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Richard H. Houghton III

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AN ARGUMENT FOR INDIAN STATUS FOR NATIVE HAWAIIANS—THE DISCOVERY OF A LOST TRIBE

Richard H. Houghton III*

Introduction

There is only one group of Native Americans in the United States today that is not considered “Indian,” one group that the United States government has consistently overlooked in its efforts to benefit and compensate Native Americans. That group is the Native Hawaiian people.¹ Unlike other Indians, including Native Alaskans, Congress has not dealt comprehensively with Native Hawaiians.² Moreover, statutes passed for the general benefit of Indians or Indian tribes have not yet been administratively or judicially interpreted to include Native Hawaiians.³

Nevertheless, the concerns motivating Congress to enact legislation for other Native American groups exist equally among Native Hawaiians. Like other Native Americans, Native Hawaiians were once a sovereign people⁴ who have suffered as a result of white encroachment and eventual United States seizure and exploitation of their lands.⁵ Like other Indians, Native Hawaiians have become a forgotten and impoverished minority in their own land.⁶ More than 60 percent of the Native Hawaiian people have no reportable income, and of those with income, nearly 30 percent

* B.S.F.S., 1983, Georgetown University School of Foreign Service; J.D., 1987, Catholic University Law School. Law Clerk, Senior Judges, District of Columbia Court of Appeals. The author wishes to thank Professor Nell Jessup Newton for her invaluable guidance and support.

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1. For purposes of this article, the term “Native Hawaiian” will be used to refer to the race inhabiting the Hawaiian Islands prior to 1778 and their descendants, and unless otherwise specified does not connote any particular blood quantum.

2. F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 797 (Michie Co. ed. 1982) [hereinafter 1982 *HANDBOOK*].

3. *Id.*

4. See *infra* notes 100-113 and accompanying text.

5. See *Means Views Hawaiian, Indian Problems as One and the Same*, KA WAI OLA O OHA, Sept., 1987, at 6.

6. Native Hawaiians comprise less than 20 percent of the state population; the percentage of those of 20 percent Hawaiian blood is only 1.3 percent of the state's native population. See 1982 *HANDBOOK*, *supra* note 2, at 797 n.1. Indians on the mainland number 1,418,000 or .626 percent of the U.S. population. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 32 (1981) (Table 36).

receive less than \$4,000 a year.⁷ One quarter of the clients of the state's Department of Social Services are Native Hawaiians,⁸ as are 30 percent of the children receiving Aid to Families with Dependent Children⁹ and 30 percent of the state's welfare recipients.¹⁰ Native Hawaiian unemployment figures are double the state average,¹¹ and the life expectancy of a Native Hawaiian is shorter than the state average by seven years.¹² Finally, although Native Hawaiians account for 30 percent of the children in public schools in Hawaii,¹³ they constitute only 5 percent of graduating high school seniors.¹⁴ In sum, Native Hawaiians as a group, like mainland Indians, occupy the lowest statistical levels in virtually every area.¹⁵

Despite these similarities, there exists an enormous body of law passed for the benefit of Indians and Indian tribes from which Native Hawaiians are excluded because they do not fit the legislative or administrative definition of "Indian." Only since 1974 has Congress sporadically begun to include Native Hawaiians in limited programs designed to provide services for mainland Indians.¹⁶ Still, Congress has done so with some reticence,¹⁷ reflected even in the

7. UNITED STATES COMM'N ON CIVIL RIGHTS, BREACH OF TRUST? NATIVE HAWAIIAN HOMELANDS 6 (1980) [hereinafter BREACH OF TRUST]. See Act of Oct. 3, 1980, Pub. L. No. 96-374, § 1331(a)(1), 94 Stat. 1499 ("like other Native Americans, Native Hawaiians rank among the lowest in the level of . . . per capita income").

8. BREACH OF TRUST, *supra* note 7, at 6.

9. *Id.*

10. *Id.*

11. Compare the unemployment rate for mainland Indians, which was approximately 40 percent in 1979. Note, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1204 (1983).

12. BREACH OF TRUST, *supra* note 7, at 7.

13. In this article, Hawaiian words will be spelled according to Hawaiian grammar using glottal stops but omitting macrons. The exceptions to this will be if a Hawaiian word is used in an English title (e.g., state of Hawaii), as an English adjective (e.g., Hawaiian), or in a quotation taken from a source not using the traditional spelling.

14. Blondin, *A Case for Reparations for Native Hawaiians*, 16 HAW. B.J. 13 n.3 (1981). See Act of Oct. 3, 1980, *supra* note 7 ("like other Native Americans, Native Hawaiians rank in the lowest in the level of educational attainment").

15. Native Hawaiians have lower birth weights and infant survival rates, and disproportionately higher levels of alcoholism, suicide, illness, and illiteracy than the rest of the state population. G. KANAHELE, CURRENT FACTS AND FIGURES ABOUT HAWAIIANS 8-35 (1982).

16. See, e.g., Act of Jan. 4, 1975, Pub. L. No. 93-644, § 802, 88 Stat. 2291 (codified at 42 U.S.C. § 2991a (1980)).

17. In testimony regarding the propriety of including Native Hawaiians in educational programs for the benefit of other Indians, the Department of Health, Education and

wording of its statutes.¹⁸ It often appears that Congress simply forgets that Native Hawaiians sorely need the benefits of legislation enacted for the benefit of all Indians or Indian tribes, or shies away from including them because of the belief that they are not Indians.

More often, Congress' intent to extend benefits to all Indians is frustrated by the Washington bureaucracy. A good illustration is the application of the Snyder Act establishing certain programs for Indians under the auspices of the Bureau of Indian Affairs (BIA).¹⁹ Congress identified as the beneficiaries of the Act the Indians throughout the United States;²⁰ the Department of the Interior, which oversees the BIA, originally ruled that "Indians" meant "any and all Indians, to whatever degree."²¹ Nevertheless, Native Hawaiians are excluded from applying for the benefits offered under the Act because the Department later required that Indians be members of a "federally recognized" tribe to receive any benefits from the BIA, and that an Indian group must inhabit the continental United States to apply for recognition.²² Thus, every Native American group in the United States except Native Hawaiians can apply for recognition and the benefits flowing from that status. This small section of the Code of Federal Regulations succeeded in arbitrarily denying a myriad of benefits available to Indians and Indian tribes to Native Hawaiians, even in instances where it appears that the intent of Congress would have been to include them.²³

Welfare; the Congressional Research Service, and the Department of the Interior submitted opinions that Native Hawaiians could not be included on the basis of their being Indians. See *Inclusion of Native Hawaiians in Certain Indian Acts and Programs: Hearings on S. 857, 859, 860 Before the Senate Select Comm. on Indian Affairs, 95th Cong., 2d Sess.* (1978) [hereinafter *Hearings on S. 857*].

18. See, e.g., American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1982)) (while the title of the Act refers to the intended beneficiaries as "Indians," the statute is worded in such a way as to distinguish between Native Hawaiians and American Indians).

19. 42 Stat. 208 (1921) (codified as amended at 25 U.S.C. § 13 (1982)).

20. *Id.*

21. Dep't of Interior Solicitor Op. M-36857 (Feb. 22, 1973) (quoted in Weatherhead, *What Is an "Indian Tribe"?—The Question of Tribal Existence*, 8 AM. INDIAN L. REV. 1, 8 (1980)).

22. 25 C.F.R. § 83 (1985).

23. See, e.g., 28 U.S.C. § 1362. This provision was enacted to allow Indian tribes access to federal courts without having to meet a \$10,000 jurisdictional limitation, especially in cases where the United States declines to bring an action on behalf of the tribe in cases involving trust lands. See generally H.R. REP. NO. 2040, 89th Cong., 2d Sess. (1966)

This article will first briefly examine the importance of both Indian and tribal status in American law as prerequisites to benefits and protections afforded by the federal government. Part II will analyze the term "Indian" and its application in the law to show that Native Hawaiians are Indians. Part III will examine the criteria used to establish tribal status and, applying each to the Native Hawaiian people, will demonstrate that as a group they constitute an Indian tribe and therefore are eligible for benefits extended to other Indians and Indian tribes. Part IV will then propose both congressional and administrative solutions to the present failure to include Native Hawaiians in programs for the general benefit of Indians and Indian tribes. Finally, it will be shown that without the implementation of a comprehensive solution, the Native Hawaiian people will continue to be unjustly excluded from a vast number of programs for which they should be eligible because of their status as Indians and as an Indian tribe.

I. *The Importance of Indian and Tribal Status in Federal Law: A Brief Introduction*

The question of whether a person is an Indian or whether a Native American group constitutes an Indian tribe is one of unquestionable significance in the field of Indian law.²⁴ The benefits afforded by legislation for Indians hinge on a determination that the beneficiary is indeed an Indian.²⁵ Similarly, because the federal government's power to legislate for the benefit of Indian groups²⁶ is limited by the Constitution to Indian tribes,²⁷ a showing that

(S. 1356). While the United States has declined to bring suit against the state of Hawaii over the latter's mismanagement of the Hawaiian trust lands, Native Hawaiians are unable to avail themselves of section 1362 because the statute requires that the tribe be recognized by the Department of the Interior, and Native Hawaiians are precluded from recognition.

24. For a detailed discussion of tribal status, see generally Weatherhead, *supra* note 21. For the purpose of this article, the term "tribe" is not meant to refer to any particular socio-political arrangement. Rather, it is a reconciliation of the legal and ethnohistorical meanings of the term. See *id.* at 5 n.27 and accompanying text.

25. See, e.g., 25 U.S.C. § 1901 (1982) (Indian Child Welfare Act) (set out in 25 C.F.R. § 23 (1985)).

26. For a detailed discussion of federal power over the Indian tribes, see generally Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).

27. U.S. CONST. art. 1, § 8 (Congress "shall have Power . . . to regulate Commerce . . . with the Indian Tribes").

a group is an Indian tribe is a prerequisite to the protections, services, and benefits offered by the government to the tribes.²⁸ Although the determination of who is an Indian is sometimes a difficult one, the determination of tribal status is often more complicated. Most benefits conferred upon individual Indians are extended to them as tribal members, and thus a great deal depends on the affirmative establishment of tribal status. Though the layperson might think there is only one kind of Indian tribe, for purposes of American Indian law there are basically two—those that are “recognized” and those that are not.²⁹ “Recognized” means that the government acknowledges as a matter of law that a particular indigenous group is a tribe³⁰ by conferring the legal status of “tribe” on that group,³¹ thus bringing it within Congress’ legislative powers. While recognition of tribal status may come from many different entities for a variety of purposes, the most important is that offered by the federal government. Unequivocal federal recognition of a group’s tribal status is a prerequisite to receiving the services offered by the Department of the Interior³² and establishes tribal status for all federal purposes.³³

Although a large number of Native American groups have been governmentally recognized as tribes,³⁴ many, including Native Hawaiians, have not. There are two situations in which the federal government or the courts will be required to determine whether

28. For an exhaustive study of the federal services available to Indians and Indian tribes, see generally CONGRESSIONAL RESEARCH SERV., *FEDERAL PROGRAMS OF ASSISTANCE TO AMERICAN INDIANS* (1978) (No. 78-110 GOV) (R. Jones, author).

29. Nonrecognized Indians can be broken down into three basic subgroups. The first are those that have never been recognized, like Native Hawaiians. The second consists of those that were once recognized, but have had their tribal status terminated by Congress. *See, e.g.*, 73 Stat. 502 (1959) (Catawba Tribe); 71 Stat. 283 (1957) (Coyote Valley Ranch Band); 68 Stat. 250 (1954) (Mixed-Blood Utes). For detailed discussions of the termination of tribal status, see generally S. TYLER, *A HISTORY OF INDIAN POLICY* 151-97 (1973); Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977); Note, 35 STAN. L. REV., *supra* note 11, at 1181. The third are those that have applied for recognition, but have been turned down. *See, e.g.*, 51 Fed. Reg. 2437 (1986) (United Lumbee Nation of North Carolina); 50 Fed. Reg. 38047 (1985) (Northwest Cherokee Wolf Band, Red Clay Inter-tribal Indian Band); 50 Fed. Reg. 18746 (1985) (Tchinouk Indians of Oregon).

