* v. *Weeks*, 430 U. S. 73, 84–85 (1977) (distribution of tribal property); *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463, 479–480 (1976) (Indian immunity from state taxes); *Fisher* v. *District Court of Sixteenth Judicial Dist. of Mont.*, 424 U. S. 382, 390–391 (1976) *(per curiam)* (exclusive tribal court jurisdiction over tribal adoptions). As we have observed, "every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians." *Mancari*, *supra*, at 552.

Mancari, upon which many of the above cases rely, presented the somewhat different issue of a preference in hiring and promoting at the federal Bureau of Indian Affairs (BIA), a preference which favored individuals who were "'one-fourth or more degree Indian blood and . . . member[s] of a Federally-recognized tribe.'" 417 U. S., at 553, n. 24 (quoting 44 BIAM 335, 3.1 (1972)). Although the classification had a racial component, the Court found it important that the preference was "not directed towards a 'racial' group consisting of 'Indians,'" but rather "only to members of 'fed-

erally recognized' tribes." 417 U. S., at 553, n. 24. "In this sense," the Court held, "the preference [was] political rather than racial in nature." *Ibid.;* see also *id.*, at 554 ("The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion"). Because the BIA preference could be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians," and was "reasonable and rationally designed to further Indian self-government," the Court held that it did not offend the Constitution. *Id.*, at 555. The opinion was careful to note, however, that the case was confined to the authority of the BIA, an agency described as "*sui generis.*" *Id.*, at 554.

Hawaii would extend the limited exception of *Mancari* to a new and larger dimension. The State contends that "one of the very purposes of OHA—and the challenged voting provision—is to afford Hawaiians a measure of self-governance," and so it fits the model of *Mancari.* Brief for Respondent 34. It does not follow from *Mancari*, however, that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens.

The tribal elections established by the federal statutes the State cites illuminate its error. See Brief for Respondent 22 (citing, *e. g.*, the Menominee Restoration Act, 25 U. S. C. § 903b, and the Indian Reorganization Act, 25 U. S. C. § 476). If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi sovereign. The OHA elections, by contrast, are the affair of the State of Hawaii. OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations. See Haw. Const., Art. XII, §§ 5–6. The Hawaiian Legislature has declared that OHA exists to serve "as the principal public agency in th[e]

State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians." Haw. Rev. Stat. § 10–3(3) (1993); see also Lodging by Petitioner, Tab 6, OHA Annual Report 1993–1994, p. 5 (May 27, 1994) (admitting that "OHA is technically a part of the Hawai'i state government," while asserting that "it operates as a semi-autonomous entity"). Foremost among the obligations entrusted to this agency is the administration of a share of the revenues and proceeds from public lands, granted to Hawaii to "be held by said State as a public trust." Admission Act §§ 5(b), (f), 73 Stat. 5, 6; see Haw. Const., Art. XII, § 4.

The delegates to the 1978 constitutional convention explained the position of OHA in the state structure:

> "The committee intends that the Office of Hawaiian Affairs will be independent from the executive branch and all other branches of government although it will assume the status of a state agency. The chairman may be an ex officio member of the governor's cabinet. The status of the Office of Hawaiian Affairs is to be unique and special. . . . The committee developed this office based on the model of the University of Hawaii. In particular, the committee desired to use this model so that the office could have maximum control over its budget, assets and personnel. The committee felt that it was important to arrange a method whereby the assets of Hawaiians could be kept separate from the rest of the state treasury." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59, at 645.

Although it is apparent that OHA has a unique position under state law, it is just as apparent that it remains an arm of the State.

The validity of the voting restriction is the only question before us. As the Court of Appeals did, we assume the va-

lidity of the underlying administrative structure and trusts, without intimating any opinion on that point. Nonetheless, the elections for OHA trustee are elections of the State, not of a separate quasi sovereign, and they are elections to which the Fifteenth Amendment applies. To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decision-making in critical state affairs. The Fifteenth Amendment forbids this result.

B

Hawaii further contends that the limited voting franchise is sustainable under a series of cases holding that the rule of one person, one vote does not pertain to certain special purpose districts such as water or irrigation districts. See *Ball* v. *James*, 451 U. S. 355 (1981); *Salyer Land Co.* v. *Tulare Lake Basin Water Storage Dist.*, 410 U. S. 719 (1973). Just as the *Mancari* argument would have involved a significant extension or new application of that case, so too it is far from clear that the *Salyer* line of cases would be at all applicable to statewide elections for an agency with the powers and responsibilities of OHA.

We would not find those cases dispositive in any event, however. The question before us is not the one-person, one-vote requirement of the Fourteenth Amendment, but the race neutrality command of the Fifteenth Amendment. Our special purpose district cases have not suggested that compliance with the one-person, one-vote rule of the Fourteenth Amendment somehow excuses compliance with the Fifteenth Amendment. We reject that argument here. We held four decades ago that state authority over the boundaries of political subdivisions, "extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution." *Gomillion*, 364 U. S., at 345. The Fifteenth Amendment has independent meaning and force. A State may not deny or abridge the right to vote on account of race, and this law does so.

C

Hawaii's final argument is that the voting restriction does no more than ensure an alignment of interests between the fiduciaries and the beneficiaries of a trust. Thus, the contention goes, the restriction is based on beneficiary status rather than race.

As an initial matter, the contention founders on its own terms, for it is not clear that the voting classification is symmetric with the beneficiaries of the programs OHA administers. Although the bulk of the funds for which OHA is responsible appears to be earmarked for the benefit of "native Hawaiians," the State permits both "native Hawaiians" and "Hawaiians" to vote for the office of trustee. The classification thus appears to create, not eliminate, a differential alignment between the identity of OHA trustees and what the State calls beneficiaries.

Hawaii's argument fails on more essential grounds. The State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment. The Amendment applies to "any election in which public issues are decided or public officials selected." *Terry,* 345 U. S., at 468. There is no room under the Amendment for the concept that the right to vote in a particular election can be allocated based on race. Race cannot qualify some and disqualify others from full participation in our democracy. All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others. Under the Fifteenth Amendment voters are treated not as members of a distinct race but as members of the whole citizenry. Hawaii may not assume, based on race, that petitioner or any other of its citizens will not cast a principled vote. To accept the position advanced by the State would give rise to the same indignities, and the same resulting tensions and ani-

mosities, the Amendment was designed to eliminate. The voting restriction under review is prohibited by the Fifteenth Amendment.

* * *

When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.

In this case the Fifteenth Amendment invalidates the electoral qualification based on ancestry. The judgment of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE SOUTER joins, concurring in the result.

I agree with much of what the Court says and with its result, but I do not agree with the critical rationale that underlies that result. Hawaii seeks to justify its voting scheme by drawing an analogy between its Office of Hawaiian Affairs (OHA) and a trust for the benefit of an Indian tribe. The majority does not directly deny the analogy. It instead at one point assumes, at least for argument's sake, that the "revenues and proceeds" at issue are from a "'public trust.'" *Ante*, at 521. It also assumes without deciding that the State could "treat Hawaiians or native Hawaiians as tribes." *Ante*, at 519. Leaving these issues undecided, it holds that the Fifteenth Amendment forbids Hawaii's voting scheme, because the "OHA is a state agency," and thus

election to the OHA board is not "the internal affair of a quasi sovereign," such as an Indian tribe. *Ante*, at 520.

I see no need, however, to decide this case on the basis of so vague a concept as "quasi sovereign," and I do not subscribe to the Court's consequently sweeping prohibition. Rather, in my view, we should reject Hawaii's effort to justify its rules through analogy to a trust for an Indian tribe because the record makes clear that (1) there is no "trust" for native Hawaiians here, and (2) OHA's electorate, as defined in the statute, does not sufficiently resemble an Indian tribe.

The majority seems to agree, though it does not decide, that the OHA bears little resemblance to a trust for native Hawaiians. It notes that the Hawaii Constitution uses the word "trust" when referring to the 1.2 million acres of land granted in the Admission Act. *Ante*, at 508, 521. But the Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii. The Act specifies that the land is to be used for the education of, the developments of homes and farms for, the making of public improvements for, and public use by, *all* of Hawaii's citizens, as well as for the betterment of those who are "native." Admission Act § 5(f).

Moreover, OHA funding comes from several different sources. See, *e. g.*, OHA Fiscal 1998 Annual Report 38 (hereinafter Annual Report) ($15 million from the 1.2 million acres of public lands; $11 million from "[d]ividend and interest income"; $3 million from legislative appropriations; $400,000 from federal and other grants). All of OHA's funding is authorized by ordinary state statutes. See, *e. g.*, Haw. Rev. Stat. §§ 10–4, 10–6, 10–13.5 (1993); see also Annual Report 11 ("OHA's fiscal 1998–99 legislative budget was passed as Acts 240 and 115 by the 1997 legislature"). The amounts of funding and funding sources are thus subject to change by ordinary legislation. OHA spends most, but not all, of its money to benefit native Hawaiians in many different ways. See Annual Report (OHA projects support education, hous-

ing, health, culture, economic development, and nonprofit organizations). As the majority makes clear, OHA is simply a special purpose department of Hawaii's state government. *Ante*, at 520–521.

As importantly, the statute defines the electorate in a way that is not analogous to membership in an Indian tribe. Native Hawaiians, considered as a group, may be analogous to tribes of other Native Americans. But the statute does not limit the electorate to native Hawaiians. Rather it adds to approximately 80,000 native Hawaiians about 130,000 additional "Hawaiians," defined as including anyone with one ancestor who lived in Hawaii prior to 1778, thereby including individuals who are less than one five-hundredth original Hawaiian (assuming nine generations between 1778 and the present). See Native Hawaiian Data Book 39 (1998). Approximately 10% to 15% of OHA's funds are spent specifically to benefit this latter group, see Annual Report 38, which now constitutes about 60% of the OHA electorate.

I have been unable to find any Native American tribal definition that is so broad. The Alaska Native Claims Settlement Act, for example, defines a "Native" as "a person of one-fourth degree or more Alaska Indian" or one "who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is . . . regarded as Native by any village or group" (a classification perhaps more likely to reflect real group membership than any blood quantum requirement). 43 U. S. C. § 1602(b). Many tribal constitutions define membership in terms of having had an ancestor whose name appeared on a tribal roll—but in the far less distant past. See, *e. g.*, Constitution of the Choctaw Nation of Oklahoma, Art. II (membership consists of persons on final rolls approved in 1906 and their lineal descendants); Constitution of the Sac and Fox Tribe of Indians of Oklahoma, Art. II (membership consists of persons on official roll of 1937, children since born to two members of the Tribe, and children born to one mem-

ber and a nonmember if admitted by the council); Revised Constitution of the Jicarilla Apache Tribe, Art. III (membership consists of persons on official roll of 1968 and children of one member of the Tribe who are at least three-eighths Jicarilla Apache Indian blood); Revised Constitution Mescalero Apache Tribe, Art. IV (membership consists of persons on the official roll of 1936 and children born to at least one enrolled member who are at least one-fourth degree Mescalero Apache blood).

Of course, a Native American tribe has broad authority to define its membership. See *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 72, n. 32 (1978). There must, however, be some limit on what is reasonable, at the least when a State (which is not itself a tribe) creates the definition. And to define that membership in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members—leaving some combination of luck and interest to determine which potential members become actual voters—goes well beyond any reasonable limit. It was not a tribe, but rather the State of Hawaii, that created this definition; and, as I have pointed out, it is not like any actual membership classification created by any actual tribe.

These circumstances are sufficient, in my view, to destroy the analogy on which Hawaii's justification must depend. This is not to say that Hawaii's definitions themselves independently violate the Constitution, cf. *post*, at 535–536, n. 11 (JUSTICE STEVENS, dissenting); it is only to say that the analogies they here offer are too distant to save a race-based voting definition that in their absence would clearly violate the Fifteenth Amendment. For that reason I agree with the majority's ultimate conclusion.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins as to Part II, dissenting.

The Court's holding today rests largely on the repetition of glittering generalities that have little, if any, application

to the compelling history of the State of Hawaii. When that history is held up against the manifest purpose of the Fourteenth and Fifteenth Amendments, and against two centuries of this Court's federal Indian law, it is clear to me that Hawaii's election scheme should be upheld.

I

According to the terms of the federal Act by which Hawaii was admitted to the Union, and to the terms of that State's Constitution and laws, the Office of Hawaiian Affairs (OHA) is charged with managing vast acres of land held in trust for the descendants of the Polynesians who occupied the Hawaiian Islands before the 1778 arrival of Captain Cook. In addition to administering the proceeds from these assets, OHA is responsible for programs providing special benefits for native Hawaiians. Established in 1978 by an amendment to the State Constitution, OHA was intended to advance multiple goals: to carry out the duties of the trust relationship between the islands' indigenous peoples and the Government of the United States; to compensate for past wrongs to the ancestors of these peoples; and to help preserve the distinct, indigenous culture that existed for centuries before Cook's arrival. As explained by the senior Senator from Hawaii, Senator Inouye, who is not himself a native Hawaiian but rather (like petitioner) is a member of the majority of Hawaiian voters who supported the 1978 amendments, the amendments reflect "an honest and sincere attempt on the part of the people of Hawai'i to rectify the wrongs of the past, and to put into being the mandate [of] our Federal government—the betterment of the conditions of Native Hawaiians."[1]

[1] App. E to Brief for Hawai'i Congressional Delegation as *Amicus Curiae* E–3. In a statement explaining the cultural motivation for the amendments, Senator Akaka pointed out that the "fact that the entire State of Hawai'i voted to amend the State Constitution in 1978 to establish the Office of Hawaiian Affairs is significant because it illustrates the recognition of the importance of Hawaiian culture and traditions as the foundation for the *Aloha* spirit." *Id.*, at E–5.

Today the Court concludes that Hawaii's method of electing the trustees of OHA violates the Fifteenth Amendment. In reaching that conclusion, the Court has assumed that the programs administered by OHA are valid. That assumption is surely correct. In my judgment, however, the reasons supporting the legitimacy of OHA and its programs in general undermine the basis for the Court's decision holding its trustee election provision invalid. The OHA election provision violates neither the Fourteenth Amendment nor the Fifteenth.

That conclusion is in keeping with three overlapping principles. First, the Federal Government must be, and has been, afforded wide latitude in carrying out its obligations arising from the special relationship it has with the aboriginal peoples, a category that includes the native Hawaiians, whose lands are now a part of the territory of the United States. In addition, there exists in this case the State's own fiduciary responsibility—arising from its establishment of a public trust—for administering assets granted it by the Federal Government in part for the benefit of native Hawaiians. Finally, even if one were to ignore the more than two centuries of Indian law precedent and practice on which this case follows, there is simply no invidious discrimination present in this effort to see that indigenous peoples are compensated for past wrongs, and to preserve a distinct and vibrant culture that is as much a part of this Nation's heritage as any.

II

Throughout our Nation's history, this Court has recognized both the plenary power of Congress over the affairs of Native Americans [2] and the fiduciary character of the special

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[2] See, *e. g.*, *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U. S. 520, 531, n. 6 (1998); *United States* v. *Wheeler*, 435 U. S. 313, 319 (1978); *United States* v. *Antelope*, 430 U. S. 641, 645 (1977); *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974); *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 564–565 (1903); *United States* v. *Kagama*, 118 U. S. 375 (1886).

federal relationship with descendants of those once sovereign peoples.[3] The source of the Federal Government's responsibility toward the Nation's native inhabitants, who were subject to European and then American military conquest, has been explained by this Court in the crudest terms, but they remain instructive nonetheless.

> "These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." *United States* v. *Kagama*, 118 U. S. 375, 383–384 (1886) (emphasis in original).

As our cases have consistently recognized, Congress' plenary power over these peoples has been exercised time and again to implement a federal duty to provide native peoples with special "'care and protection.'"[4] With respect to the Pueblos in New Mexico, for example, "public moneys have been expended in presenting them with farming implements and utensils, and in their civilization and instruction." *United States* v. *Sandoval*, 231 U. S. 28, 39–40 (1913). Today, the Federal Bureau of Indian Affairs (BIA) administers countless modern programs responding to comparably pragmatic concerns, including health, education, housing, and impoverishment. See Office of the Federal Register, United States Government Manual 1999/2000, pp. 311–312. Federal regulation in this area is not limited to the strictly practical

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[3] See, *e. g.*, *United States* v. *Sandoval*, 231 U. S. 28 (1913); *Kagama*, 118 U. S., at 384–385; *Cherokee Nation* v. *Georgia*, 5 Pet. 1 (1831).

[4] *Sandoval*, 231 U. S., at 45; *Kagama*, 118 U. S., at 384–385.

but has encompassed as well the protection of cultural values; for example, the desecration of Native American graves and other sacred sites led to the passage of the Native American Graves Protection and Repatriation Act, 25 U. S. C. § 3001 *et seq.*

Critically, neither the extent of Congress' sweeping power nor the character of the trust relationship with indigenous peoples has depended on the ancient racial origins of the people, the allotment of tribal lands,[5] the coherence or existence of tribal self-government,[6] or the varying definitions of "Indian" Congress has chosen to adopt.[7] Rather, when it comes to the exercise of Congress' plenary power in Indian affairs, this Court has taken account of the "numerous occasions" on which "legislation that singles out Indians for particular and special treatment" has been upheld, and has concluded that as "long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation

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[5] See, *e. g.*, *United States* v. *Celestine*, 215 U. S. 278, 286–287 (1909).

[6] See *United States* v. *John*, 437 U. S. 634, 653 (1978) ("Neither 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"); *Delaware Tribal Business Comm.* v. *Weeks*, 430 U. S. 73, 82, n. 14, 84–85 (1977) (whether or not federal statute providing financial benefits to descendants of Delaware Tribe included nontribal Indian beneficiaries, Congress' choice need only be "'tied rationally to the fulfillment of Congress' unique obligation toward the Indians'" (quoting *Morton* v. *Mancari*, 417 U. S., at 555)).

[7] See generally F. Cohen, Handbook of Federal Indian Law 19–20 (1982). Compare 25 U. S. C. § 479 ("The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians") with § 1603(c)(3) (Indian is any person "considered by the Secretary of the Interior to be an Indian for any purpose").

towards the Indians, such legislative judgments will not be disturbed." *Morton* v. *Mancari*, 417 U. S. 535, 554–555 (1974).

As the history recited by the majority reveals, the grounds for recognizing the existence of federal trust power here are overwhelming. Shortly before its annexation in 1898, the Republic of Hawaii (installed by United States merchants in a revolution facilitated by the United States Government) expropriated some 1.8 million acres of land that it then ceded to the United States. In the Organic Act establishing the Territory of Hawaii, Congress provided that those lands should remain under the control of the territorial government "until otherwise provided for by Congress," Act of Apr. 30, 1900, ch. 339, § 91, 31 Stat. 159. By 1921, Congress recognized that the influx of foreign infectious diseases, mass immigration coupled with poor housing and sanitation, hunger, and malnutrition had taken their toll. See *ante*, at 506. Confronted with the reality that the Hawaiian people had been "frozen out of their lands and driven into the cities," H. R. Rep. No. 839, 66th Cong., 2d Sess., 4 (1920), Congress decided that 27 specific tracts of the lands ceded in 1898, comprising about 203,500 acres, should be used to provide farms and residences for native Hawaiians. Act of July 9, 1921, ch. 42, 42 Stat. 108. Relying on the precedent of previous federal laws granting Indians special rights in public lands, Congress created the Hawaiian Homes Commission to implement its goal of rehabilitating the native people and culture.[8] Hawaii was required to adopt this Act as a condi-

[8] See H. R. Rep. No. 839, 66th Cong., 2d Sess., 4, 11 (1920). Reflecting a compromise between the sponsor of the legislation, who supported special benefits for "all who have Hawaiian blood in their veins," and plantation owners who thought that only "Hawaiians of the pure blood" should qualify, Hawaiian Homes Commission Act: Hearings before the Senate Committee on the Territories, H. R. Rep. No. 13500, 66th Cong., 3d Sess., 14–17 (1920), the statute defined a "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778," 42 Stat. 108.

tion of statehood in the Hawaii Statehood Admissions Act (Admissions Act), § 4, 73 Stat. 5. And in an effort to secure the Government's duty to the indigenous peoples, § 5 of the Admissions Act conveyed 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. § 5(f), *id.*, at 6.

The nature of and motivation for the special relationship between the indigenous peoples and the United States Government was articulated in explicit detail in 1993, when Congress adopted a Joint Resolution containing a formal "apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii." 107 Stat. 1510. Among other acknowledgments, the resolution stated that the 1.8 million acres of ceded lands had been obtained "without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government." *Id.*, at 1512.

In the end, however, one need not even rely on this official apology to discern a well-established federal trust relationship with the native Hawaiians. Among the many and varied laws passed by Congress in carrying out its duty to indigenous peoples, more than 150 today expressly include native Hawaiians as part of the class of Native Americans benefited.[9] By classifying native Hawaiians as "Native Americans" for purposes of these statutes, Congress has made clear that native Hawaiians enjoy many of "the same rights and privileges accorded to American Indian, Alaska

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[9] See Brief for Hawai'i Congressional Delegation as *Amicus Curiae* 7, and App. A; see also, *e. g.*, American Indian Religious Freedom Act, 42 U. S. C. § 1996 *et seq.;* Native American Programs Act of 1974, 42 U. S. C. §§ 2991–2992; Comprehensive Employment and Training Act, 29 U. S. C. § 872; Drug Abuse Prevention, Treatment, and Rehabilitation Act, 21 U. S. C. § 1177; Cranston-Gonzalez National Affordable Housing Act, § 958, 104 Stat. 4422; Indian Health Care Amendments of 1988, 25 U. S. C. § 1601 *et seq.*

Native, Eskimo, and Aleut communities." 42 U. S. C. § 11701(19). See also § 11701(17) ("The authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of . . . Hawaii").

While splendidly acknowledging this history—specifically including the series of agreements and enactments the history reveals—the majority fails to recognize its import. The descendants of the native Hawaiians share with the descendants of the Native Americans on the mainland or in the Aleutian Islands not only a history of subjugation at the hands of colonial forces, but also a purposefully created and specialized "guardian-ward" relationship with the Government of the United States. It follows that legislation targeting the native Hawaiians must be evaluated according to the same understanding of equal protection that this Court has long applied to the Indians on the continental United States: that "special treatment . . . be tied rationally to the fulfillment of Congress' unique obligation" toward the native peoples. 417 U. S., at 555.

Declining to confront the rather simple logic of the foregoing, the majority would seemingly reject the OHA voting scheme for a pair of different reasons. First, Congress' trust-based power is confined to dealings with tribes, not with individuals, and no tribe or indigenous sovereign entity is found among the native Hawaiians. *Ante*, at 518–520. Second, the elections are "elections of the State," not of a tribe, and upholding this law would be "to permit a State, by racial classification, to fence out whole classes of citizens from decisionmaking in critical state affairs." *Ante*, at 522. In my view, neither of these reasons overcomes the otherwise compelling similarity, fully supported by our precedent, between the once subjugated, indigenous peoples of the continental United States and the peoples of the Hawaiian

Islands whose historical sufferings and status parallel those of the continental Native Americans.

Membership in a tribe, the majority suggests, rather than membership in a race or class of descendants, has been the *sine qua non* of governmental power in the realm of Indian law; *Mancari* itself, the majority contends, makes this proposition clear. *Ante,* at 519–520. But as scholars have often pointed out, tribal membership cannot be seen as the decisive factor in this Court's opinion upholding the BIA preferences in *Mancari;* the hiring preference at issue in that case not only extended to nontribal member Indians, it also required for eligibility that ethnic Native Americans possess a certain quantum of Indian blood.[10] Indeed, the Federal Government simply has not been limited in its special dealings with the native peoples to laws affecting tribes or tribal Indians alone. See nn. 6, 7, *supra.* In light of this precedent, it is a painful irony indeed to conclude 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.[11]

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[10] See, *e. g.,* Frickey, Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law, 110 Harv. L. Rev. 1754, 1761–1762 (1997). As is aptly explained, the BIA preference in that case was based on a statute that extended the preference to ethnic Indians—identified by blood quantum—who were not members of federally recognized tribes. 25 U. S. C. § 479. Only the implementing regulation included a mention of tribal membership, but even that regulation required that the tribal member also "'be one-fourth or more degree Indian blood.'" *Mancari,* 417 U. S., at 553, n. 24.

[11] JUSTICE BREYER suggests that the OHA definition of native Hawaiians (*i. e.,* Hawaiians who may vote under the OHA scheme) is too broad to be "reasonable." *Ante,* at 527 (opinion concurring in result). This suggestion does not identify a constitutional defect. The issue in this case is *Congress'* power to define who counts as an indigenous person, and *Congress'* power to delegate to States its special duty to persons so defined. (JUSTICE BREYER's interest in *tribal* definitions of membership—and in

Of greater concern to the majority is the fact that we are confronted here with a state constitution and legislative enactment—passed by a majority of the entire population of Hawaii—rather than a law passed by Congress or a tribe itself. See, *e. g.*, *ante*, at 519–522. But as our own precedent makes clear, this reality does not alter our analysis. As I have explained, OHA and its trustee elections can hardly be characterized simply as an "affair of the State" alone; they are the instruments for implementing the Fed-

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this Court's holding that tribes' power to define membership is at the core of tribal sovereignty and thus "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority," *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 56 (1978)—is thus inapposite.) Nothing in federal law or in our Indian law jurisprudence suggests that the OHA definition of native is anything but perfectly within that power as delegated. See *supra*, at 531–534, and nn. 6–7. Indeed, the OHA voters match precisely the set of people to whom the congressional apology was targeted.

Federal definitions of "Indian" often rely on the ability to trace one's ancestry to a particular group at a particular time. See, *e. g.*, 25 CFR, ch. 1, § 5.1 (1999) (extending BIA hiring preference to "persons of Indian descent who are . . . (b) [d]escendants of such [tribal] members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation"); see also n. 7, *supra*. It can hardly be correct that once 1934 is two centuries past, rather than merely 66 years past, this classification will cease to be "reasonable." The singular federal statute defining "native" to which JUSTICE BREYER points, 43 U. S. C. § 1602(b) (including those defined by blood quantum without regard to membership in any group), serves to underscore the point that membership in a "tribal" structure *per se*, see *ante*, at 525, is not the acid test for the exercise of federal power in this arena. See R. Clinton, N. Newton, & M. Price, American Indian Law 1054–1058 (3d ed. 1991) (describing provisions of the Alaska Native Claims Settlement Act creating geographic regions of natives with common heritage and interest, 43 U. S. C. § 1606, requiring those regions to organize a native corporation in order to qualify for settlement benefits, § 1607, and establishing the Alaska Native Fund of federal moneys to be distributed to "enrolled natives," §§ 1604–1605); see also *supra*, at 535, and n. 10. In the end, what matters is that the determination of indigenous status or "real group membership," *ante*, at 526 (BREYER, J., concurring in result), is one to be made by Congress—not by this Court.

eral Government's trust relationship with a once sovereign indigenous people. This Court has held more than once that the federal power to pass laws fulfilling the federal trust relationship with the Indians may be delegated to the States. Most significant is our opinion in *Washington* v. *Confederated Bands and Tribes of Yakima Nation*, 439 U. S. 463, 500–501 (1979), in which we upheld against a Fourteenth Amendment challenge a state law assuming jurisdiction over Indian tribes within a State. While we recognized that States generally do not have the same special relationship with Indians that the Federal Government has, we concluded that because the state law was enacted "in response to a federal measure" intended to achieve the result accomplished by the challenged state law, the state law itself need only "'rationally further the purpose identified by the State.'" *Id.*, at 500 (quoting *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307, 314 (1976) *(per curiam)*).

The state statutory and constitutional scheme here was without question intended to implement the express desires of the Federal Government. The Admissions Act in § 4 mandated that the provisions of the Hawaiian Homes Commission Act "shall be adopted," with its multiple provisions expressly benefiting native Hawaiians and not others. 73 Stat. 5. More, the Admissions Act required that the proceeds from the lands granted to the State "shall be held by said State as a public trust for . . . the betterment of the conditions of native Hawaiians," and that those proceeds "shall be managed and disposed of . . . in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States." § 5, *id.*, at 6. The terms of the trust were clear, as was the discretion granted to the State to administer the trust as the State's laws "may provide." And Congress continues to fund OHA on the understanding that it is thereby furthering the federal trust obligation.

The sole remaining question under *Mancari* and *Yakima* is thus whether the State's scheme "rationally further[s] the purpose identified by the State." Under this standard, as with the BIA preferences in *Mancari*, the OHA voting requirement is certainly reasonably designed to promote "self-government" by the descendants of the indigenous Hawaiians, and to make OHA "more responsive to the needs of its constituent groups." *Mancari*, 417 U. S., at 554. The OHA statute provides that the agency is to be held "separate" and "independent of the [State] executive branch," Haw. Rev. Stat. § 10–4 (1993); OHA executes a trust, which, by its very character, must be administered for the benefit of Hawaiians and native Hawaiians, §§ 10–2, 10–3(1), 10–13.5; and OHA is to be governed by a board of trustees that will reflect the interests of the trust's native Hawaiian beneficiaries, Haw. Const., Art. XII, § 5 (1993); Haw. Rev. Stat. § 13D–3(b) (1993). OHA is thus "directed to participation by the governed in the governing agency." *Mancari*, 417 U. S., at 554. In this respect among others, the requirement is "reasonably and directly related to a legitimate, nonracially based goal." *Ibid.*

The foregoing reasons are to me more than sufficient to justify the OHA trust system and trustee election provision under the Fourteenth Amendment.

III

Although the Fifteenth Amendment tests the OHA scheme by a different measure, it is equally clear to me that the trustee election provision violates neither the letter nor the spirit of that Amendment.[12]

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[12] Just as one cannot divorce the Indian law context of this case from an analysis of the OHA scheme under the Fourteenth Amendment, neither can one pretend that this law fits simply within our non-Indian cases under the Fifteenth Amendment. As the preceding discussion of *Mancari* and our other Indian law cases reveals, this Court has never understood laws relating to indigenous peoples simply as legal classifications defined by

Section 1 of the Fifteenth Amendment provides:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U. S. Const., Amdt. 15.

As the majority itself must tacitly admit, *ante*, at 513–514, the terms of the Amendment itself do not here apply. The OHA voter qualification speaks in terms of ancestry and current residence, not of race or color. OHA trustee voters must be "Hawaiian," meaning "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples have thereafter continued to reside in Hawaii." Haw. Rev. Stat. § 10–2 (1993). The ability to vote is a function of the lineal *descent* of a modern-day resident of Hawaii, not the blood-based characteristics of that resident, or of the blood-based proximity of that resident to the "peoples" from whom that descendant arises.

The distinction between ancestry and race is more than simply one of plain language. The ability to trace one's ancestry to a particular progenitor at a single distant point in time may convey no information about one's own apparent or acknowledged race today. Neither does it of necessity imply one's own identification with a particular race, or the exclusion of any others "*on account of race*." The terms manifestly carry distinct meanings, and ancestry was not included by the Framers in the Amendment's prohibitions.

Presumably recognizing this distinction, the majority relies on the fact that "[a]ncestry can be a proxy for race." *Ante*, at 514. That is, of course, true, but it by no means

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race. Even where, unlike here, blood quantum requirements are express, this Court has repeatedly acknowledged that an overlapping political interest predominates. It is only by refusing to face this Court's entire body of Indian law, see *ante*, at 511–512, that the majority is able to hold that the OHA qualification denies non-"Hawaiians" the right to vote "on account of race."

follows that ancestry is always a proxy for race. Cases in which ancestry served as such a proxy are dramatically different from this one. For example, the literacy requirement at issue in *Guinn* v. *United States*, 238 U. S. 347 (1915), relied on such a proxy. As part of a series of blatant efforts to exclude blacks from voting, Oklahoma exempted from its literacy requirement people whose ancestors were entitled to vote prior to the enactment of the Fifteenth Amendment. The *Guinn* scheme patently "served only to perpetuate . . . old [racially discriminatory voting] laws and to effect a transparent racial exclusion." *Ante*, at 513. As in *Guinn*, the voting laws held invalid under the Fifteenth Amendment in all of the cases cited by the majority were fairly and properly viewed through a specialized lens—a lens honed in specific detail to reveal the realities of time, place, and history behind the voting restrictions being tested.

That lens not only fails to clarify, it fully obscures the realities of this case, virtually the polar opposite of the Fifteenth Amendment cases on which the Court relies. In *Terry* v. *Adams*, 345 U. S. 461 (1953), for example, the Court held that the Amendment proscribed the Texas "Jaybird primaries" that used neutral voting qualifications "with a single proviso—Negroes are excluded," *id.*, at 469. Similarly, in *Smith* v. *Allwright*, 321 U. S. 649, 664 (1944), it was the blatant "discrimination against Negroes" practiced by a political party that was held to be state action within the meaning of the Amendment. Cases such as these that "strike down these voting systems . . . designed to exclude one racial class (at least) from voting," *ante*, at 513–514, have no application to a system designed to empower politically the remaining members of a class of once sovereign, indigenous people.

Ancestry surely can be a proxy for race, or a pretext for invidious racial discrimination. But it is simply neither proxy nor pretext here. All of the persons who are eligible to vote for the trustees of OHA share two qualifications that no other person old enough to vote possesses: They are bene-

ficiaries of the public trust created by the State and administered by OHA, and they have at least one ancestor who was a resident of Hawaii in 1778. A trust whose terms provide that the trustees shall be elected by a class including beneficiaries is hardly a novel concept. See 2 A. Scott & W. Fratcher, Law of Trusts § 108.3 (4th ed. 1987). The Committee that drafted the voting qualification explained that the trustees here should be elected by the beneficiaries because "people to whom assets belong should have control over them . . . . The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary."[13] The described purpose of this aspect of the classification thus exists wholly apart from race. It is directly focused on promoting both the delegated federal mandate, and the terms of the State's own trustee responsibilities.

The majority makes much of the fact that the OHA trust—which it assumes is legitimate—should be read as principally intended to benefit the smaller class of "native Hawaiians," who are defined as at least one-half descended from a native islander circa 1778, Haw. Rev. Stat. § 10–2 (1993), not the larger class of "Hawaiians," which includes "any descendant" of those aboriginal people who lived in Hawaii in 1778 and "which peoples thereafter have continued to reside in Hawaii," *ibid.* See *ante*, at 523. It is, after all, the majority notes, the larger class of Hawaiians that enjoys the suffrage right in OHA elections. There is therefore a mismatch in interest alignment between the trust beneficiaries and the trustee electors, the majority contends, and it thus cannot be said that the class of qualified voters here is defined solely by beneficiary status.

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[13] 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59, p. 644.

While that may or may not be true depending upon the construction of the terms of the trust, there is surely nothing racially invidious about a decision to enlarge the class of eligible voters to include "any descendant" of a 1778 resident of the Islands. The broader category of eligible voters serves quite practically to ensure that, regardless how "dilute" the *race* of native Hawaiians becomes—a phenomenon also described in the majority's lavish historical summary, *ante*, at 506–507—there will remain a voting interest whose ancestors were a part of a political, cultural community, and who have inherited through participation and memory the set of traditions the trust seeks to protect. The putative mismatch only underscores the reality that it cannot be purely a racial interest that either the trust or the election provision seeks to secure; the political and cultural interests served are—unlike *racial* survival—shared by both native Hawaiians and Hawaiians.[14]

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[14] Of course, the majority's concern about the absence of alignment becomes salient only if one assumes that something other than a *Mancari*-like political classification is at stake. As this Court has approached cases involving the relationship among the Federal Government, its delegates, and the indigenous peoples—including countless federal definitions of "classes" of Indians determined by blood quantum, see n. 7, *supra*—any "racial" aspect of the voting qualification here is eclipsed by the political significance of membership in a once-sovereign indigenous class.

Beyond even this, the majority's own historical account makes clear that the inhabitants of the Hawaiian Islands whose descendants constitute the instant class are identified and remain significant as much because of culture as because of race. By the time of Cook's arrival, "the Hawaiian people had developed, over the preceding 1,000 years or so, a cultural and political structure . . . well-established traditions and customs and . . . a polytheistic religion." *Ante*, at 500. Prior to 1778, although there "was no private ownership of land," *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 232 (1984), the native Hawaiians "lived in a highly organized, self-sufficient, subsistence social system based on communal land tenure with a sophisticated language, culture, and religion," 42 U. S. C. § 11701(4). According to Senator Akaka, their society "was steeped in science [and they] honored their *'aina* (land) and environment, and therefore developed methods of irrigation, agriculture, aquaculture, navigation,

Even if one refuses to recognize the beneficiary status of OHA trustee voters entirely,[15] it cannot be said that the ancestry-based voting qualification here simply stands in the

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medicine, fishing and other forms of subsistence whereby the land and sea were efficiently used without waste or damage. Respect for the environment and for others formed the basis of their culture and tradition." App. E to Brief for Hawai'i Congressional Delegation as *Amicus Curiae* E–4. Legends and oral histories passed from one generation to another are reflected in artifacts such as carved images, colorful feathered capes, songs, and dances that survive today. For some, Pele, the God of Fire, still inhabits the crater of Kilauea, and the word of the Kahuna is still law. It is this culture, rather than the Polynesian race, that is uniquely Hawaiian and in need of protection.

[15] JUSTICE BREYER's even broader contention that "there is no 'trust' for native Hawaiians here," *ante*, at 525, appears to make the greater mistake of conflating the public trust established by Hawaii's Constitution and laws, see *supra*, at 537, with the "trust" relationship between the Federal Government and the indigenous peoples. According to JUSTICE BREYER, the "analogy on which Hawaii's justification must depend," *ante*, at 527, is "destroy[ed]" in part by the fact that OHA is not a trust (in the former sense of a trust) for native Hawaiians alone. Rather than looking to the terms of the public trust itself for this proposition, JUSTICE BREYER relies on the terms of the land conveyance to Hawaii in part of the Admissions Act. But the portion of the trust administered by OHA does not purport to contain in its corpus all 1.2 million acres of federal trust lands set aside for the benefit of all Hawaiians, including native Hawaiians. By its terms, only "[t]wenty per cent of all revenue derived from the public land trust shall be expended by the office for the betterment of the conditions of native Hawaiians." Haw. Rev. Stat. § 10–13.5 (1993). This portion appears to coincide precisely with the one-fifth described purpose of the Admissions Act trust lands to better the conditions of native Hawaiians. Admissions Act § 5(f), 73 Stat. 6. Neither the fact that native Hawaiians have a specific, beneficial interest in only 20% of trust revenues, nor the fact that the portion of the trust administered by OHA is supplemented to varying degrees by nontrust moneys, negates the existence of the trust itself.

Moreover, neither the particular terms of the State's public trust nor the particular source of OHA funding "destroys" the centrally relevant trust "analogy" on which Hawaii relies—that of the relationship between the Federal Government and indigenous Indians on this continent, as compared with the relationship between the Federal Government and indige-

shoes of a classification that would either privilege or penalize "on account of" race. The OHA voting qualification—part of a statutory scheme put in place by democratic vote of a multiracial majority of all state citizens, including those non-"Hawaiians" who are not entitled to vote in OHA trustee elections—appropriately includes every resident of Hawaii having at least one ancestor who lived in the islands in 1778. That is, among other things, the audience to whom the congressional apology was addressed. Unlike a class including only full-blooded Polynesians—as one would imagine were the class strictly defined in terms of race—the OHA election provision *excludes* all full-blooded Polynesians currently residing in Hawaii who are not descended from a 1778 resident of Hawaii. Conversely, unlike many of the old southern voting schemes in which any potential voter with a "taint" of non-Hawaiian blood would be excluded, the OHA scheme excludes no descendant of a 1778 resident because he or she is also part European, Asian, or African as a matter of race. The classification here is thus both too inclusive and not inclusive enough to fall strictly along racial lines.

At pains then to identify at work here a singularly "racial purpose," *ante*, at 515, 517—whatever that might mean, although one might assume the phrase a "proxy" for "racial discrimination"—the majority next posits that "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Ante*, at 517. That is, of course, true when ancestry is the basis for denying or abridging one's right to vote or to share the blessings of freedom. But it is quite wrong to ignore the relevance of ancestry to claims of

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nous Hawaiians in the now United States-owned Hawaiian Islands. That trust relationship—the only trust relevant to the Indian law analogy—includes the power to delegate authority to the States. As we have explained, *supra*, at 531–534, the OHA scheme surely satisfies the established standard for testing an exercise of that power.

an interest in trust property, or to a shared interest in a proud heritage. There would be nothing demeaning in a law that established a trust to manage Monticello and provided that the descendants of Thomas Jefferson should elect the trustees. Such a law would be equally benign, regardless of whether those descendants happened to be members of the same race.[16]

In this light, it is easy to understand why the classification here is not "demeaning" at all, *ante*, at 523, for it is simply not based on the "premise that citizens of a particular race are somehow more qualified than others to vote on certain matters," *ibid.* It is based on the permissible assumption in this context that families with "any" ancestor who lived in Hawaii in 1778, and whose ancestors thereafter continued to live in Hawaii, have a claim to compensation and self-determination that others do not. For the multiracial majority of the citizens of the State of Hawaii to recognize that deep reality is not to demean their own interests but to honor those of others.

It thus becomes clear why the majority is likewise wrong to conclude that the OHA voting scheme is likely to "become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry

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[16] Indeed, "[i]n one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times." *Hodel* v. *Irving*, 481 U. S. 704, 716 (1987). Even the most minute fractional interests that can be identified after allotted lands are passed through several generations can receive legal recognition and protection. Thus, we held not long ago that inherited shares of parcels allotted to the Sioux in 1889 could not be taken without compensation even though their value was nominal and it was necessary to use a common denominator of 3,394,923,840,000 to identify the size of the smallest interest. *Id.*, at 713–717. Whether it is wise to provide recompense for all of the descendants of an injured class after several generations have come and gone is a matter of policy, but the fact that their interests were acquired by inheritance rather than by assignment surely has no constitutional significance.

is disclosed by their ethnic characteristics and cultural traditions." *Ante*, at 517. The political and cultural concerns that motivated the nonnative majority of Hawaiian voters to establish OHA reflected an interest in preserving through the self-determination of a particular people ancient traditions that they value. The fact that the voting qualification was established by the entire electorate in the State—the vast majority of which is not native Hawaiian—testifies to their judgment concerning the Court's fear of "prejudice and hostility" against the majority of state residents who are not "Hawaiian," such as petitioner. Our traditional understanding of democracy and voting preferences makes it difficult to conceive that the majority of the State's voting population would have enacted a measure that discriminates against, or in any way represents prejudice and hostility toward, that self-same majority. Indeed, the best insurance against that danger is that the electorate here retains the power to revise its laws.

IV

The Court today ignores the overwhelming differences between the Fifteenth Amendment case law on which it relies and the unique history of the State of Hawaii. The former recalls an age of abject discrimination against an insular minority in the old South; the latter at long last yielded the "political consensus" the majority claims it seeks, *ante*, at 524—a consensus determined to recognize the special claim to self-determination of the indigenous peoples of Hawaii. This was the considered and correct view of the District Judge for the United States District Court for the District of Hawaii, as well as the three Circuit Judges on the Court of Appeals for the Ninth Circuit.[17] As Judge Rymer explained:

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[17] Indeed, the record indicates that none of the 20-plus judges on the Ninth Circuit to whom the petition for rehearing en banc was circulated even requested a vote on the petition. App. to Pet. for Cert. 44a.

> "The special election for trustees is not equivalent to a general election, and the vote is not for officials who will perform general governmental functions in either a representative or executive capacity. . . . Nor does the limitation in these circumstances suggest that voting eligibility was designed to exclude persons who would otherwise be interested in OHA's affairs. . . . Rather, it reflects the fact that the trustees' fiduciary responsibilities run only to native Hawaiians and Hawaiians and 'a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles.'[18] The challenged part of Hawaii law was not contrived to keep non-Hawaiians from voting in general, or in any respect pertinent to their legal interests. Therefore, we cannot say that [petitioner's] right to vote has been denied or abridged in violation of the Fifteenth Amendment.
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> "[18] 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Comm. Rep. No. 59 at 644. The Committee reporting on Section 5, establishing OHA, further noted that trustees should be so elected because 'people to whom assets belong should have control over them. . . . The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary.' *Id.*"
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> 146 F. 3d 1075, 1081–1082 (CA9 1998).

In my judgment, her reasoning is far more persuasive than the wooden approach adopted by the Court today.

Accordingly, I respectfully dissent.

Justice Ginsburg, dissenting.

I dissent essentially for the reasons stated by Justice Stevens in Part II of his dissenting opinion. *Ante*, at 529–538 (relying on established federal authority over Native

Americans). Congress' prerogative to enter into special trust relationships with indigenous peoples, *Morton* v. *Mancari*, 417 U. S. 535 (1974), as JUSTICE STEVENS cogently explains, is not confined to tribal Indians. In particular, it encompasses native Hawaiians, whom Congress has in numerous statutes reasonably treated as qualifying for the special status long recognized for other once-sovereign indigenous peoples. See *ante*, at 533–534, and n. 9 (STEVENS, J., dissenting). That federal trust responsibility, both the Court and JUSTICE STEVENS recognize, has been delegated by Congress to the State of Hawaii. Both the Office of Hawaiian Affairs and the voting scheme here at issue are "tied rationally to the fulfillment" of that obligation. See *Mancari*, 417 U. S., at 555. No more is needed to demonstrate the validity of the Office and the voting provision under the Fourteenth and Fifteenth Amendments.

DOCUMENT F

S. Rep. No. 112-251 (2012).

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112TH CONGRESS 2d Session | SENATE | REPORT 112–251

TO EXPRESS THE POLICY OF THE UNITED STATES REGARDING THE UNITED STATES RELATIONSHIP WITH NATIVE HAWAIIANS AND TO PROVIDE PARITY AND A PROCESS FOR THE RECOGNITION BY THE UNITED STATES OF THE NATIVE HAWAIIAN GOVERNING ENTITY

DECEMBER 17, 2012.—Ordered to be printed

Mr. AKAKA, from the Committee on Indian Affairs, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 675]

The Committee on Indian Affairs, to which was referred the bill (S. 675) to express the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process for the recognition by the United States of the Native Hawaiian governing entity, having considered the same, reports favorably thereon with an amendment and recommends that the bill (as amended) do pass.

PURPOSE

The purpose of S. 675 is to ensure parity in federal treatment of Native nations with whom the United States has a trust responsibility, to establish a process for the reorganization and federal recognition of a Native Hawaiian governing entity, and to reaffirm the special political and legal relationship between the United States and the Native Hawaiian governing entity for purposes of carrying on a government-to-government relationship.

BACKGROUND

Native Hawaiians are the only federally-recognized Native people barred from self-determination and self-governance

The Native Hawaiian people are the only federally-recognized Native people without a government-to-government relationship

29–010

with the Federal Government. Native Hawaiians are indigenous to the State of Hawaii—just as American Indians are indigenous to the contiguous United States and Alaska Natives are indigenous to the State of Alaska.[1] S. 675 creates parity within federal policy so that Native Hawaiians will be treated as are all other Native Americans.[2]

> I have seen so many changes in Hawai'i and across the country, and I have been amazed at the resiliency of our Native Hawaiian people, our culture, and our language. . . . I have witnessed profound change in the status and treatment of all indigenous peoples. Gone are the days when teaching our language was banned, when our culture and traditions were deemed unimportant. We now know that our language, culture, and traditions hold incredible wisdom about how best to live in this place we call Hawaii.[3]

Having survived more than 200 years of foreign influence, the Native Hawaiian people are determined to preserve, develop, and pass on to future generations their ancestral territory and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions. Native Hawaiians preserve and perpetuate their culture, language,

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[1] In 2011, the State of Hawaii officially recognized the Native Hawaiian people as "the only indigenous, aboriginal, maoli population of Hawaii." Act 195 (26th Haw. Leg. Sess. (2011)). "The enactment of Act 195 was yet another example of Hawaii's ongoing desire to recognize the unique contributions and traditions of the Native Hawaiian people." *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs,* 112th Cong. (Apr. 13, 2012) (statement of Sen. Brickwood Galuteria, Majority Leader, Hawaii State Capitol). That Native Hawaiians, Alaska Native, and American Indians are not of the same racial group should not be a factor in determining who is considered "Indian." Alaska Natives and American Indians of the forty-eight contiguous states have many racial differences and yet both groups are considered Indians under federal law. Despite racial differences between Indians in the lower forty-eight states and Alaska Natives, the United States Supreme Court has included Alaska Natives, non-Indians under an anthropological meaning, within the term "Indian." Alaska Pac. Fisheries v. United States, 248 U.S. 78, 86–87 (1918) (noting that the Annette Islands were established as a reservation "for the use of the Metlakahtla Indians . . . and such other Alaskan natives as may join them"). See discussion *infra* pp. 6–9.

[2] *S. Comm. on Indian Affairs: Business Meeting to consider S. 675, S. 1345, S. 1684* (Sept. 13, 2012) (statement of Sen. Daniel K. Akaka, Chairman, S. Comm. on Indian Affairs). Native Hawaiians "have yet to be afforded the same recognition as our first Americans" and the responsibility to rectify this disparity is a moral imperative on the part of the United States Federal Government. 156 CONG. REC. H700, H712 (daily ed. Feb. 23, 2010) (statement of Rep. Faleomavaega). *See also Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs,* 112th Cong. (Apr. 13, 2012) (statement of Melody Mackenzie, Associate Professor of Law and Director of Ka Huli Ao Center for Excellence in Native Hawaiian law at University of Hawaii, Richardson School of Law) ("Native Hawaiians . . . are . . . the only native group in the United States that has a long history of . . . federal recognition, but does not have a clearly acknowledged government-to-government relationship with the U.S. government."). The Congress has never properly addressed the status of Native Hawaiians and it is within Congress' constitutional authority to do so. U.S. CONST., art. I, §8, cl. 3. *See also* United States v. Lara, 541 U.S. 193, 196 (2004) ("We must decide whether Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribes' inherent legal authority. We conclude that Congress does possess this power."). "Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and the duty of exercising a fostering care and protection over all dependent Indian communities." *Sandoval,* 231 U.S. at 45–46; *see* United States v. Kagama, 118 U.S. 375, 384–85 (1886) ("From [the Indians] very weakness so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. . . . It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.").

[3] Sen. Daniel K. Akaka, Final Speech to the Council for Native Hawaiian Advancement's Annual Native Hawaiian Convention (Oct. 5, 2012).

and lifeways through traditional practices like *ho'oponopono* (peacemaking and conflict resolution), *la'au lapa'au* (traditional medicine), *lua* (martial arts), *oli* (chant), and *hula* (dance). These practices help Native Hawaiians address current socio-economic conditions, education, health, and resource management. By encouraging traditional practices as well as civic participation, community governance, and self-sufficiency, Native Hawaiians ensure that their culture will continue for many generations to come.

The Native Hawaiian people have become leaders in national efforts to ensure the survival and proliferation of indigenous languages, and are the first Native American peoples to develop and offer Native language education programming from preschool to Ph.D.[4] "For the past twenty years [Native Hawaiians] have been recognized as 'the go-to source of support' for Native American immersion and teaching methodology for endangered indigenous languages."[5]

Native Hawaiians suffer the same consequences of negative federal treatment as American Indians and Alaska Natives, yet Native Hawaiians do not have a means to address these issues

Native Hawaiian socio-economic and health conditions lag significantly behind other populations in Hawaii[6] and the nation, and remain comparable to other Native Americans. Native Hawaiians consistently exhibit higher rates of unemployment than the state average, and are increasingly underrepresented in white-collar jobs, while remaining overrepresented in blue-collar jobs.[7] In 1999, 14.1 percent of Native Hawaiian families living in Hawaii lived below the poverty level, nearly double the statewide rate of 7.6 percent.[8] In 2010, Native Hawaiians made up the largest percentage of people, 28.7 percent, who received homeless shelter services.[9] Native Hawaiian veterans also suffer disproportionately from the

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[4] *A Timeline of Revitalization,* E OLA KA 'OLELO HAWAII: THE HAWAIIAN LANGUAGE SHALL LIVE (Nov. 17, 2012). The two leading entities in Native American language revitalization are 'Aha Pūnana Leo, Inc. and the Liaison of Ka Haka 'Ula O Ke'elikōlani, Hawaiian language college established by the Hawaii State Legislature in 1997 at the University of Hawaii at Hilo. "These two entities lead a consortium of programs in Hawaii and also in the national Native American language immersion effort." *In Our Way: Expanding the Success of Native Language & Culture-Based Education: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (May 26, 2011) (statement of Nāmaka Rawlins, Liaison, Consortium 'Aha Pūnana Leo, Ka Haka 'Ula O Ke'elikōlani, Ke Kula 'o Nāwahīokalani'ōpu'u).

[5] *In Our Way: Expanding the Success of Native Language & Culture-Based Education: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (May 26, 2011) (statement of Nāmaka Rawlins, Liaison, Consortium 'Aha Pūnana Leo Ka Haka 'Ula O Ke'elik Iōlani, Ke Kula 'o Nāwahīokalani'ōpu'u). (noting that current federal educational legislation fails to take into account "the unique needs of Native American languages and the crisis of extinction facing Native American languages" and this legislation may actually suppress Native American languages in American education).

[6] "[T]he social statistics of Native Hawaiians, welfare rolls, incarceration rates, health issues are very, very significant and Hawaiians rank on the top of all of those social ills at this point, and have been for many, many years. And the legislation and NAHASDA and homeownership I think is an important step in providing stability." *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs,* 112th Cong. (Apr. 13, 2012) (statement of Richard Naiwieha Wurdeman, President, Native Hawaiian Bar Ass'n).

[7] Shawn Malia Kana'iaupuni, Nolan J. Malone & Koren Ishibashi, *ka huaka'i i mua: Findings from the 2005 Native Hawaiian Educational Assessment* (Mar. 2005).

[8] OFFICE OF HAWAIIAN AFFAIRS, NATIVE HAWAIIAN DATA BOOK 189, Table 2.48 (2011) [hereinafter *Data Book*].

[9] *Id.* at 251, Table 2.91.

consequences of military service, including higher rates of disorders related to combat exposure.[10]

The achievement outcomes for Native Hawaiian children are among the lowest throughout elementary and secondary school and the math achievement scores of Native Hawaiians continue to be significantly lower than those of other ethnic groups.[11] Less than half of Native Hawaiian adults hold either a bachelor's or graduate/professional degree as compared to all adults in Hawaii.[12]

Native Hawaiians have the highest incidence of lung, breast, and uterine cancer of any group in Hawaii.[13] In 2007, 11 percent of the Native Hawaiian population suffered from diabetes, compared to a rate of 6 percent for the rest of the State of Hawaii.[14] In 2009 and 2010, 69.6 percent of the Native Hawaiian population was considered overweight or obese as compared to the statewide average of 52.1 percent.[15]

Until there is a recognized government-to-government relationship between the Federal Government and the Native Hawaiian people, as there exists between the Federal Government and all other Native American peoples, Native Hawaiians will not have access to the federal policy of self-determination, nor will they be able to exercise self-governance, as do all other Native Americans. This policy was "intended to assure that all three groups of America's indigenous Native people, American Indians, Alaska Natives and Native Hawaiians have equal status under federal law."[16] Without access to this federal policy, without the opportunity to make decisions about their own affairs, resources, and futures, the disparities between Native Hawaiians and other Americans will persist and continue to worsen. Self-governance empowers Native people by recognizing, in policy and in practice, the right of all Native people to govern themselves.[17] "[S]elf-determination ensures the promise of Native self-sufficiency. It results in our continued ability to be productive and contribute to the well-being of our families, our communities, and our great nation."[18] The steady growth of sustained economic development across the nation among Native governments is evidence that the federal policy of self-determination does work.[19]

> [A] growing number of [Native] nations have broken out of the prevailing pattern of poverty. They have moved aggressively to take control of their futures and rebuild their

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[10] *Programs and Services for Native Veterans: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (May 24, 2012) (statement of D. Noelani Kalipi, President, TiLeaf Group) (citations omitted).

[11] Shawn Malia Kana'iaupuni, Nolan J. Malone & Koren Ishibashi, *ka huaka'i i mua: Findings from the 2005 Native Hawaiian Educational Assessment* (Mar. 2005).

[12] *Id.*

[13] DATA BOOK, *supra* note 8, at 559, Figure 7.49b & 562, Figure 7.49g, Figure 7.49h (for the years 1995–2000).

[14] *Id.* at 542, Table 7.42b & 544, Figure 7.42h.

[15] *Id.* at 598–599, Table 7.64.

[16] *Native Hawaiian Government Reorganization Act: Legislative Hearing on S. 1011 Before the S. Comm. on Indian Affairs,* 111th Cong. 16 (Aug. 6, 2009) (statement of Haunani Apoliona, Chairperson, Board of Trustees, Office of Hawaiian Affairs).

[17] *Advancing the Federal-Tribal Relationship through Self-Governance and Self-Determination: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (Sept. 20, 2012) (statement of D. Noelani Kalipi, President, TiLeaf Group).

[18] Sen. Daniel K. Akaka, Address at the Alaska Federation of Natives Convention (Oct. 19, 2012).

[19] *Advancing the Federal-Tribal Relationship through Self-Governance and Self-Determination: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (Sept. 20, 2012) (statement of D. Noelani Kalipi, President, TiLeaf Group).

> nations, rewriting constitutions, reshaping economies, and reinvigorating Indigenous communities, cultures, and families. Today they are creating sustainable, self-determined societies that work in all dimensions—economic, social and political.[20]

Native people across the country have benefitted from the United States' policy of supporting self-determination and self-governance for its indigenous peoples. "With a similar government-to-government relationship, Native Hawaiians could access the most powerful tools in federal law to perpetuate our culture and our traditions."[21]

Committee jurisdiction over American Indians, Alaska Natives and Native Hawaiians

This Committee has jurisdiction to study the unique problems of American Indian, Native Hawaiian, and Alaska Native people, and to propose legislation to alleviate these difficulties. These issues include, but are not limited to, Indian education, economic development, land management, trust responsibilities, health care, and claims against the United States. Additionally, most legislation proposed by Members of the Senate that specifically pertains to American Indians, Native Hawaiians, or Alaska Natives is under the jurisdiction of the Committee. This Committee has exercised jurisdiction over matters related to Native Hawaiians since it was organized in 1977. The Committee has concluded that the Native Hawaiian people are a distinctly Native community that fall within the scope of Congress's power to legislate with respect to "Indian Tribes."[22]

Congressional authority over Indian affairs

Since the founding of the United States, Congress has exercised a broad constitutional authority over Indian affairs while simultaneously recognizing the sovereignty possessed by the Native people as the original inhabitants of this nation who occupied and exercised dominion and control over the lands which eventually became the United States.[23] "It is well-established that 'the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court has] consistently described as 'plenary and exclusive.'"[24]

The Constitution vests Congress with the authority to address the conditions of the indigenous, Native people of the United States, and the Supreme Court has upheld this congressional au-

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[20] *Id.* (quoting Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations, One Works, the Other Doesn't, in* REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 1, 6 (Miriam Jorgensen, ed., 2007)).

[21] Sen. Daniel K. Akaka, Speech at the Annual Native Hawaiian Convention (Aug. 25, 2011).

[22] U.S. CONST. art. I, § 8, cl. 3.

[23] Delaware Tribal Business Council v. Weeks, 430 U.S. 73 (1977); United States v. Sioux Nation, 448 U.S. 371 (1980); U.S. v. Lara, 541 U.S. 193, 203 (2004). Congress' plenary power over Indian affairs includes the power to recognize, terminate and restore the tribal status of Indian tribes. *Lara,* 541 U.S. at 201–2.

[24] *Lara,* 541 U.S. at 200.

thority under the Indian Commerce Clause,[25] the Treaty Clause,[26] the Supremacy Clause,[27] the Property Clause,[28] and the War Powers Clause.[29] Congress may exercise its power to rationally promote the welfare of the Native people of the United States. "These powers comprehend all that is required for the regulation of our intercourse with Indians."[30]

"Indians" and "tribes": political and legal distinctions, not cultural or racial designations

American Indians, Alaska Natives, and Native Hawaiians are often generally referred to as "Native Americans," and are cited in the Constitution as "Indians" or "Indian Tribes."[31] As indigenous, or Native, peoples, American Indians, Alaska Natives, and Native Hawaiians have collective and individual rights under international and domestic law, including rights of self-determination and self-governance.