30. 1982 HANDBOOK, *supra* note 2, at 3-7, 19.

31. Weatherhead, *supra* note 21, at 17.

32. 25 C.F.R. § 54.2 (1985).

33. *See* W. CANBY, *AMERICAN INDIAN LAW IN A NUTSHELL* 4 (1981).

34. *See, e.g.*, Indian Tribal Entities Recognized and Eligible to Receive Services, 50 Fed. Reg. 6055 (1985) (list of all tribes or bands recognized by the BIA).

a group of Indians not presently "recognized" is a tribe or band within the scope of Congress' power: first, when the group applies for recognition by the Department of the Interior in order to avail itself of the benefits offered to Indians by the BIA,³⁵ and second, when the group wishes to take advantage of benefits or protections offered generally to tribal Indians by the government which are not tied directly to the Interior Department.³⁶ There are two very basic steps to recognition as a tribal entity: first, one must show that the group seeking acknowledgment is comprised of Indians, and second, that the group constitutes a tribe. Although Native Hawaiians as a group would meet the criteria required by the Department of the Interior for recognition, federal regulations preclude Native Hawaiians from even applying for recognition by the Bureau of Indian Affairs as constituting a tribe.³⁷ Nevertheless, there is nothing to preclude the recognition of Native Hawaiians as an Indian tribe for purposes of general Indian legislation not directly provided by the BIA. A close examination of the Native Hawaiian people shows that they are both Indians and an Indian tribe because they are an aboriginal group whose ancestors, before the arrival of whites, inhabited territory that became a part of the United States.³⁸ In addition, the Native Hawaiian people constitute an Indian tribe because they meet the criteria necessary to establish tribal status.³⁹

II. *Native Hawaiians as Indians: A Matter of Semantics*

The term "Indian" is perhaps as ambiguous as any in legal usage in the United States. Congress has never provided a generic definition for application to the field of Indian law, and as a result the base determination of who is an Indian has been left to be decided inconsistently by the courts⁴⁰ and federal agencies.⁴¹ However, courts now generally agree on the basic definition of

35. See, e.g., 25 C.F.R. § 20 (1985) (financial and social services); 25 C.F.R. § 26 (1985) (employment assistance).

36. See Weatherhead, *supra* note 21, at 18.

37. 25 C.F.R. § 83.4 (1984). See *infra* notes 380-384 and accompanying text.

38. See *infra* notes 67-75 and accompanying text.

39. See *infra* notes 100-341 and accompanying text.

40. See, e.g., *United States v. Sandoval*, 231 U.S. 28, 39-47 (1913) (Pueblo natives are Indians), *overruling* *United States v. Joseph*, 94 U.S. 614, 616 (1876) (Pueblo natives are not Indians).

41. See F. COHEN, *HANDBOOK ON FEDERAL INDIAN LAW* 2 nn.3-4 (1942) [hereinafter 1942 HANDBOOK].

“Indian,”⁴² and although no federal court has considered whether Native Hawaiians as a people fall under that rubric,⁴³ the status of Native Hawaiians as an indigenous people within the United States calls for legal treatment identical to that received by mainland Indians. The term “Indian” encompasses those aborigines who, before the arrival of Caucasians, inhabited the territories that became the fifty United States, and their descendants.⁴⁴ Therefore, the term properly includes not only the natives of the forty-eight contiguous states, but the Inuit and Aleut peoples of Alaska,⁴⁵ and the natives of Hawaii. In addition, racial characteristics are not determinative of one’s status as an Indian because the term “Indian” is not a racial classification; rather, it is a political distinction based on historical circumstances. Thus, although Native Hawaiians may not be similar to mainland Indians in the anthropological sense, the plight of both groups as indigenous peoples within the United States requires analogous legal treatment.⁴⁶

The ambiguity surrounding the term “Indian” has a long history. A confused Spanish admiral named Christopher Columbus, who mistakenly believed that he had discovered the East Indies,⁴⁷ first applied the term to the native residents of the Caribbean Islands in 1493.⁴⁸ Though others later corrected Columbus’ mistake in geography, they never corrected the appellation that he applied to the indigenous people of the Americas. Westerners eventually applied the term “Indian” to all aboriginal groups in North and South America,⁴⁹ a practice taken up by the American

42. See *infra* notes 55-63 and accompanying text.

43. 1982 HANDBOOK, *supra* note 2, at 803. One court has ruled that a particular group of Native Hawaiians does not constitute an Indian band for purposes of 28 U.S.C. § 1362 because it was not “duly recognized” by the Department of the Interior, but left open the question of whether Native Hawaiians as a group constitute a tribe. See *Price v. Hawaii*, 764 F.2d 623, 627 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986).

44. See *infra* notes 57-63 and accompanying text.

45. These two groups are often referred to as Eskimos, though that appellation is incorrect.

46. See *infra* notes 81-83 and accompanying text.

47. R. BERKHOFFER, *THE WHITE MAN’S INDIAN* 5 (1979).

48. C. JANE, *SELECT DOCUMENTS ILLUSTRATING THE FOUR VOYAGES OF COLUMBUS* 3, 5, 17 (1930).

49. E. ARBER, *THE FIRST THREE ENGLISH BOOKS ON AMERICA* 224 (1885) (“for so call we all nations of the new found lands”) (quoting G. Oviedo y Valdes, *De la Natural Hystoria de las Indias* (1526) (original in Spanish)).

colonists⁵⁰ and eventually Congress,⁵¹ though the term was later occasionally modified to "American Indian" to avoid a solecism.⁵² In short, Americans used the term "Indian" to refer to the aboriginal inhabitants of the territory incorporated into the United States, and this is the most accepted definition in use today.⁵³

Courts have had few conceptual problems applying the term "Indian" to groups such as the Dakota, Iroquois, or Navajo, but in 1968 the Indian Claims Commission balked when asked to apply it to Native Alaskans.⁵⁴ Section 2 of the Indian Claims Commission Act of 1946 provided that the Commission would hear and determine claims against the United States by any Indian tribe, band, or other identifiable group of American Indians.⁵⁵ Because the United States government vigorously contested the inclusion of Native Alaskans in the term "American Indian," the Commission certified to the United States Court of Claims the question whether two Alaskan groups, the Inuits and the Aleuts, were Indians for purposes of the Indian Claims Commission Act. In *United States v. Native Village of Unalakleet*,⁵⁶ the Court of Claims held that the generic term "American Indian" as used in section 2 of the Act encompassed "all American aborigines."⁵⁷ Because

50. See, e.g., Letter from Johann Friedrich Zinn to his wife, Anna Sophia (Aug. 12, 1739) ("the Settlement . . . was Yesterday most fiercely attacked by several . . . Indians") (original in German); Letter from William Hepburn to Mary McCracken (1803) (the "Indians . . . are a curious lot").

51. See, e.g., U.S. CONST. art. 1, § 8, cl. 3 ("Congress shall . . . regulate commerce . . . with the Indian Tribes"); Act Regulating Trade and Intercourse with the Indians, ch. 161, § 2, 4 Stat. 729 (1834) ("no person shall . . . trade with any of the Indians"); Act of Aug. 20, 1789, ch. 10, 1 Stat. 54 (an act to "defray[] the expense of negotiating . . . with the Indian Tribes"); Articles of Confederation IX (The United States . . . shall have the [power to regulate] the trade and manag[e] all affairs with the Indians").

52. See, e.g., 42 U.S.C. § 1996 (American Indian Religious Freedom Act), *supra* note 18.

53. The Bureau of American Ethnology (now the Anthropology Department) of the Smithsonian Institution defines the word "Indian" as the common designation of the aborigines of America. BUREAU OF AMERICAN ETHNOLOGY, HANDBOOK OF AMERICAN INDIANS (1979) (a reprint of the 1907-1910 edition). *Accord*, *Frazer v. Spokane*, 29 Wash. 278, 69 P. 779, 782 (1902) (the term "Indian as ordinarily used is understood to refer to members of that race of men who inhabited America when it was found by Caucasians"). The definitive authority on the subject of Indian law defines an "Indian" in part as a person whose "ancestors lived in America before its discovery by the white race." 1942 HANDBOOK, *supra* note 41, at 2.

54. *United States v. Native Village of Unalakleet*, 19 Ind. Cl. Comm'n 140 (1968).

55. 25 U.S.C. § 70(a) (1982).

56. 411 F.2d 1255 (Ct. Cl. 1969).

57. *Id.* at 1257.

Aleuts and other Native Alaskans are aboriginal groups whose ancestors inhabited an area now a part of the United States before the arrival of westerners, the court concluded they must be included in the term "Indian."⁵⁸ In addition to the Court of Claims, the United States Court of Appeals for the Ninth Circuit, which has federal appellate jurisdiction over both Alaska and Hawaii, has long held that Eskimos and Aleuts are Indians. In 1948 the court held in *Hynes v. Grimes Packing Co.*⁵⁹ that the Indian Citizen Act⁶⁰ conferring United States citizenship on "all non-citizen Indians" applied to Native Alaskans.⁶¹ Similarly, in 1976 the court, relying in part on the reasoning of the Court of Claims in *Unalakleet*, ruled that the term "Indian" as used in 25 U.S.C. § 345⁶² means the aborigines of America and thus includes Native Alaskans.⁶³

The inclusion of Native Alaskans within this definition leaves Native Hawaiians as the only other aboriginal people who, prior to Western settlement, lived in an area that later became part of the fifty United States and are not considered Indians.⁶⁴ Nonetheless, it follows from the reasoning of the Court of Claims in *Unalakleet* and other later federal cases⁶⁵ that Native Hawaiians properly can be termed Indians. The *Unalakleet* court determined that the term "American Indian" includes all the descendants of any pre-Columbian inhabitants of the United States.⁶⁶ Thus, this definition must also include Native Hawaiians who are descended from the prediscovery inhabitants of what is now the state of Hawaii.

The Hawaiian people migrated to the Hawaiian Islands in two separate waves: the first from the area of the South Marquess Islands

58. *Unalakleet*, 411 F.2d at 1257.

59. 165 F.2d 323 (9th Cir. 1948), *vacated*, 337 U.S. 86 (1949).

60. Act of June 2, 1924, ch. 233, 43 Stat. 253.

61. *Hynes*, 165 F.2d at 326.

62. 25 U.S.C. § 345 (1982). Section 345 states in part that: "[a]ll persons . . . of Indian blood . . . entitled to an allotment of land under an act of Congress . . . may commence and prosecute or defend any action . . . in the proper district court of the United States."

63. *Pence v. Kleppe*, 529 F.2d 135, 138-39 (9th Cir. 1976).

64. 42 CONG. Q. 2109 (Aug. 25, 1984); Appellant's Supplemental Memorandum at 5, *Price v. Hawaii*, 764 F.2d 623 (9th Cir. 1985) (No. 84-2444) [hereinafter Supplemental Memorandum].

65. *See, e.g., Pence*, 529 F.2d at 138-39.

66. *Unalakleet*, 411 F.2d at 1256.

about 400 A.D.,⁶⁷ and the second from the area of Tahiti between the years 900-1000 A.D.⁶⁸ When Hawaii's counterpart to Columbus, England's Captain James Cook, "discovered" the Islands in 1778,⁶⁹ he found a population of more than 300,000 natives⁷⁰ possessing a mature culture,⁷¹ a prosperous land-based economy,⁷² and a complex, anthropomorphic religion.⁷³ It is interesting to note that Captain Cook and his men called the Native Hawaiians they encountered Indians,⁷⁴ a term they also had applied to other aboriginal groups they encountered during the same 1778-89 voyage along the coasts of Oregon, Washington, Alaska, and the Aleutian and Bering seas, and who are now all considered Indians under United States law.⁷⁵

In addition to historical findings and the views implicit in federal court decisions such as *Pence* and *Unalakleet*, both Hawaiian state courts and Congress have included Native Hawaiians in the term

67. R. KUYKENDALL, HAWAII: A HISTORY 5 (1948).

68. *Id.* at 6; E. HANDY, K. EMORY, E. BRYAN, P. BUCK & J. WISE, ANCIENT HAWAIIAN CIVILIZATION 23-24 (1965) [hereinafter E. HANDY].

69. I R. KUYKENDALL, THE HAWAIIAN KINGDOM 12-17 (1938). Cook first landed at Waimea, Kaua'i, on January 20, 1778. Some academicians theorize that Cook's "discovery" of the Islands came after previous visits by Spaniards. See generally Dahlgren, *Were the Hawaiian Islands visited by Spaniards Before the Discovery by Captain Cook in 1778?*, in KUNGL. SVENSKA VETENSKAPSAKADEMIENS. Handlingar Bond 57, No. 4 (1916) (several non-indigenous items such as iron nails were reportedly found by the English when they arrived).

70. R. SCHMITT, DEMOGRAPHIC STATISTICS OF HAWAII: 1778-1965, at 10-11 (1968).

71. See generally G. DAWS, SHOAL OF TIME (1968). See 1 R. KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 69, at 1-28.

72. For a discussion of the Hawaiian land system, see generally J. HOBBS, HAWAII—A PAGEANT OF THE SOIL (1935); Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848, 848-50 (1975); Brief of Hou Hawaiians & Maui Loa, Chief of the Hou Hawaiians, as Amici Curiae at 5-10, *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (No. 83-141) [hereinafter Brief of Hou Hawaiians as Amici Curiae].

73. See E. HANDY, *supra* note 68, at 47-54; R. KUYKENDALL, HAWAII: A HISTORY, *supra* note 67, at 10-11, 39-41.

74. Captain Cook wrote of his return to the island of Hawaii in January 1779: "The ships are very much crowded with Indians & surrounded by a multatude of canoes." James King, who took charge of the expedition after Captain Cook's death, described Cook's anger at a native's theft of some tools from one of the ships: "In going on board, the Capt' expressed his sorrow that the behaviour of the Indians would at least oblige him to use force."

Dr. William Ellis, Cook's surgeon, wrote: "[T]he Indians behaved with great resolution and intrepidity, and notwithstanding a severe fire was kept up for some time afterwards, they maintained their ground, and as soon as one fell, another immediately supplied his place." 3 CAPTAIN COOK'S JOURNALS 490-91, 530, 540 (W. Wharton ed. 1893).

75. Supplemental Memorandum, *supra* note 64, at 6.

“Indian.” For example, in 1982 the Hawaii Supreme Court compared the status of Native Hawaiians with that of mainland Indians in *Ahuna v. Department of Hawaiian Home Lands*,⁷⁶ and stated that questions involving Native Hawaiians should be analyzed in the same manner as those involving other Native Americans.⁷⁷ To determine the breadth of a trust responsibility owed to Native Hawaiians under a state statute, the court turned to mainland federal decisions involving the federal-Indian trust relationship, stating that the court was dealing with relationships between the government and an aboriginal people and thus “reason dictates that [courts] draw the analogy between Native Hawaiians . . . and other Native Americans.”⁷⁸ Congress has also indicated an understanding that Native Hawaiians can be treated as Indians by including Native Hawaiians in the term “Indian” in several pieces of legislation, including the American Indian Religious Freedom Act of 1978,⁷⁹ which was enacted to protect Native American religions.⁸⁰ Thus, under the reasoning of federal and state case law and in the view of Congress, Native Hawaiians can validly be considered Indians.

The determination that Native Hawaiians are Indians is unaffected by the argument that they are not of the same racial stock as the Indians inhabiting the forty-eight contiguous states and thus cannot be considered to be Indians.⁸¹ The Court of Claims rejected a similar anthropological argument regarding Eskimos in *Unalakleet*.⁸² The court reasoned that the term “Indian” does not

76. 64 Haw. 327, 640 P.2d 1161 (1982).

77. *Id.* at 334, 640 P.2d at 1169.

78. *Id.*

79. Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1982)).

80. See also 21 U.S.C. § 1177d (1983), which includes Native Hawaiians in the term “American Indian.” For other inclusions of Native Hawaiians in the term “Indian,” see *infra* notes 157-164 and accompanying text.

81. Hawaiians are of Polynesian racial stock, while the groups inhabiting the forty-eight contiguous states are of Asian/Mongolian racial stock. Yet despite analogous racial differences between Indians in the lower forty-eight states and Native Alaskans, the United States Supreme Court has implicitly included Native Alaskans, non-Indians under an “anthropological” meaning, within the term “Indian.” See *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 86-87 (1918) (Annette Islands were set aside as an “Indian Reservation” for the Metlakatla Indians and “such other Alaskan Natives as may join them”).

82. See *Unalakleet*, 411 F.2d at 1260-61. Inuits (“Eskimos”) and Aleuts display many physical characteristics which differentiate them from the Indians inhabiting the “lower 48.” Members of the two groups have more pronounced Mongolian features (almond-shaped eyes, round faces), have generally smaller hands and feet, and have an appreciably higher percentage of B-type blood (ABO system) than do other Indians. See HANDBOOK OF AMERICAN INDIANS, *supra* note 53.

signify a particular race but a class of indigenous aborigines who, prior to the encroachments of white settlers, inhabited the territories that later became the United States.⁸³ It follows that Native Hawaiians cannot logically be excluded from being considered Indians simply because they are of Polynesian rather than Mongolian racial stock.⁸⁴

The Constitution also precludes a definition of "Indian" limited by race. Congressional enactments for the benefit of Indians are based on the Indians' political status as dependent aboriginal peoples, not on their racial status as Indians.⁸⁵ Thus, in situations where one's status as an Indian is determinative of a benefit available under a federal statute, to limit those benefits on the basis of race would violate the fifth amendment equal protection clause.⁸⁶ To illustrate, if legislation for the general benefit of Indians was based on "race, creed, or color, slant of eyes or shape of cranium,"⁸⁷ that legislation would constitute invidious racial discrimination and violate the Constitution.⁸⁸ Because a construction of a statute rendering it constitutional is always preferred,⁸⁹ it must be assumed that when Congress accords benefits to Indians generally without limitations, it does not do so on the basis of racial criteria but on the basis of their status as members of

83. *Unalakleet*, 411 F.2d at 1261. *Accord*, *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

84. Dr. Thor Heyerdahl has postulated that Native Hawaiians and the Indians inhabiting the Pacific Northwest Coast had extensive pre-Columbian contacts and are directly related racially. Supplemental Memorandum, *supra* note 64, at 6 (citing T. HEYERDAHL, *AMERICAN INDIANS IN THE PACIFIC* 69-178 (1952)).

85. *Mancari*, 417 U.S. at 552-53 & n.24. *See* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Seemingly inconsistent with this line of cases is *United States v. Rogers*, 45 U.S. (5 How.) 566 (1846), in which the Court held that a white man who had been adopted by the Cherokee Nation and lived as an Indian could not avail himself of jurisdictional benefits for Indians because he "was still a white man, of the white race." 45 U.S. (5 How.) at 573. This result can be partially explained, however, by the fact that the special considerations made for Indians are only available to those who have the "unique legal status" that distinguishes Indians from all other Americans. *See* *Dillon v. Montana*, 451 F. Supp. 168, 175-76 (D. Mont. 1978) (citing *Mancari*, 417 U.S. 535), *rev'd on other grounds*, 634 F.2d 463 (9th Cir. 1980).

86. *Mancari*, 417 U.S. at 552-53; *Pence*, 529 F.2d at 138-39; *Unalakleet*, 411 F.2d at 1260-61. *See* U.S. CONST. amend. V.

87. *Unalakleet*, 411 F.2d at 1260-61.

88. *Cf. Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (application of statutes to Chinese because they are Chinese unconstitutional).

89. *Unalakleet*, 411 F.2d at 1261.

the class of Native Americans.⁹⁰ Thus, Native Hawaiians as American aboriginals cannot constitutionally be excluded from the class of Indians on the ground that they are not racially Indians.⁹¹

To conclude, the term "Indian" in American Indian law encompasses those aborigines who, before the arrival of the whites, inhabited the territories that became the fifty United States, and their descendants. Therefore, the term properly includes the natives of Hawaii.

III. *Native Hawaiians as an Indian Tribe: A Matter of History*

Once it is determined that members of a particular group are Indians, the only issue remaining regarding the inclusion of that group in federal programs not directly tied to the Bureau of Indian Affairs for the general benefit of Indian tribes is whether the group constitutes a tribe.⁹² Congress may not apply its powers over Indians to a particular group or community by arbitrarily calling them a tribe.⁹³ Rather, the group must possess certain characteristics that make them a tribe: those that they possess as an American aboriginal people, and those that are a result of treatment by the federal government. The *Handbook of Federal Indian Law*⁹⁴ discusses five considerations which "singly or jointly have been particularly relied upon in reaching the conclusion that a group constitutes a tribe or band"⁹⁵ of Indians. The considerations are:

- (1) whether the group has had treaty relations with the United States;
- (2) whether the group has been denominated a tribe by act of Congress or Executive order;

90. *Id.* See generally Johnson & Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587 (1979).

91. See *id.* Accord, *Pence*, 529 F.2d at 138-39.

92. See Weatherhead, *supra* note 21, at 1, 5. Tribes not recognized may nevertheless receive government services. See Joint Tribal Council of Passamoquoddy v. Morton, 388 F. Supp. 649 (1974), *aff'd*, 528 F.2d 370 (1st Cir. 1975); United States v. Washington, 384 F. Supp. 312 (D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

93. *Sandoval*, 231 U.S. at 46.

94. 1942 HANDBOOK, *supra* note 41.

95. Letter from LaFollette Butler, Acting Commissioner of Indian Affairs, to Senator Henry M. Jackson, Chairman of the Senate Comm. on Interior & Insular Affairs (Jan. 7, 1974).

- (3) whether the group has been treated as having collective rights in tribal lands or funds, even though not expressly denominated a tribe;
- (4) whether the group has been treated as a tribe or band by other Indian tribes; and
- (5) whether the group has exercised political authority over its members, through a tribal council or other governmental forms.⁹⁶

In addition to these five criteria, the existence of special congressional appropriations for the group is often considered in determining tribal status.⁹⁷ Satisfying the criteria will suffice to establish that the aboriginal group under consideration does constitute an Indian tribe for purposes of benefits not directly tied to the BIA.⁹⁸

*Hawaiian-American Treaty Relations: 'A'ole e hiki i ka i'a li'ilii'ike ala i ka nui.*⁹⁹

The first consideration in determining if a particular group of Indians constitutes a "tribe" is whether the group has had treaty relations with the United States. A treaty relationship with the United States expressly recognizes that an Indian tribe is an innately sovereign entity,¹⁰⁰ a showing important in establishing tribal status. As with many mainland Indian tribes, the Native Hawaiian people had extensive treaty relations as a sovereign nation with the United States over a period extending from the first visit of an American military ship to the Islands in 1825 to the overthrow of the monarchy in 1893.¹⁰¹ As with treaties concluded between the United States and the mainland Indian tribes, the first treaties with Native Hawaiians were concerned primarily with "peace and

96. 1942 HANDBOOK, *supra* note 41, at 270-71.

97. *Id.* at 271.

98. Prior to 1978, these were the original criteria for determining tribal status. After that date, in order to receive benefits from the BIA the requirement that the tribe reside in the continental United States was added. See 43 Fed. Reg. 39,361 (Oct. 2, 1978). Although there are other definitions of tribal status, *see, e.g.*, 25 C.F.R. § 83.4, they are more general than those outlined here. Thus, meeting these five criteria would suffice to establish tribal status under any test.

99. The small fish cannot swallow the big fish. Hawaiian proverb.

100. *Washington v. Washington State Comm'l Passenger Fishing Ass'n*, 443 U.S. 658, 675 (1979). See *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901) (the *Diamond Rings Cases*) (treaty is an international agreement between sovereigns).

101. For a detailed discussion of diplomatic relations between Hawaii and the United States, *see generally* C. TANSILL, *DIPLOMATIC RELATIONS BETWEEN THE UNITED STATES AND HAWAII*, FORDHAM U. HIST. SERIES, No. 1 (1940).

friendship.” As American interest in the lands of the aboriginal signatories increased, however, amorphous concepts of peace and friendship gave way to concrete trade and land concessions, further mirroring events on the mainland. The final result was the abrogation of the treaties and complete annexation of the natives’ lands by the United States.