Although the aboriginal tribes, nations, and peoples, over which Congress exercised its Indian affairs authority were defined in part by communities of common ancestry, the unique constitutional significance of such entities derives from their separate existence as independent political communities.[32] Native people and groups were nations,[33] and the relationship between the United States and its Native peoples reflected a political understanding between sovereigns. The Supreme Court has repeatedly made clear that Indian tribes are the political and familial heirs to "once-sovereign

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[25] U.S. CONST. art. I, § 8, cl. 3. Congressional authority over Indian affairs does not emanate solely from the Commerce Clause's reference to "Indian Tribes." Rather, the Constitution implicitly gives Congress the power to manage Indian affairs more generally. *See, e.g.*, Board of County Comm'rs of Creek County v. Seber, 318 U.S. 705, 715 (1943); United States v. Sandoval, 231 U.S. 28, 45–46 (1913); United States v. Kagama, 118 U.S. 375, 383–84 (1886).

[26] U.S. CONST. art. II, § 2, cl. 2.

[27] U.S. CONST. art. IV, § 2.

[28] U.S. CONST. art. IV, § 3, cl. 2.

[29] U.S. CONST. art. I, § 8, cl. 11.

[30] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

[31] Jon Van Dyke, *The Political Status of the Native Hawaiian People,* 17 YALE L. & POL'Y REV. 95, 119 (1998). Just as there is no universally agreed-upon legal defmition of "Indian," there is also no universal "definition of what constitutes a Native nation, in part because each community defines itself differently and because the U.S. government in its relations with tribes has operated from conflicting sets of cultural and political premises across time." DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 3 (3d ed. 2011) (citing the Indian Self-Determination Act of 1975, 25 U.S.C. § 450e, which defines an Indian tribe as "any Indian tribe, band, nation, or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.") (citations omitted). *See also* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 582 n.4 (1979) ("The scope of the phrase 'Indian tribe' may vary from statute to statute.") (citing United States v. Sandoval, 231 U.S. 28, 48–49 (1913)). "Although no universal definition exists, many statutes give definitions for purposes of particular laws, federal agencies like the Bureau of Indian Affairs (BIA) generate their own definitions, numerous courts have crafted definitions, and the term tribe is found—though not defined—in the Constitution's commerce clause." WILKINS & STARK, *supra* note 31, at 3. "Federal law ordinarily uses the term 'Indian tribe' to designate a group of native people with whom the federal government has established some kind of political relationship." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 137 (2005 ed.).

[32] *Worcester,* 31 U.S. at 559.

[33] *See e.g.,* 42 U.S.C. § 11701(1) ("The Congress finds that: Native Hawaiians comprise a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago whose society was organized as a Nation prior to the arrival of the first nonindigenous people in 1778."). *See also Native Hawaiian Government Reorganization Act of 2009: Legislative Hearing on S. 1011 Before the S. Comm. on Indian Affairs,* 111th Cong. 66 (Aug. 6, 2009) (statement of Steven Joseph Gunn, Attorney and Adjunct Professor of Law, Washington Univ. in St. Louis) ("In regard to the term Indian Tribe, it has been used synonymously or interchangeably with the term Indian Nation. [Alexander] Hamilton in Federalist 24 talked about regulating trade with Indian tribes and spoke of them as Indian nations. And [in] *Worcester v. Georgia,* Chief Justice Marshall talked about the words treaty and nation as being Anglo words of our choice, but clearly words that are applicable to Indian tribes.") (citations omitted).

political communities," and not "racial group[s]."[34] The Supreme Court has also repeatedly applied these concepts of "Indian" and "tribe" to a wide variety of Native American communities, recognizing both the constant evolution of Native communities and that the questions of whether and how to treat these evolving communities are ones assigned to Congress under the Constitution.[35]

To the framers of the Constitution, an "Indian tribe" simply meant a distinct group of indigenous people with their diversity of unique cultures, languages and traditions—each with their own ways of governing themselves.[36] "The consistent use of these terms

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[34] United States v. Antelope, 430 U.S. 641, 646 (1972); *see* Fisher v. District Ct. of Sixteenth Jud. District of Mont., 424 U.S. 382, 389 (1976); Morton v. Mancari, 417 U.S. 535, 553–54 (1974); Elk v. Wilkins, 112 U.S. 94, 109 (1884); *see also* Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993); United States v. Mazurie, 419 U.S. 544, 557 (1975).

[35] Concerning Native American communities, the Court has held that "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, and not by the courts." *Sandoval,* 231 U.S. at 46 (citations omitted). For example, the Supreme Court approved Congress' tribal designation for the Pueblo Indians of New Mexico in 1913. Prior to the United States' acquisition of New Mexico, the Pueblo Indians were Mexican citizens. They became citizens of the United States through the Treaty of Guadalupe Hidalgo, U.S.-Mex., 9 Stat. 922, T.S. No. 207 (1848). "The Court determined that the Pueblos fell with the scope of Congress' Indian commerce power and could be recognized as 'Indians.'" Derek H. Kauanoe & Breann Swann Nu'uhiwa, *We Are Who We Thought We Were: Congress' Authority to Recognize a Native Hawaiian Polity United by Common Descent,* 13 ASIAN-PAC. L. & POL'Y J. 117, 150 (2012) (citing *Sandoval,* 231 U.S. at 45–46). Decisions like these were noteworthy because the Pueblo Indians, once citizens of Mexico, had been already been declared "non-Indians" by the Court in 1877 because they differed in many respects from the concept of "Indian tribe" that prevailed at the time. Despite their differences, the Pueblo Indians lived in "distinctly Indian communities" and Congress acted properly under the Indian Commerce Clause in determining that they were "dependent communities entitled to its aid and protection, like other Indian tribes." *See Sandoval,* 231 U.S. at 46–47; United States v. Candelaria, 271 U.S. 432, 439, 442–43 (1926). The United States now regards Alaska Native groups as Indian tribes, despite earlier court holdings and Attorney General Opinions to the contrary. Kauanoe & Swann Nu'uhiwa, *supra* note 35, at 150 (citations omitted). In 1978, the Court again recognized Congress' authority to create a reservation for the benefit of the Choctaw Indians in Mississippi, even though (1) they were "merely a remnant of a larger group of Indians" that had moved to Oklahoma; (2) "federal supervision over them had not been continuous"; and (3) they had resided in Mississippi for more than a century and had become fully integrated into the political and social life of the State. United States v. John, 437 U.S. 634, 652–53 (1978). The Court deferred to Congress' determination that they were a "tribe for the purposes of federal Indian law" even though the tribe had only recently organized into a distinct Indian community. *Id.* at n. 20.

[36] *See Worcester,* 31 U.S. (6 Pet.) at 519, 559, 583 (equating Indian tribe and Indian nation and defining "nation" as a "people distinct from others" and "as being vested with rights which constitute them a state, or separate community"). The term "Indian" is often used interchangeably with "aboriginal," yet "[t]here is no single definition of the term *Indian.*" STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS 18 (3d ed. 2004)-(emphasis in original). "In 1846, in a case called United States v. Rogers, the Supreme Court described Indian tribes as 'aboriginal tribes of Indians.' In 1867, the United States enacted the Treaty of Cession with Russia, and it spoke of Alaska Natives and compared their treatment to that of the 'aboriginal tribes' of the United States. So we have used the word Indian and aboriginal interchangeably, and clearly, Native Hawaiians are the aboriginal and Native peoples of the Hawaiian Islands." *Native Hawaiian Government Reorganization Act of 2009: Legislative Hearing on S. 1011 Before the S. Comm. on Indian Affairs,* 111th Cong. 66 (Aug. 6, 2009) (statement of Steven Joseph Gunn, Attorney and Adjunct Professor of Law, Washington Univ. in St. Louis) (citing United States v. Rogers, 45 U.S. (1 How.) 567, 571 (1846)). *See also* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 9 (5th ed. 2009) ("'Indian' is another term the meaning of which varies according to the purpose for which the definition is sought.") (citing FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 2 (1942)). The use of the term "Indian" is credited to Christopher Columbus when he wrongly called the indigenous people of the Bahamas archipelago "Indians" because he incorrectly believed he had discovered the East Indies. "Believing he [Columbus] has discovered his conjectured shorter sea route to the Indies, he naturally calls the first people he encounters *los Indios*—Indians—and claims their island for the Spanish Crown. . . . Regardless of whether Columbus thought he had landed among the East Indies or among islands near Japan or even elsewhere near the Asian continent, he would probably have used the same all-encompassing term for the natives, because *India* stood as a synonym for all of Asia east of the river Indus at the time and *Indies* was the broadest designation available for all the area he claimed under royal patent." ROBERT A. WILLIAMS, JR., SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION 181 (2012) (quoting Robert Berkhofer, Jr., *The White Man's Indian: Images of the American Indian from Columbus to the Present* 5 (1979)) (emphasis in original).

'Indian' and 'tribe' results in the Federal Government treating all federally-recognized Native peoples equally, with the same tools to address the unique needs and priorities in their own communities."[37]

> The fact that they are from different regions of the United States and speak different languages does not change the fact that they are indigenous peoples with whom the United States executed treaties, took lands into trust on their behalf, and has a special responsibility to promote their welfare through the federal policy of self-governance and self-determination. The reference to native groups as "Indians" or "tribes" is a reflection of their status as indigenous peoples.[38]

Because Native Hawaiians today have a direct historic, cultural, and land-based link to the indigenous people who inhabited and exercised sovereignty over the Hawaiian Islands before the first European contact in 1778, and because they are determined to preserve and to pass on to future generations their Native lands and their distinct culture, the Native Hawaiian community falls squarely within the scope of Congress's plenary power to legislate with respect to Indian tribes.

Congressional authority to provide for the reorganization and recognition of Indian tribes

Congress has frequently enacted legislation that provides for the reorganization of Indian tribes and the recognition of Native sovereigns pursuant to its Indian affairs powers. For example, the Indian Reorganization Act of 1934 provides that "[a]ny Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws . . . which shall become effective when—(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary [of the Interior] under such rules and regulations as the Secretary may prescribe; and (2) approved by the Secretary."[39]

On numerous occasions, Congress has enacted specific statutes that restore federal recognition of previously terminated tribes. There are many tribal restoration acts throughout Title 25 of the U.S. Code, involving interim council elections set up and run by the Secretary, with participation based on statutory criteria that include lineal descent or required ancestry, as well as other measures of connection to the community. Some of these statutes establish a process for nominating and electing members of an interim council or body that has responsibility for functioning as the acting tribal government and developing proposed constitutions and bylaws to be voted on by the members in an election conducted by the Secretary.[40] In addition, courts have relied on treaties or laws that

[37] Sen. Daniel K. Akaka, Final Speech to the Native Hawaiian Convention (Oct. 5, 2012).
[38] *Advancing the Federal-Tribal Relationship through Self-Governance and Self-Determination: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (Sept. 20, 2012) (statement of D. Noelani Kalipi, President, TiLeaf Group).
[39] 25 U.S.C. § 476(a).
[40] 25 U.S.C. § 711.

promise to provide for tribal self-government,[41] as well as statutes that prescribe in detail the structure and operation of tribal governments.[42]

Each of the 566 federally recognized tribes has had its own unique political history with the United States. "While no Native political history is perfectly analogous to the political history of Native Hawaiians, it is also true that no Native political history is perfectly analogous to any other Native political history."[43] Despite their differences, each of these communities falls within the scope of Congress' authority.[44]

The federal trust responsibility to the Native Hawaiian people

The trust doctrine is one of the most important principles in Federal Indian law.[45] In treaties, Native nations relinquished certain rights in exchange for promises from the federal government. The trust responsibility is the Federal Government's obligation to honor those promises. This obligation is a legal one under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes.[46] Since 1831, the United States Supreme Court has recognized the existence of a trust relationship between the United States and Indian tribes.[47] Over the past century, the Supreme Court has repeatedly reaffirmed this "distinctive obligation of trust incumbent upon the Government" in its dealings with Indians.[48]

Nearly "every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the Federal Government."[49] Within the framework of this trust relationship, Congress has enacted hundreds of statutes defining the contours of the United States' fiduciary responsibilities. Statutes, like treaties, can create a trust duty. As extensions of treaties, statutes are often the vehicles by which Congress creates the programs and services necessary to fulfill its treaty obligations.[50]

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[41] *See* Ex Parte Crow Dog, 109 U.S. 556, 568 (1883) (discussing a federal pledge in a treaty to "secure to" a tribe "an orderly government, by appropriate legislation thereafter to be framed and enacted").

[42] *See* Fletcher v. United States, 116 F.3d 1315, 1327 (10th Cir. 1997) (discussing approving and invoking an act in which "Congress . . . prescribed the form of tribal government for the Osage Tribe," including "establish[ing] the offices of a principal chief, an assistant principal chief, and an eight-member Osage tribal council, and requir[ing] that elections be held every four years to fill those offices").

[43] Kauanoe & Swann Nu'uhiwa, *supra* note 35, at 151.

[44] *See, e.g.,* United States v. Lara, 541 U.S. 193, 196 (2004) ("We must decide whether Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribes' inherent legal authority. We conclude that Congress does possess this power.").

[45] *See, e.g.,* AMERICAN INDIAN POLICY REVIEW COMMISSION, 2 FINAL REPORT, APPENDIXES, AND INDEX SUBMITTED TO CONGRESS (1977) ("The purpose behind the trust is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs that are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.").

[46] Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942).

[47] This moral obligation was first discussed by Chief Justice John Marshall in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

[48] *Seminole Nation,* 316 U.S. at 296; *see* United States v. Mitchell, 463 U.S. 206, 225–26 (1983) (noting "the undisputed existence of a general trust relationship between the United States and the Indian people").

[49] COHEN, *supra* note 31, at 420–21.

[50] Stephen L. Pevar, *The Federal-Tribal Trust Relationship: Its Origin, Nature, and Scope* 2–3 (2008) ("Many [statutes] give a federal agency elaborate control over tribal property, pre-

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Native Hawaiians are the indigenous, Native people of Hawaii with whom the United States has a trust relationship. The terms "Native Hawaiian," "Hawaiian," and "native Hawaiian" are used interchangeably in numerous laws by federal, state, and local governments to refer to the indigenous people of Hawaii. Congress has consistently recognized its political, legal, and trust relationship with the Native Hawaiian people. In 1920, Congress began enacting laws to meet its trust responsibility to the Native Hawaiian people, beginning with passage of the Hawaiian Homes Commission Act (HHCA).[51] Since passage of the HHCA, Congress has repeatedly recognized the distinct status of Native Hawaiians. For over 90 years, the United States has consistently interacted with Native Hawaiians based on the same political and legal relationship it has maintained with all America's Native peoples.

The United States has acknowledged this relationship and its duty to the Native Hawaiian people, and in fact has codified its duty by enacting over 150 statutes.[52] Pursuant to its authority under the Constitution, Congress has included Native Hawaiians in numerous laws enacted to benefit other Native peoples in the United States and, in other statutes, has established separate programs specifically for Native Hawaiians, including. the Native Hawaiian Education Act and the Native Hawaiian Health Care Improvement Act.[53] The findings in both of these acts specifically refer to the existence of a trust relationship between the Native Hawaiian people and the United States. By enacting hundreds of statutes and other actions, the Federal Government has assumed the special responsibilities of a trust relationship toward Native Hawaiians—as it has for American Indians and Alaska Natives.

The struggles of Native Hawaiians to protect their rights as an indigenous people, and secure a land and natural resource base to exercise those rights, echo the historic struggle of all Native Americans. As a result, in the early 1970s, Congress began to include Native Hawaiians in statutes establishing programs designed to provide services for American Indians and Alaska Natives. Native Hawaiians are included in over 150 congressional acts providing as-

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cluding the tribe from managing these resources on their own. The Supreme Court recognized in United States v. Mitchell, 463 U.S. 206 (1983), that when this arrangement occurs, the agency then has the *fiduciary* duty to manage that property wisely and in the tribe's best interests.") (emphasis in original).

[51] 42 Stat. 108 (1921). This Act is now part of Hawaii's State Constitution. *See* Haw. Const. art. XII.

[52] Van Dyke, *supra* note 31, at 106 (noting that the following laws are among those that classify Native Hawaiians as Native Americans and include them in Native American benefit programs: the National Historic Preservation Act § 4006(a)(6), 16 U.S.C.A. § 470a(d)(6); the National Museum of the American Indian Act §§ 1–10, 13, 16, 20 U.S.C. §§ 80q–80q–12, 80q–15 (1994); the Drug Abuse Prevention, Treatment and Rehabilitation Act § 4106(d), 21 U.S.C. § 1177(d) (1994); Native American Languages Act, 25 U.S.C. §§ 2901–2912 (1994); the Workforce Investment Act of 1998 § 166, 29 U.S.C.A. § 2911 (West Supp. 1998); the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1994); the Native American Programs Act of 1974, 42 U.S.C. §§ 2991–2992 (1994); the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act § 311(c)(4), 42 U.S.C. § 4577(c)(4) (1994). For a sampling of other recent laws aimed at benefiting Native Hawaiians economically and culturally, see, for example, 20 U.S.C.A. § 4441 (West Supp. 1998); 20 U.S.C.A. § 7118 (West Supp. 1998); the Native Hawaiian Education Act, 20 U.S.C.A. §§ 7901–7912 (West Supp. 1998); the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001–3013 (1994); 42 U.S.C. § 254s (1994); the Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. §§ 11701–11714 (1994); the Cranston-Gonzalez National Affordable Housing Act § 958, Pub. L. No. 101–625, 104 Stat. 4079, 4422 (1990). *See also,* Native Hawaiian Education Act § 9212, 20 U.S.C.A. § 7912(1) (West Supp. 1998); National Museum of the American Indian Act § 16(11), 20 U.S.C. § 80q–14(11) (1994); Native American Graves Protection and Repatriation Act § 2(10), 25 U.S.C. § 3001(10) (1994)).

[53] Native Hawaiian Education Act, 20 U.S.C. §§ 7511–7517; Native Hawaiian Health Care Improvement Act, 42 U.S.C. §§ 11701–11714.

sistance to Native people for health, housing, welfare, and education often on an equal basis with that provided to members of federally-recognized Indian tribes. That Congress has included Native Hawaiians in legislation promulgated primarily for the benefit of American Indians, in addition to enacting legislation solely for the benefit of Native Hawaiians is evidence of a continuing guardian-ward relationship between Native Hawaiians and the Federal Government. Congress enacted these 150 laws in order to carry out its responsibility to protect Native Hawaiian rights, address Native Hawaiian concerns, and provide resources to meet the needs of the Native Hawaiian people.[54]

Despite these explicit inclusions and congressional actions, Native Hawaiians are still not included in statutes that advance self-determination and provide a meaningful right to exercise self-governance. Although there are historical distinctions that separate Native Hawaiians from other Native Americans, none of these differences adequately explain the Federal Government's failure to assume responsibility for the protection of Native Hawaiian people, their land, and their political status. Native Hawaiians remain the only major group of Native Americans with whom the nation has not reconciled historic claims.[55]

Many programs administered by the Bureau of Indian Affairs (BIA) are premised on the existence of a tribal government that exercises powers of self-governance. Because the Native Hawaiian government was illegally overthrown with the participation of the United States, the Native Hawaiian people were divested of their ability to be self-governing. "As a result of these actions by the United States—its participation in the overthrow and its ultimate annexation of Hawaii—the United States was instrumental in depriving Native Hawaiians of their sovereignty and their national lands."[56] The Native Hawaiian people have a great need for these BIA programs, but cannot take advantage of them because the Native Hawaiian people no longer have a centralized governmental entity with which the BIA can consult.[57]

Although the United States has applied the same federal policies, and many of the same federal laws, to the Native Hawaiian people as it has applied to other Native Americans, it has not permitted

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[54] There are also 12 statutes that specifically require the Federal Government to consult with Native Hawaiian organizations in carrying out its trust responsibility. *Infra* notes 171 & 172.

[55] Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law,* 98 CAL. L. REV. 1165, 1194 (2010). "A closer examination of the historical context, however, shows that the denial of Native Hawaiian sovereignty and property followed the familiar process of treating indigenous peoples as a race in need of reformation rather than a polity with political rights. Measures that seek to restore a portion of what this racialization took away should not falter under the guise of equal protection." *Id.*

[56] *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs,* 112th Cong. (Apr. 13, 2012) (statement of Melody Mackenzie, Associate Professor of Law and Director of Ka Huhi Ao Center for Excellence in Native Hawaiian law at University of Hawaii, Richardson School of Law).

[57] HISTORY, JURISDICTION, AND A SUMMARY OF LEGISLATIVE ACTIVITIES OF THE S. SELECT COMM. ON INDIAN AFFAIRS, 95TH CONG. 24 (1977–1978). However, just as tribes have been able to maintain a trust relationship with the Federal Government through tribal councils or similar governing bodies, Native Hawaiians have been able to maintain this relationship through their homestead associations. Homestead associations have been vital to the implementation of the HHCA as Congress intended. "[S]elf-determination and self-governance is [sic] expressed through the existence of organizations governed by beneficiaries [of the HHCA] or homesteaders themselves. These homestead associations have existed for decades, and have representative leadership through democratically elected processes for each homestead land area on different islands within the state." *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs,* 112th Cong. (Apr. 13, 2012) (statement of Michelle Kauhane, Deputy Director, State of Hawaii, Department of Hawaiian Home Lands).

the Native Hawaiian people to become an organized, self-governing people. As a result, Native Hawaiians continue to suffer the consequences of the illegal overthrow of their indigenous government.

Self-governance: an element of the federal trust responsibility

The situation in Indian country within the United States paralleled the colonial expansion occurring abroad.[58] Initially the idea was to remove Indians to the West—outside of the settled states. As the non-Indian settlement reached the central continent and began the migration toward California and the Pacific Northwest, the logistics of relocating tribes outside of state boundaries became increasingly problematic.[59]

> As a nation we have changed course many times in the policies governing our dealings with Native people. We began with treaties with Native people, and then we turned to war. We enacted laws recognizing Native governments, and then we passed laws terminating our relationships with those governments. We repudiated our termination policy and restored our relationships with Native governments. Finally for the last 39 years we adopted a policy of recognizing and supporting the rights of this nation's First Americans to self-determination and self-governance.[60]

After more than a century of failed efforts to improve the lives of America's indigenous people, the only strategy that has worked is the federal promotion of tribal self-government, known as the policy of "self-determination."[61] Self-determination is about improving the well-being of the indigenous people in the United States, the "poorest and, arguably, historically most oppressed and disempowered people."[62]

The federal policy of self-determination recognizes the distinctive cultural, political, and economic rights of all Native nations, and encourages the political autonomy of those Native nations. Despite its blemished treaty rights record, the United States has shown an ongoing belief in the validity of treaties and agreements by maintaining federal policies that affirm nation-to-nation relationships; enacting federal laws that support tribal self-governance and tribal judicial systems; issuing judicial decisions that recognize the inherent sovereignty of all Native Americans; and by presidential ac-

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[58] Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes,* 34 ARIZ. ST. L.J. 113, 164–65 (2002). "This was the period in which the United States acquired Cuba and the Philippines through the Spanish-American War, engaged in gunboat diplomacy in the Caribbean basin and Latin America, acquired the rights to build the Panama Canal by taking Panama away from Columbia, and overthrew the internationally-recognized indigenous monarchy of the Republic of Hawaii, ultimately annexing Hawaii to the United States. In short, it was the period when the American will toward empire reached its peak. During this period, in order to justify the expanding American colonial empire, both the political branches and the federal judiciary virtually ignored the constitutional principles upon which the nation was founded. Yet, the colonial expansion of American authority continued to raise thorny constitutional problems that the Supreme Court could not easily resolve by resorting to the first principles of the United States Constitution. Ultimately, it gave up trying." *Id.* at 164 (citations omitted).

[59] *Id.* at 164–65.

[60] *Native Hawaiian Government Reorganization Act: Legislative Hearing on S. 1011 Before the S. Comm. on Indian Affairs,* 111th Cong. 5 (Aug. 6, 2009) (statement of Senator Daniel K. Inouye).

[61] Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Successful Policy* 13 (Joint Occasional Papers on Native Affairs (JOPNA) Working Paper No. 1, 2010).

[62] *Id.* at. 14.

tions that carve out a path for positive intergovernmental relations. Self-determination is more than a guiding principle; it is a full-fledged right of all peoples that can be invoked by its holders to claim their inherent sovereignty.

Since his first day in office, President Obama has worked to strengthen the government-togovernment relationship between the United States and Native governments in order to improve the quality of life for all Native Americans, including Native Hawaiians.[63] The President and his Administration have made tremendous progress addressing major concerns in Indian country.[64] In 2009, the President signed a memorandum directing federal agencies to fully implement Executive Order 13175, "Consultation and Coordination with Tribal Governments." In 2010, in response to calls from many tribal leaders, President Obama announced the United States' support of the United Nations Declaration on the Rights of Indigenous Peoples (Declaration).[65] The Declaration was initiated in 1976, primarily by American Indian leaders who "turned to the international community principally because of the longstanding failure of the United States courts and federal law to recognize that Indian nations and other [N]ative peoples in this country are entitled to constitutional rights and to equality before the law."[66] The Declaration includes numerous references to the right of indigenous peoples to continue their languages, cultures, and traditions. Support of the Declaration by the United States goes hand-in-hand with the United States' commitment to address the consequences of the history of Native American people. As President Obama recognized, "few have been more marginalized and ignored by Washington for as long as Native Americans—our First Americans."[67]

"It is time for the United States to give [Native Hawaiians] access to its best policies on Native peoples, not just the legacies of the worst ones."[68] The federal reaffirmation of Native Hawaiian

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[63] The Obama Administration supports S. 675. *See* Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples 4 (Dec. 9, 2010). Other proponents that have expressed strong support for the Native Hawaiian Government Reorganization Act include Attorney General Eric Holder, Interior Secretary Ken Salazar, Interior Assistant Secretary Kevin Washburn, the current Governor of Hawaii, Neil Abercrombie, the entire Hawaii congressional delegation, the Hawaii State Office of Hawaiian Affairs, the American Bar Association and the National Congress of American Indians.

[64] This includes improving the quality of care offered by the Indian Health Service (IHS) by signing into law the Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010); promoting economic development in Indian country by providing more than $3 billion through the Recovery Act, Pub. L. No. 111–5, 123 Stat. 115 (2009), to help tribal communities renovate schools on reservations, spur job creation in tribal economies, improve housing and energy efficiency, and support health facilities and policing services; and making tribal communities safer through the Tribal Law and Order Act (TLOA), Pub. L. No. 111–211, 124 Stat. 2258 (2010).

[65] G.A. Res. 61/295, U.N. GAOR, 61st Sess., Supp. No. 49, U.N. Doc. 07–58681 (Oct. 2, 2007).

[66] *Setting the Standard: Domestic Policy Implications of the U.N. Declaration on the Rights of Indigenous Peoples: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. 13–14 (June 9, 2011) (statement of Robert T. Coulter, Executive Director, Indian Law Resource Center) (noting that the conditions that gave rise to the Declaration have not improved and Native nations in this country continue to live with a system of Federal law that is unconstitutional, discriminatory, and unworkable, analogous to the "separate but equal" legal doctrine). "Congress should embrace the Declaration, because it is American. It is based on American values. It is American in its origin." *Id.* at 14.

[67] Remarks by President Obama during the Opening of the Tribal Nations Conference & Interactive Discussion with Tribal Leaders (Nov. 5, 2009).

[68] *Advancing the Federal-Tribal Relationship through Self-Governance and Self-Determination: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (Sept. 20, 2012) (statement of Sen. Daniel K. Akaka, Chairman, S. Comm. on Indian Affairs) (noting how "self-deter-

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sovereignty, acknowledged through the same self-governance programs that have enabled other tribes to generate revenues through their own business enterprises, operate court and effective law enforcement systems, and design school curricula to better meet the needs of Native students, would do the same for the Native Hawaiian people. The federal policy of self-determination has enabled Native nations to build strong economies, reverse decades of culture and language loss, and to tailor programs and services to better meet the needs of their people.[69]

Congress' commitment to parity among all Native Americans

Congress enunciated its policy of parity in the federal treatment of Native nations when it amended the IRA in 1994 in order to prohibit the Federal Government and its agencies from taking any action that "classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes."[70] Signed into law by President Clinton on May 31, 1994, the amendments overruled prior practices of classifying tribes based on date of their date of recognition or manner of recognition.[71] Congress made it clear that "if a tribe is federally recognized, they possess the full panoply of powers of sovereign Indian tribes unless specifically divested by treaty or Congressional action."[72] "Tribe" was thus defined to include all federally recognized tribes in all federal statutes affecting Indian tribal governments.[73]

The 1994 amendments to the IRA put an end to the discriminatory practices that had been developing within the Department of the Interior (DOI).[74] DOI began to classify tribes as either "his-

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mination and self-governance has proven to be the only federal policy that has worked for Native communities").

[69] *Id.*

[70] Pub. L. No. 103–263, 108 Stat. 707 (codified at 25 U.S.C. § 476(f)–(g)).

[71] Memorandum from John D. Leshy, Solicitor, Office of the Solicitor, U.S. Dep't of the Interior, to Ada E. Deer, Assistant Secretary, Office of Indian Affairs, U.S. Dep't of the Interior 3 (July 13, 1994).

[72] *The Indian Reorganization Act—75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination: Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. 45 (statement of Steven J.W. Heeley, Policy Consultant, Akin, Gump, Strauss, Hauer & Feld, LLP (noting also that this "artificial distinction represents a significant departure from the Congressional intent and purpose of the IRA and is reminiscent of the very policies of assimilation that the IRA was intended to address")). "Subsequent amendments to the IRA also addressed the category of tribes that chose not to . . . organize under IRA constitutions, and to make clear that federally recognized Indian tribes had the right to not adopt an IRA constitution if they so chose." *Id.* at 46. *See also* H.R. Rep. No. 103–781 at 3 (1994) as reprinted in 1994 USCCAN 3768.

[73] Leshy, *supra* note 71, at 3–7 (citing the broad defmition of "tribe" in the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301(1): "any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government"). In his memorandum, Leshy also notes the broad defmition of "tribe" in many other federal statutes, including, Indian Land Consolidation Act, 25 U.S.C. § 2201(1); the Indian Child Welfare Act, 25 U.S.C. § 1903(8); the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(e); and the Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. § 3202(10).