Treaty relations between the United States and the Native Hawaiian people began with the signing of a bilateral agreement between the parties in 1826¹⁰² by Captain Thomas ap Catesby Jones on behalf of the United States, and the Regent Ka’ahumanu on behalf of King Kau’ikea’ouli.¹⁰³ Captain Jones, commander of the U.S.S. *Peacock*, concluded the Articles of Arrangement while on a military tour of the Pacific.¹⁰⁴ The agreement, like most of the treaties entered into with mainland Indian tribes during the same period, included a “perpetual peace and friendship” provision.¹⁰⁵ Similarly, the Articles primarily served as a commercial agreement that was “eminently beneficial to the United States,”¹⁰⁶ yet gave no real benefits to the native people.¹⁰⁷ While the Articles are considered an “unperfected treaty” because they were never presented to the U.S. Senate for its advice and consent,

102. Articles of Arrangement with the King of the Sandwich Islands, Dec. 23, 1826, United States-Hawaii, reprinted in 3 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 269 (H. Miller ed. 1937) [hereinafter H. MILLER]. The Articles do not appear in the U.S. Treaty Series (T.S.) compilations because they were never submitted to the Senate for ratification.

103. *Id.*, preamble. The English version of the preamble reads: “Articles of arrangement made at Oahu between Thomas ap Catesby Jones, appointed by the United States, on the one part, and Kauikeaouli, Chief of the Islands of Hawaii, and his guardians, on the other part.”

104. *Id.* at 249, 269. Captain Jones had signed a similar agreement with Chief Pomare II of Raiatea and Tahaa, Tahiti, on September 6, 1826, on the same voyage.

105. Compare *id.* at 269-70 (“The peace and friendship subsisting between the United States [and Hawaii] are hereby confirmed, and declared to be perpetual.”) with Treaty with the Ricara Tribe, July 18, 1825, United States-Ricara Indian Nation, art. I, 7 Stat. 259 (“perpetual friendship”).

106. *Report to the Committee on Foreign Affairs of the House of Representatives*, H. REP. NO. 92, 28th Cong., 2d Sess. 468 (1845).

107. See 3 H. MILLER, *supra* note 102, at 269-71. While the Articles gave Hawaiians certain shipping privileges, the kingdom at this time had no ocean-going trading vessels with which to exercise those privileges. When the kingdom did develop a small fleet, it gained only a limited ability to avail itself of the benefits of U.S.-Hawaiian trade. Most Native Hawaiian seamen served on foreign vessels or became the masters of small ships involved in inter-island trade. See 1 R. KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 69, at 95-98.

the United States availed itself of the privileges granted it by the compact, most of which concerned shipping and whaling concessions.¹⁰⁸ Thus, it still can be considered a treaty because it was honored in practice by both signatories,¹⁰⁹ and Captain Jones was authorized by the United States government to conclude such an arrangement.¹¹⁰

Although the Articles of Arrangement arguably did not constitute a *de jure* treaty,¹¹¹ the United States did conclude a treaty with the Hawaiian people in 1849.¹¹² Like similar treaties between the United States and the mainland tribes, the treaty provided for the extradition to the United States of Americans accused of certain crimes,¹¹³ and for the free and unhindered passage of Americans in Hawaiian territory.¹¹⁴ As with the Articles of Arrangement, the United States yielded little and gained much; for while the terms of the treaty were reciprocal,¹¹⁵ the Kingdom of Hawai'i's position as a fledgling "third-world" country rendered it largely incapable of taking advantage of the trade privileges granted it pursuant to the terms of the treaty.¹¹⁶ In effect, the treaty greatly increased America's trade advantage over the Hawaiians and solidified the American foothold on the Islands.

108. 3 H. MILLER, *supra* note 102, at 270-73.

109. *Id.* at 273-74. The United States considered the compact "morally binding" on both parties. *Id.* (citing Andrew Allen, *Report Upon the Official Relations with the Hawaiian Islands from the First Appointment of a Consular Officer There by This Government* (Feb. 9, 1893) (in S. EXEC. DOC. No. 77, 52d Cong., 2d Sess. (1893)). See Bradley, *Thomas ap Catesby Jones and the Hawaiian Islands 1826-1827*, 39 HAW. HIST. SOC'Y REP. 23 (1931) ("American officials [sought] to impress upon the perplexed chiefs the sanctity of this agreement" which the Senate ignored).

110. See H.R. REP. No. 92, *supra* note 106.

111. Despite the failure of the Senate to ratify the Articles, the United States government consistently referred to them as a treaty. See, e.g., 3 H. MILLER, *supra* note 102, at 274 ("this was the first *treaty* formally negotiated by the Hawaiians with a foreign power") (emphasis added).

112. Treaty of Commerce, Friendship and Navigation, Dec. 20, 1849, United States-Hawaii, 9 Stat. 977, T.S. No. 160 [hereinafter Treaty of Commerce]. This treaty was the first formally executed recognition of Hawaiian sovereignty by the government of the United States. See S. EXEC. DOC. No. 77, *supra* note 109, at 40-41 (quoting Secretary of State Webster).

113. Compare Treaty of Commerce, art. XIV, 9 Stat. at 981 with Treaty of Washington, Oct. 13, 1846, United States-Winnebago Nation, art. I, 9 Stat. 853.

114. Cf. Articles of Treaty, Oct. 27, 1805, United States-Cherokee Nation, art. II, 7 Stat. 95 (providing for the unmolested passage of United States citizens in the Indian country).

115. See generally Treaty of Commerce, *supra* note 112.

116. See *supra* note 107.

Indeed, the United States and the Native Hawaiian people entered into three other major treaties between 1850 and the annexation of the islands in 1898 that gave the United States an appreciably more substantial gain than that given to the Kingdom of Hawai'i.¹¹⁷ First, in 1855, Hawai'i signed a declaration¹¹⁸ acceding to the Treaty on the Rights of Neutrals at Sea¹¹⁹ between Russia and the United States. Second, another Treaty of Reciprocity was signed in 1875¹²⁰ giving the United States the exclusive right to export to Hawaii duty-free a long list of commodities, while giving the Hawaiians the right to export duty-free to the United States only one-fifth the number of goods.¹²¹ This provision is similar to those in many treaties with the mainland Indians that granted certain exclusive trading rights to the United States.¹²² Finally, the last treaty signed by the parties as sovereign entities was the Convention of 1884¹²³ which gave the United States the right to

117. This number does not include several postal agreements reached between the two parties. *E.g.*, Postal Convention, May 4, 1870, United States-Hawaii, 16 Stat. 1113; Convention for the Exchange of Money Orders, Sept. 11, 1883, United States-Hawaii, 23 Stat. 736; Parcel Post Convention, Dec. 19, 1888, United States-Hawaii, 25 Stat. 1472.

118. Declaration of Accession to the Principles of the Convention with Russia of July 22, 1854, Mar. 26, 1855, *reprinted in* 7 H. MILLER, *supra* note 102, at 121 (Doc. No. 176). Because this was a unilateral declaration by the Kingdom of Hawaii, it is not included in the United States Treaty Series (T.S.) compilations.

119. Treaty Concerning the Rights of Neutrals at Sea, July 22, 1854, United States-Russia, 10 Stat. 1105, T.S. No. 300.

120. Treaty of Commercial Reciprocity, Jan. 30, 1875, United States-Hawaii, 19 Stat. 625, T.S. No. 161; Act of July 18, 1876, ch. 2, [1876] Haw. Laws 4-6. For discussions of this treaty, see 3 R. KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 69, at 17-45; C. ROBINSON, A HISTORY OF TWO RECIPROCITY TREATIES: THE TREATY WITH CANADA, THE TREATY WITH THE HAWAIIAN ISLANDS IN 1876 (1904).

121. Treaty of Commercial Reciprocity, Jan. 30, 1875, United States-Hawaii, 19 Stat. 625, T.S. No. 161; Act of July 18, 1876, ch. 2, [1876] Haw. Laws 4-6. For discussions of this treaty, see 3 R. KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 69, at 17-45; C. ROBINSON, *supra* note 120 (compare Articles I and II of the treaty); Levy, *supra* note 72, at 858. Although the treaty allowed Hawaiian sugar cane to enter the United States duty-free, the sugar plantations were owned by westerners and not Native Hawaiians, who saw few if any benefits. In addition, the prosperity of the kingdom came to be dependent on the maintenance of the reciprocity agreement, binding Hawaii to the United States by powerful economic ties which later allowed the United States to obtain far-reaching concessions from the Hawaiians. *Id.*

122. *See, e.g.*, Treaty of St. Louis, Nov. 3, 1804, United States-Sac and Fox Indian Nations, art. VIII, 7 Stat. 84 (United States granted exclusive right to regulate trade).

123. Convention of Commercial Reciprocity, Dec. 6, 1884, United States-Hawaii, 25 Stat. 1399, T.S. No. 163.

establish an American coaling station for its ships on O'ahu¹²⁴ similar to many of the exclusive concessions gained from the mainland Indian tribes.¹²⁵

Because the increased number of rights granted to Americans that accompanied this treaty process greatly swelled the numbers of whites on the Islands, Native Hawaiians, like the tribes on the mainland, became a minority in their own land. From a population of 300,000 in 1778,¹²⁶ the Hawaiian people were reduced by 1890 to a population of 41,000¹²⁷ that owned a little under one quarter of the land.¹²⁸ In 1893, the American merchant community, dissatisfied with its lack of political control and fearing a diminution of the control it did possess, organized to overthrow the monarchy.¹²⁹ The openly pro-annexation United States Minister in Hawai'i,¹³⁰ John L. Stevens, ordered Marines from the U.S.S. *Boston* to land in Honolulu to lend support to the merchants in the revolt.¹³¹ The merchants overthrew the monarchy and pro-

124. *Id.* The station was established at Pearl Harbor, and was later expanded into a naval base.

125. *See, e.g.*, Treaty of St. Louis, *supra* note 122, art. IX (establishing a trading house and factory on Indian territory); Treaty of Limits, June 16, 1802, United States-Creek Nation, art. III, 7 Stat. 68 (establishing U.S. outposts on Indian land).

126. *See infra* note 193.

127. 1982 HANDBOOK, *supra* note 2, at 799; S. STEVENS, AMERICAN EXPANSION IN HAWAII 1842-1898, at 145 (1968).

128. Brief of Hou Hawaiians as Amici Curiae, *supra* note 72, at 19. Native Hawaiians owned about 250,000 acres.

129. M. TATE, THE UNITED STATES AND THE HAWAIIAN KINGDOM 155-91 (1965). The merchants formed a Committee of Public Safety made up entirely of non-Hawaiians. 3 R. KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 69, at 587. The fact that this group did not represent the Native Hawaiian people but instead the Western business class was evident even to mainland Americans of the period. *See, e.g.*, Fresno Daily Evening Expositor, Mar. 16, 1893, at 1 (noting that the revolution was "formulated by the sugar producing elements of the Islands"). For a detailed discussion of this period see generally W. ALEXANDER, HISTORY OF THE LATER YEARS OF THE HAWAIIAN MONARCHY AND THE REVOLUTION OF 1893 (1896).

130. *See* A. TAYLOR, UNDER HAWAIIAN SKIES, A NARRATIVE OF THE ROMANCE, ADVENTURE AND HISTORY OF THE HAWAIIAN ISLANDS: A COMPLETE HISTORICAL ACCOUNT 474 (1922) ("He desired that the monarchy should fall, and that the Islands should be annexed to the United States").

131. R. KUYKENDALL, HAWAII: A HISTORY, *supra* note 67, at 177-79. Stevens had recently informed the State Department that the "Hawaiian pear is now fully ripe, and this is the golden hour for the United States to pluck it." 26 CONG. REC. 309 (Dec. 18, 1893) (Special Message to Congress by President Cleveland). Stevens ordered 162 Marines ashore and their presence was made known to the native population. 3 R. KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 69, at 595. His excuse for the invasion was the protection of American citizens and property. Ironically, the only threat to American property came not from

claimed a provisional government¹³² which the U.S. Minister quickly recognized.¹³³ In 1898 the United States unilaterally annexed the Islands as a territory,¹³⁴ abrogating the independent status of Hawai'i that America had recognized in all previous treaties. Like the Indians on the mainland, the Native Hawaiians learned that the word "perpetual," when used in a treaty by the United States, meant "at our pleasure."

As with many of the treaties signed by the United States and mainland Indian tribes, the United States moved from seeking friendship and economic cooperation with the Native Hawaiian people as a sovereign nation to finally expropriating the natives' lands and extinguishing that sovereignty. Nevertheless, treaty relations did exist and therefore Native Hawaiians satisfy the first consideration in determining tribal status.

Congressional and Executive Recognition: Ho'i hou no i ka 'ehu, me he moi.¹³⁵

The legislative and executive branches of government occasionally expressly denominated a particular aboriginal group an Indian tribe.¹³⁶ More frequently, however, the Executive and Congress took actions implicitly recognizing a group as an Indian tribe.¹³⁷ Native Hawaiians fit within this mode of recognition and satisfy the second criterion for tribal status.

Although Native Hawaiians have never been expressly denominated a tribe by act of Congress, an examination of that

the Hawaiian people, but from the actions of the American rebels themselves. See M. TATE, *supra* note 129, at 176.

132. For a general discussion of the Republic, see R. KUYKENDALL, HAWAII: A HISTORY, *supra* note 67, at 183-92.

133. W. RUSS, THE HAWAIIAN REVOLUTION (1893-1894), at 95 (1959). Although reports of the incident conflict, it seems that the U.S. Minister had assured some of the rebels before the actual revolt that American diplomatic recognition of their cause would be quickly forthcoming. 3 R. KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 69, at 598-601; R. KUYKENDALL, HAWAIIAN KINGDOM 1874-1893, THE KALAKAUA DYNASTY 588 (1968) (he earlier told rebels that "the troops . . . would be ready to land any moment to prevent the destruction of American life . . . and would recognize the existing government whatever it might be").

134. H.R.J. Res. 55, July 7, 1898, 30 Stat. 750. See E. CARPENTER, AMERICA IN HAWAII 177-92, 232-49 (1889).

135. Said of someone who returns to old habits. Hawaiian proverb.

136. See, e.g., Act of Jan. 8, 1983, Pub. L. No. 97-429, 96 Stat. 2269 (codified at 25 U.S.C. §§ 1300b-11 to -16 (1984)) (recognizing Texas Band of Kickapoo as a tribe).

137. 1982 HANDBOOK, *supra* note 2, at 3-4.

body's relations with Native Hawaiians shows a legislative willingness to treat that group as an Indian tribe. In addition to several treaties between the United States and the Kingdom of Hawai'i ratified by Congress between 1826 and 1886¹³⁸ closely resembling treaties concluded with other Indian nations during the same period,¹³⁹ Congress enacted the Hawaiian Homes Commission Act in 1921,¹⁴⁰ creating the equivalent of a reservation for Native Hawaiians over which the United States stood as trustee. The setting aside of Indian reservations during the nineteenth century by act of Congress or by executive order was one of the primary methods these governmental branches employed to extend recognition to "particular groups of Indians as tribes,"¹⁴¹ and in 1919, Congress, resenting the Executive's infringement on its constitutional prerogatives to deal with public lands, declared that only it could withdraw public lands of the United States to establish Indian reservations.¹⁴² The Hawaiian Homes Commission Act withdrew 200,000 acres of Hawaiian land to which the United States held title and set it aside for the benefit of Native Hawaiians.¹⁴³ When questions were raised about the constitutionality of the Act, the Solicitor of the Department of the Interior submitted an opinion arguing strongly that the Act was constitutional and made analogous references to congressional acts that set aside lands in a similar manner for mainland Indians¹⁴⁴ as precedent.¹⁴⁵ The House Committee on Territories agreed and stated that there were numerous "precedents for such legislation in previous enactments granting Indians [and other groups] special privileges in obtaining . . . public lands."¹⁴⁶ In short, the Hawaiian

138. See *supra* and *infra* notes 111-144 and accompanying text.

139. Compare Treaty of Commerce, *supra* note 112, art. X with Treaty of Peace and Friendship, July 2, 1791, United States-Cherokee Nation, art. X, 7 Stat. 39.

140. Act of July 9, 1921, ch. 42, 42 Stat. 108 (formally codified as amended at 48 U.S.C. §§ 961-717 (1958) (omitted 1959) (set out in full as amended at HAW. REV. STAT. § 1-146 (1980)) [hereinafter HHCA]. For a discussion of the Hawaiian Homes Commission Act, see *infra* notes 222-245 and accompanying text.

141. Letter from LaFollette Butler, *supra* note 95.

142. See Act of June 3, 1919, ch. 4, 41 Stat. 3; Act of Mar. 3, 1927, ch. 299, 44 Stat. 1347. See also Letter from LaFollette Butler, *supra* note 95.

143. HHCA, *supra* note 140.

144. See, e.g., Act of Feb. 28, 1891, ch. 383, § 1, 26 Stat. 794 (codified at 25 U.S.C. § 331 (1982)).

145. LEGISLATIVE RESEARCH BUREAU, STATE OF HAWAII, LEGAL ASPECTS OF THE HAWAIIAN HOMES PROGRAM 43 (1964) (Report No. 1a) (H. Doi, author) [hereinafter H. Doi].

146. H.R. REP. No. 839, 66th Cong., 2d Sess. (1920).

Homes Commission Act was another sign of Congress' willingness to treat Native Hawaiians as though they constituted an Indian tribe.

Congress has since continued to include the Native Hawaiian people in programs enacted for the benefit of Indians. In 1974, Congress specifically included Native Hawaiians as beneficiaries in a bill providing services for other Indians. The Native American Programs Act of 1974¹⁴⁷ included Native Hawaiians in a program to "provide the goal of economic and social self-sufficiency for American Indians" through providing financial assistance to both public and nonprofit agencies serving native groups.¹⁴⁸ Similarly, the American Indian Religious Freedom Act¹⁴⁹ guarantees "*Indians* their inherent rights of freedom [to practice the] religion of the American Indian, Eskimo, Aleut, and Native Hawaiian,"¹⁵⁰ thus explicitly equating Native Hawaiians and Indians.¹⁵¹ The Drug Abuse Prevention, Treatment, and Rehabilitation Act provides that Native Americans, including Native Hawaiians, are to be given special consideration in government funding of rehabilitative programs.¹⁵² Finally, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act¹⁵³ provides similar benefits for Native Americans, again including Native Hawaiians.¹⁵⁴

In addition to the acts of Congress including Native Hawaiians in programs benefitting mainland Indians, Congress has passed legislation specifically for Native Hawaiians. In 1978, Congress directed the Secretary of Labor to arrange for programs to meet the employment and training needs of Native Hawaiians through

147. Act of Jan. 4, 1975, Pub. L. No. 93-644, 88 Stat. 2324 (codified at 42 U.S.C. § 2991 (1982) (Native American Programs Act)).

148. *Id.* §§ 802-803, 42 U.S.C. §§ 2991a-b.

149. Act of Aug. 11, 1978, Pub. L. No. 95-341, 92 Stat. 469 (1978) (S.J.R. 102) (codified at 42 U.S.C. § 1996 (1982)).

150. *Id.* (emphasis added).

151. Also in 1978, Congress amended the Comprehensive Employment and Training Act, Act of Dec. 28, 1973, Pub. L. No. 93-203, tit. III, § 302(c)(1), 87 Stat. 839, 858 (codified at 29 U.S.C. § 801 (1981)), to include Native Hawaiians in the Indian Manpower program.

152. Act of Apr. 26, 1983, Pub. L. No. 98-24, § 5(a)(3), 97 Stat. 175, 183 (codified at 21 U.S.C. § 1177d (1984)).

153. Pub. L. No. 98-24, *supra* note 152, § 5(a)(2) (codified at 42 U.S.C. § 4577 (1984)).

154. This list is far from exhaustive. *See, e.g.*, 29 U.S.C. § 1671(c)(2) (1984) (including Native Hawaiians in Employment and Training Program for Native Americans); Kamakawiwo'ole, *Mai Wakinekona*, KA WAI OLA O OHA, Oct., 1987, at 15 (listing inclusion of Native Hawaiians in several Indian bills introduced in the fall of 1987).

public and nonprofit agencies.¹⁵⁵ In 1980, Congress enacted three statutes identifying Native Hawaiians as subjects for special federal attention. First, the Native Hawaiian Education Study Act¹⁵⁶ provided assistance for educational opportunities and services for Native Hawaiians and established an Advisory Council to make periodic recommendations to the Secretary of Education on how the Department of Education can better serve the needs of Native Hawaiians. Second, the act establishing Kalaupapa¹⁵⁷ National Historical Park¹⁵⁸ on the island of Moloka'i provides employment preferences for Native Hawaiians in administrative positions in the park,¹⁵⁹ and established a Park Advisory Commission with at least one Native Hawaiian member.¹⁶⁰ Finally, the Native Hawaiian Study Commission Act¹⁶¹ established a nine-member commission, at least three of whom were to be Native Hawaiians, to study the culture and needs of the Native Hawaiian people and prepare a report on the subject for Congress.¹⁶² More recently, Congress has extended single-family home mortgage insurance to Native Hawaiians,¹⁶³ and has made special appropriations to organizations primarily serving and representing Native Hawaiians.¹⁶⁴

155. Pub. L. No. 95-524, tit. III, § 302(c)(1)(B), 92 Stat. 1909 (1978) (codified at 29 U.S.C. § 872 (1978)).

156. Act of Oct. 3, 1980, Pub. L. No. 96-374, tit. XIII, pt. C, § 1331, 94 Stat. 1499 (codified at 20 U.S.C. § 1221-1 (1982)).

157. Kalaupapa, on Moloka'i, is the location of a settlement established for those afflicted with Hansen's disease (leprosy) whose cases were considered incurable.

158. Pub. L. No. 96-565, tit. I, 94 Stat. 3321 (1980) (codified at 16 U.S.C. § 410jj (1982)).

159. *Id.* § 107(1), 16 U.S.C. § 410jj-6. Compare the hiring preferences in the Bureau of Indian Affairs under the Indian Reorganization Act of 1934, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (1982)).

160. *Id.* § 108(a), 16 U.S.C. § 410jj-7(a). In 1978, Congress created the Kaloko-Honokohau National Historic Park. *See* 16 U.S.C. § 396d (1982). The Act provided for the preferential hiring of Native Hawaiians (16 U.S.C. § 396d(e)) and established an Advisory Committee of which at least six members must be Native Hawaiian (16 U.S.C. § 396d(f)).

161. Act of Dec. 22, 1980, Pub. L. No. 96-565, tit. III, 94 Stat. 3324 (1980) (codified at 42 U.S.C. § 2991 (1982)).

162. *Id.* § 303. *See* NATIVE HAWAIIAN STUDY COMM'N, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS PURSUANT TO PUB. L. NO. 96-565, TITLE III (1983). The Commission members, appointed by President Reagan, were sharply divided over the many issues they addressed. In fact, the Hawaiian members of the Commission split from the mainland majority and issued their own vigorous dissenting report. *See* NATIVE HAWAIIAN STUDY COMM'N, REPORT OF THE MINORITY (1983).

163. 12 U.S.C. § 171z-12 (1984).

164. 20 U.S.C.A. § 351c (Supp. 1985).

Statutes such as these expressly providing solely for the benefit of Native Hawaiians as a group are significant because one additional factor considered in determining tribal status is the existence of special appropriations for the group seeking that status.¹⁶⁵ Thus, although the legislature has not expressly denominated Native Hawaiians a tribe by act of Congress, it has consistently treated them as such in both general legislation for the benefit of Indians and in legislation solely for Native Hawaiians as a group.