[74] *The Indian Reorganization Act—75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination: Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. 35–41 (June 23, 2011) (testimony of Steven Heeley, Policy Consultant, Akin, Gump, Strauss, Hauer & Feld, LLP (citing 25 U.S.C. § 476(f) and noting that DOI's practice came to light when the Pascua Yaqui Nation of Arizona made efforts to amend their tribal constitution)). "Strangely, although the Department was apparently making this distinction amongst tribes, it appears that the Department never notified the affected tribes or the Congress of their new status. Had they done so, we would have acted to correct this unauthorized arbitrary and unreasonable differentiation of tribal status long ago. . . . [O]ur amendment would void any past determination by the Department that an Indian tribe is created and would prohibit any such determinations in the future. . . . [O]ur amendment will correct any instance where any federally recognized Indian tribe has been classified as 'created' and that it will prohibit such classifica-

toric," and entitled to the full panoply of inherent sovereign powers not otherwise divested by treaty or congressional action, or "created," and therefore possessing limited sovereign powers.[75] By enacting the 1994 amendments and broadening the definition of "tribe" in federal statutes, Congress explicitly rejected DOI's classifications.[76] The amendments ensured that DOI, as well as all other federal agencies, upheld the original intent of the IRA to promote tribal sovereignty by allowing all federally recognized tribes to organize and self-govern.[77]

Native Hawaiian self-governance: a brief history

The Hawaiian Islands were isolated from outside contact for centuries before 1778, when the British explorer Captain James Cook arrived. The Native Hawaiian people were an independent, self-governing society long before contact with Europeans and Americans.[78] The Native Hawaiian people thrived in a "highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion."[79]

High chiefs (*ali'nui*) controlled a district of an island or an entire island. Local chiefs (*ali'i*) controlled specific lands or resources (*konohiki*), and commoners (*maka'ainana*) worked the land for the benefit of all. Lands were divided into parcels enclosed by boundaries that radiated from a point on a mountain top to the sea. The parcel was known as an *ahupua 'a,* an economically self-sufficient

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tions from being imposed or used in the future. Our amendment makes it clear that *it is and has always been* Federal law and policy that Indian tribes recognized by the Federal Government stand on an equal footing to each other and to the Federal Government." 140 CONG. REC. S6147 (daily ed. May 19, 1994) (statement of Sen. Daniel K. Inouye (D-Hawaii) (emphasis added).

[75] "Such an artificial distinction represent[ed] a significant departure from the Congressional intent and purpose of the IRA and [was] reminiscent of the very policies of assimilation that the IRA was intended to address. . . . In enacting Public Law 103–263 [the 1994 IRA amendments], Congress rejected the artificial distinction of historic and created tribes and made clear that any regulation, rule or administrative decision that classifies, enhances or diminishes the privileges and immunities available to a federally recognized tribe relative to other tribes shall have no force and effect." *The Indian Reorganization Act—75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination: Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. 36 (testimony of Steven Heeley, Policy Consultant, Akin, Gump, Strauss, Hauer & Feld, LLP (citing 25 U.S.C. § 476(0)).

[76] Leshy, *supra* note 71, at 7. Leshy also noted that the 1994 amendments to the IRA were not "confined to the IRA," but were "intended to address all instances where such categories or classifications of Indian tribes have been applied and any statutory basis which may have been used to establish, ratify, or implement the categories or classifications." *Id.* at 3, n.3 (quoting 140 CONG. REC. S6147 (daily ed. May 19, 1994) (statement of Sen. John McCain)).

[77] Sen. Daniel K. Inouye (D–Hawaii), who co-sponsored the legislation, told Congress that "The amendment which we are offering . . . will make it clear that the Indian Reorganization Act does not authorize or require the Secretary to establish classifications between Indian tribes. . . . [I]t is and has always been Federal law and policy that Indian tribes recognized by the Federal Government stand on an equal footing to each other and to the Federal Government. . . . Each federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes and has the right to exercise the same inherent and delegated authorities. This is true without regard to the manner in which the Indian tribe became recognized by the United States or whether it has chosen to organize under the IRA. By enacting this amendment . . ., we will provide the stability for Indian tribal governments that the Congress thought it was providing 60 years ago when the IRA was enacted." 140 CONG. REC. S6147 (daily ed. May 19, 1994).

[78] The history of Native Hawaiian self-governance forms the foundation for the exercise of self-governing authority by Native Hawaiians today, originating from the sovereignty exercised by Native Hawaiians prior to European and American suppression of that authority. In federal law, this is known as "inherent sovereignty." *See* United States v. Wheeler, 435 U.S. 313, 320, 322–23 (1978).

[79] Jon M. Van Dyke, *supra* note 31, at 95 (quoting Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103–150, 107 Stat. 1510, 1510 (1993) [hereinafter *Apology Resolution*]). The Senate passed the Apology Resolution on Oct. 27, 1993, the House passed it on Nov. 15, 1993, and President Clinton signed it on Nov. 23, 1993. A joint resolution is passed by a simple majority in both houses of Congress and is signed by the President.

tract of land, which included farmland, forest resources, fresh water, and access to the sea. The lands were held in common for the benefit of all. By 1810, not long after the first European contact, King Kamehameha I unified the Hawaiian Islands. The unified Hawaiian Kingdom preserved the communal land tenure system and created a centralized governmental with which foreign governments could interact.

In 1840, acting on the advice of westerners, King Kamehameha III promulgated the first written constitution of the Hawaiian Kingdom. The constitution established the Hawaiian monarchy and declared that the monarchy controlled the land for the benefit of the chiefs and the commoners, who owned the land collectively.[80] Following this formal declaration clarifying land ownership in the kingdom was the "Great Mahele" of 1848, authorizing the monarchy to divide lands between the king, the government, the ali'i (chiefs), and the common people, in order to determine, and ultimately transfer, clear title. Although the Great Mahele created, for the first time in Hawaii's history, an opportunity for private ownership of land, ownership was subject to the right of Native tenancy by those who had customarily used and occupied the lands.

Of the approximate 4 million acres in the islands of Hawaii, the King, through the Great Mahele, reserved 1 million acres for himself and his royal successors, known as "crown lands"; 1.5 million acres were designated as "government lands";[81] and the other 1.5 million acres were given to the King's chiefs, for use by the common people, and became known as "konohiki lands."

The political relationship between the Kingdom of Hawaii and the United States

The United States ratified more than 365 Indian treaties from 1777 until 1871. These treaties evidence the government-to-government relationships between the tribes and the United States.[82] Under the Constitution of the United States, United States courts are bound by treaties made under the authority of the United States and by customary international law.[83] Although the United States has never treated the governments of its indigenous peoples as *equal* governments, it has treated them as governments.

As the United States expanded westward, treaties became the primary vehicle for acquiring Indian lands. For the United States, treaties with America's indigenous peoples were tools for diplomacy

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[80] "The origin of the present government, and system of polity, is as follows: Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom." *The First Constitution of Hawaii* in THE FUNDAMENTAL LAW OF HAWAII 10, 12 (Lorrin A. Thurston ed., 1904).

[81] *In re* Estate of Kamehameha, 2 Haw. 715, 725–6 (1864). The land considered government and crown lands eventually became the basis for a land trust for Native Hawaiians. *See* Newlands Resolution, J. Res. 55, July 7, 1898, § 1, 30 Stat. 750 and the Admissions Act of 1959, Pub. L. No. 86–3, 73 Stat. 4 (1959).

[82] DOCUMENTS OF UNITED STATES INDIAN POLICY 84 (Francis Prucha, ed. 2000) (noting that the Fort Laramie Treaty of September 17, 1851 refers to the United States and the Sioux [signatories of the treaty] as "the aforesaid nations").

[83] "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. art. VI.

and acquiring land. For the American Indians, Alaska Natives, and Native Hawaiians, treaties were about establishing peace and friendship and preserving their tribal sovereignty over their homelands.[84] The United States considered the Hawaiian Islands vital to the protection of its interests and power in the Pacific. Treaty relations increasingly focused on assuring commercial and military access. "Throughout the nineteenth century, the United States recognized the independence of the Kingdom of Hawaii; extended full and complete diplomatic recognition to the Hawaiian government; and entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887."[85] These five treaties represented official recognition of sovereign status; the relationship between the Hawaiian Government and the Federal Government was considered to be one between sovereigns. On December 30, 1842, President Tyler officially recognized Hawaii as an independent nation and declared a policy of maintaining Hawaiian independence. In recognition of its independence, Congress provided an appropriation for the appointment of a United States minister to Hawaii, and in 1848, President Tyler assigned a minister to Hawaii.[86]

From the beginning of its relations with Hawaii, the United States sought to "prevent the absorption of Hawaii or the political control of that country by any foreign power."[87] While the treaties did offer Hawaii advantageous trade relations with the United States, "the United States has so far interfered with the internal policy of Hawaii as to secure an agreement from that Government restricting the disposal of bays and harbors and the crown lands to other countries, and has secured exclusive privileges in Pearl Harbor of great importance to this Government."[88] By the late-1800s, the United States had come to view Hawaii as part of the American system and efforts by another foreign power to colonize the islands would have been regarded as acts of war against the United States.[89]

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[84] *Compare, e.g.,* U.S. Treaty with the Hawaiian Islands in 1849 with the United States' Treaty with the Wyandot, 7 Stat. 49 (Aug. 3, 1795). The early treaties with the Native Hawaiians, like the treaties the United States entered into with the mainland Indian tribes during the same period, included a provision that declared perpetual peace and friendship. These treaties, in actuality, often provided the United States commercial gain while offering no real benefits to the native people. 3 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 269–272 (Hunter Miller ed. 1933).

[85] Jon M. Van Dyke & Melody K. MacKenzie, *An Introduction to the Rights of the Native Hawaiian People,* 10–JUL. HAW. B. J. 63, 63 (July 2006) (citing Apology Resolution, Pub. L. No. 103–150, 107 Stat. 1510 (1993)). Between 1839 and 1852 Hawaii received formal recognition as a sovereign, independent national from the United States and nearly every major European nation. *See* Ralph S. Kuykendall, I THE HAWAIIAN KINGDOM 1–11 (1967) (citations omitted).

[86] 5 Stat. 643 (1843).

[87] S. REP. NO. 227, at 20 (1894). "Without stating the reasons for this policy, which included very important commercial and military considerations, the attitude of the United States toward Hawaii was in moral effect that of a friendly protectorate. It has been a settled policy of the United States that if it should turn out that Hawaii, for any cause, should not be able to maintain an independent government, that country would be encouraged in its tendency to gravitate toward political union with this country." *Id.*

[88] S. REP. NO. 227, at 21–22 (1894).

[89] "It is known and felt by the Hawaiian Government and people that their Government and institutions are feeble and precarious; that the United States, being so near a neighbor, would be unwilling to see the islands pass under foreign control. Their prosperity is continually disturbed by expectations and alarms of unfriendly political proceedings, as well from the United States as from other foreign powers. Their prosperity is continually disturbed by expectations and alarms of unfriendly political proceedings, as well from the United States as from other foreign powers. A reciprocity treaty, while it could not materially diminish the revenues of the United States, would be a guaranty of the good will and forbearance of all nations until the people of the islands shall of themselves, at no distant day, voluntarily apply for admission into

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The United States' illegal overthrow of the Kingdom of Hawaii allowed for Hawaii's annexation

In 1887, an opposition group of mostly Americans pressed for the adoption of a constitution that would reduce the king to a ceremonial figurehead.[90] King Kalakaua, in power at the time, unsuccessfully sought the protection of the United States from this powerful group. The opposition used the threat of violence to force King Kalakaua to accept a new constitution that stripped the monarchy of executive powers and replaced his cabinet with members of the opposition group. The new constitution, signed by King Kalakaua under duress, became known as the Bayonet Constitution, and it effectively disenfranchised most Native Hawaiian voters.[91]

Under the 1887 Constitution, the King was deprived of his power and the United States-dominated cabinet and legislature became increasingly more influential. King Kalakaua moved to restore his power, but all attempts were unsuccessful. The constant presence of American military forces in Hawaii helped to discourage his efforts. When King Kalakaua died in 1891, his sister Lili'uokalani succeeded him, and members of the Native population persuaded the new queen to draft a new constitution in an attempt to restore Native rights and powers.[92] Queen Lili'uokalani's proposed constitution was opposed by a group calling themselves the Committee of Safety, a small group of mostly American businessmen and politicians who felt that annexation by the United States, the major importer of Hawaiian agricultural products, would be beneficial for the economy of Hawaii.[93] With strong encouragement from Washington, D.C., and the assurances of support from the United States minister, John L. Stevens, the Committee of Safety conspired to

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the Union." President Andrew Johnson, Fourth Annual Message to the Congress (Dec. 9, 1868). *See also* Letter from John L. Stevens, United States Minister to Hawaii, to John W. Foster, Secretary of State (Nov. 20, 1892) (*in* PAPERS RELATING TO THE ANNEXATION OF THE HAWAIIAN ISLANDS TO THE UNITED STATES 184, 189 (1893) ("To postpone American action many years is only to add to present unfavorable tendencies and to make future possession [of Hawaii] more difficult.")); Henry Cabot Lodge, Republican Senator from Massachusetts, *Our Blundering Foreign Policy*, in 19 THE FORUM 8, 16 (Mar.–Aug. 1895) (Mr. Lodge later became Chairman of the Senate Foreign Relations Committee (1919–1924)) ("[F]or the sake of our commercial supremacy in the Pacific we should control the Hawaiian Islands . . . .").

[90] This group was a party of *haole* ("white") businessmen that was distrustful of King Kalakaua, even though he signed a reciprocity treaty with the United States making it possible for sugar to be sold to the U.S. tax-free, in large part because of his revival of Hawaiian traditions such as the historic Hula, and construction of the royal Iolani Palace. *See* DOCUMENTS OF AMERICAN DEMOCRACY: A COLLECTION OF ESSENTIAL WORKS 205 (Roger L. Kemp ed. 2010) [hereinafter *DOCUMENTS OF AMERICAN DEMOCRACY*].

[91] By forcing the adoption of the Bayonet Constitution, foreigners, primarily Americans, greatly increased their political role in Hawaii. *See* REMAKING QUEEN VICTORIA 142 (Margaret Homans & Adrienne Munich, eds., 1997) ("In 1887, while Liliuokalani was attending Queen Victoria's jubilee celebrations, the American business community revolted and her brother Kalakaua, then king, was forced at bayonet-point to sign a new constitution, known historically as the 'Bayonet Constitution.' This illegal document, never ratified by the people of Hawaii, 'deprived the sovereign of all power,' and 'from that day the missionary party took the law into its own hands.'") (quoting LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 181 (1898)). The new constitution extended the right to vote to wealthy non-citizens (foreign resident aliens) for the first time, excluded Asians, and restricted access for Native Hawaiians through land-ownership and English literacy provisions. In this manner, many Americans and Europeans acquired full voting rights without the need for Hawaiian citizenship. *Compare* Hawaiian Kingdom Const. art. 62 (1887) (allowing for "male *resident[s]* of the Kingdom" of "American or European birth or descent" who can "read and write the Hawaiian, English or some European language" the right to vote for their district Representative), *with* Hawaiian Kingdom Const. art. 62 (1864) (allowing "male *subject[s]* of the Kingdom, who . . . know how to read and write" the right to vote for their district Representative) (emphasis added).

[92] DOCUMENTS OF AMERICAN DEMOCRACY, *supra* note 90, at 205.

[93] *Id.* The Committee of Safety, under the leadership of Sanford B. Dole, was also known as the "Committee of Public Safety," the "Committee on Annexation," or the "Annexation Club." The Committee of Safety consisted of thirteen men, "*all foreigners* and some of *brief residence* in the country." H.R. Exec. Doc. No. 47, 53d Cong., 3d Sess. 353 (1893) (emphasis in original).

overthrow the monarchy.[94] Following Stevens' orders, American troops landed in Honolulu on January 16, 1893.[95]

Within twenty-four hours of the American troops landing, and before the takeover of the Hawaiian government was complete, Stevens, without permission from the U.S. State Department,[96] recognized the Committee of Safety as the new "Provisional Government," "the de facto government of the Hawaiian Islands."[97] On January 17, 1893, Queen Lili'uokalani abdicated her authority, but did so only under protest[98] and subject to a later review of the situation by the American government. The United States military then took custody of the government building.

A presidential investigation of the overthrow revealed facts that led President Grover Cleveland to call for restoration of the monarchy.[99] In a message to Congress, the President observed that the overthrow was not "by the people of the islands," but rather that "the Provisional Government owes its existence to an armed invasion by the United States."[100] He concluded that the United States' role was in opposition to established American foreign policy, to morality, and to principles of international law.[101] Consequently, he stated that the United States "cannot allow itself to refuse to

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[94] Stevens, an avowed annexationist, was the United States Department of State Minister to the Kingdom of Hawaii in 1893. *See* Pub. L. No. 103–150, 107 Stat. 1510 (1993) (acknowledging the illegal actions of Minister Stevens and the United States).

[95] Although the stated reason for the military invasion was to protect the U.S. consulate and the lives and property of American citizens, the troops took up a position between the queen's palace and the government building, allowing the insurrectionists to take over occupation of the buildings. "[W]hen Hawaiian leaders stopped accommodating [Anglo-American interests], they met with American force." Berger, *supra* note 55, at 1195.

[96] The Proceedings and Debates of the Fifty-Third Congress, Second Session, 26 CONG. REC. 311 (1893) ("Thus it appears that Hawaii was taken possession of by the United States forces without the consent or wish of the government of the islands, or of anybody else so far as shown, except the United States Minister.").

[97] WASHINGTON GOVERNMENT PRINTING OFFICE, PAPERS RELATING TO THE ANNEXATION OF THE HAWAIIAN ISLANDS TO THE UNITED STATES 22 (1893).

[98] Queen Lili'uokalani had not yet surrendered when Minister Stevens recognized the Provisional Government on behalf of the United States. The United States' recognition of the Provisional Government may have influenced Lili'uokalani's decision to surrender in 1893: "Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the Constitutional Sovereign of the Hawaiian Islands." Letter from Queen Lili'uokalani to Sanford B. Dole, Esq., (Jan. 17, 1893). Protesting the annexation of Hawaii, the Queen later wrote, "I yielded my authority to the forces of the United States in order to avoid bloodshed, and because I recognized the futility of a conflict with so formidable a power." Letter from Queen Lili'uokalani to William McKinley, President of the United States (June 17, 1897).

[99] *President's Message Relating to the Hawaiian Islands*, H.R. Exec. Doc. No. 47, 53d Cong., 2d Sess., at XVI (1893) (commonly referred to as the *Report of the Commissioner to the Hawaiian Islands* or the *Blount Report*). The Blount Report was conducted by Commissioner James H. Blount, who was appointed by President Cleveland to impartially investigate the events surrounding the January 1893 overthrow of the Kingdom of Hawaii. Blount concluded that the United States diplomatic and military representatives had abused their authority and were responsible for the change in government—all in violation of international law. International law deems acts of state officials and representatives as acts of the state for purposes of determining international responsibility. Thus, Minister Stevens' actions, although not directed by the Department of the State or the President, would be the responsibility of the United States. Blount also discovered that many Native Hawaiians were forced to sign the petition for annexation by storekeepers and others in exchange for food and other necessities. *Id.* at 354. As a result of this investigation, Stevens was recalled from his diplomatic post.

[100] The Proceedings and Debates of the Fifty-Third Congress, Second Session, 26 CONG. REC. 311 (1893). President Cleveland called the United States' role in the overthrow of Hawaii "an act of war." *Id* ("[B]ut for the lawless occupation of Honolulu under false pretexts by the United States forces, and but for Minister Stevens' recognition of the provisional government when the United States forces were its sole support and constituted its only military strength, the Queen and her Government would never have yielded to the provisional government, even for a time and for the sole purpose of submitting her case to the enlightened justice of the United States.").

[101] The Proceedings and Debates of the Fifty-Third Congress, Second Session, 26 CONG. REC. 312 (1893).

redress an injury inflicted through an abuse of power by an officer clothed with its authority and wearing its uniform; the United States cannot fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation."[102] President Cleveland refused to annex Hawaii to the United States, and in 1894, "[m]embers of the provisional government declare[d] themselves the 'Republic of Hawaii' and wait[ed] for a better opportunity to seek annexation."[103]

The overthrow of Queen Lili'uokalani and imposition of the Republic of Hawaii was contrary to the will of the Native Hawaiians. Native Hawaiians staged mass protest rallies and formed two groups to protest the overthrow and prevent annexation. One was the *Hui Hawaii Aloha Aina,* loosely translated as the Hawaiian Patriotic League, and the other was its female counterpart, the *Hui Hawaii Aloha Aina o Na Wahine.* On January 5, 1895, the protests took the form of an armed attempt to derail annexation but the armed revolt was suppressed by forces of the Republic. The leaders of the revolt were imprisoned along with Queen Lili'uokalani who had been jailed for failing to put down the revolt.

Cleveland's successor, President McKinley, ran for office in 1896 on a pro-annexation platform, arguing that even though most residents of the islands were either Native Hawaiian or Asian, they were under the control of the superior American minority, and annexation was necessary to prevent a Japanese takeover.[104] In March of 1897, William McKinley was inaugurated as President of the United States. McKinley was in favor of annexation, and the change in leadership was soon felt. On June 16, 1897, McKinley and three representatives of the government of the Republic of Hawaii signed a treaty of annexation. President McKinley then submitted the treaty to the United States Senate for ratification.

The *Hui Hawaii Aloha Aina* protest groups organized a mass petition drive. They hoped that if the United States government realized that the majority of Native Hawaiian citizens opposed annexation, the move to annex Hawaii would be stopped. Between September 11 and October 2, 1897, the two groups collected petition signatures on each of the five principal islands of Hawaii. The petition, clearly marked "Petition Against Annexation" and written in both the Hawaiian and English languages, was signed by 21,269 Native Hawaiian people—nearly every adult and *more than half* of the 39,504 Native Hawaiians reported by the census for the same year.[105]

The petition helped to defeat the proposed annexation treaty in 1898.[106] However, other events immediately brought the subject of annexation up again.[107] With the ensuing Spanish-American War, part of which was fought in the Philippine Islands, proponents of annexation argued that Hawaii was needed to support military ac-

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[102] *Id.*

[103] DATA BOOK, *supra* note 8, at 412.

[104] Berger, *supra* note 55, at 1195 (citations omitted).

[105] Presumably, Native Hawaiian children would not have signed the petition. In the 1896 Census, there were 15,018 Native Hawaiian children (ages 0–15). This means that there were only 3,217 eligible Native Hawaiians who did not sign the anti-annexation petition. Department of Public Instruction, Report of the General Superintendent of the Census, 1896, at 54, table VIII (1897).

[106] On February 27, 1898, after the Hawaiian delegation, which included Lili'oukalani, presented the petition against annexation to the Senate, there were only 46 senators willing to vote for annexation. The treaty was thus defeated in the Senate.

[107] On February 15, 1898, the U.S. Battleship *Maine* was blown up in Havana harbor in Cuba.

tion as a mid-Pacific fueling station and naval installation. The pro-annexation forces in Congress submitted a proposal to annex the Hawaiian Islands by joint resolution, which required only a simple majority vote in both chambers. This eliminated the two-thirds majority needed, and, as a result, the necessary support was in place. In July 1898, a joint resolution passed control of Hawaii to the United States. House Joint Resolution 259, 55th Congress, 2nd session, known as the "Newlands Resolution," passed Congress, and was signed into law by President McKinley on July 7, 1898. Amidst the fervor surrounding the Spanish American War, President McKinley thus secured the political domination of the territory of Hawaii and the appropriation of its lands." [108]

Upon annexation, control of the crown and government lands passed from the Republic of Hawaii to the United States.

> Through the 1898 Joint Resolution and the 1900 Organic Act,[109] the United States received 1.8 million acres of lands, formerly Crown and Government Lands under the Hawaiian Kingdom, and exempted these lands from the existing public laws of the United States by mandating that the revenue and proceeds from these lands be "used solely for the benefit of the inhabitants of the Hawaiian Islands for education and other public purposes." [110]

This public trust established a special trust relationship between the United States and the inhabitants of Hawaii, similar to the trust relationship between the Federal Government and Indian Tribes, by imposing fiduciary responsibilities on the United States and constraining the use, management, and proceeds generated from the trust to public purposes.[111] This meant that 1.8 million acres in which the Native Hawaiian people were to have interest following the Great Mahele [112] became United States property.

Hawaii's transition from a foreign nation to domestic dependent Native nation

At the time of annexation, the political and legal relationship between the Native Hawaiian people and the United States changed from interacting as two independent nations through treaties to one of relating to the Native Hawaiian people as a domestic dependent Native nation. As is noted in Public Law 103–150, the Apology Resolution, "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum." [113]

Hawaii was designated as a non-self-governing territory of the United States from 1898 to 1959. During that time, the United States allowed citizenship for all persons living in the Hawaiian Islands, greatly expanding the number of non-Native Hawaiian citizens beyond what had been allowed by the Kingdom of Hawaii. Al-

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[108] Berger, *supra* note 55, at 1195. The annexation of Hawaii reveals the same denigration of indigenous interests found throughout American Indian history. *Id.*

[109] *See* An Act to Provide for a Government for the Territory of Hawaii, 31 Stat. 141, 56 Cong. Sess. 1 (April 30, 1900).

[110] Van Dyke & MacKenzie, *supra* note 85, at 63 (citing the Newlands Resolution and Organic Act).

[111] *Id.* at 63–64 (citations omitted).

[112] *See* discussion *supra* p. 17.

[113] Pub. L. No. 103–150, 107 Stat. 1510 (1993).

though Native Hawaiians made up less than half the resident population in Hawaii at the time of the overthrow, they were more than 80 percent of the Kingdom's citizenry.[114] After Annexation, the Native Hawaiian percentage of the citizenry of the territory was less than 25 percent.[115] "[T]he residents of the Hawaiian Islands exercised their right to self-determination in 1959 when they voted to become a state,[116] and they are now a self-governing political community. But the Native Hawaiian population has never had an opportunity to exercise its separate right to self-determination and to reestablish itself as self-governing autonomous [N]ative nation."[117]

The fact that the indigenous Native Hawaiian community does not presently have an operating tribal government recognized by the Department of the Interior (DOI) does not remove that community from the scope of Congress's Indian affairs power. The Constitution does not limit Congress' Indian affairs power to indigenous groups with a particular government structure. "[S]ome bands of Indians, for example, had little or no tribal organization while others . . . were highly organized."[118] Nor does the Constitution limit Congress's power to groups that continue to exercise all aspects of sovereignty. European "discovery" and the establishment of the United States necessarily diminished certain aspects of Indian sovereignty.[119] Thus, under the Constitution, "[f]ederal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians.'"[120]

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[114] At the time of the overthrow, only those born in Hawaii were considered citizens. *See, e.g.,* I Statute Laws of Kamehameha III, p. 76, § III (1846); Letter from Ferdinand Hutchison, Minister of the Interior for the Hawaiian Kingdom, to H.H. Parker, regarding the determination of his citizenship status, published in the HAWAIIAN GAZETTE (official publication of the Government of the Kingdom), at 2 (Jan. 21, 1868). At the time of the overthrow of the Kingdom of Hawaii, less than 10 percent of foreigners were actually born in Hawaii. 1 NATIVE HAWAIIANS STUDY COMMISSION: REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS PURSUANT TO PUBLIC LAW 96–565, TITLE III, at 68, table 3 (Jun. 23, 1983).

[115] 1 NATIVE HAWAIIANS STUDY COMMISSION: REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS PURSUANT TO PUBLIC LAW 96–565, TITLE III, at 69, table 4 (Jun. 23, 1983). The Organic Act extended citizenship to all residents of Hawaii, even those who were born elsewhere. An Act to Provide for a Government for the Territory of Hawaii, 31 Stat. 141, 56 Cong. Sess. 1 (April 30, 1900).

[116] "Even this statement has been challenged, because the only options offered to the people of Hawaii were (1) to become a state or (2) to remain a territory. Some have argued that the resolutions of the United Nations General Assembly . . . require that nonself-governing peoples be given the additional options of complete independence and free associated state status." Jon M. Van Dyke, Carmen Di Amore-Siah, & Gerald W. Berkely-Coats, *Self-Determination for Nonself-Governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawaii,* 18 U. HAW. L. REV. 623, 624 n. 3 (1996) (referring to Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, Annexes, Agenda Item No. 38, at 9, U.N. Doc. A/4684 (1960)).

[117] Van Dyke, Di Amore-Siah, & Berkely-Coats, *supra* note 116, at 624–25.

[118] Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 664 (1979) (citations omitted). *See also,* United States v. John, 437 U.S. 634 (1978), where the Court upheld Congress's power to provide for a group of Indians that did not have a federally-recognized tribal government, because federal supervision had lapsed.

[119] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 45 (1831).

[120] United States v. Antelope, 430 U.S. 641, 646 (1977) (quoting Morton v. Mancari, 417 U.S. 535, 553 n. 24 (1974)).

The Hawaiian Homes Commission Act of 1921

By the time Hawaii was annexed as a territory to the United States in 1898, the Native Hawaiian population had plummeted,[121] its traditional practices[122] and the communal land tenure system had been forcibly replaced by European and American models of ownership, the Kingdom of Hawaii had been illegally overthrown, and Hawaiian lands had been taken without the consent of the Native Hawaiian people. Two years later, Congress entrusted management of the lands to a territorial legislature established by the Organic Act of 1900.[123] These lands are referred to as the "Ceded Lands" or the "Public Lands Trust." As a result of losing their homelands, the Native Hawaiian people found themselves at the bottom of the socio-economic scale in their own land.[124]

During this time, federal Indian policies were focused primarily on the allotment and assimilation of the Native people.[125] The two prevailing laws of this era were the Dawes Act[126] and Burke Act.[127] These two acts sought to provide eligible Indians with allotments of lands for residential, ranching, and agricultural purposes, with the hope of hastening the assimilation process. Through these federal allotment and assimilation practices, Congress attempted to address the deteriorating social and economic conditions among the Native people by returning them to their land.

Passed in 1921, the Hawaiian Homes Commission Act (HHCA)[128] was modeled after these Acts, as it too recognized the

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[121] Estimates of the Native Hawaiian population prior to the arrival of Captain James Cook in 1778 range from 300,000 to 800,000. By 1850, the population dropped to 84,165, and by 1872, it dropped even further to 56, 897. Van Dyke, supra note 31, at 95.

[122] When Hawaii became an American territory in 1900, the Native Hawaiian language and cultural practices were discouraged. *See* LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LA E PONO AL 316 (1992); Van Dyke, *supra* note 31, at 103 n.50.

[123] An Act to Provide for a Government for the Territory of Hawaii, 31 Stat. 141, 56 Cong. Sess. 1 (April 30, 1900). The Organic Act established the government for the Territory of Hawaii. Prior to Hawaii's statehood, the Territorial Government was responsible for implementing the HHCA. The Territorial Government often provided leases to sugar planters on the 203,500 acres while failing to provide the land for Native Hawaiian homesteads. After Hawaii became a state, the Department of Hawaiian Home Lands (DHHL) took over that responsibility. DHHL has also not administered the Act well, and this has sparked intense criticism.

[124] DATA BOOK, *supra* note 8, at 189, Table 2.48. *See* discussion *supra,* pp. 3–5.

[125] The Kingdom of Hawaii was overthrown and annexed during the Allotment & Assimilation Era of Federal Indian Law (1871–1928). The United States did not identify Native Hawaiians as a separate political entity because it would have been inconsistent with federal Indian policy. During this period, the United States attempted to rid American Indians and Alaska Natives of their native languages and culture. The HHCA was an allotment-era policy and was enacted when Congress still thought that "civilizing" the indigenous peoples required destruction of their autonomy and their identification as a separate political identity. In 1928, the Merriam Report revealed the devastating effects of the Indian General Allotment Act (GAA) (25 U.S.C. §§ 331 to 334, 339, 341, 342, 348, 349, 354, and 381 (1887) (§§ 331 to 333 repealed)) and it became clear that the United States needed to change its policies towards tribal governments. In response to the Merriam Report, Congress passed the Indian Reorganization Act in 1934 (IRA) (25 U.S.C. §§ 461–479 (1934)) as a remedy for its prior allotment practices. The IRA repudiated the policy of allotment and allowed tribes to adopt constitutions and to reestablish structures for tribal governance. Tribal sovereignty was now to be encouraged rather than destroyed.

[126] Popularly known as the "Indian" General Allotment Act (GAA) (25 U.S.C. §§ 331 to 334, 339, 341, 342, 348, 349, 354, and 381 (§§ 331 to 333 repealed)). This Act stated that Indians who received land allotments or voluntarily took up residence away from their tribes were to be given United States citizenship.

[127] 34 Stat. 182 (1906). The Burke Act amended section 6 of the GAA, by postponing the acquisition of citizenship until the end of the trust period, typically twenty-five years, or until the allottee received a patent in fee from the Secretary of the Interior.

[128] 42 Stat. 108 (1921). This Act is now part of Hawaii's State Constitution. *See* Haw. Const. art. XII. The HHCA was remarkably similar in purpose and effect to the General Allotment Act (GAA), 25 U.S.C. §§ 331 to 334, 339, 341, 342, 348, 349, 354, and 381 (1887) (§§ 331–333 repealed), which destroyed tribalism and assimilated Indians as individuals into the dominant society. The GAA took collectively owned tribal lands and allotted parcels to individual tribal members. The surplus lands, lands not allotted to individual tribal members, was then sold to

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deteriorating conditions of the Native Hawaiian people[129] and sought to rehabilitate Hawaii's indigenous peoples by setting aside 203,500 acres of ceded lands for a homesteading program to provide residences, farms, and pastoral lots for native Hawaiians,[130] and returning Native Hawaiians to their ancestral lands, allowing them to take up homesteading on specified lands and reestablish a traditional Hawaiian way of life.[131] "The Hawaiian Homes Commission Act is a clear example of federal policies towards Native peoples that have consistently been applied to Native Hawaiians, not always at exactly the same time, but often closely afterwards."[132]

Having learned from the devastating consequences that resulted from American Indians losing most of their lands as a result of the Dawes Act, Congress, through enactment of the HHCA, created a federal land trust that provided for 99-year leases to qualified Native Hawaiians. These long-term leases ensured that the trust lands would benefit the Native Hawaiian people for generations. With passage of the HHCA, Congress began to enact measures to remedy the Native Hawaiian people's plight resulting from the loss of their home lands and culture.[133]

By developing the HHCA, executive branch and congressional leaders were under the impression that the Federal Government was assuming trust responsibilities similar to those it had historically exercised in managing Indian affairs. In hearings on the legislation, the Secretary of the Interior, Franklin K. Lane, testified, "One thing that impressed me . . . was the fact that the Natives of the islands who are our wards, I should say, and for whom in a sense we are trustees, are falling off rapidly in numbers, and many of them are in poverty."[134]

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non-Indians. Both the HHCA and the GAA were poorly carried out, often giving their beneficiaries parcels of useless, inarable land.

[129] Van Dyke & MacKenzie, *supra* note 85, at 64 (citing Act of July 9, 1921, ch. 42, 42 Stat. 108).

[130] *Id.* (citing Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161, 1162 (1982), "in which the Hawaii Supreme Court found that the purpose of the HHCA was to rehabilitate Native Hawaiians. The court drew on language in the legislative history of the HHCA to conclude that there was 'an intent to establish a trust relationship between the government and Hawaiian persons.'").

[131] *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs*, 112th Cong. (Apr. 13, 2012) (statement of Melody Mackenzie, Associate Professor of Law and Director of Ka Huhi Ao Center for Excellence in Native Hawaiian law at University of Hawaii, Richardson School of Law).

[132] *Id* (statement of Sen. Brickwood Galuteria, Majority Leader, Hawaii State Capitol).

[133] *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs*, 112th Cong. (Apr. 2012) (statement of Colleen Hanabusa, Rep., U.S. House of Representatives) (noting that the HHCA was critical to preserve the Native Hawaiian people and culture).

[134] H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920). The House Committee Report on the HHCA defended the bill against the charge that it was "unconstitutional class legislation" by noting that Congress had the authority to provide special benefits for unique groups such as "Indians, soldiers and sailors." Half a century later, the United States Supreme Court would address constitutional arguments to uphold legislation benefitting Indians as a group in Morton v. Mancari, 417 U.S. 535, 553 n.24, 554 (1974) (holding that Indian status was "political rather than racial in nature" because tribal Indians were "members of quasi-sovereign tribal entities"). The Court determined that the employment preference for Indians in the Bureau of Indian Affairs was not impliedly repealed by the Equal Employment Opportunities Act of 1972, and that the preference did not constitute invidious racial discrimination but was reasonable and rationally designed to further Indian self-government. *Id.* The Supreme Court was careful to note, however, that [*Mancari*] was confined to the authority of the BIA, an agency described as "*sui generis*." Rice v. Cayetano, 528 U.S. 495, 520 (2000) (quoting *Mancari*, 417 U.S. at 554) (emphasis in original). "Thus while Native Hawaiian classifications do not automatically come within the safe harbor *Mancari* provides for American Indian classifications, equal protection challenges regarding Native Hawaiians implicate similar questions and should be analyzed under similar principles." Berger, *supra* note 55, at 1193.

Secretary Lane explained that special programs for Native Hawaiians are fully supported by history and "an extension of the same idea" that supports such programs for other Indians.[135]

Senator John H. Wise, a member of the Legislative Commission of the Territory of Hawaii, testified before the United States House of Representatives as follows:

> The idea in trying to get the lands back to some of the Hawaiians is to rehabilitate them. I believe that we should get them on lands and let them own their own homes . . . The Hawaiian people are a farming people and fishermen, out-of-door people, and when they were frozen out of their lands and driven into the cities, they had to live in the cheapest places, tenements. That is one of the big reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.[136]

In 1920, Prince Kuhio, the Territory's sole delegate to Congress, testified before the full U.S. House of Representatives: "[I]f conditions continue to exist as they do today . . . my people . . . will pass from the face of the earth."[137] Secretary Lane attributed the declining population to health problems similar to those faced by the "Indian in the United States" and concluded that the Nation must provide similar remedies.[138]

Congress compared the HHCA to "previous enactments granting Indians . . . special privileges in obtaining and using the public lands."[139] In support of the Act, the House Committee on the Territories recognized that, prior to the Great Mahele, Native Hawaiians had a one-third interest in the lands of the Kingdom. The Committee reported that the HHCA was necessary to address the way Native Hawaiians had been short-changed in prior land-distribution schemes.[140]

The history of federal Indian policy establishing reservations was also in the minds of the Congressmen who voted for the HHCA. Recognizing that the Native Hawaiian people were deprived of their lands without their consent,[141] the Chairman of the House

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[135] *Proposed Amendments to the Organic Act of the Territory of Hawaii: Hearings Before the H. Comm. on the Territories*, 66th Cong. 129–31 (statement of Secretary Lane that "[w]e have got the right to set aside these lands for this particular body of people, because I think the history of the islands will justify that before any tribunal in the world," rejecting the argument that legislation aimed at "this distinct race" would be unconstitutional because "it would be an extension of the same idea" as that established in dealing with Indians, and citing a Department of the Interior Solicitor's opinion stating that setting aside public lands within the Territory of Hawaii would not be unconstitutional, relying in part on the Congressionally authorized allotment to Indians as precedent for such an action); *see also id.* at 127 (colloquy between Secretary Lane and Representative Monahan, analogizing status of Native Hawaiians to that of Indians); T3id. at 167–170 (colloquy between Rep. Curry, Chair of the Committee, and Reps. Dowell and Humphreys, making the same analogy and rejecting the objection that "we have no government or tribe to deal with here").

[136] *Id.* at 129–31.

[137] 59 CONG. REC. 7453 (1920).

[138] H.R. Rep. No. 66–839. at 5 (1920).

[139] H.R. Rep. No. 66–839, at 11 (1920); *see also id.* at 4 (suggesting that the HHCA was enacted in part because, after the arrival and settlement of foreigners in Hawaii, the Native Hawaiians had been "frozen out of their lands and driven into the cities," where they were "dying" as a people).

[140] H.R. Rep. No. 66–839, at 6–7 (1920).

[141] Although Hawaii became a state, the Native Hawaiian people never surrendered their right to self-governance. "Native Hawaiians were never consulted or given an opportunity to

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Committee on Territories noted that the motivations behind the legislation were the same as those supporting similar land trust legislation relating to Indian tribes:

> The United States Government has supported [the Indians] and helped them along; now they are in such a position that they can take care of themselves. And we can do that for the Indians. Why? Because we came to this country and took their land away from them, and treaty after treaty has been violated. And if we can afford to do that for the Indians—and we have done it and it is constitutional—why can we not do the same for the Hawaiians whose land has been taken away from them?[142]

Under the HHCA, Congress designated a trust of 203,500 acres of public lands to be available for Native Hawaiian homesteads (Hawaiian Home Lands Trust or HHL Trust).[143] However, similar to other federal policies enacted to remedy the effects of the loss of land on American Indians and Alaska Natives of this era, the HHCA has generally failed to provide agricultural or residential lands or to achieve its lofty goal of rehabilitating the Native Hawaiian people."[144] The lands set aside as part of the HHL Trust were some of the poorest, largely unsuitable for farming, and lacking in necessary irrigation water.

It has been over 90 years since the enactment of the HHCA and only approximately 10,000 land leases have been issued to Native Hawaiian beneficiaries for homesteading purposes.[145] "[T]he waitlist of individual applicants to receive a land award under the [HHCA] exceeds 26,000 individuals, with waiting times ranging from five years to 50 years."[146]

Statehood and the delegation offederal trust responsibilities to the State of Hawaii

When the State of Hawaii was admitted into the Union in 1959, the federal policy toward the Native people of America was designed to divest the Federal Government of its responsibilities for

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vote on whether incorporation into the United States was desirable." Native Hawaiian Rights Handbook 97 (Melody Kapilialoha MacKenzie, ed., 1991). *See* Worcester v. Georgia, 31 U.S. 515,520 (1832) ("[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.").

[142] *Proposed Amendments to the Organic Act of the Territory of Hawaii, Hearings on HR. 7257 Before the H. Comm. on the Territories,* 67th Cong. 1st Sess. 141 (June 9 & 10, 1921) (statement of Charles F. Curry, Chairman, H. Comm. on the Territories).

[143] The HHL Trust was designated from the 1.8 million acres of land that became United States property upon the annexation of Hawaii. *See supra* p. 25. From the 1.8 million acres, the United States reserved 400,000 acres for its use. The 1.2 million acres remaining became the public land trust. The public land trust was ceded to the State of Hawaii for five specified purposes, including "for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act." *See infra* note 151. In doing so, Congress delegated to the State of Hawaii the trust responsibility owed to the Native Hawaiians.

[144] "[I]n many ways we're back in the same situation we were in 1920 with people coming to Congress basically saying our people are dispossessed from their lands. They're dying. They don't have a place to live. And we're in that same situation. So I see this S. 65 as an opportunity to really fulfill the promise of the Hawaiian Homes Commission Act." *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs,* 112th Cong. (Apr. 13, 2012) (statement of Melody Mackenzie, Associate Professor of Law & Director, Ka Huli Ao Center for Excellence in Native Hawaiian Law, University of Hawaii Richardson School of Law, University of Hawaii at Manoa).

[145] *Id.* (statement of Michelle Kauhane, Deputy Director, State of Hawaii, Department of Hawaiian Home Lands).

[146] *Id.*

the Indian tribes and their members and to transfer many of those responsibilities to the several states.[147] A prime example of this federal policy was the enactment of Public Law No. 83–280, an Act which vested criminal jurisdiction and certain aspects of civil jurisdiction over Indian lands in certain states.[148] Similarly, in 1959 and as a condition of statehood, the United States transferred responsibilities related to administering the HHCA to the new State of Hawaii, while explicitly retaining the authority to alter, amend or repeal the HHCA.[149] In the Hawaii Admission Act, the United States delegated its principal responsibilities under the HHCA to the new state.[150] As a further condition of statehood, the United States imposed a public trust on lands ceded to the State of Hawaii for five purposes, one of which was the "betterment of the conditions of native Hawaiians."[151] The Act says that departure from the prescribed purposes is a breach of trust.[152] The Admission Act makes clear that the United States anticipated that the State of Hawaii's constitution and laws would provide for the manner in which the HHCA and the public trust would be administered.

"While the State of Hawaii has administrative and rulemaking authority, the Federal Government retains oversight to ensure that the original intent of the Act is maintained."[153] This supervisory role of the United States demonstrates the existence of a trust relationship between the United States and the Native Hawaiian community. "[T]he State of Hawaii has embraced its role in managing the Hawaiian Home Lands trust, and continues to support efforts to enhance [the] self-determination and self-governance [of the Native Hawaiian people]."[154]

That the special requirements of the Admissions Act have not been fully observed by the state is well established. "[D]espite the legal obligations and responsibilities, [Native Hawaiians] have always . . . been in the lessor priority when there have been other needs for the community."[155] At Hawaii's 1978 constitutional convention, this led to proposals for three constitutional amendments that were accepted and adopted by voters. The result was the establishment of the State of Hawaii Office of Hawaiian Affairs

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[147] This was during the era known as Termination in Federal Indian Policy (1945–1961). During Termination, federal policies attempted to end the Indians' status as wards of the United States by forcing the assimilation of all America's indigenous peoples. H.R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953). By the 1970s, Congress once again changed its course, rejecting such policies of assimilation and termination and promoting tribal self-determination. *See, e.g.*, Indian Self-Determination and Education Assistance Act, Pub. L. 93–638, 88 Stat. 2214 (codified at 25 U.S.C. 458–458(e)).

[148] 67 Stat. 5884 (1953).

[149] Section 223 of the HHCA, Act of July 9, 1921, 42 Stat. 108 (1920), codified in Haw. Const., Art. XII § 1.

[150] Hawaii Admission Act, 5(f), Pub. L. No. 86–3, 73 Stat. 4 (1959).

[151] *Id.* (declaring the purposes of the public trust to be: (1) for the support of the public schools; (2) for the betterment of the conditions of native Hawaiians, as defined by the Hawaiian Homes Commission Act, as amended; (3) for the development of farm and home ownership on as widespread basis as possible; (4) for the making of public improvements; (5) and for the provision of lands for public use). The language of trust in the Act arguably reflects a continuing interest of Hawaiian people in the 5(f) lands transferred to the state by the United States. This would give rise to a claim for income from the lands or for the value of lands the state has appropriated to its own uses.

[152] Hawaiian Admission Act, sec. 5(f), Pub. L. No. 86–3, 73 Stat. 4 (1959).

[153] *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs*, 112th Cong. (Apr. 13, 2012) (statement of Melody Mackenzie, Associate Professor of Law and Director of Ka Huli Ao Center for Excellence in Native Hawaiian law at University of Hawaii, Richardson School of Law).

[154] *Id.* (statement of Sen. Brickwood Galuteria, Majority Leader, Hawaii State Capitol).

[155] *Id.* (statement of Richard Naiwieha Wurdeman, President, Native Hawaiian Bar Association).

(OHA)[156] managed by a board of trustees that receives and expends the portion of income from the public trust lands that is allocable to Native Hawaiians. OHA was created by the State of Hawaii in order to administer the trust created by the congressional legislation authorizing its annexation as the fiftieth state of the United States. Pursuant to its authorizing legislation, OHA was "intended to advance multiple goals: to carry out the duties of the trust relationship between the islands' indigenous peoples and the Government of the United States; to compensate for past wrongs to the ancestors of these peoples; and to help preserve the distinct, indigenous culture that existed for centuries before Cook's arrival [in 1778]."[157]

Apology & Reconciliation: a mandate for the United States to address Native Hawaiian self-governance

Acknowledging the 100th anniversary of the 1893 overthrow of the Kingdom of Hawaii, Congress passed an Apology Resolution[158] in 1993 in which it apologized on behalf of the United States to Native Hawaiians for the United States' role in the illegal overthrow of the Kingdom of Hawaii, the subsequent suppression of the inherent right of the Native Hawaiian people to self-determination and self-governance, and committed the United States to a process of reconciliation with Native Hawaiians.

The Apology Resolution acknowledges the direct participation of United States agents and citizens in the overthrow, and recognizes that the 1.8 million acres of lands acquired by the United States were done so without the consent of or compensation paid to the Native Hawaiian people. The apology also acknowledges that Native Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people over their national lands to the United States, urges the President to seek reconciliation with the Hawaiian people, and provides a foundation for reconciliation between the United States and the Native Hawaiian people.[159]

> When I proposed the Apology Resolution a few years ago, I had three goals. They were to (1) educate the Congress and the American public on the overthrow of the Kingdom of Hawaii, (2) to provide a continuing forum for discussion and (3) to lay the foundation for reconciliation efforts between Native Hawaiians and the Federal Government. The Apology Resolution is the first step towards reconciliation, the first step towards healing.[160]

In response to the Apology Resolution, the Departments of the Interior and Justice conducted a series of consultations and hearings in Native Hawaiian communities in 1999. These hearings determined that because the United States aided in the destruction of the Native Hawaiian government, effectively suppressing the Native Hawaiian people's right to self-determination, federal recognition of a Native Hawaiian government is the proper path to

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[156] Haw. Const., art. XII, §§§ 4–6 (1978).
[157] Rice v. Cayetano, 528 U.S. 495, 528 (2000) (Stevens, J., dissenting).
[158] Apology Resolution, Pub. L. No. 103–150, 107 Stat. 1510 (1993).
[159] *Id.*
[160] Daniel Akaka, United States Senator for Hawaii, Newsroom, Statements and Speeches, *Remarks of U.S. Senator Daniel K. Akaka for Reconciliation Process Public Dialogue* (Dec. 10, 1999).

reconciliation. The result of the Departments' reconciliation efforts was a joint report, From Mauka to Makai: The River of Justice Must Flow Freely, published in 2000. The report concluded:

> [T]hat the Native Hawaiian people continue to maintain a distinct community and certain governmental structures and they desire to increase their control over their own affairs and institutions. As a matter of justice and equity, this Report recommends that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes.[161]

This report recommends that the reconciliation process between the Federal Government and the Native Hawaiian people should "result in congressional confirmation of a political, government-to-government relationship between Native Hawaiians and the Federal Government pursuant to Congress' plenary authority over Indian Affairs."[162]

Since the issuance of the report, the Senators from Hawaii have introduced legislation to implement the findings of the reconciliation report. This Committee held several hearings on the matter. While Congress has consistently recognized Native Hawaiians as among the indigenous peoples of the United States on whose behalf it may exercise its powers under the Indian Commerce Clause, it has not as yet acted to provide a process for the reorganization and subsequent recognition of a sovereign Native Hawaiian governing entity as a necessary first step to promote reconciliation, as called for by the Apology Resolution.

While its potential remains unfulfilled, the Apology Resolution has increased Native Hawaiians' initiatives for self-determination.[163] It is within Congress' plenary power to enact legislation "to clarify Native Hawaiians" political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body.[164]

Nineteen years after the Apology, the federal trust responsibility to Native Hawaiians remains intact but unfulfilled

In 2011, the Hawaii state legislature introduced and enacted Act 195.[165] Act 195 established a Native Hawaiian Roll Commission which officially acknowledges Native Hawaiians as the only indigenous people of the Islands. It also establishes a governor-appointed commission charged with enrolling qualified Native Hawaiians to participate in the reorganization of a self-governing entity.

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[161] THE DEPARTMENT OF THE INTERIOR & THE DEPARTMENT OF JUSTICE, FROM MAUKA TO MAICAI: THE RIVER OF JUSTICE MUST FLOW FREELY, REPORT ON THE RECONCILIATION PROCESS BETWEEN THE FEDERAL GOVERNMENT AND NATIVE HAWAIIANS 17 (Oct. 23, 2000) [hereinafter *Mauka to Makai*].

[162] *Id.* at ii.

[163] *Legislative Hearing on H.R. 443, 444, 1461, 1556, 2444 Before the H. Subcomm. on Indian and Alaska Native Affairs,* 112th Cong. (Sep. 22, 2011) (statement of Representative Boren (D–OK), Member, H. Subcomm. on Indian and Alaska Native Affairs) ("Self-governance is arguably the most successful Indian policy in the history of our country.").

[164] MAUKA TO MAKAI, *supra* note 161, at 17.

[165] The Hawaii State Legislature passed SB1520 and it was signed into law as Act 195 by Governor Abercrombie. Act 195 recognizes Native Hawaiians as the indigenous population of the Hawaiian Islands. The law establishes the Native Hawaiian Roll Commission, with unpaid commissioners appointed by the Governor, to certify and publish a roll of Qualified Native Hawaiians. Act 195 calls for the roll to be used to organize a Native Hawaiian governing entity that is recognized by the State of Hawaii, and can be recognized by the United States.

Through Act 195, the State of Hawaii expressly supports the continuing development of the reorganization of the Native Hawaiian governing entity and its subsequent recognition by the Federal Government. "The enactment of Act 195 was yet another example of Hawaii's ongoing desire to recognize the unique contributions and traditions of the Native Hawaiian people." [166]

The State of Hawaii has also worked to embrace, protect and advance the Native Hawaiian people and their culture in other ways, including but not limited to: designating the Native Hawaiian language as one of the two official languages of the state; [167] recognizing the legitimacy of the traditional Native Hawaiian child-rearing practice of hanai (fostering/adoption) in state functions such as the provision of human services and education; [168] and implementing a system of protecting Native Hawaiian graves and sacred sites through State burial councils comprised of Native Hawaiian representatives with expertise in Native Hawaiian culture and burial practices appointed by the Governor and confirmed by the State Senate. [169]

Further, the Administration has implemented programming in a number of departments to address many Native Hawaiian concerns, concerns shared by other Native Americans, in the Departments of Defense, Health and Human Services, Housing and Urban Development, the Interior Agriculture, Treasury, Veterans Affairs, Commerce and Education, as well as the Small Business Administration and other federal agencies.

In addition to retaining oversight and policy responsibilities over the HHCA, Congress has enacted over 150 laws addressing the conditions of Native Hawaiians, protecting their rights, and strengthening their ability to perpetuate their language and culture. [170] In many of these statutes, Congress specifically requires federal agencies to engage in meaningful consultation with the Native Hawaiian people for issues related to national parks, national historic preservation programs, the national trails system, the Native American Graves Protection and Repatriation Act (NAGPRA), vocational rehabilitation services, and public health and welfare economic opportunity programs. [171] There are additional federal statutes that direct the employment of at least one Native Hawaiian representative to applicable boards, councils, or advisory commissions to represent the interests of Native Hawaiians and to en-

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[166] *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs,* 112th Cong. (Apr. 13, 2012) (statement of Sen. Brickwood Galuteria, Majority Leader, Hawaii State Capitol).

[167] Haw. Const. art. XV, § 4.

[168] Hawaii Administrative Rules, Title 17, Subtitle 6, Chapter 656.1 (1998).

[169] Hawaii Administrative Rules, Title 13, Chapter 300 (1996).

[170] These acts are codified in 14 titles of the United States Code. *See* discussion *supra* pp. 10–12.

[171] 16 U.S.C. § 396d; 16 U.S.C. §§ 470a, h–2, h–4; 16 U.S.C. § 1244; 25 U.S.C. § 3002; 25 U.S.C. § 3003; 25 U.S.C. § 3004; 25 U.S.C. § 3005; 25 U.S.C. § 3006; 29 U.S.C. § 721; 42 U.S.C. § 2991B–1; 42 U.S.C. § 3032G; 42 U.S.C. § 11705. In response to President Obama's 2009 Memorandum on Tribal Consultation requiring regular and meaningful consultation and collaboration with tribal officials, the Department of Defense published its policy and procedures to identify and ensure compliance "with the requirements of Presidential Memorandums, Executive orders, statutes, and regulations." U.S. DEPARTMENT OF DEFENSE, DEPARTMENT OF DEFENSE INSTRUCTION NUMBER 4710.03: CONSULTATION POLICY WITH NATIVE HAWAIIAN ORGANIZATIONS (Oct. 25, 2011). *See* Memorandum on Tribal Consultation (Nov. 5, 2009) (referring to Exec. Order No. 13175 (Nov. 6, 2000)); DEPARTMENT OF DEFENSE PLAN OF ACTION TO IMPLEMENT THE POLICIES AND DIRECTIVES OF EXECUTIVE ORDER 13175, CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS, PROGRESS REPORT (2011).

sure the survival of traditional Native Hawaiian subsistence, culture, and religion.[172]

Separate is not equal: the Secretary of the Interior has failed to act to uphold the federal trust responsibility

The Committee has compiled an extensive oversight record in the 112th Congress, conducting 32 oversight hearings, 5 field hearings, and 12 roundtables to study the unique problems of Native Americans, which includes the American Indian, Native Hawaiian, and Alaska Native people. The Committee reviewed, monitored, and studied federal agency programs, activities, and policy implementation related to Native Americans and the trust responsibility of the United States. While most of these oversight activities produced information related to Native Hawaiians, approximately ten specifically focused in part, and another three focused exclusively on Native Hawaiians or programs for their benefit.

Over the last 21 months, as part of its oversight duties, the Committee conducted seventeen site visits to Native Hawaiian homelands, historical and sacred sites, natural and cultural resources project sites, agricultural sites, public charter schools, Native language immersion programs, housing, health care, social services, senior and childcare programs and facilities; and, economic development activities and projects in Hawaii. The Committee has also received and reviewed oral and written testimony from federal, state, and tribal officials, dozens of Native Hawaiian educators, housing officials, community representatives and leaders, business leaders, professors of Federal Indian Law, experts in Native Hawaiian history, law and legal precedents, and many other Native Hawaiian and Native American organizations.

Witnesses testified before the Committee explaining the numerous obstacles Native Hawaiians face because the Federal Government continues to retain oversight over Native Hawaiian affairs, yet allows for the implementation of federal law by state offices. This delegation of authority disregards federal mandates and ignores the Federal Government's trust responsibility to Native Hawaiians. "The enactment of S. 675 . . . would address this inequity and provide for Native Hawaiian control, management and accountability of native lands and resources, thereby providing parity in federal policies towards American Indians, Alaska Natives and Native Hawaiians."[173]

The broad scope of the Committee's oversight has established a notable failure of the United States to afford the Native Hawaiian people the same rights, the same privileges, and the same opportunities as every other federally-recognized Native people. This fail-

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[172] 16 U.S.C. § 396d; 16 U.S.C. § 410jj–7; 16 U.S.C. § 470i; 16 U.S.C. § 6401; 20 U.S.C. § 4441; 20 U.S.C. § 7514; and 25 U.S.C. § 4221.

[173] *Advancing the Federal-Tribal Relationship through Self-Governance and Self-Determination: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (Sept. 20, 2012) (statement of D. Noelani Kalipi, President, TiLeaf Group) ("These situations best illustrate the challenges faced by Native Hawaiians and the consequences of not being afforded the opportunity to federal policies that encourage and empower native peoples to manage their lands and resources within the federal framework of self-determination,"). Ms. Kalipi specifically mentioned the HHCA (a Federal statute adopted into the State of Hawaii's Constitiutuion as a condition of statehood "subject to amendment or repeal only with the consent of the United States") and its implementation by DHHL (a state agency) and the complications that can arise when state officials are faced with having to choose between what is in the best interest of the State versus what it is the best interest of the Native Hawaiians). *See, e.g.,* Hawaii Admissions Act, Pub. L. 86–3, 73 Stat. 4.

ure is particularly egregious with respect to DOI and the Office of Native Hawaiian Relations.

In 2004, Congress created the Office of Native Hawaiian Relations within the Office of the Secretary of the Interior with the following duties: (1) effectuate and implement the special legal relationship between the Native Hawaiian people and the United States; (2) continue the process of reconciliation with the Native Hawaiian people; and (3) fully integrate the principle and practice of meaningful, regular, and appropriate consultation with the Native Hawaiian people by assuring timely notification of and prior consultation with the Native Hawaiian people before any federal agency takes any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands.[174]

Congress delegated authority for the federal recognition of tribes to the executive branch. This authority flows from the President to the Secretary of the Interior to the Bureau of Indian Affairs. Yet, regarding Native Hawaiians, the Secretary of the Interior did not delegate this authority to the Bureau of Indian Affairs. The Office of Native Hawaiian Relations has been designated by the Secretary of the Interior to administer the responsibilities of the United States under the Hawaiian Home Lands Recovery Act[175] and the HHCA, which include advancing the interests of the beneficiaries, and assisting the beneficiaries and the State of Hawaii Department of Hawaiian Home Lands (DHHL) in obtaining assistance from programs of the Department of the Interior and other federal agencies that will promote homesteading opportunities, economic self-sufficiency, and social well-being of the beneficiaries. When these responsibilities are ignored, or transferred to the State of Hawaii, as witnesses have noted often occurs, the Federal Government fails to uphold its trust responsibility to the Native Hawaiian people.