Similarly, while no executive order has ever expressly designated Native Hawaiians a tribe, the executive branch has consistently treated Native Hawaiians in the same manner as other Indian tribes. In 1829, President Adams, in terms reminiscent of the official attitude toward Indian tribes in the nineteenth century, expressed to King Kamehameha III his wishes for his people's "advancement . . . in the arts of the civilized world"¹⁶⁶ and congratulated the King and his people on the rapid progress made in "acquiring a knowledge of the True Religion—the Religion of the Christian Bible."¹⁶⁷ In 1842, President Tyler, in a message to Congress on December 30, fully recognized the independent sovereign status of the Kingdom of Hawai'i and its people.¹⁶⁸ Finally, when, in 1874, King David Kalakaua traveled to Washington, D.C., on a goodwill trip designed to promote treaty relations,¹⁶⁹ he, like the chiefs of several Indian tribes that came before him, was received by President Grant as the visiting leader of a sovereign yet somewhat inferior native people.¹⁷⁰

In addition to the President, other members of the executive branch have treated Native Hawaiians in a manner similar to mainland Indians. For example, in 1920 the then-Secretary of the Interior, Franklin K. Lane, referred to Native Hawaiians as "wards

165. 1942 HANDBOOK, *supra* note 41, at 271; Letter from LaFollette Butler, *supra* note 95.

166. Letter on Behalf of President Adams from Samuel Southwell, Secretary of the Navy, to H.M. King Kamehameha III (Jan. 20, 1829). Compare similar language in treaties and communications between the United States government and the mainland Indians. *See, e.g.*, Treaty of Vincennes, Aug. 13, 1803, United States-Kaskaskia Tribe, art. I, 7 Stat. 79 (the treaty was meant to enable the Indians to procure "the means of improvement in the arts of civilization").

167. Letter from Samuel Southwell, *supra* note 166.

168. Letter from John C. Calhoun, Secretary of State, to Timoteo Haalilio and William Richards, Comm'rs of the Hawaiian Gov't (July 6, 1844).

169. R. KUYKENDALL, HAWAII: A HISTORY, *supra* note 67, at 150.

170. *Id.* One curious Washingtonian wrote that he was going to do his best to wrangle an invitation to one of the congressional receptions because he had "seen several Red Indians but never a Brown One." Letter from Jacob Stevenson to Richard Armstrong (1874).

. . . for whom in a sense we are responsible."¹⁷¹ This attitude is identical to that which proved to be the driving force behind mainland Indian policy for most of our history.¹⁷² So, while contacts between Native Hawaiians and the executive branch were not as extensive as those resulting in congressional recognition due to the limited opportunity for Native Hawaiians to interact with the Executive, the latter still evinced a habit of treating the Native Hawaiian people and their rulers in a way analogous to the treatment afforded the Indian tribes and their chiefs.

Congressional dealings with Native Hawaiians show that they have been treated as an Indian tribe on many occasions. Congress concluded treaties with Native Hawaiians as a sovereign people and then later, after their lands and sovereignty had been taken from them, included Native Hawaiians in programs for Indians. While not as extensive as the contacts between Native Hawaiians and Congress, the relation with the executive branch similarly showed a predilection on the part of the Executive to treat Native Hawaiians as a tribe. Thus, Native Hawaiians satisfy the second consideration for tribal status.

Hawaiian Trust Lands: Ola ka lawai'a i kahi po'o manu.¹⁷³

Native Hawaiians traditionally had a collective right in their lands and maintain their right in 200,000 acres of Hawaiian lands set aside for them by the United States Congress as the equivalent of a reservation. Both the historical developments surrounding the Hawaiian trust lands and the present status of those lands compel the conclusion that the Native Hawaiian people possess a collective right in tribal lands, and thus they satisfy the third consideration for determining tribal status.

The basis of the Hawaiian civilization was a complex system of land tenure¹⁷⁴ similar to the feudal system prevalent in Europe

171. *Ahuna*, 64 Haw. at 336, 640 P.2d at 1167.

172. See, e.g., *Cherokee Nation*, 30 U.S. (5 Pet.) at 17 (relationship resembles that of "a ward to his guardian"). For a more detailed discussion of the ward/guardian relationship, see generally Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

173. Unlucky fishermen can still eat the head of their bait. Hawaiian proverb. This is a way of saying that one has not had good results.

174. For a detailed discussion of this land tenure system, see E. HANDY, *supra* note 68, at 81-93 (1965); J. HOBBS, *supra* note 72; Levy, *supra* note 72, at 848; M. Kelly, "Changes in Land Tenure in Hawaii, 1778-1850" (June, 1956) (unpublished thesis in the University of Hawaii Library). For an explanation of Hawaiian land and property terms, see *Territory v. Bishop Tr. Co.*, 41 Haw. 358, 361-62 (1956).

during the Middle Ages.¹⁷⁵ This system was based on land divisions of the major Hawaiian Islands,¹⁷⁶ each of which contained one or more large constituent geographic divisions called *moku'aina*.¹⁷⁷ Each *moku'aina* was divided into large tracts of between 100 to 100,000 acres called *ahupua'a*.¹⁷⁸ The boundaries of the *ahupua'a* generally followed natural land contours from a point on the summit of an inland mountain down to the ocean¹⁷⁹ to form a wedge-shaped tract that included forest, agricultural, and coastal fishing lands.¹⁸⁰ As a result, the majority of *ahupua'a* were economically self-sufficient. Most *ahupua'a* were divided into smaller units called *'ili* and *'ili kupono*,¹⁸¹ which in turn were subdivided into individual plots farmed by the general population, or *maka'ainana*.

A hierarchical social system paralleled this pattern of land division. Although the *maka'ainana* lived on their own plots of land, there was no concept of fee simple absolute ownership.¹⁸² Rather,

175. J. HOBBS, *supra* note 72, at 1; 1 R. KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 69, at 3.

176. Hawaii'i, Maui, Lana'i, Moloka'i, O'ahu, Kaua'i, and Ni'ihau. This does not include the island of Kahoolawe, which was seldom populated except by an occasional fishing party, or the smaller islands of the chain, such as Kaula or Molokini, which were uninhabited.

177. J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848, at 3 (1958). See also L. CANNELORA, THE ORIGIN OF HAWAIIAN LAND TITLE AND THE RIGHTS OF NATIVE TENANTS (1974) (available from the Security Title Corp., 1001 Bishop Street, Suite 1200, Honolulu, Hawaii).

178. J. CHINEN, *supra* note 177, at 1-3.

179. BREACH OF TRUST, *supra* note 7, at 3. For a description of the boundaries of the *ahupua'a*, see *In re Boundaries of Pulehunui*, 4 Haw. 239, 240-44 (1879).

180. See *Kalipi v. Hawaiian Tr. Co.*, 66 Haw. 1, 656 P.2d 745, 749 (1982) (citing *Boundaries of Pulehunui*, 4 Haw. at 241). See also *Palama v. Sheehan*, 50 Haw. 298, 440 P.2d 95 (1968).

181. For a description of the differences between the *ahupua'a*, *'ili*, and *'ili kupono*, see *Harris v. Carter*, 6 Haw. 195, 206-07 (1877), where the Hawaii Supreme Court stated: [E]rroneous opinions have sometimes prevailed as to what are "Ahupuaas" and "Ilis." An Ahupuaa has been called the "unit" of land in this country; but is by no means a measure of area, for Ahupuaas vary exceedingly as to size. Many Ahupuaas are divided into Ilis; other Ahupuaas have no Ilis in them. . . . There are two kinds of Ilis. One, the Ili of the Ahupuaa, [is] a mere subdivision of the Ahupuaa for the mere convenience of the chief holding the Ahupuaa. . . . The other class were the "Ili Kupono." . . . These were independent of the Ahupuaa [and the chief of the ili kupono was independent of the chief of the ahupuaa].

182. Levy, *supra* note 72, at 849; 1982 HANDBOOK, *supra* note 2, at 798; Brief for the Queen Liliuokalani Tr., King Lunaliilo Tr., Alu Like, Inc., & Association of Hawaiian Civic Clubs as Amici Curiae at 8, *Hawaiian Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (No. 83-141) [hereinafter Brief of Queen Liliuokalani Tr. as Amicus Curiae].

all the lands in a particular *moku'aina* belonged solely to the high chief, the *ali'i 'ai moku*,¹⁸³ who assigned the *ahupua'a* within his territory to his most important subchiefs or *ali'i 'ai ahupua'a*.¹⁸⁴ These *ali'i* passed on the process of infeudation and parceled out the smaller *'ili* to lower-ranking chiefs called *konohiki*,¹⁸⁵ who were responsible for land administration and general government.¹⁸⁶ In return for these land grants, each societal level supplied goods or services to the level immediately superior to it. In sum, the government and landholdings were inextricably woven into the Native Hawaiian social fabric and formed the stylobate for the entire culture.

This system of feudal land tenure remained basically unchanged even when the first Hawaiian king, Kamehameha I (the Great), united all the islands into a single kingdom between 1794 and 1805.¹⁸⁷ After his conquests, Kamehameha became the *ali'i 'ai moku* of the entire island chain and thus exercised supreme authority, as sole owner¹⁸⁸ and government, over all the lands of the kingdom.¹⁸⁹ All Hawaiians held their lands at the King's pleasure; there were no inheritance rights and non-Hawaiians were excluded from holding land.¹⁹⁰

183. BREACH OF TRUST, *supra* note 7, at 3.

184. Brief of the Office of Hawaiian Affairs as Amicus Curiae at 2-5, Hawaiian Housing Auth. v. Midkiff, 467 U.S. 229 (1984) (No. 83-141).

185. E. HANDY, *supra* note 68, at 38. See Brief of Hou Hawaiians as Amicus Curiae, *supra* note 72, at 6-7.

186. E. HANDY, *supra* note 68, at 38. See Brief of Hou Hawaiians as Amicus Curiae, *supra* note 72, at 6-7. Unlike the European serfs, however, Native Hawaiians were not bound to the land or any particular chief, but were free to move. DEP'T OF BUDGET AND FINANCE, STATE OF HAWAII, LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 148 (1979) (Jon Van Dyke, team leader) [hereinafter LAND MANAGEMENT].

187. *Id.* at 7. For a description of the unification of the Islands, see R. KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 69, at 29-60; R. TREGASKIS, THE WARRIOR KING: HAWAII'S KAMEHAMEHA THE GREAT (1973).

188. *But see* United States v. Fullard-Leo, 331 U.S. 256, 266-69 (1947); Liliuokalani v. United States, 45 Ct. Cl. 418, 425 (1910). These mainland cases suggest that the Hawaiian kings did not own the land but held it in trust for the people. While this may have been the view later in the monarchy, see *infra* note 197 and accompanying text, cases from the Supreme Court of Hawaii suggest a different view under the first Kamehameha. See, e.g., Hawaiian Comm'l & Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675, 680 (1904) ("the King was the sole owner . . . of the land and could do with [it] as he pleased").

189. Brief of Hou Hawaiians as Amici Curiae, *supra* note 72, at 7.

190. *Id.* at 7-8. As one voyager stated in 1818: "Europeans are not allowed to own land. They receive it on condition that after death it shall be returned to the king, and during their life time it is not transferable from one to another." 1 R. KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 69, at 60.

Change eventually came, however, under pressure from Western influence after Kamehameha's death in 1819. Because of Hawai'i's geographic position, it was becoming a principal trading center in the Pacific basin and a large number of whites settled on the Islands. The results closely paralleled those of Western contact with the Indians on the mainland.¹⁹¹ Increased settlement by whites caused the economy to change rapidly from one based on agriculture to one dependent on trade, and as the economy changed traditional Hawaiian culture changed with it. Under pressure from white settlers who wished to own land in fee simple, the King promulgated the Constitution of 1840 declaring that the land belonged collectively to the *ali'i*, and to the people, under the monarch's control.¹⁹² Consequently, as whites began to acquire land under the new system, the traditional system began to collapse. Native population levels fell drastically and native land ownership fell with them.¹⁹³ In short, white settlement in areas populated by the native people had the same deleterious effects in Hawaii as on the mainland.¹⁹⁴

These effects continued to intensify as more whites settled in the kingdom. Pressure from the growing number of westerners to make land available for development mounted on the government, and the result was the Great Mahele, the Great Division,

191. 1982 HANDBOOK, *supra* note 2, at 799.