The Department of the Interior (DOI) has a trust responsibility to all Native Americans: American Indians, Native Hawaiians, and Alaska Natives. Yet, the Office of Native Hawaiian Relations is not located within the framework of the Assistant Secretary of Indian Affairs within DOI. The Assistant Secretary of Indian Affairs has the responsibility to fulfill DOI's trust responsibilities to all Native American tribes and individuals, as well as promoting the self-determination and economic well-being of the tribes and their members. As it is currently structured, the Office of Native Hawaiian Relations does not engage on behalf of the United States, despite the mandate to "effectuate and implement the special relationship between the Native Hawaiian people and the United States" and to "fully integrate the principle and practice of meaningful . . . consultation with the Native Hawaiian people . . . before any Federal agency takes actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands."[176]

The Committee notes the support of the current Assistant Secretary of Indian Affairs, and urges the Secretary of the Interior to take affirmative steps to carry out the federal trust responsibility.

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[174] On January 22, 2004, the U.S. Senate approved funding for an Office of Native Hawaiian Relations based in Washington, D.C., thereby highlighting the special relationship between the U.S. government and Native Hawaiians. President Bush signed the bill into law as part of the Omnibus Appropriations Act for fiscal year 2004. Pub. L. No. 108–199, 118 Stat. 445 (2004) (referring specifically to section 148).

[175] Pub. L. No. 104–42, 109 Stat. 353 (1995).

[176] Pub. L. No. 108–199, 118 Stat. 445 (2004).

"The Native Hawaiians are in a very similar situation to the Native Alaskans and American Indians on the mainland. There is every reason to believe that they should also have a government-to-government relationship with the United States. I personally fully support that . . . [The Native Hawaiians] deserve to have a similar treatment as similar entities . . . and I hope [S. 675] passes as it is because I would look forward to implementing such a bill, if I were confirmed."[177] In order to fulfill its federal trust responsibility, American Indians, Native Hawaiians, and Alaska Natives must all be organized under Indian Affairs at DOI.

The Committee has concluded that the conditions and challenges facing Native Hawaiians mirror those found in American Indian and Alaska Native communities across the nation. These challenges are daunting, the problems seemingly intractable, the health disparities and other statistical inequities deeply troubling. Without full and equal access to the prevailing federal policy on self-determination, and the ability to once again exercise their right to be self-governing, Native Hawaiians will continue to lack parity under federal law, and the purpose of the more than 150 federal statutes enacted over the past 90 years will be frustrated, and the intent and authority of the Congress undermined.

Congress has consistently fulfilled its trust responsibilities to Native Hawaiians and must act to correct the failure of the Secretary of the Interior

"Congress has created and continues to fund programs to address the Native Hawaiian needs in the areas of health, education, welfare and housing, but has failed to uphold the final and most important piece of the trust relationship with Native Hawaiians, a guaranteed right to self-governance."[178] However well-intentioned, without a government-to-government relationship between the United States and Native Hawaiians, the programs and mechanisms created to help manage Native Hawaiian land trusts and resources, including the Office of Native Hawaiian Relations, will continue to prevent self-governance and self-determination by Native Hawaiians.[179] "[T]he management of Native Hawaiian resources within the state framework does not result in self-governance and self-determination by Native Hawaiians, nor does it result in Native Hawaiian control and management of resources—a fundamental element of self-rule under the federal framework."[180]

While the history of the United States is replete with examples of unequal treatment of certain groups of people, one of the things that make our nation so great is that our system of laws allows us to change, correct mistakes, and right past wrongs. "It is our responsibility as a nation to do right by America's Native people, those who exercised sovereignty on lands that later became part of

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[177] *The President's Nomination of Kevin K. Washburn to be Assistant Secretary—Indian Affairs, Department of the Interior: Nomination Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (Sept. 14, 2012) (statement of Kevin K. Washburn).

[178] *S Comm. on Indian Affairs: Business Meeting to consider S. 675, S. 1345, S. 1684* (Sept. 13, 2012) (statement of Sen. Daniel K. Akaka, Chairman, S. Comm. on Indian Affairs).

[179] *Advancing the Federal-Tribal Relationship through Self-Governance and Self-Determination: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (Sept. 20, 2012) (statement of D. Noelani Kalipi, President, TiLeaf Group) (noting that "without access to the federal framework of self-governance and self-determination . . . Native Hawaiians don't have the same tools available to manage and control their resources").

[180] *Id.*

the United States. While we can never change the past, we have the power to change the future."[181] The United States has recognized hundreds of Alaska Native and American Indian communities. The Committee has concluded that it is long past time for the Native Hawaiian people to have the same rights, the same privileges, and the same opportunities as every other federally-recognized Native people.

NEED FOR LEGISLATION

The Native Hawaiian Government Reorganization Act of 2012 is necessary legislation for a number of compelling reasons.

The primary goal of S. 675 is to establish a process for the reorganization and federal recognition of a Native Hawaiian government and to reaffirm the special political and legal relationship between the United States and the Native Hawaiian governing entity for purposes of carrying on a government-to-government relationship. Congress has consistently recognized Native Hawaiians as among the Native people of the United States on whose behalf it may exercise its powers under the Indian Commerce Clause and other relevant provisions of the Constitution. Congress has not yet acted to provide a process for reorganizing a Native Hawaiian governing entity.

That inaction has placed Native Hawaiians at a unique disadvantage. Of the three major groups of Native Americans in the United States—American Indians, Alaska Natives, and Native Hawaiians—only Native Hawaiians currently lack the benefits of democratic self-government. In earlier eras, similar deprivations wreaked havoc on countless American Indians and Alaska Natives. To avoid this, consultation with Native Hawaiians must be emphasized.[182] As President Obama recently stated, "History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results."[183]

For nearly a half century, Congress has pursued a strong policy of tribal self-determination and self-government, with the "overriding goal of encouraging tribal self-sufficiency and economic development."[184] The results of this policy have been striking. As the co-director of the Harvard Project on American Indian Economic Development, Joseph P. Kalt, recently wrote, "the evidence is overwhelming that political self-rule is the only policy" that has succeeded in overcoming Native Americans' "social, cultural, and economic destruction."[185] For Native Americans, economic develop-

[181] 158 CONG. REC. S7765–66 (daily ed. Dec. 12, 2012) (statement of Sen. Daniel K. Akaka).

[182] *Hawaiian Homeownership Act of 2011: Oversight Field Hearing on S. 65 Before the S. Comm. on Indian Affairs,* 112th Cong. (Apr. 13, 2012) (statement of Robin Danner, President/CEO, Council for Native Hawaiian Advancement (CNHA)).

[183] Memorandum of November 5, 2009—Tribal Consultation, 74 Fed. Reg. 57,881, 57,881 (Nov. 9, 2009).

[184] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987) (citations omitted).

[185] Joseph P. Kalt, *Constitutional Rule and the Effective Governance of Native Nations, in* AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 184 (Eric D. Lemont ed., 2006). "[F]ederal promotion of tribal self-government under formal policies known as 'self-determination' is turning out to be, after a century or more of failed efforts to improve the lives of the U.S. indigenous people, the only strategy that has worked. In so doing, the strategy is improving the well-being of its poorest and, arguably, historically most oppressed and disempowered people." Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy that Works* 15 (Harvard Kennedy School Faculty Research Working Paper Series, Paper No. RWP10–043, 2010) (quoting Richard M. Nixon, Special

ment "is first and foremost a political problem. At the heart of it lie sovereignty and the governing institutions through which sovereignty can be effectively exercised."[186] By establishing a process that would lead to the reorganization of a sovereign Native Hawaiian government, S. 675 will finally put Native Hawaiians on a par with other Native Americans, giving them equal access to the benefits of accountable, local, democratic self-rule.

Reconciliation and remedy to a historical wrong

Much of the evolving federal policy and history with the Indian Tribes was the result of balancing the nation's founding ideals against its need for civil order. The federal policy of recognizing the sovereignty of tribes, and promoting the self-determination and self-governance of Native nations through their tribal governments is in part, a testament to the American understanding that (1) tribal peoples never consented to be governed by the United States, and (2) that the power of tribal governments emanates from the consent of their membership. Over time, the United States came to view its relationship with the Indian tribes as one of a trustee to a ward, and of a greater nation to a dependent nation.

The last recognized government of the Native Hawaiian people was the Kingdom of Hawaii, built on the foundation of Native Hawaiian culture and sovereignty in the Hawaiian archipelago from time immemorial. Prior to the illegal overthrow in 1893, the United States recognized the Kingdom of Hawaii as foreign nation, but it is clear that the United States' attitude and policies towards the Kingdom of Hawaii evolved in a manner consistent with its attitude, policies and treatment of Indian Tribes as dependent nations in need of protection. This is evidenced by President Johnson's message to Congress on December 9, 1868 wherein he states, "It is known and felt by the Hawaiian Government and people that their Government and institutions are feeble and precarious; that the United States, being so near a neighbor, would be unwilling to see the islands pass under foreign control. Their prosperity is continually disturbed by expectations and alarms of unfriendly political proceedings, as well from the United States as from other foreign powers."

In enacting the Apology Resolution, the United States acknowledged that, in contravention of existing treaties of friendship and peace, the United States Minister John L. Stevens "conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous

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Message on Indian Affairs (July 8, 1970). In July 2009, then-Assistant Secretary of the Interior for Indian Affairs, Larry Echo Hawk signed a Memorandum of Understanding (MOU) with Harvard University's Project on American Indian Economic Development "whereby the Department and Harvard will collaborate on promoting Tribal economic development through research, outreach and leadership education." *Strengthening Self-Sufficiency: Overcoming Barriers to Economic Development in Native Communities Oversight Field Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. 8, 16 (Aug. 17, 2011) (statement of Michael R. Smith, Deputy Bureau Director, Field Operations, Bureau of Indian Affairs, U.S. Department of the Interior) (citations omitted). *See also Strengthening Self-Sufficiency: Overcoming Barriers to Economic Development in Native Communities Oversight Field Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. 32 (Aug. 17, 2011) (statement of Robin Puanani Danner, President & CEO, Council for Native Hawaiian Advancement).

[186] Stephen Cornell & Joseph P. Kalt, *Sovereignty and Nation Building: The Development Challenge in Indian Country Today,* 22 Amer. Indian Culture & Res. J. 187, 212 (1998); Charles Wilkinson, Blood Struggle: The Rise of Modern Indian Nations 271 (2005) ("Experience in Indian economic development . . . has shown that strong and effective tribal governments, anchored in tribal culture, are critical for economic progress.").

and lawful government of Hawaii," by landing armed naval forces of the United States to support the illegal overthrow of the Kingdom of Hawaii and extending "diplomatic recognition to the Provisional Government that was formed by the conspirators without the consent of the Native Hawaiian people or the lawful Government of Hawaii."

The Apology Resolution recognizes that actions by the United States resulted in the suppression of the "inherent sovereignty of the Native Hawaiian people" and the "deprivation of the rights of Native Hawaiians to self-determination." Further, the Apology Resolution finds that "the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language and social institutions." The United States committed itself to a process of reconciliation, urging the President to "support reconciliation efforts between the United States and the Native Hawaiian people."

As a result of the Apology Resolution, the U.S. Departments of Justice and the Interior conducted a series of reconciliation hearings in Hawaii in December 1999, resulting in the issuance of the a report on the reconciliation process between the Federal Government and Native Hawaiians on October 23, 2000, entitled *From Mauka to Makai: The River of Justice Must Flow Freely*. The report notes that reconciliation requires "actions to rectify the injustices and compensation for the harm."

The Native Hawaiian Government Reorganization Act of 2012 provides a remedy for the unjust suppression of the Native Hawaiian right to self-determination and self-governance within the framework of existing federal law. Because the bill simply empowers the Secretary of the Interior to recognize a Native Hawaiian government once reorganized by the Native Hawaiian people, it serves as the first necessary step towards reconciliation. As is the case with other federally-recognized tribes, the contours of the federal relationship with the Native Hawaiian people can be further defined by future Congresses with appropriate and representative consultation with the Native Hawaiian government.

The Native Hawaiian Government Reorganization Act implements the key recommendation called for in the 2000 report issued by the Departments of Justice and the Interior, advancing the reconciliation process Congress called for in the Apology Resolution nearly 20 years ago.

Necessary tool for the preservation and perpetuation of an indigenous people and culture

"Native self-governance leads to Native self-sufficiency, resulting in our continued ability to be productive and contribute to the well-being of our families, our communities, and our great nation."[187] Self-governance would allow Native Hawaiian people to exert control over their people and communities—as they had done for thousands of years before the overthrow of the Kingdom of Hawaii. Self-governance is vital to the survival of the Native Hawaiian people and their culture. As explained in the Apology Resolution, self-gov-

[187] Sen. Daniel K. Akaka, Final Speech to the Native Hawaiian Convention (Oct. 5, 2012).

ernance is a fundamental right that Native Hawaiians, like all other Native Americans, should be allowed to practice. Establishing an avenue for Native Hawaiians to reorganize and receive federal recognition will provide opportunities for Native Hawaiians to preserve their cultural resources, exercise self-governance and self-determination, and develop their own solutions to the problems faced by their community.

With the ability to control the decision-making process, Native Hawaiians could expand the level of services that it provides and has brought economic benefits to all Native Hawaiians: provide more housing, medical facilities, develop its economic base, and the course of the protection of natural resources. One of the great advantages of the federal policy of advancing Native self-determination through self-governance has been the wide range of tools afforded to Native people in their ability to perpetuate their traditional knowledge, perspectives, values and cultures for generations to come. Self-determination is the only federal policy to help Native people address health concerns and the socio-economic conditions of their communities in a manner that leads to greater self-sufficiency.[188]

Self-governance ensures that, within the framework of federal law, Native people can exercise their legislative, judicial and executive authorities consistent with their cultural values and community norms. By doing so, tribes are able to develop their economies and address the health, safety and welfare concerns of their communities in a manner that ensures their indigenous cultures are perpetuated and their traditional lifeways continue to be relevant to future generations. Tribes have also used their sovereign authority to develop programs and services to retain and recover aspects of tribal life, such as the Native language and ceremonies, which may otherwise be lost.

While the United States has clearly legislated to provide resources to assist the Native Hawaiian people in perpetuating their culture and language, and to improve the health and socio-economic conditions of their communities, a failure to recognize the self-governing authority of the Native Hawaiian people will always hamper the efficacy of these resources and deny Native Hawaiians some of the greatest tools available under existing federal law to perpetuating their culture and ensuring a healthy population.

The Native Hawaiian Government Reorganization Act of 2012 provides a process for the Native Hawaiian people to reorganize their representative government and petition to have that government recognized by the United States, providing an effective mechanism for the Native Hawaiian people to be self-governing and to exercise legislative, judicial and executive authorities in a manner that is consistent with Native Hawaiian culture, lifeways and values.

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[188] "[T]he question was not whether the federal government had an interest in the affairs of the American Indian tribes, but rather 'how that responsibility can be best fulfilled.' The answer adopted by the federal government was and remains self-determination through self-governance and economic self-sufficiency." Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy that Works* 19 (Harvard Kennedy School Faculty Research Working Paper Series, Paper No. RWP10–043, 2010) (quoting Richard M. Nixon, Special Message on Indian Affairs (July 8, 1970).

Clarity and parity in federal policy

The United States has long recognized the Native Hawaiian people as an indigenous people to whom it has a trust responsibility. Beginning in 1921, the Congress began enacting legislation to address the socio-economic conditions of Native Hawaiians and the protection of their collective rights and culture, sometimes in the same legislation it advanced for other Native American groups, and in other instances, as separate but parallel legislation.

The rationale for separate legislation for Native Hawaiians was enunciated in the History, Jurisdiction, and a Summary of Legislative Activities of the United States Senate Select Committee on Indian Affairs during the Ninety-Fifth Congress, as it contemplated legislation to include the Native Hawaiian people in the Indian Education Act. The report states:

> [T]he committee concluded that simply expanding the definition of "Indian" under present Federal laws to include Native Hawaiians ignored the uniqueness of a number of programs administered by the Bureau of Indian Affairs which are premised on the existence of a tribal government exercising powers of self-government. Native Hawaiian organizations do not exercise comparable self-governing authority. However, the committee received testimony which documented the Native Hawaiian's need for supplemental educational services. The committee amendment to S. 857, the Native Hawaiian Education Act, was in the nature of a substitute, and established separate educational programs for Native Hawaiians identical to those provided by the Indian Education Act.[189]

This approach to meeting the federal trust responsibility to the Native Hawaiian people is common when the primary legislation relies on tribal government institutions in implementing key provisions, but when the legislation can be implemented without heavy reliance on the self-governing authority of tribes, Congress has generally elected to legislate on behalf of Native Hawaiians in the same legislation as American Indians and Alaska Natives.

This disparate treatment is a direct result of U.S. action aiding in the illegal overthrow of the Kingdom of Hawaii, effectively depriving Native Hawaiians of their traditional government. "[T]his bill does not propose anything new nor does it afford special treatment to Native Hawaiians. Rather, this bill acknowledges our special relationship with Native Hawaiians and places them on equal footing with the other aboriginal, indigenous people of the United States. It merely extends the Federal policy of self-governance and self-determination to Native Hawaiians." [190]

The federal policy towards its Native nations is to uphold the trust responsibility in three primary ways: (1) the provision of programs and services to address socio-economic needs; (2) the protection of the collective rights of the Native people; and (3) assuring the right to self-governance within the framework of federal law.

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[189] HISTORY, JURISDICTION, AND A SUMMARY OF LEGISLATIVE ACTIVITIES OF THE S. SELECT COMM. ON INDIAN AFFAIRS, 95TH CONG. 24 (1977–1978).

[190] Joint Statement of Senators Daniel K. Akaka and Daniel K. Inouye Before the House Judiciary Subcommittee on the Constitution regarding H.R. 309/S. 147, the Native Hawaiian Reorganization Act 3 (July 19, 2005).

For more than 90 years, Congress has acted to address the socioeconomic needs and protect the collective rights of the Native Hawaiian people, enacting over 150 statutes. S. 675 fulfills the third and final area of the trust responsibility by ensuring that the Native Hawaiian people have a mechanism to reorganize their representative Native government and seek its recognition by the United States.

"[S. 675] is nothing more than another manifestation of the bedrock of our federal policy toward indigenous people."[191] With its passage, the Congress ensures parity in federal policy for all recognized Native people and clarifies the federal relationship with the Native Hawaiian people, allowing them full access to the prevailing federal policy on self-determination and the ability to exercise their right to self-governance.[192]

Administrative efficiency and best use of federal and Native Hawaiian resources

As was noted earlier, existing federal law requires the provision of services to and consultation with the Native Hawaiian people by a variety of federal departments and agencies. Effective and efficient administration of programs designed to provide services and meet consultation requirements are hampered by the lack of a formal government-to-government relationship through which federal agencies can work. As a result, federal agencies must develop separate programs, regulations, and processes for meeting responsibilities to Native Hawaiians than are developed for meeting the same responsibilities to other Native people that have a government-to-government relationship with the United States. This results in duplicative efforts and an inefficient use of resources that could otherwise be dedicated to programmatic solutions rather than administrative costs.

The disparate treatment of Native Hawaiians and a lack of centralized services also results in a duplication of efforts by Native Hawaiian organizations seeking to serve the same populations, particularly in the areas of outreach and program administration. One of the core efficiencies that tribal governments represent for their members is a centralized place for accessing a variety of programs, services, and solutions. Without a recognized representative government, Native Hawaiians must learn about and access a multiplicity of organizations providing services, often focused around an area of concern, a locality, or both.

Finally, the absence of a recognized government representing the Native Hawaiian people results in undue burdens and inefficiencies for organizations and agencies seeking to work or consult with the Native Hawaiian community. For example, both the State of Hawaii and the United States have laws governing the treatment of Native graves and funerary objects, particularly when found in the course of development.

The State of Hawaii burial protection laws require developers to consult with the lineal and cultural descendants of burials that

[191] Joint Statement of Congressmen Neil Abercrombie and Ed Case Before the House Judiciary Subcommittee on the Constitution on H.R. 309/S. 147, the Native Hawaiian Government Reorganization Act of 2005, 2–3 (July 19, 2005).

[192] *Advancing the Federal-Tribal Relationship through Self-Governance and Self-Determination: Oversight Hearing Before the S. Comm. on Indian Affairs,* 112th Cong. (Sept. 20, 2012) (statement of Sen. Daniel K. Akaka, Chairman, S. Comm on Indian Affairs).

may be found on a development site in advance of development. The absence of a recognized Native government requires developers to have a deeper understanding of the history and family composition of an area where they are proposing development in order to effectively meet the state law requirements. They must conduct outreach and provide public opportunities for input into communities they may not know how best to reach. A recognized Native Hawaiian government could decrease the level of effort required by developers to comply with the applicable laws and increase the rates of success in effectively engaging the lineal and cultural descendants in a coordinated and timely fashion.

By reorganizing a central and recognized representative government for the Native Hawaiian people, passage of S. 675, the Native Hawaiian Government Reorganization Act, will enhance efficiencies for: federal, state and local governments working with the Native Hawaiian community; the Native Hawaiian community members finding and successfully accessing appropriate and available programs and services; as well as other organizations and efforts seeking to work or consult with the Native Hawaiian people.

LEGISLATIVE HISTORY

S. 675 was introduced on March 30, 2011, by Senator Akaka for himself and Senators Inouye, Begich and Murkowski, and referred to the Committee on Indian Affairs. S. 675 was identical to the version of the legislation marked up by the Committee in the 111th Congress, except for technical and conforming changes. On April 7, 2011, the bill was ordered by the Committee to be favorably reported without amendment. On September 13, 2012, the bill was ordered by the Committee to be reported favorably with an amendment in the nature of a substitute.

A House companion measure to S. 675, H.R. 1250, was introduced on March 30, 2011, by Representative Hirono for herself and Representatives Bordallo, Boswell, Carnahan, Cole, Courtney, DeGette, Faleomavaega, Farr, Hanabusa, Hinchey, Honda, Kildee, Kucinich, Maloney, Matsui, McDermott, McIntyre, Napolitano, Payne, Roybal-Allard, Sablan, Stark, Walz, Woolsey, and Young, and referred to the Committee on Natural Resources. Representatives Andrews, Brady, Cohen, Jones, McCollum, Miller, and Rahall joined as co-sponsors on March 31, 2011. Representatives Boren, DeLauro, Grijalva, Lewis, Moore, Moran, Olver, Pastor, and Reyes joined as co-sponsors on April 1, 2011. Representatives Frank, Garamendi, Lofgren, Zoe and Sarbanes joined as co-sponsors on April 6, 2011. Representatives Brown, Christensen, Chu, Conyers, Markey, and Rangel joined on April 12, 2011. The Natural Resources Committee has not met to consider the bill as of this report.

In the 111th Congress, S. 1011 was introduced on May 7, 2009, by Senator Akaka for himself and Senator Inouye, and referred to the Committee on Indian Affairs. Senators Dorgan, Begich, and Murkowski became cosponsors on August 5, 2009. A hearing was held before the Committee on Indian Affairs on August 6, 2009. On December 17, 2009, the bill was ordered by the Committee to be favorably reported with an amendment in the nature of a substitute. Other versions of the bill, S. 381 and S. 708, were introduced but not considered by the Committee.

A House companion measure to S. 1011, H.R. 2314, was introduced on May 7, 2009, by Representative Abercrombie for himself and Representative Hirono, and referred to the Committee on Natural Resources. The Natural Resources Committee met to consider the bill on June 11, 2009. On December 16, 2009, the bill was favorably reported without amendment to the House of Representatives by the Yeas and Nays 26–13. On February 23, 2010, the House of Representatives considered H.R. 2314 and passed by the Yeas and Nays 245–164 with an amendment in the nature of a substitute offered by Representative Abercrombie. Other versions of the bill, H.R. 862 and H.R. 1711, were introduced but not considered by the Natural Resources Committee.

In the 110th Congress, S. 310 was introduced on January 17, 2007, by Senator Akaka for himself and Senators Inouye, Cantwell, Dodd, Murkowski, Stevens, Coleman, Dorgan, and Smith, and referred to the Committee on Indian Affairs. Senator Klobuchar became a cosponsor on December 3, 2007. A hearing was held before the Committee on Indian Affairs on May 3, 2007. On May 10, 2007, the bill was ordered by the Committee to be favorably reported without amendment to the full Senate.

A House companion measure to S. 310, H.R. 505, was introduced on January 17, 2007, by Representative Abercrombie, and referred to the Committee on Natural Resources. On May 2, 2007, the Natural Resources Committee met to consider the bill. The bill was ordered favorably reported to the House of Representatives by voice vote. The bill passed the House on October 24, 2007.

In the 109th Congress, S. 147 was introduced on January 25, 2005, by Senator Akaka for himself and Senator Inouye, and referred to the Committee on Indian Affairs. Senator Smith of Oregon became a cosponsor on February 16, 2005, Senator Cantwell of Washington on February 18, 2005, and Senator Murkowski of Alaska on March 8, 2005. A hearing on S. 147 was held before the Committee on March 1, 2005, and on March 9, 2005, the bill, with an amendment in the nature of a substitute, was ordered by the Committee to be favorably reported to the full Senate. After the business meeting on March 9, 2005, when the bill was ordered reported with the substitute amendment, the following additional Senators joined as cosponsors: Senator Coleman of Minnesota on March 10, 2005, Senator Dorgan of North Dakota on April 4, 2005, Senator Stevens of Alaska on April 5, 2005, and Senator Graham of South Carolina on May 11, 2005.

A House companion measure to S. 147, H.R. 309, was introduced on January 25, 2005, by Representative Abercrombie, for himself and Representatives Case, Grijalva, Young, Moran, Bordallo and Faleomavaega, and referred to the Committee on Resources. On February 1, 2005, Representative Rahall joined as a cosponsor.

In the 108th Congress, S. 344 was introduced on February 11, 2003, by Senator Akaka, for himself and Senator Inouye, and referred to the Committee on Indian Affairs. Senator Reid of Nevada became a cosponsor on February 27, 2003, Senator Stevens of Alaska on March 17, 2003, Senator Hatch of Utah on November 12, 2003, Senator Smith of Oregon on December 9, 2003, Senator Campbell of Colorado on April 21, 2004, and Senator Carper of Delaware on June 24, 2004. A hearing on S. 344 was held before the Committee on Indian Affairs on February 25, 2003. S. 344 was

ordered favorably reported to the full Senate by the Committee on Indian Affairs on May 14, 2003.

A House companion measure to S. 344, H.R. 665, was introduced on February 11, 2003, by Representative Abercrombie, for himself and Representative Case, and thereafter referred to the Committee on Resources.

In the 107th Congress, S. 746 was introduced on April 6, 2001, by Senator Akaka, for himself and Senator Inouye, and thereafter referred to the Committee on Indian Affairs. On July 24, 2001, S. 746 was ordered favorably reported to the full Senate. The Committee report accompanying the bill was S. Rep. No. 107–66.

A House companion measure to S. 746, H.R. 617, was introduced in the House of Representatives by Representative Neil Abercrombie, for himself and Representatives Patsy Mink, Eni Faleomavaega, James Hansen, Dale Kildee, Nick Rahall, and Don Young, and thereafter referred to the Committee on Resources. H.R. 617 was ordered favorably reported to the full House of Representatives on May 16, 2001. S. 746 and H.R. 617 were not acted upon prior to the sine die adjournment of the 107th session of Congress.

In the 106th Congress, S. 2899 was introduced by Senator Akaka, for himself and Senator Inouye, and referred to the Committee on Indian Affairs. A House companion measure to S. 2899, H.R. 4904, was introduced in the House of Representatives and thereafter referred to the Committee on Resources. The Committee and the Committee on Resources held five consecutive days of joint hearings on S. 2899 and H.R. 4904 in Hawai'i from Monday, August 28, through Friday, September 1, 2000. The Committee held an additional hearing on S. 2899 in Washington D.C. on September 13, 2000. S. 2899 was ordered favorably reported to the full Senate by the Committee on September 13, 2000. The Committee report accompanying the bill was Senate Report 106–424. H.R. 4904 was ordered favorably reported by the House Resources Committee and passed the House on September 26, 2000. H.R. 4904 failed to pass the Senate before the sine die adjournment of the 106th session of the Congress.

SUMMARY OF THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

A number of amendments were made to S. 675, all of which were included in a substitute amendment accepted by the Committee on September 13, 2012. These changes were made to streamline the legislation and recognize the work of the State of Hawaii's Native Hawaiian Roll Commission, tasked with establishing a base roll of Native Hawaiians interested in reorganizing a Native Hawaiian government.

SECTION-BY-SECTION ANALYSIS OF S. 675, AS AMENDED

Section 1. Short title

Section 1 states that this Act may be cited as the "Native Hawaiian Government Reorganization Act of 2012".

Section 2. Findings

Section 2 establishes that Congress finds that, like American Indians and Alaska Natives, the Native Hawaiian people, having

never relinquished claims to inherent sovereignty, have a special political and legal relationship to the United States, arising out of their status as indigenous, Native people. Section 2 also establishes that Congress possesses and has exercised its constitutional authority to address the conditions of the Native Hawaiian people in more than 150 federal laws, including adopting the Hawaiian Homes Commission Act of 1920 and the Hawaii Admissions Act in 1959. This section also identifies other state, federal and international support for the purpose of this legislation.

Section 3. Definitions

Defines various terms used in the Act.

Section 4. United States policy and purpose

Section 4 provides the following: Congress possesses and exercises the constitutional authority to address Native Hawaiian conditions; the Native Hawaiian people have the right to autonomy in internal affairs, an inherent right of self-determination and self-governance; the Native Hawaiian people have the right to reorganize and the right to become economically self-sufficient; the United States reaffirms the special political and legal relationship between the United States and the Native Hawaiian people, and the authority delegated to the State of Hawaii in the Admissions Act; the United States ensures parity in policy and treatment among all federally-recognized indigenous groups; the U.S. will continue to engage in reconciliation process and political relations with the Native Hawaiian people; and the purpose of the bill is to provide a process for the reorganization and federal recognition of a single Native Hawaiian government that exercises the inherent powers of native self-government under existing federal law, with the same privileges and immunities as other federally-recognized Indian tribes.

Section 5. Reorganization of the Native Hawaiian governing entity

Section 5 recognizes the Native Hawaiian right to reorganize under Section 16 of the Indian Reorganization Act; defines the membership of the Native Hawaiian people for the purposes of reorganization as those people appearing on the roll certified by the State of Hawaii Native Hawaiian Roll Commission authorized under Act 195; provides for the establishment of an Interim Governing Council, tasked with preparing the Constitution and By-Laws and submitting them for Secretarial approval; and requires the Interim Governing Council, with assistance from the Secretary, to conduct the election of officers of the Native Hawaiian governing entity, then terminates the Council.

Section 6. Applicability of other Federal laws

Section 6 provides the following: the Native Hawaiian Governing Entity has the inherent powers and privileges of self-government of an Indian Tribe, including the power to define its own membership, and will be listed as an Indian Tribe on the Federally Recognized Indian Tribe List; the Native Hawaiian Governing Entity is subject to the Indian Gaming Regulatory Act (IGRA) and its gaming prohibitions. Effectively, the Native Hawaiian Governing Entity will be barred from gaming, as all gaming in the State of Hawaii

is prohibited under state law; and the Secretary may treat the Native Hawaiian governing entity as an Indian Tribe for the purpose of carrying out any activity authorized under the Indian Reorganization Act.

Section 7. Severability

Section 7 provides that if any provision of the Act is held invalid, it is the intent of Congress that the remaining provisions remain in effect.

Section 8. Authorization of appropriations

Section 8 authorizes the appropriation of such sums as are necessary to carry out the Act.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business meeting on September 13, 2012, the Committee on Indian Affairs, by voice vote, adopted S. 675 with an amendment in the nature of a substitute and ordered the bill reported to the Senate, with the recommendation that the Senate do pass S. 675 as reported.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974 was not available for inclusion in this report. The estimate will be printed in either a supplemental report or the Congressional Record when it is available.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that the regulatory impact of S. 675 will be minimal.

EXECUTIVE COMMUNICATIONS

The Committee has received no communications from the Executive Branch regarding S. 675.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that the enactment of S. 675 will not affect any changes in existing law.

ADDITIONAL VIEWS OF VICE CHAIRMAN BARRASSO

Federal recognition of a Native group is of profound importance to many stakeholders—the Native group itself and its members, the United States and its citizens, local communities and the people who live in them. I understand how challenging, complex, and time-consuming the administrative recognition process is—the Committee has heard a great deal about those problems—and sympathize with groups that have gone through it or attempted to go through it.

Nevertheless, it is my view that legislative recognition—legislation that deems a group or tribe to be federally recognized—is not the right way to decide which groups should be recognized and which groups should not be recognized.

That is a determination that can be best made by the Executive Branch of the Government following the regulations that have been adopted for that purpose, to analyze and evaluate of the historic, cultural, political, and other key factors that should go into the decision of whether a Native group should be formally recognized by the United States.

Testifying about several recognition bills at a hearing before this Committee during the 110th Congress, the Director of the Office of Federal Acknowledgement at the Department of the Interior stated—

> Legislation such as S. 514, S. 724, S. 1058, and H.R. 1294 [recognition bills introduced in the 110th Congress] would allow these groups to bypass this [the Federal acknowledgement] process—allowing them to avoid the scrutiny to which other groups have been subjected. The Administration supports all groups going through the Federal acknowledgment process under 25 CFR Part 83.1.

The Department's witness went on to point out that, in light of the importance and implications of recognition decisions, the Department adopted its Federal acknowledgment regulations at 25 CFR Part 83 in 1978 in recognition of "the need to end ad hoc decision making and adopt uniform regulations for Federal acknowledgment."

I do know and appreciate how important this bill is to the Chairman and to many Native Hawaiian people in his home state. However, I feel that the policy should be the same for all Native groups—they should go through the administrative acknowledgement process to be federally recognized. Although there is a reorganization process contemplated by the bill as amended in the business meeting on September 13, 2012, it is, in effect, a legislative recognition of the Native Hawaiian entity. For that reason I cannot support the bill.

JOHN BARRASSO.

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DOCUMENT G

157 Cong. Rec. 1,978-84 (2011) (statement of Sen. Akaka).

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS -- (Senate - March 30, 2011)

[Page: S1978]

By Mr. AKAKA (for himself, Mr. **INOUYE**, Mr. **BEGICH**, and Ms. **MURKOWSKI**):

S. 675. a bill to express the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process for the recognition by the United States of the Native Hawaiian governing entity; to the Committee on Indian Affairs.

Mr. AKAKA. Mr. President, today I rise to introduce legislation of great importance to my state, the Native Hawaiian Government Reorganization Act of 2011. This bill would ensure parity in federal policy as it relates to the Native Hawaiian people. It would put them on equal footing with American Indians and Alaska Natives. I have sponsored this common-sense legislation since the 106th Congress.

Last December, I spoke here on the Senate floor to reaffirm my commitment to enact this legislation. I made it clear then to my colleagues and my constituents that I would be reintroducing this legislation in the 112th Congress. I am moving forward with the legislation that was reported out of the Senate Committee on Indian Affairs in the 111th Congress.

Throughout my Senate career, I have been a member of the Committee on Indian Affairs. I have worked diligently with my colleagues on the Committee to champion legislation to improve conditions for our Native communities across the United States. At the beginning of the 112th Congress, I became the Chairman of this Committee. I look forward to working on the many pressing issues for American Indians, Alaska Natives, and Native Hawaiians. Reconciliation between the United States and the Native Hawaiian people will be a top priority.

In 1993, I sponsored a measure commonly known as the Apology Resolution. This resolution was signed into law by President Bill Clinton. It outlined the history --prior to--and following the overthrow of the Kingdom of Hawaii, including the involvement in the overthrow by agents of the United States. In the resolution, the United States apologized for its involvement--and acknowledged the ramifications of the overthrow. It committed to support reconciliation efforts between the United States and the Native Hawaiian people.

However, additional Congressional action is needed.

My legislation allows us to take the necessary next step in the reconciliation process. The bill does three things. First, it authorizes an office in the Department of the Interior to serve as a liaison between Native Hawaiians and the United

States. Second, it forms an interagency task force chaired by the Departments of Justice and Interior, and composed of officials from federal agencies that administer programs and services impacting Native Hawaiians. Third, it authorizes a process for the reorganization of the Native Hawaiian government for the purposes of a federally-recognized government-to-government relationship. Once the Native Hawaiian government is recognized, an inclusive democratic negotiations process representing both Native Hawaiians and non-Native Hawaiians would be established. There are many checks and balances in this process. Any agreements reached would still require the legislative approval of the State and Federal governments.

Opponents have spread misinformation about the bill. Let me be clear on some things that this bill does not do. My bill will not allow for gaming. It does not allow for Hawaii to secede from the United States. It does not allow for private land to be taken. It does not create a reservation in Hawaii.

What this bill does do is allow the people of Hawaii to come together and address issues arising from the overthrow of the Kingdom of Hawaii more than 118 years ago.

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It is time to move forward with this legislation. To date, there have been a total of 12 Congressional hearings, including 5 joint hearings in Hawaii held by the Senate Committee on Indian Affairs and the House Natural Resources Committee. Our colleagues in the House have passed versions of this bill three times. We, however, have never had the opportunity to openly debate this bill on its merits in the Senate. We have a strong bill that is supported by Native communities across the United States, by the State of Hawaii, and by the Obama Administration.

Last week, I met with officials and community leaders in the state of Hawaii to share my intention to reintroduce this legislation. I received widespread support. This support was not surprising. A poll conducted by the Honolulu Advertiser in May of last year reported that 66 percent of the people of Hawaii support Federal recognition for Native Hawaiians. And 82 percent of Native Hawaiians polled support Federal recognition.

My efforts have the support of the National Congress of American Indians, the Alaska Federation of Natives, and groups throughout the Native Hawaiian community including the Association of Hawaiian Civic Clubs, the Native Hawaiian Bar Association, the Council for Native Hawaiian Advancement, and two state agencies which represent the interests of the Native Hawaiian people, the Office of Hawaiian Affairs and the Department of Hawaiian Home Lands. I have also received support from national organizations such as the American Bar Association, and from President Obama, the Department of Justice, and the Department of Interior.

I encourage all of my colleagues to stand with me and support this legislation. I welcome any of my colleagues with concerns to speak with me so I can explain how important this bill is for the people of Hawaii. The people of Hawaii have waited for far too long. America has a history of righting past wrongs. The United States has federally recognized government-to-government relationships with 565 tribes across our country. It is time to extend this policy to the Native Hawaiians.

Mr. President, I ask unanimous consent that the text of the bill be printed in the *Record*.

There being no objection, the text of the bill was ordered to be printed in the *Record*, as follows:

S. 675

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ``Native Hawaiian Government Reorganization Act of 2011''.

SEC. 2. FINDINGS.

Congress finds that--

(1) the Constitution vests Congress with the authority to address the conditions of the indigenous, native people of the United States and the Supreme Court has held that under the Indian Commerce, Treaty, Supremacy, and Property Clauses, and the War Powers, Congress may exercise that power to rationally promote the welfare of the native peoples of the United States so long as the native people are a ``distinctly native community'';

(2) Native Hawaiians, the native people of the Hawaiian archipelago that is now part of the United States, are 1 of the indigenous, native peoples of the United States, and the Native Hawaiian people are a distinctly native community;

(3) the United States has a special political and legal relationship with, and has long enacted legislation to promote the welfare of, the native peoples of the United States, including the Native Hawaiian people;

(4) under the authority of the Constitution, the United States concluded a number of treaties with the Kingdom of Hawaii, and from 1826 until 1893, the United States--

(A) recognized the sovereignty of the Kingdom of Hawaii as a nation;

(B) accorded full diplomatic recognition to the Kingdom of Hawaii; and

(C) entered into treaties and conventions of peace, friendship and commerce with the Kingdom of Hawaii to govern trade, commerce, and navigation in 1826, 1842, 1849, 1875, and 1887;

(5) pursuant to the Hawaiian Homes Commission Act, 1920 (42 Stat. 108, chapter 42), the United States set aside approximately 203,500 acres of land in trust to better address the conditions of Native Hawaiians in the Federal territory that later became the State of Hawaii and in enacting the Hawaiian Homes Commission Act, 1920, Congress acknowledged the Native Hawaiian people as a native people of the United States, as evidenced by the Committee Report, which notes that Congress relied on the Indian affairs power and the War Powers, including the power to make peace;

(6) by setting aside 203,500 acres of land in trust for Native Hawaiian homesteads and farms, the Hawaiian Homes Commission Act, 1920, assists the members of the Native Hawaiian community in maintaining distinctly native communities throughout the State of Hawaii;

(7) approximately 9,800 Native Hawaiian families reside on the Hawaiian Home Lands, and approximately 25,000 Native Hawaiians who are eligible to reside on the Hawaiian Home Lands are on a waiting list to receive assignments of Hawaiian Home Lands;

(8)(A) in 1959, as part of the compact with the United States admitting Hawaii into the Union, Congress delegated the authority and responsibility to administer the Hawaiian Homes Commission Act, 1920, lands in trust for Native Hawaiians and established a new public trust (commonly known as the ``ceded lands trust''), for 5 purposes, 1 of which is the betterment of the conditions of Native Hawaiians, and Congress thereby reaffirmed its recognition of the Native Hawaiians as a distinctly native community with a direct lineal and historical succession to the aboriginal, indigenous people of Hawaii;

(B) the public trust consists of lands, including submerged lands, natural resources, and the revenues derived from the lands; and

(C) the assets of this public trust have never been completely inventoried or segregated;

(9) Native Hawaiians have continuously sought access to the ceded lands in order to establish and maintain native settlements and distinct native communities throughout the State;

(10) the Hawaiian Home Lands and other ceded lands provide important native land reserves and resources for the Native Hawaiian community to maintain the practice of Native Hawaiian culture, language, and traditions, and for the continuity, survival, and economic self-sufficiency of the Native Hawaiian people as a distinctly native political community;

(11) Native Hawaiians continue to maintain other distinctly native areas in Hawaii, including native lands that date back to the ali`i and kuleana lands reserved under the Kingdom of Hawaii;

(12) through the Sovereign Council of Hawaiian Homelands Assembly, Native Hawaiian civic associations, charitable trusts established by the Native Hawaiian ali`i, nonprofit native service providers and other community associations, the Native Hawaiian people have actively maintained native traditions and customary usages throughout the Native Hawaiian community and the Federal and State courts have continuously recognized the right of the Native Hawaiian people to engage in certain customary practices and usages on public lands;

(13) on November 23, 1993, Public Law 103-150 (107 Stat. 1510) (commonly known as the ``Apology Resolution'') was enacted into law, extending an apology on behalf of the United States to the native people of Hawaii for the United States' role in the overthrow of the Kingdom of Hawaii;

(14) the Apology Resolution acknowledges that the overthrow of the Kingdom of Hawaii occurred with the active participation of agents and citizens of the United States, and further acknowledges that the Native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as a people over their national lands, either through the Kingdom of Hawaii or through a plebiscite or referendum;

(15)(A) the Apology Resolution expresses the commitment of Congress and the President--

(i) to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii; and

(ii) to support reconciliation efforts between the United States and Native Hawaiians;

(B) Congress established the Office of Hawaiian Relations within the Department of the Interior with 1 of its purposes being to consult with Native Hawaiians on the reconciliation process; and

(C) the United States has the duty to reconcile and reaffirm its friendship with the Native Hawaiian people because, among other things, the United States Minister and United States naval forces participated in the overthrow of the Kingdom of Hawaii;

(16)(A) despite the overthrow of the Government of the Kingdom of Hawaii, Native Hawaiians have continued to maintain their separate identity as a single distinctly native political community through cultural, social, and political institutions, and to give expression to their rights as native people to self-determination, self-governance, and economic self-sufficiency; and

(B) there is clear continuity between the aboriginal, indigenous, native people of the Kingdom of Hawaii and their successors, the Native Hawaiian people today;

(17) Native Hawaiians have also given expression to their rights as native people to self-determination, self-governance, and economic self-sufficiency--

(A) through the provision of governmental services to Native Hawaiians, including the provision of--

(i) health care services;

(ii) educational programs;

(iii) employment and training programs;

(iv) economic development assistance programs;

(v) children's services;

(vi) conservation programs;

(vii) fish and wildlife protection;

(viii) agricultural programs;

(ix) native language immersion programs;

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(x) native language immersion schools from kindergarten through high school;

(xi) college and master's degree programs in native language immersion instruction; and

(xii) traditional justice programs; and

(B) by continuing their efforts to enhance Native Hawaiian self-determination and local control;

(18) Native Hawaiian people are actively engaged in Native Hawaiian cultural practices, traditional agricultural methods, fishing and subsistence practices, maintenance of cultural use areas and sacred sites, protection of burial sites, and the exercise of their traditional rights to gather medicinal plants and herbs, and food sources;

(19) the Native Hawaiian people wish to preserve, develop, and transmit to future generations of Native Hawaiians their lands and Native Hawaiian political and cultural identity in accordance with their traditions, beliefs, customs and practices, language, and social and political institutions, to control and manage

their own lands, including ceded lands, and to achieve greater self-determination over their own affairs;

(20) this Act provides a process within the framework of Federal law for the Native Hawaiian people to exercise their inherent rights as a distinct, indigenous, native community to reorganize a single unified Native Hawaiian governing entity for the purpose of giving expression to their rights as a native people to self-determination and self-governance;

(21) Congress--

(A) has declared that the United States has a special political and legal relationship for the welfare of the native peoples of the United States, including Native Hawaiians;

(B) has identified Native Hawaiians as an indigenous, distinctly native people of the United States within the scope of its authority under the Constitution, and has enacted scores of statutes on their behalf; and

(C) has delegated broad authority to the State of Hawaii to administer some of the United States' responsibilities as they relate to the Native Hawaiian people and their lands;

(22) the United States has recognized and reaffirmed the special political and legal relationship with the Native Hawaiian people through the enactment of the Act entitled, ``An Act to provide for the admission of the State of Hawaii into the Union'', approved March 18, 1959 (Public Law 86-3; 73 Stat. 4), by--

(A) ceding to the State of Hawaii title to the public lands formerly held by the United States, and mandating that those lands be held as a public trust for 5 purposes, 1 of which is for the betterment of the conditions of Native Hawaiians; and

(B) transferring the United States responsibility for the administration of the Hawaiian Home Lands to the State of Hawaii, but retaining the exclusive right of the United States to consent to any actions affecting the lands included in the trust and any amendments to the Hawaiian Homes Commission Act, 1920 (42 Stat. 108, chapter 42), that are enacted by the legislature of the State of Hawaii affecting the beneficiaries under the Act;

(23) the United States has continually recognized and reaffirmed that--

(A) Native Hawaiians have a direct genealogical, cultural, historic, and land-based connection to their forebears, the aboriginal, indigenous, native people who exercised original sovereignty over the Hawaiian Islands;

(B) Native Hawaiians have never relinquished their claims to sovereignty or their sovereign lands;

(C) the United States extends services to Native Hawaiians because of their unique status as the native people of a prior-sovereign nation with whom the United States has a special political and legal relationship; and

(D) the special relationship of American Indians, Alaska Natives, and Native Hawaiians to the United States arises out of their status as aboriginal, indigenous, native people of the United States; and

(24) the State of Hawaii supports the reaffirmation of the special political and legal relationship between the Native Hawaiian governing entity and the United States, as evidenced by 2 unanimous resolutions enacted by the Hawaii State Legislature in the 2000 and 2001 sessions of the Legislature and by the testimony of the Governor of the State of Hawaii before the Committee on Indian Affairs of the Senate on February 25, 2003, and March 1, 2005.

SEC. 3. DEFINITIONS.

In this Act:

(1) **ABORIGINAL, INDIGENOUS, NATIVE PEOPLE**.--The term ``aboriginal, indigenous, native people'' means a people whom Congress has recognized as the original inhabitants of the lands that later became part of the United States and who exercised sovereignty in the areas that later became part of the United States.

(2) **APOLOGY RESOLUTION**.--The term ``Apology Resolution'' means Public Law 103-150 (107 Stat. 1510), a Joint Resolution extending an apology to Native Hawaiians on behalf of the United States for the participation of agents of the United States in the January 17, 1893, overthrow of the Kingdom of Hawaii.

(3) **COMMISSION**.--The term ``Commission'' means the Commission established under section 8(b).

(4) **COUNCIL**.--The term ``Council'' means the Native Hawaiian Interim Governing Council established under section 8(c)(2).

(5) **INDIAN PROGRAM OR SERVICE**.--

(A) **IN GENERAL**.--The term ``Indian program or service'' means any federally funded or authorized program or service provided to an Indian tribe (or member of an Indian tribe) because of the status of the members of the Indian tribe as Indians.

(B) **INCLUSIONS**.--The term ``Indian program or service'' includes a program or service provided by the Bureau of Indian Affairs, the Indian Health Service, or any other Federal agency.

(6) **INDIAN TRIBE**.--The term ``Indian tribe'' has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

(7) **INDIGENOUS, NATIVE PEOPLE**.--The term ``indigenous, native people'' means the lineal descendants of the aboriginal, indigenous, native people of the United States.

(8) **INTERAGENCY COORDINATING GROUP**.--The term ``Interagency Coordinating Group'' means the Native Hawaiian Interagency Coordinating Group established under section 6.

(9) **NATIVE HAWAIIAN GOVERNING ENTITY**.--The term ``Native Hawaiian governing entity'' means the governing entity organized pursuant to this Act by the qualified Native Hawaiian constituents.

(10) **NATIVE HAWAIIAN MEMBERSHIP ORGANIZATION**.--The term ``Native Hawaiian Membership Organization'' means an organization that--

(A) serves and represents the interests of Native Hawaiians, has as a primary and stated purpose the provision of services to Native Hawaiians, and has expertise in Native Hawaiian affairs;

(B) has leaders who are elected democratically, or selected through traditional Native leadership practices, by members of the Native Hawaiian community;

(C) advances the cause of Native Hawaiians culturally, socially, economically, or politically;

(D) is a membership organization or association; and

(E) has an accurate and reliable list of Native Hawaiian members.

(11) **OFFICE**.--The term ``Office'' means the United States Office for Native Hawaiian Relations established by section 5(a).

(12) **QUALIFIED NATIVE HAWAIIAN CONSTITUENT**.--For the purposes of establishing the roll authorized under section 8, and prior to the recognition by the United States of the Native Hawaiian governing entity, the term ``qualified Native Hawaiian constituent'' means an individual who the Commission determines has satisfied the following criteria and who makes a written statement certifying that he or she--

(A) is--

(i) an individual who is 1 of the indigenous, native people of Hawaii and who is a direct lineal descendant of the aboriginal, indigenous, native people who--

(I) resided in the islands that now comprise the State of Hawaii on or before January 1, 1893; and

(II) occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii; or

(ii) an individual who is 1 of the indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act, 1920 (42 Stat. 108, chapter 42), or a direct lineal descendant of that individual;

(B) wishes to participate in the reorganization of the Native Hawaiian governing entity;

(C) is 18 years of age or older;

(D) is a citizen of the United States; and

(E) maintains a significant cultural, social, or civic connection to the Native Hawaiian community, as evidenced by satisfying 2 or more of the following 10 criteria:

(i) Resides in the State of Hawaii.

(ii) Resides outside the State of Hawaii and--

(I)(aa) currently serves or served as (or has a parent or spouse who currently serves or served as) a member of the Armed Forces or as an employee of the Federal Government; and

(bb) resided in the State of Hawaii prior to the time he or she (or such parent or spouse) left the State of Hawaii to serve as a member of the Armed Forces or as an employee of the Federal Government; or

(II)(aa) currently is or was enrolled (or has a parent or spouse who currently is or was enrolled) in an accredited institution of higher education outside the State of Hawaii; and

(bb) resided in the State of Hawaii prior to the time he or she (or such parent or spouse) left the State of Hawaii to attend such institution.

(iii)(I) Is or was eligible to be a beneficiary of the programs authorized by the Hawaiian Homes Commission Act, 1920 (42 Stat. 108, chapter 42), and resides or resided on land set aside as ``Hawaiian home lands'', as defined in such Act; or

(II) Is a child or grandchild of an individual who is or was eligible to be a beneficiary of the programs authorized by such Act and who resides or resided on land set aside as ``Hawaiian home lands'', as defined in such Act.

(iv) Is or was eligible to be a beneficiary of the programs authorized by the Hawaiian Homes Commission Act, 1920 (42 Stat. 108, chapter 42).

(v) Is a child or grandchild of an individual who is or was eligible to be a beneficiary of the programs authorized by the Hawaiian

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Homes Commission Act, 1920 (42 Stat. 108, chapter 42).

(vi) Resides on or has an ownership interest in, or has a parent or grandparent who resides on or has an ownership interest in, ``kuleana land'' that is owned in whole or in part by a person who, according to a genealogy verification by the Office of Hawaiian Affairs or by court order, is a lineal descendant of the person or persons who received the original title to such ``kuleana land'', defined as lands granted to native tenants pursuant to Haw. L. 1850, p. 202, entitled ``An Act Confirming Certain Resolutions of the King and Privy Council Passed on the 21st day of December, A.D. 1849, Granting to the Common People Allodial Titles for Their Own Lands and House Lots, and Certain Other Privileges'', as amended by Haw. L. 1851, p. 98, entitled ``An Act to Amend An Act Granting to the Common People Allodial Titles for Their Own Lands and House Lots, and Certain Other Privileges'' and as further amended by any subsequent legislation.

(vii) Is, or is the child or grandchild of, an individual who has been or was a student for at least 1 school year at a school or program taught through the medium of the Hawaiian language under section 302H-6, Hawaii Revised Statutes, or at a school founded and operated primarily or exclusively for the benefit of Native Hawaiians.

(viii) Has been a member since September 30, 2009, of at least 1 Native Hawaiian Membership Organization.

(ix) Has been a member since September 30, 2009, of at least 2 Native Hawaiian Membership Organizations.

(x) Is regarded as a Native Hawaiian and whose mother or father is (or if deceased, was) regarded as Native Hawaiian by the Native Hawaiian community, as evidenced by sworn affidavits from two or more qualified Native Hawaiian constituents certified by the Commission as possessing expertise in the social, cultural, and civic affairs of the Native Hawaiian community.

(13) **SECRETARY**.--The term ``Secretary'' means the Secretary of the Interior.

(14) **SPECIAL POLITICAL AND LEGAL RELATIONSHIP**.--The term ``special political and legal relationship'' shall refer, except where differences are specifically indicated elsewhere in the Act, to the type of and nature of relationship the United States has with the several federally recognized Indian tribes.

SEC. 4. UNITED STATES POLICY AND PURPOSE.

(a) *Policy*.--The United States reaffirms that--

(1) Native Hawaiians are a unique and distinct, indigenous, native people with whom the United States has a special political and legal relationship;

(2) the United States has a special political and legal relationship with the Native Hawaiian people, which includes promoting the welfare of Native Hawaiians;

(3)(A) Congress possesses and hereby exercises the authority under the Constitution, including but not limited to Article I, Section 8, Clause 3, to enact legislation to better the conditions of Native Hawaiians and has exercised this authority through the enactment of--

(i) the Hawaiian Homes Commission Act, 1920 (42 Stat. 108, chapter 42);

(ii) the Act entitled ``An Act to provide for the admission of the State of Hawaii into the Union'', approved March 18, 1959 (Public Law 86-3; 73 Stat. 4); and

(iii) more than 150 other Federal laws addressing the conditions of Native Hawaiians;

(B) other sources of authority under the Constitution for legislation on behalf of the indigenous, native peoples of the United States, including Native Hawaiians, include but are not limited to the Property, Treaty, and Supremacy Clauses, War Powers, and the Fourteenth Amendment, and Congress hereby relies on those powers in enacting this legislation; and

(C) the Constitution's original Apportionment Clause and the 14th Amendment Citizenship and amended Apportionment Clauses also acknowledge the propriety of legislation on behalf of the native peoples of the United States, including Native Hawaiians;

(4) Native Hawaiians have--

(A) an inherent right to autonomy in their internal affairs;

(B) an inherent right of self-determination and self-governance;

(C) the right to reorganize a Native Hawaiian governing entity; and

(D) the right to become economically self-sufficient; and

(5) the United States shall continue to engage in a process of reconciliation and political relations with the Native Hawaiian people.

(b) *Purpose*.--The purpose of this Act is to provide a process for the reorganization of the single Native Hawaiian governing entity and the reaffirmation of the special political and legal relationship between the United States and that Native Hawaiian governing entity for purposes of continuing a government-to-government relationship.

SEC. 5. UNITED STATES OFFICE FOR NATIVE HAWAIIAN RELATIONS.

(a) *Establishment*.--There is established within the Office of the Secretary the United States Office for Native Hawaiian Relations.

(b) *Duties*.--The Office shall--

(1) continue the process of reconciliation with the Native Hawaiian people in furtherance of the Apology Resolution;

(2) upon the reaffirmation of the government-to-government relationship between the single Native Hawaiian governing entity and the United States, effectuate and coordinate the special political and legal relationship between the Native Hawaiian governing entity and the United States through the Secretary, and with all other Federal agencies;

(3) provide timely notice to, and consult with, the Native Hawaiian governing entity before taking any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands;

(4) work with the Interagency Coordinating Group, other Federal agencies, and the State of Hawaii on policies, practices, and proposed actions affecting Native Hawaiian resources, rights, or lands; and

(5) prepare and submit to the Committee on Indian Affairs and the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives an annual report detailing the activities of the Interagency Coordinating Group that are undertaken with respect to the continuing process of reconciliation and to effect meaningful consultation with the Native Hawaiian governing entity and may provide recommendations for any necessary changes to Federal law or regulations promulgated under the authority of Federal law.

(c) *Applicability to Department of Defense*.--This section shall have no applicability to the Department of Defense or to any agency or component of the Department of Defense, but the Secretary of Defense may designate 1 or more officials as liaison to the Office.

SEC. 6. NATIVE HAWAIIAN INTERAGENCY COORDINATING GROUP.

(a) *Establishment*.--In recognition that Federal programs authorized to address the conditions of Native Hawaiians are largely administered by Federal agencies

other than the Department of the Interior, there is established an interagency coordinating group, to be known as the ``Native Hawaiian Interagency Coordinating Group''.

(b) *Composition*.--The Interagency Coordinating Group shall be composed of officials, to be designated by the President, from--

(1) each Federal agency whose actions may significantly or uniquely impact Native Hawaiian programs, resources, rights, or lands; and

(2) the Office.

(c) *Lead Agency*.--

(1) **IN GENERAL**.--The Department of the Interior and the White House Office of Intergovernmental Affairs shall serve as the leaders of the Interagency Coordinating Group.

(2) **MEETINGS**.--The Secretary shall convene meetings of the Interagency Coordinating Group.

(d) *Duties*.--The Interagency Coordinating Group shall--

(1) coordinate Federal programs and policies that affect Native Hawaiians or actions by any agency or agencies of the Federal Government that may significantly or uniquely affect Native Hawaiian resources, rights, or lands;

(2) consult with the Native Hawaiian governing entity, through the coordination referred to in paragraph (1), but the consultation obligation established in this provision shall apply only after the satisfaction of all of the conditions referred to in section 8(c)(8); and

(3) ensure the participation of each Federal agency in the development of the report to Congress authorized in section 5(b)(5).

(e) *Applicability to Department of Defense*.--This section shall have no applicability to the Department of Defense or to any agency or component of the Department of Defense, but the Secretary of Defense may designate 1 or more officials as liaison to the Interagency Coordinating Group.

SEC. 7. DESIGNATION OF DEPARTMENT OF JUSTICE REPRESENTATIVE.

The Attorney General shall designate an appropriate official within the Department of Justice to assist the Office in the implementation and protection of the rights of Native Hawaiians and their political and legal relationship with the United States, and upon the recognition of the Native Hawaiian governing entity as provided for in section 8, in the implementation and protection of the rights of the Native Hawaiian governing entity and its political and legal relationship with the United States.

SEC. 8. PROCESS FOR REORGANIZATION OF NATIVE HAWAIIAN GOVERNING ENTITY AND REAFFIRMATION OF SPECIAL POLITICAL AND LEGAL RELATIONSHIP BETWEEN UNITED STATES AND NATIVE HAWAIIAN GOVERNING ENTITY.

(a) *Recognition of Native Hawaiian Governing Entity*.--The right of the qualified Native Hawaiian constituents to reorganize the single Native Hawaiian governing entity to provide for their common welfare and to adopt appropriate organic governing documents is recognized by the United States.