192. Land, although "owned" by the king, in theory belonged to the *ali'i* and the people under them. The preamble stated: "Kamehameha I, was the founder of the Kingdom, and to him belonged all the land . . . though it was not his own private property. It belonged to the chiefs, and the people in common, of whom Kamehameha I was the head, and had the management of the landed property." HAW. CONST. OF 1840, preamble, *reprinted in* TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS ESTABLISHED IN THE REIGN OF KAMEHAMEHA III, at 11-13 (1842) [hereinafter TRANSLATION]; THE FUNDAMENTAL LAW OF HAWAII 3 (L. Thurston ed. 1904) [hereinafter L. THURSTON].

193. The following table illustrates the alarmingly rapid drop in the Native Hawaiian population:

Year	Population
1778	300,000
1832	130,313
1853	71,019
1860	67,084
1866	58,765
1872	51,531
1890	40,622

R. KUYKENDALL, HAWAII: A HISTORY, *supra* note 67, at 298.

194. Compare the effects of the allotment period on the mainland tribes. *See generally*, D. OTIS, THE DAWES ACT AND ALLOTMENT OF INDIAN LANDS (1973).

of 1848.¹⁹⁵ In response to Western demands, King Kamehameha III divided the Hawaiian lands into private crown lands and government lands, the latter to be divided between the *ali'i* and the *maka'ainana*, thereby reaffirming the latter's collective right to the land.¹⁹⁶ More than eight thousand Native Hawaiian commoners received small plots of land, called *kuleana*, within the *ahupua'a* in which they lived.¹⁹⁷ Legislation enacted immediately after the last *mahele* between the King and the *ali'i* allowed each native tenant or *hoa'aina* to apply for his own *kuleana*.¹⁹⁸ However, these land grants proved largely ineffective for several reasons. First, the act limited the land available for *kuleana* grants because it only allowed the *hoa'aina* to apply for a grant of land that they had actually cultivated¹⁹⁹ plus a small house lot of not less than a quarter of an acre.²⁰⁰ Second, a *hoa'aina* had to prove his claim before a Land Commission and pay the survey costs.²⁰¹ However, many *hoa'aina* were too poor to pay for the survey,²⁰² or lacked the sophistication necessary to prove their claims. Third, many *hoa'aina* refrained from applying for *kuleana* because they feared

195. Rules Adopted by Privy Council, Dec. 18, 1847, § 4, 4 PRIVY COUNCIL RECORD 1 (1847). See P. VITORSEK, J. REILEY & R. REDISKE, PRINCIPLES AND PRACTICES OF HAWAIIAN REAL ESTATE 1 (8th ed. 1981). "The term *mahele* means to divide or apportion. . . . [T]he Great *Mahele* of 1848 . . . accomplished the division of the undivided interest in land between the King on one hand and the chiefs and *konohikis* on the other." *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 182 n.5, 504 P.2d 1330, 1336 n.5, (*McBryde I*), *aff'd on reh.*, 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed and cert. denied*, 417 U.S. 962, *and cert. denied*, 417 U.S. 976 (1974). For a detailed description of the Great *Mahele*, see J. CHINEN, *supra* note 177.

196. BREACH OF TRUST, *supra* note 7, at 3 n.1; *Harris*, 6 Haw. at 198, 200-01. The King received 984,000 acres, the *ali'i* 1 million acres, and the commoners 28,000. *Id.* at 4; Note, *Midkiff v. Tom: The Constitutionality of Hawaii's Land Reform Act*, 6 U. HAW. L. REV. 561, 563 (1984).

197. The Bishop Museum in Honolulu has determined the number to be 8,205. Levy, *supra* note 72, at 856 n.52.

198. Act of Aug. 6, 1850, § 1, [1850] Haw. Laws 202, *reprinted in* 2 REVISED LAWS OF HAWAII 1925, at 2141; 1 R. KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 69, at 291-94.

199. Act of Dec. 21, 1849, § 6, [1850] Haw. Laws 202, *reprinted in* 2 REVISED LAWS OF HAWAII 1925, 2142.

200. *Id.*; Levy, *supra* note 72, at 853.

201. Act of Dec. 10, 1845, ch. 7, § 1, 2 [1847] Haw. Laws 107, *reprinted in* 2 REVISED LAWS OF HAWAII 1925, at 2120. The Commission was charged with "the investigation and final ascertainment or rejection of all claims of private individuals, whether native or foreigners, to any landed property." *Id.*; Levy, *supra* note 72, at 853.

202. The survey costs averaged less than \$20. Brief of Hou Hawaiians as Amici Curiae, *supra* note 72, at 14.

reprisals by their *ali'i* or by land agents.²⁰³ Finally, a later act of the legislature barred all *hoa'aina* claims not proven by 1854.²⁰⁴ As a result, the majority of the Native Hawaiian people was separated from the land.²⁰⁵ In addition, like the Indians on the mainland during the allotment period, many of those Native Hawaiians who were given land grants soon lost or sold the land because of their lack of understanding of a new and foreign land system or because of a need for money.²⁰⁶ The increasing demands of white settlers thus brought about the swift destruction of the traditional Native Hawaiian land system, and by 1852 thousands of acres of land were owned by a few whites while Native Hawaiians owned only a tiny fraction.²⁰⁷ By 1896 Native Hawaiians, like mainland Indians, had become a landless minority in their own country.²⁰⁸

Furthermore, having asserted economic dominance over the kingdom by the late 1880s, the westerners turned to establish complete political control as well.²⁰⁹ The principal white landowners founded the "Hawaiian League" in 1887 to increase their power at the expense of the monarchy.²¹⁰ In consequence, the whites

203. Levy, *supra* note 72, at 856 (citing T. MORGAN, *HAWAII—A CENTURY OF ECONOMIC CHANGE 1778-1876*, at 137 (1948)).

204. Act Relating to the Board of Commissioners to Quiet Land Titles, [1853] Haw. Laws 26, reprinted in 2 REVISED LAWS OF HAWAII 1925, at 2145.

205. Levy, *supra* note 72, at 856.

206. See, e.g., *Kanakanui v. Leslie*, 7 Haw. 223 (1888). Compare the effects on mainland Indians of the General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified in scattered sections of 25 U.S.C. (1982)). See D. OTIS, *supra* note 194. Traditionally, the Native Hawaiians believed that no human could own land permanently. Like the mainland Indians, they believed that it belonged to the gods; the people were merely trustees who administered the land for the gods and the good of the community and could not sell or misuse it. Brief of Queen Liliuokalani Tr. as Amicus Curiae, *supra* note 182, at 8-9; BREACH OF TRUST, *supra* note 7, at 4.

207. See Levy, *supra* note 72, at 860 n.80. By 1897, the white 9 percent of the population owned 67 percent of the taxable land; Hawaiians and part-Hawaiians, only 24 percent. A. LIND, *AN ISLAND COMMUNITY* 57 (1938). In 1881, Native Americans owned more than 156 million acres of land. By 1934, they owned only 30 percent of that amount. F. COHEN, *HANDBOOK ON FEDERAL INDIAN LAW 137-38* (Michie Co. ed. 1972); A. JOSEPHY, *THE INDIAN HERITAGE OF AMERICA 350-51* (1968) (Indians owned 138 million acres in 1887, which had fallen to 90 million acres by 1932).

208. *Report to the Joint Comm. on Hawaii, S. Doc. No. 151*, 75th Cong., 3d Sess. 83 (1938); 1982 *HANDBOOK, supra* note 2, at 800. Hawaiians and part-Hawaiians constituted a little under 35 percent of the population. A. LIND, *HAWAII'S PEOPLE* 27 (1967).

209. See generally S. STERN, *AMERICAN EXPANSION IN HAWAII 1842-1898* (1945).

210. 3 R. KUYKENDALL, *HAWAIIAN KINGDOM, supra* note 69, at 347-49.

staged a coup d'état on July 6, 1887, and forced the King to promulgate a new constitution, the "Bayonet Constitution" of 1887, supplanting the power of the King with that of the white landowners.²¹¹ Nevertheless, the whites were dissatisfied with limited power and in 1893, with the help of the United States, they overthrew the Hawaiian government and replaced it with their own.²¹² The Republic of Hawaii was founded soon thereafter, and among its first official acts was the expropriation²¹³ of all crown lands without compensation to the Queen, Lili'uokalani.²¹⁴ The lands were immediately made available to westerners for purchase.

When Congress annexed Hawaii in 1898, the United States, without paying any compensation, took title to the crown and government lands expropriated from the Native Hawaiian people by the Republic.²¹⁵ In denying compensation to Queen Lili'uokalani or the Hawaiian people for the crown lands taken by the United States, the United States Court of Claims nevertheless recognized that Native Hawaiians had a collective right in the lands.²¹⁶ On July 9, 1921, Congress acknowledged an obligation to the indigenous people of Hawaii and their descendants by enacting the Hawaiian Homes Commission Act.²¹⁷ The Act established a land

211. Compare HAW. CONST. OF 1864, art. XLV, reprinted in L. THURSTON, *supra* note 192, at 174 (the upper legislature of the Hawaiian parliament was chosen by the king from the Hawaiian *ali'i* class) with HAW. CONST. OF 1887 art. LIX, reprinted in L. THURSTON, *supra*, at 88-89 (the upper legislature was chosen by taxpayers, many of whom were white, from a field of candidates limited to wealthy landowners, the vast majority of whom were white). The king's absolute veto power was changed to a veto which could be overridden by a two-thirds vote of the legislature. HAW. CONST. OF 1887, reprinted in R. LYDECKER, *ROSTER LEGISLATURE OF HAWAII 1841-1918*, at 159 (1918). The overall voting power of Native Hawaiians was also greatly reduced. Under the requirements of the new constitution, only one-fourth of the native population was eligible to vote. G. DAWES, *ATLAS OF HAWAII* 26-27 (1970).

212. See *supra* notes 129-132 and accompanying text.

213. See HAW. CONST. OF 1894, art. XCV, [1895] Haw. Laws 118, reprinted in L. THURSTON, *supra* note 192, at 237.

214. See *Liliuokalani*, 45 Ct. Cl. 418.

215. H.J. Res. 55, *supra* note 134, at § 1; *Liliuokalani*, 45 Ct. Cl. at 436; 1982 *HANDBOOK*, *supra* note 2, at 801, 804; Levy, *supra* note 72, at 863. See Note, *Hawaii's Ceded Lands*, 3 U. HAW. L. REV. 101 (1981).

216. *Liliuokalani*, 45 Ct. Cl. at 428:

The crown lands were the resourceful methods of income to sustain, in part at least, the dignity of the office to which they were inseparably attached. When the office ceased to exist they became as other lands of the Sovereignty and passed to the defendants as part and parcel of the public domain.

217. HHCA, *supra* note 140, at § 1. For a detailed discussion of both the land and the legal aspects of the program, see generally H. DOI, *supra* note 145; LEGISLATIVE RESEARCH

trust for the use and benefit of Native Hawaiians of about 200,000 out of the 2 million acres of public lands taken from the Native Hawaiian people.²¹⁸ The purpose of the trust, as proposed by the territorial legislature to Congress, was twofold: to recognize that the lands once belonging to the Kingdom of Hawai'i and now possessed by the United States were impressed with a trust relationship and belonged to the Native Hawaiian people,²¹⁹ and to provide an economic base for the improvement of the social and economic situation of that people.²²⁰ Similarly, Congress was animated to restore some of Hawai'i's lands to the Native Hawaiian people because "the Hawaiians were deprived of their lands without any say on their part."²²¹ In fact, the chairman of the House Committee on Territories noted that the motivating factor behind the legislation was identical to that behind similar land trust legislation relating to the mainland Indian tribes "[b]ecause we came to this country and took their land away from them . . . [a]nd if we can afford to [provide land trusts] for the Indians . . . why can we not do the same for the Hawaiians?"²²² In short, as with

BUREAU, STATE OF HAWAII, LAND ASPECTS OF THE HAWAIIAN HOMES PROGRAM (1964) (Report No. 1b) (A. Spitz, author).