(b) *Commission*.--

(1) **IN GENERAL**.--There is authorized to be established a Commission to be composed of 9 members for the purposes of--

(A) preparing and maintaining a roll of qualified Native Hawaiian constituents; and

(B) certifying that the individuals on the roll of qualified Native Hawaiian constituents meet the definition of qualified Native Hawaiian constituent set forth in section 3.

(2) **MEMBERSHIP**.--

(A) **APPOINTMENT**.--

(i) **IN GENERAL**.--Not later than 180 days after the date of enactment of this Act, the Secretary shall appoint the members of the

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Commission in accordance with subparagraph (B).

(ii) **CONSIDERATION**.--In making an appointment under clause (i), the Secretary may take into consideration a recommendation made by any Native Hawaiian Membership Organization.

(B) **REQUIREMENTS**.--Each member of the Commission shall demonstrate, as determined by the Secretary--

(i) not less than 10 years of experience in the study and determination of Native Hawaiian genealogy (traditional cultural experience shall be given due consideration); and

(ii) an ability to read and translate into English documents written in the Hawaiian language.

(C) **VACANCIES**.--A vacancy on the Commission--

(i) shall not affect the powers of the Commission; and

(ii) shall be filled in the same manner as the original appointment.

(3) **EXPENSES**.--Each member of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance of services for the Commission.

(4) **DUTIES**.--The Commission shall--

(A) prepare and maintain a roll of qualified Native Hawaiian constituents as set forth in subsection (c); and

(B) certify that the individuals on the roll of qualified Native Hawaiian constituents meet the definition of that term as set forth in section 3.

(5) **STAFF**.--

(A) **IN GENERAL**.--The Commission may, without regard to the civil service laws (including regulations), appoint and terminate an executive director and such other additional personnel as are necessary to enable the Commission to perform the duties of the Commission.

(B) **COMPENSATION**.--

(i) **IN GENERAL**.--Except as provided in clause (ii), the Commission may fix the compensation of the executive director and other personnel without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification of positions and General Schedule pay rates.

(ii) **MAXIMUM RATE OF PAY**.--The rate of pay for the executive director and other personnel shall not exceed the rate payable for level V of the Executive Schedule under section 5316 of title 5, United States Code.

(6) **DETAIL OF FEDERAL GOVERNMENT EMPLOYEES**.--

(A) **IN GENERAL**.--An employee of the Federal Government may be detailed to the Commission without reimbursement.

(B) **CIVIL SERVICE STATUS**.--The detail of the employee shall be without interruption or loss of civil service status or privilege.

(7) **PROCUREMENT OF TEMPORARY AND INTERMITTENT SERVICES**.--The Commission may procure temporary and intermittent services in accordance with section 3109(b) of title 5, United States Code, at rates for individuals that do not exceed the daily equivalent of the annual rate of basic pay prescribed for level V of the Executive Schedule under section 5316 of that title.

(8) **EXPIRATION**.--The Secretary shall dissolve the Commission upon the reaffirmation of the special political and legal relationship between the Native Hawaiian governing entity and the United States.

(c) *Process for Reorganization of Native Hawaiian Governing Entity*.--

(1) **ROLL**.--

(A) **CONTENTS**.--The roll shall include the names of the qualified Native Hawaiian constituents who are certified by the Commission to be qualified Native Hawaiian constituents, as defined in section 3.

(B) **FORMATION OF ROLL**.--Each individual claiming to be a qualified Native Hawaiian constituent shall submit to the Commission documentation in the form established by the Commission that is sufficient to enable the Commission to determine whether the individual meets the definition set forth in section 3; *Provided*, That an individual presenting evidence that he or she satisfies the definition in section 2 of Public Law 103-150 shall be presumed to meet the requirement of section 3(12)(A)(i).

(C) **DOCUMENTATION**.--The Commission shall--

(i)(I) identify the types of documentation that may be submitted to the Commission that would enable the Commission to determine whether an individual meets the definition of qualified Native Hawaiian constituent set forth in section 3;

(II) recognize an individual's identification of lineal ancestors on the 1890 Census by the Kingdom of Hawaii as a reliable indicia of lineal descent from the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawaii on or before January 1, 1893; and

(III) permit elderly Native Hawaiians and other Native Hawaiians lacking birth certificates or other documentation due to birth on Hawaiian Home Lands or other similar circumstances to establish lineal descent by sworn affidavits from 2 or more qualified Native Hawaiian constituents;

(ii) establish a standard format for the submission of documentation and a process to ensure veracity; and

(iii) publish information related to clauses (i) and (ii) in the Federal Register.

(D) **CONSULTATION**.--In making determinations that each individual proposed for inclusion on the roll of qualified Native Hawaiian constituents meets the definition of qualified Native Hawaiian constituent in section 3, the Commission may consult with Native Hawaiian Membership Organizations, agencies of the State of Hawaii including but not limited to the Department of Hawaiian Home Lands, the Office of Hawaiian Affairs, and the State Department of Health, and

other entities with expertise and experience in the determination of Native Hawaiian ancestry and lineal descendancy.

(E) **NOTIFICATION**.--The Commission shall--

(i) inform an individual whether they have been deemed by the Commission a qualified Native Hawaiian constituent; and

(ii) inform an individual of a right to appeal the decision if deemed not to be a qualified Native Hawaiian constituent.

(F) **CERTIFICATION AND SUBMITTAL OF ROLL TO SECRETARY**.--The Commission shall--

(i) submit the roll containing the names of those individuals who meet the definition of qualified Native Hawaiian constituent in section 3 to the Secretary within 2 years from the date on which the Commission is fully composed; and

(ii) certify to the Secretary that each of the qualified Native Hawaiian constituents proposed for inclusion on the roll meets the definition set forth in section 3.

(G) **PUBLICATION**.--Upon certification by the Commission to the Secretary that those listed on the roll meet the definition of qualified Native Hawaiian constituent set forth in section 3, the Commission shall publish the notice of the certification of the roll in the Federal Register, notwithstanding pending appeals pursuant to subparagraph (H).

(H) **APPEAL**.--The Secretary, in consultation with the Commission, shall establish a mechanism for an administrative appeal for any person whose name is excluded from the roll who claims to meet the definition of qualified Native Hawaiian constituent in section 3.

(I) **PUBLICATION; UPDATE**.--The Commission shall--

(i) publish the notice of the certification of the roll regardless of whether appeals are pending;

(ii) update the roll and provide notice of the updated roll on the final disposition of any appeal;

(iii) update the roll to include any person who has been certified by the Commission as meeting the definition of qualified Native Hawaiian constituent in section 3 after the initial publication of the roll or after any subsequent publications of the roll; and

(iv) provide a copy of the roll and any updated rolls to the Council.

(J) **EFFECT OF PUBLICATION**.--The publication of the initial and updated roll shall serve as the basis for the eligibility of qualified Native Hawaiian constituents whose names are listed on those rolls to participate in the reorganization of the Native Hawaiian governing entity.

(2) **ORGANIZATION OF COUNCIL**.--

(A) **ORGANIZATION**.--The Commission, in consultation with the Secretary, shall hold a minimum of 3 meetings and each meeting shall be at least 2 working days of the qualified Native Hawaiian constituents listed on the roll established under this section--

(i) to develop criteria for candidates to be elected to serve on the Council;

(ii) to determine the structure of the Council, including the number of Council members; and

(iii) to elect members from individuals listed on the roll established under this subsection to the Council.

(B) **POWERS**.--

(i) **IN GENERAL**.--The Council--

(I) shall represent those listed on the roll established under this section in the implementation of this Act; and

(II) shall have no powers other than powers given to the Council under this Act.

(ii) **FUNDING**.--The Council may enter into a contract with, or obtain a grant from, any Federal or State agency to carry out clause (iii).

(iii) **ACTIVITIES**.--

(I) **IN GENERAL**.--The Council shall conduct, among the qualified Native Hawaiian constituents listed on the roll established under this subsection, a referendum for the purpose of determining the proposed elements of the organic governing documents of the Native Hawaiian governing entity, including but not limited to--

(aa) the proposed criteria for future membership in the Native Hawaiian governing entity;

(bb) the proposed powers and authorities to be exercised by the Native Hawaiian governing entity, as well as the proposed privileges and immunities of the Native Hawaiian governing entity;

(cc) the proposed civil rights and protection of the rights of the citizens of the Native Hawaiian governing entity and all persons affected by the exercise of governmental powers and authorities of the Native Hawaiian governing entity; and

(dd) other issues determined appropriate by the Council.

(II) **DEVELOPMENT OF ORGANIC GOVERNING DOCUMENTS**.--Based on the referendum, the Council shall develop proposed organic governing documents for the Native Hawaiian governing entity and may seek technical assistance from the Secretary on the draft organic governing documents to ensure that the draft organic governing documents comply with this Act and other Federal law.

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(III) **DISTRIBUTION**.--The Council shall publish to all qualified Native Hawaiian constituents of the Native Hawaiian governing entity listed on the roll published under this subsection notice of the availability of--

(aa) a copy of the proposed organic governing documents, as drafted by the Council; and

(bb) a brief impartial description of the proposed organic governing documents;

(IV) **ELECTIONS**.--

(aa) **IN GENERAL**.--Not sooner than 180 days after the proposed organic governing documents are drafted and distributed, the Council, with the assistance of the Secretary, shall hold elections for the purpose of ratifying the proposed organic governing documents.

(bb) **PURPOSE**.--The Council, with the assistance of the Secretary, shall hold the election for the purpose of ratifying the proposed organic governing documents 60 days after publishing notice of an election.

(cc) **OFFICERS**.--On certification of the organic governing documents by the Secretary in accordance with paragraph (4), the Council, with the assistance of the Secretary, shall hold elections of the officers of the Native Hawaiian governing entity pursuant to paragraph (5).

(3) **SUBMITTAL OF ORGANIC GOVERNING DOCUMENTS**.--Following the reorganization of the Native Hawaiian governing entity and the adoption of organic governing documents, the Council shall submit the organic governing documents of the Native Hawaiian governing entity to the Secretary.

(4) **CERTIFICATIONS**.--

(A) **IN GENERAL**.--Within the context of the future negotiations to be conducted under the authority of section 9(b)(1), and the subsequent actions by the Congress and the State of Hawaii to enact legislation to implement the

agreements of the 3 governments, not later than 180 days, which may be extended an additional 90 days if the Secretary deems necessary, after the date on which the Council submits the organic governing documents to the Secretary, the Secretary shall certify or decline to certify that the organic governing documents--

(i) establish the criteria for membership in the Native Hawaiian governing entity;

(ii) were adopted by a majority vote of those qualified Native Hawaiian constituents whose names are listed on the roll published by the Secretary and who voted in the election;

(iii) provide authority for the Native Hawaiian governing entity to negotiate with Federal, State, and local governments, and other entities;

(iv) provide for the exercise of inherent and other appropriate governmental authorities by the Native Hawaiian governing entity;

(v) prevent the sale, disposition, lease, or encumbrance of lands, interests in lands, or other assets of the Native Hawaiian governing entity without the consent of the Native Hawaiian governing entity;

(vi) provide for the protection of the civil rights of the citizens of the Native Hawaiian governing entity and all persons affected by the exercise of governmental powers and authorities by the Native Hawaiian governing entity; and

(vii) are consistent with applicable Federal law.

(B) **RESUBMISSION IN CASE OF NONCOMPLIANCE**.--

(i) **RESUBMISSION BY THE SECRETARY**.--If the Secretary determines that the organic governing documents, or any part of the documents, do not meet all of the requirements set forth in subparagraph (A), the Secretary shall resubmit the organic governing documents to the Council, along with a justification for each of the Secretary's findings as to why the provisions are not in full compliance.

(ii) **AMENDMENT AND RESUBMISSION OF ORGANIC GOVERNING DOCUMENTS**.--If the organic governing documents are resubmitted to the Council by the Secretary under clause (i), the Council shall--

(I) amend the organic governing documents to ensure that the documents meet all the requirements set forth in subparagraph (A); and

(II) resubmit the amended organic governing documents to the Secretary for certification in accordance with this paragraph.

(C) **CERTIFICATIONS DEEMED MADE**.--The certifications under this paragraph shall be deemed to have been made if the Secretary has not acted within 180 days after the date on which the Council has submitted the organic governing documents of the Native Hawaiian governing entity to the Secretary.

(5) **ELECTIONS**.--On completion of the certifications by the Secretary under paragraph (4), the Council, with the assistance of the Secretary, shall hold elections of the officers of the Native Hawaiian governing entity.

(6) **PROVISION OF ROLL**.--The Council shall provide a copy of the roll of qualified Native Hawaiian constituents to the governing body of the Native Hawaiian governing entity.

(7) **TERMINATION**.--The Council shall cease to exist and shall have no power or authority under this Act after the officers of the governing body who are elected as provided in paragraph (5) are installed.

(8) **REAFFIRMATION**.--Notwithstanding any other provision of law, the special political and legal relationship between the United States and the Native Hawaiian people is hereby reaffirmed and the United States extends Federal recognition to the Native Hawaiian governing entity as the representative sovereign governing body of the Native Hawaiian people after--

(A) the approval of the organic governing documents by the Secretary under subparagraph (A) or (C) of paragraph (4); and

(B) the officers of the Native Hawaiian governing entity elected under paragraph (5) have been installed.

SEC. 9. REAFFIRMATION OF DELEGATION OF FEDERAL AUTHORITY TO STATE OF HAWAII; NEGOTIATIONS; CLAIMS.

(a) *Reaffirmation*.--The delegation by the United States of authority to the State of Hawaii to address the conditions of the indigenous, native people of Hawaii contained in the Act entitled ``An Act to provide for the admission of the State of Hawaii into the Union'', approved March 18, 1959 (Public Law 86-3; 73 Stat. 4), is reaffirmed.

(b) *Negotiations*.--

(1) **IN GENERAL**.--Upon the reaffirmation of the special political and legal relationship between the United States and the Native Hawaiian governing entity, the United States and the State of Hawaii may enter into negotiations with the Native Hawaiian governing entity designed to lead to an agreement or agreements addressing such matters as--

(A) the transfer of State of Hawaii lands and surplus Federal lands, natural resources, and other assets, and the protection of existing rights related to such lands or resources;

(B) the exercise of governmental authority over any transferred lands, natural resources, and other assets, including land use;

(C) the exercise of civil and criminal jurisdiction;

(D) the exercise of other powers and authorities that are recognized by the United States as powers and authorities typically exercised by governments representing indigenous, native people of the United States;

(E) any residual responsibilities of the United States and the State of Hawaii; and

(F) grievances regarding assertions of historical wrongs committed against Native Hawaiians by the United States or by the State of Hawaii.

(2) **AMENDMENTS TO EXISTING LAWS**.--Upon agreement on any matter or matters negotiated with the United States or the State of Hawaii, and the Native Hawaiian governing entity, the parties may submit--

(A) to the Committee on Indian Affairs of the Senate, the Committee on Energy and Natural Resources of the Senate, and the Committee on Natural Resources of the House of Representatives recommendations for proposed amendments to Federal law that will enable the implementation of agreements reached between the governments; and

(B) to the Governor and the legislature of the State of Hawaii, recommendations for proposed amendments to State law that will enable the implementation of agreements reached between the governments.

(3) **GOVERNMENTAL AUTHORITY AND POWER**.--The Native Hawaiian governing entity shall be vested with the inherent powers and privileges of self-government of a native government under existing law, except as set forth in section 10(a). Said powers and privileges may be modified by agreement between the Native Hawaiian governing entity, the United States, and the State pursuant to paragraph (1), subject to the limit described by section 10(a). Unless so agreed, nothing in this Act shall preempt Federal or State authority over Native Hawaiians or their property under existing law or authorize the State to tax or regulate the Native Hawaiian governing entity.

(4) **MEMBERSHIP**.--Once the United States extends Federal recognition to the Native Hawaiian governing entity, the United States will recognize and affirm the Native Hawaiian governing entity's inherent power and authority to determine its own membership criteria, to determine its own membership, and to grant, deny,

revoke, or qualify membership without regard to whether any person was or was not deemed to be a qualified Native Hawaiian constituent under this Act.

(c) *Claims*.--Nothing in this Act--

(1) alters existing law, including case law, regarding obligations of the United States or the State of Hawaii relating to events or actions that occurred prior to recognition of the Native Hawaiian governing entity;

(2) creates, enlarges, revives, modifies, diminishes, extinguishes, waives, or otherwise alters any claim or cause of action against the United States or its officers or the State of Hawaii or its officers, or any defense (including the defense of statute of limitations) to any such claim or cause of action; or

(3) amends section 2409a of title 28, United States Code (commonly known as the ``Quiet Title Act''), chapter 171 of title 28, United States Code (commonly known as the ``Federal Tort Claims Act''), section 1491 of title 28, United States Code (commonly known as the ``Tucker Act''), section 1505 of title 28, United States Code (commonly known as the ``Indian Tucker Act''), the Hawaii Organic Act (31 Stat. 141), or any other Federal statute, except as expressly amended by this Act.

SEC. 10. APPLICABILITY OF CERTAIN FEDERAL LAWS.

(a) *Indian Gaming Regulatory Act*.--

(1) **IN GENERAL**.--The Native Hawaiian governing entity and Native Hawaiians may not conduct gaming activities as a matter of claimed inherent authority or under the authority of any Federal law, including the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) or under any regulations thereunder promulgated by the Secretary or the National Indian Gaming Commission.

[Page: S1984]

(2) **APPLICABILITY**.--The prohibition contained in paragraph (1) regarding the use of Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) and inherent authority to game applies regardless of whether gaming by Native Hawaiians or the Native Hawaiian governing entity would be located on land within the State of Hawaii or within any other State or territory of the United States.

(b) *Single Governing Entity*.--This Act will result in the recognition of the single Native Hawaiian governing entity. Additional Native Hawaiian groups shall not be eligible for acknowledgment pursuant to the Federal Acknowledgment Process set forth in part 83 of title 25, Code of Federal Regulations, or any other administrative acknowledgment or recognition process.

(c) *Indian Civil Rights Act of 1968*.--The Council and the subsequent governing entity recognized under this Act shall be an Indian tribe, as defined in section 201

of the Indian Civil Rights Act of 1968 (25 U.S.C. 1301) for purposes of sections 201 through 203 of that Act (25 U.S.C. 1301-1303).

(d) *Indian Programs, Services, and Laws*.--

(1) **IN GENERAL**.--Notwithstanding any other provision of this Act, nothing in this Act extends eligibility for any Indian program or service to the Native Hawaiian governing entity or its members unless a statute governing such a program or service expressly provides that Native Hawaiians or the Native Hawaiian governing entity is eligible for such program or service. Nothing in this Act affects the eligibility of any person for any program or service under any statute or law in effect before the date of enactment of this Act.

(2) **APPLICABILITY OF OTHER TERMS**.--In Federal statutes or regulations in force prior to the United States' recognition of the Native Hawaiian governing entity, the terms ``Indian'' and ``Native American'', and references to Indian tribes, bands, nations, pueblos, villages, or other organized groups or communities, shall not apply to the Native Hawaiian governing entity or its members, unless the Federal statute or regulation expressly applies to Native Hawaiians or the Native Hawaiian governing entity.

(e) *Real Property Transfers*.--Section 2116 of the Revised Statutes (commonly known as the ``Indian Trade and Intercourse Act'') (25 U.S.C. 177) does not apply to any purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from Native Hawaiians, Native Hawaiian entities, or the Kingdom of Hawaii that occurred prior to the date of the United States' recognition of the Native Hawaiian governing entity.

SEC. 11. SEVERABILITY.

If any section or provision of this Act is held invalid, it is the intent of Congress that the remaining sections or provisions shall continue in full force and effect.

SEC. 12. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as are necessary to carry out this Act.

By Mr. AKAKA (for himself, Mr. **CONRAD**, Mr. **FRANKEN**, Mr. **INOUYE**, Mr. **JOHNSON** of South Dakota, Mr. **KERRY**, Mr. **TESTER**, and Mr. **UDALL** of New Mexico):

S. 676. A bill to amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes; to the Committee on Indian Affairs.

Mr. AKAKA. Mr. President, I rise today to introduce a technical amendment to the Act of June 18, 1934, the Indian Reorganization Act.

DOCUMENT H

157 Cong. Rec. 2,045-46 (2011) (statement of Rep. Hirono).

Congressional Record
112th Congress (2011-2012)

THE NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT OF 2011 -- (House of Representatives - March 30, 2011)

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The SPEAKER pro tempore. The Chair recognizes the gentlewoman from Hawaii (Ms. *Hirono*) for 5 minutes.

Ms. HIRONO. Mr. Speaker, today a united Hawaii delegation will be introducing the Native Hawaiian Government Reorganization Act in both Chambers of Congress. Long denied the recognition and rights accorded to America's other indigenous people, this bill will finally enable Native Hawaiians to embark on their long awaited process of achieving self-determination.

On the House side, Congresswoman *Hanabusa* and I have the great pleasure of being joined in this effort by Congressman Don *Young*, Congressman *Eni Faleomavaega*, Congresswoman *Madeleine Bordallo* and Congressman *Tom Cole*. All are longstanding friends of Hawaii and Native Hawaiians.

How we treat our native indigenous people reflects our values and who we are as a country. Clearly, there is much in the history of our interactions with the native people of what is now the United States that makes us less than proud. The American Indians, Alaska Natives, and Native Hawaiians, all indigenous people, have suffered at the hands of our Government. But one of the great attributes of America has always been the ability to look objectively at our history, learn from it, and when possible make amends.

The bill we are introducing today has been more than 10 years in the making. It has been a deliberative and open legislative process. There have been 12 congressional hearings on Native Hawaiian recognition, five of which were held in Hawaii. These bills have been marked up by committees in both Chambers. The House has passed Native Hawaiian recognition bills three times: First in 2000, again in 2007, and most recently just last year.

The goals and purposes of the Native Hawaiian Government Reorganization Act are consistent with the history of the Native Hawaiian people and the record of United States involvement in Hawaii. The bill is also consistent with over 188 existing Federal laws that promote the welfare of Native Hawaiian people.

I know there are Members who question these authorized programs simply because Native Hawaiian is in the title, which is exactly why we need this bill. It will formalize the very special political and legal relationship between the United States and the Native Hawaiians by providing a process through which the Native Hawaiian community can reorganize its governing entity within this relationship. This is how we treat Alaska Natives and American Indians, and this is how we should treat Native Hawaiians.

The Kingdom of Hawaii was overthrown in 1893. Hawaii's last monarch, Queen Liliuokalani, was deposed by an armed group of businessmen and sugar planters who were American by birth or heritage, with the support, abetted by U.S. troops. The Queen agreed to relinquish her throne, under protest, to avoid bloodshed.

[Time: 10:40]

She believed the United States, with which Hawaii had diplomatic relations, would restore her to the throne.

There may be new Members to this body who have not had occasion to learn the history of Hawaii, and I extend an open invitation to those Members to share this history with you.

The State of Hawaii motto, which is also the motto of the Kingdom of Hawaii, is, ``Ua mau ke ea o ka aina i ka

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pono,'' which translates to, ``The life of the land is perpetuated in righteousness.''

Native Hawaiians, like American Indians and Alaska Natives, have an inherent sovereignty based on their status as indigenous aboriginal people. I ask for your support of the Native Hawaiian Government Reorganization Act.

Mahalo nui loa. (Thank you very much).

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DOCUMENT I

Application of Sandwich Isles Communications, Inc. for Authorization to Provide IntraLATA and Intrastate Telecommunications Services Within and Between Hawaiian Home Lands Throughout the State of Hawaii Pursuant to Haw. Rev. Stat. Section 269-16.9, Docket No. 96-0026, Order No. 16078 (Haw. Pub. Util. Comm'n 1997).

L.Y. Makua NOV 14 1997

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of SANDWICH ISLES COMMUNICATIONS, INC. For Authorization to Provide IntraLATA and Intrastate Telecommunications Services Within and Between Hawaiian Home Lands Throughout the State of Hawaii Pursuant to Haw. Rev. Stat. Section 269-16.9.	DOCKET NO. 96-0026

ORDER NO. 16078

Filed Nov. 14, 1997
At 8:45 o'clock A.M.

Karen Higashi
Chief Clerk of the Commission

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

K. Higashi

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Application of SANDWICH ISLES COMMUNICATIONS, INC. For Authorization to Provide IntraLATA and Intrastate Telecommunications Services Within and Between Hawaiian Home Lands Throughout the State of Hawaii Pursuant to Haw. Rev. Stat. Section 269-16.9.	Docket No. 96-0026 Order No. 16078

ORDER

I.

By Order No. 15268, filed on December 23, 1996, we ordered SANDWICH ISLES COMMUNICATIONS, INC. (Sandwich Isles) to comply with the commission's previous order to infuse additional paid-in capital in the amount of $1,000,000 to correct its undercapitalization. On January 2, 1997, Sandwich Isles filed, among other things, a motion for modification of Order No. 15268 to allow the company to infuse the additional paid-in capital of $1,000,000 within 30 days after it receives "interim" loan approval from a private lender or final loan approval from the Rural Utilities Service of the United States Department of Agriculture (Rural Utilities Service), whichever occurs first. By Order No. 15311, filed on January 14, 1997, we granted Sandwich Isles' motion.

On May 9, 1997, Sandwich Isles informed the commission by letter that it had infused additional paid-in capital in the amount of $1,000,000, and that it had, thus, met the requirements for temporary authorization, as established by Order No. 15311, to provide intraLATA and intrastate telecommunications services within and between Hawaiian home lands in the State of Hawaii. On this basis, Sandwich Isles stated that it would begin serving the Department of Hawaiian Home Lands (DHHL).

In Order No. 15585, filed on May 15, 1997, we concluded that Sandwich Isles had not met the requirements for temporary authorization, and declared that Sandwich Isles may not begin serving the DHHL until certain matters were clarified. By Order No. 15585, we directed Sandwich Isles to provide the commission with audited financial statements for the period ended March 31, 1997, including all disclosures and the statement of cash flows, as well as the source of the additional paid-in capital.

On June 7, 1997, Sandwich Isles filed its audited financial statements for the period ended March 31, 1997. On June 17, 1997, we filed information requests based on Sandwich Isles' audited financial statements.

On June 30, 1997, Sandwich Isles filed responses to our information requests. Sandwich Isles disclosed that $1,000,000 in debt which it owed to its parent, Waimana Enterprises, Inc. (Waimana), was converted to additional paid-in capital as agreed to by the Board of Directors of both Waimana and Sandwich Isles as of December 31, 1996.

II.

We accept Sandwich Isles' addressing its need for additional capitalization through the conversion of debt into capital. With this additional infusion of capital, Sandwich Isles has met our requirements for the issuance of a temporary authority. However, in light of further information that is now available to us, we will issue Sandwich Isles a permanent authority. We have learned that Sandwich Isles obtained an $18,000,000 bridge loan from CoBank on September 4, 1997, for the purpose of providing funds for the construction of telephone facilities on the island of Oahu as an interim loan until the advance of funds from the Rural Utilities Service. With the infusion of the additional $1,000,000 and the $18,000,000 bridge loan, Sandwich Isles appears to be financially capable of providing its proposed services.

In addition, Sandwich Isles has demonstrated that (1) it possesses sufficient technical and managerial capabilities to provide the proposed services; (2) it is fit, willing, and able to properly perform the telecommunications services and to conform to the terms, conditions, and rules prescribed or adopted by the commission; and (3) its proposed services are in the public interest.

Our granting Sandwich Isles a permanent authority moots the need for the issuance of a temporary authority. To the extent that Sandwich Isles is deemed by competent authority to be or claims to be the sole provider of services on Hawaiian home lands, Sandwich Isles will be a provider of noncompetitive services.

Sandwich Isles' permanent authority is subject to the following conditions. First, Sandwich Isles is subject to all

applicable provisions of Hawaii Revised Statutes (HRS) chapter 269, Hawaii Administrative Rules (HAR) chapter 6-80 and 6-81, any other applicable State law and commission rules, and any orders we may issue from time to time.

Second, before it starts providing intraLATA and intrastate telecommunications services, Sandwich Isles must establish a working cash account of at least $1,000,000. Sandwich Isles shall use the working cash account during the first year of its operations to pay any debt that becomes due in the usual course of business during the year that is not otherwise payable from the income it may receive in its normal course of business.

We derived the minimum amount required for working cash by averaging Sandwich Isles' projected total operating expenses for 1996 and 1997 and adding a six-month minimum capital requirement. We reserve the right to adjust the minimum amount, based upon the pro forma financial statements that we also require Sandwich Isles to submit. Sandwich Isles shall submit pro forma financial statements (that include a balance sheet and an income statement) for its first year of operations, not later than 30 days before Sandwich Isles starts providing telecommunications services. We also reserve the right to require Sandwich Isles to maintain the working cash account beyond the first year of operations.

III.

THE COMMISSION ORDERS:

1. Sandwich Isles is granted a Certificate of Authority (COA) to provide intraLATA and intrastate telecommunications

services in the State of Hawaii. Sandwich Isles' authority is restricted to providing services on lands administered by DHHL.

2. As a holder of a COA, Sandwich Isles is subject to all applicable provisions of HRS chapter 269, HAR chapter 6-80 and chapter 6-81, any other applicable State law and commission rules, and any orders that the commission may issue from time to time. In addition, by January 1 of each year, Sandwich Isles shall file with the commission a five-year forecast of its results of operations, including operating revenues, operating expenses, and rate base. This filing requirement will continue until terminated by the commission.

3. Sandwich Isles shall file tariffs in accordance with HAR §§ 6-80-39 and 6-80-40(b).

4. Before it starts providing telecommunications services, Sandwich Isles shall establish a working cash account of at least $1,000,000 for the purpose set forth in Part II of this order. The amount required in the account and the period for which the account must be held are subject to change as provided in Part II.

5. Not less than 30 days before it starts providing telecommunications services, Sandwich Isles shall file with the commission pro forma financial statements, including a balance sheet and an income statement, for its first year of operations.

DONE at Honolulu, Hawaii this 14th day of November, 1997.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By _____
Yukio Naito, Chairman

By _____
Dennis R. Yamada, Commissioner

APPROVED AS TO FORM:

_____
Robert W. Fung
Commission Counsel

96-0026e.vn

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 16078 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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Nellie Akiyama

Nellie Akiyama

DATED: November 14, 1997