218. The Act defines a Native Hawaiian as a person of 50 percent or more of "the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA, *supra* note 140, at § 201(a)(7). On April 11, 1986, the House passed H.J. Res. 17 which, if passed by the Senate, would lower the blood quantum requirements for homestead eligibility to 25 percent for the surviving spouses and children of deceased leaseholders in order to allow them to continue living on their lands until the expiration of their leases. The bill was sponsored by Congressman Daniel Akaka (D-Haw.) and is opposed by many Native Hawaiians. *Hawaiian Homestead Rule May Change*. Honolulu Advertiser, Apr. 12, 1986, at A3.

219. *Proposed Amendments to the Organic Act of the Territory of Hawaii, Hearings Before the House Comm. on the Territories*, 66th Cong., 1st Sess. 32 (1920) [hereinafter *Proposed Amendments-1920*]. The original Organic Act was the Act of Apr. 30, 1900, ch. 339, 31 Stat. 141 (set out in full at HAW. REV. STAT. § 1-28).

220. *See Proposed Amendments-1920, supra* note 219, at 26, 38. In 1951, the Attorney General of Hawaii summarized the purpose of the Act as being: "to save the Native Hawaiian race from extinction by reason of its inability to meet successfully the economic and sociological changes brought about in the Islands." LEGISLATIVE AUDITOR, STATE OF HAWAII, FINANCIAL AUDIT OF THE LOAN FUNDS OF THE DEPARTMENT OF HAWAIIAN HOME LANDS 1979, at 4 (citing Haw. Att'y Gen. Op., Nov. 13, 1951).

221. *Proposed Amendments-1920, supra* note 219, at 70.

222. *Proposed Amendments to the Organic Act of the Territory of Hawaii, Hearings on H.R. 7257 Before the House Comm. on the Territories*, 67th Cong., 1st Sess. 141 (1921) [hereinafter *Proposed Amendments-1921*]. It is interesting to note that despite the paternalistic rhetoric surrounding the debate on the Act, its principal proponents were the sugar cane barons who were worried about homesteaders occupying cultivated sugar

legislation dealing with other aboriginal groups on the mainland recognized by Congress, the Hawaiian Homes Commission Act set aside in collective trust a portion of the aboriginal lands acquired by the United States,²²³ with the idea of providing for the protection and rehabilitation of Native Hawaiians who, like the Indians on the mainland, had their lands taken from them by white settlers and eventually the United States government.²²⁴

From 1921 to 1959 the land trust established by the Hawaiian Homes Commission Act was administered by the federal government. But when Hawaii was admitted to the Union, title to and administration of the trust was transferred to the state under section 5 of the Hawaii Admission Act²²⁵ as a condition of statehood²²⁶ and adopted as state law.²²⁷ In accordance with this transfer, section 5 of the Admission Act provided that:

(b) the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title . . . to all lands defined as "available lands" by section 203 of the Hawaii Homes Commission Act, 1920, as amended . . . (f) [t]he lands granted to the State of Hawaii by subsection (b) of this section . . . together with the proceeds from the sale or other disposition of any such lands, shall be held by said State as a public trust.²²⁸

The state in turn delegated its responsibility to the newly created Department of Hawaiian Home Lands, which was charged with administering the trust.²²⁹ The functioning of the trust shows many similarities with Indian allotment lands on the mainland:²³⁰ Native Hawaiians lease homesteads, highly restricted in their alienabil-

fields. See generally M. Vause, "Hawaiian Homes Commission Act, 1920: History and Analysis" (June, 1962) (unpublished thesis in the University of Hawaii Library).

223. *Ahuna*, 64 Haw. 327, 640 P.2d 1161. While 200,000 acres of land were set aside, most of it was arid and of marginal agricultural value. Levy, *supra* note 72, at 865.

224. Compare the purpose of the Allotment Act. 1972 HANDBOOK, *supra* note 207, at 132.

225. Act of Mar. 18, 1959, Pub. L. No. 86-3, 73 Stat. 4, as amended by Act of July 12, 1960, Pub. L. No. 86-624, § 41, 74 Stat. 422 (set out but not codified at 48 U.S.C. prec. §§ 491-724 (1982)) (set out in full at HAW. REV. STAT. §§ 1-78) [hereinafter Admission Act].

226. Admission Act, *supra* note 225, at § 4.

227. HAW. CONST. art. XII, § 1.

228. Admission Act, *supra* note 225, at § 5(b).

229. HAW. REV. STAT. § 26-17 (Supp. 1984).

230. See D. OTIS, *supra* note 194.

ity, for periods of ninety-nine years;²³¹ only heirs as enumerated in the Act may inherit;²³² and the land cannot be commercially mortgaged²³³ or subleased.²³⁴

Despite the transfer of the management of the trust to the state of Hawaii, the United States, as trustee and original settlor of the trust, retained three powerful supervisory and enforcement controls to ensure the proper implementation of the trust.²³⁵ First, if the Homelands Department concludes that lands not a part of the trust would better fulfill the Homes Commission Act's mandate, the Department can exchange those lands for others of equal value, but only with the approval of the U.S. Secretary of the Interior.²³⁶ The Department of the Interior, the department charged with overseeing the government's relations with the Indian tribes, defines the relationship of the federal government to the trust as "[m]ore than merely ministerial . . . the United States can be said to have retained a role as trustee under the act while making the State the instrument for carrying out the trust."²³⁷ Second, the federal government retains enforcement power over the trust.²³⁸ The United States Department of Justice has stated that this power gives it "exclusive litigation authority if suit were brought by the United States to enforce the trust."²³⁹ Finally, the Congress has

231. HHCA, *supra* note 140, at § 208(2).

232. *Id.* § 209.

233. *Id.* § 208(5).

234. *Id.* A number of transactions resembling subleases made with various pineapple companies have, however, been approved by the state. See LEGAL ASPECTS OF THE HAWAIIAN HOMES PROGRAM, *supra* note 145, at 14-16.

235. For a general discussion of these powers, see FEDERAL-STATE TASK FORCE ON THE HAWAIIAN HOMES COMM'N ACT, REPORT TO THE UNITED STATES SECRETARY OF THE INTERIOR AND THE GOVERNOR OF THE STATE OF HAWAII 18-24 (1983) [hereinafter TASK FORCE REPORT].

236. HHCA, *supra* note 140, at § 204(4); Admission Act, *supra* note 225, at § 4.

237. Letter from Frederick N. Ferguson, Deputy Solicitor, U.S. Dep't of the Interior, to Philip Montez, Regional Director, Western Regional Office, United States Comm'n on Civil Rights (Aug. 27, 1979). *Contra* Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n, 588 F.2d 1216, 1224 n.7 (9th Cir. 1978), *cert. denied*, 444 U.S. 826 (1979). The Hawaii legislature recently considered a bill which, if passed, would allow Native Hawaiians to sue the state over the administration of the Hawaiian Homes Commission Act. See Honolulu Advertiser, Mar. 21, 1986, at A-16, col. 1.

238. Admission Act, *supra* note 225, at § 5(f). Section 5(f) reads:

(f) such lands . . . shall be managed and disposed of [by the State] for [the betterment of Native Hawaiians] and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

239. Letter from James W. Moorman, Assistant Attorney General, U.S. Dep't of

reserved the right to review and approve all substantive changes in the Act.²⁴⁰

A trust relationship between the United States and Native Hawaiians, similar to that of the United States and the mainland Indians, survived the transfer to the state of Hawaii of the management of the corpus of the trust. A trust relationship between the United States and an Indian tribe retains full force until Congress expressly repudiates it by contrary legislation,²⁴¹ a repudiation that does not exist in the case of the Hawaiian Home Lands Trust. The United States has never sufficiently manifested withdrawal of its protection so as to sever completely the trust relationship.²⁴² On the contrary, in retaining supervisory powers Congress has evinced an intent to continue that relationship. Similarly, the United States has not severed its trust relationship with some mainland tribes simply by having delegated a portion of its trust responsibilities to the states.²⁴³ Thus, although the state of Hawaii has assumed the administration of the land trust, this assumption of responsibility for the Native Hawaiians' welfare is insufficient to abrogate the federal trusteeship.²⁴⁴

Despite the dual responsibilities exercised over the trust by both the state of Hawaii and the federal government, more than sixty years after its inception the Hawaiian Homes program is a disappointing failure. Fewer than 15 percent of all Native Hawaiians have received homesteads under the program,²⁴⁵ while some eight thousand applicants wait, some as long as thirty years,²⁴⁶ to be

Justice, to Philip Montez, Regional Director, Western Regional Office, United States Commission on Civil Rights (Aug. 13, 1979).

240. Admission Act, *supra* note 225, at § 4.

241. *United States v. Celestine*, 215 U.S. 278 (1909); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

242. *Cf. Joint Tribal Council of Passamaquoddy*, 528 F.2d 370.

243. *Compare* Admission Act, *supra* note 225, §§ 4, 5(b) (delegation to state of power over Hawaiian home lands) *with* Act of Aug. 15, 1953, Pub. L. 83-280, 67 Stat. 588 (section 7 repealed and reenacted as amended, 1968) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360, 1360 note (1982) ("Public Law 280")) (delegation to several states of jurisdiction over mainland Indians). For a detailed discussion of Public Law 280, see generally Goldberg, *Public Law 280: The Limits of States' Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975).

244. *See Joint Tribal Council of Passamaquoddy*, 528 F.2d at 380. *Accord*, *Eric v. Secretary of the United States Dep't of Hous. & Urban Dev.*, 464 F. Supp. 44 (D. Alaska 1978).

245. [1982-1983] DEPARTMENT OF HAWAIIAN HOME LANDS ANNUAL REPORT: Brief of Hou Hawaiians as Amici Curiae, *supra* note 72, at 29-30 n.11.

246. TASK FORCE REPORT, *supra* note 235, at 26. Some applicants were on the waiting list so long that they died before their names came up.

awarded lands.²⁴⁷ Out of the 200,000 acres of land originally set aside by Congress under the Act, only 27,000 acres have been distributed.²⁴⁸ About 17,000 acres have been inexplicably lost,²⁴⁹ and more than 16,000 acres have been withdrawn illegally by the state in contravention of the Act.²⁵⁰ In fact, the state of Hawaii has neglected most of its responsibilities under the Act, and the state's actions have flown in the face of the state motto.²⁵¹ For example, the state on numerous occasions has exchanged trust lands for nontrust lands without first obtaining the permission of the Secretary of the Interior as required by law.²⁵² In addition, the state has diverted funds from the trust lands to pay for expenses unrelated to the trust²⁵³ and leased lands to non-Hawaiians

247. Brief of Hou Hawaiians as Amici Curiae, *supra* note 72, at 28-29; TASK FORCE REPORT, *supra* note 235, at 22. See *Hawaiian Homestead Rule May Change*, Honolulu Advertiser, Apr. 12, 1986, at A-3.

248. 1982 HANDBOOK, *supra* note 2, at 807 n.82; Brief of Hou Hawaiians as Amici Curiae, *supra* note 72, at 29-30 n.11.

249. 1982 HANDBOOK, *supra* note 2, at 807 n.82; Brief of Hou Hawaiians as Amici Curiae, *supra* note 72, at 29-30 n.11. In its 1978 report, the Homes Commission accounted for only 190,413 of the original 200,000 acres. [1977-1978] DEPARTMENT OF HAWAIIAN HOME LANDS ANNUAL REPORT 3.

250. Letter from James Watt, Secretary of the Dep't of the Interior, to George Ariyoshi, Governor of Hawaii, at 4 (Dec. 3, 1980) (citing UNITED STATES COMM'N ON CIVIL RIGHTS, OPPORTUNITIES FOR NATIVE HAWAIIANS: HAWAIIAN HOMELANDS 16 (1976)). Between statehood and 1978, the state of Hawaii had transferred by executive order 16,863 acres of HHCA lands to other state entities for use as airports, schools, parks, and reserves. *Id.* According to the Attorney General of Hawaii, the Governor's power to set aside public lands by executive order does not extend to HHCA lands and thus these transfers were illegal. Haw. Att'y Gen. Op. 75-3 (Mar. 21, 1975). *Accord*, HHCA, *supra* note 140, § 212 (Act provides that land not homesteaded may only be generally let).

251. The state motto is "*Ua mau ke ea o ka 'aina i ka pono*," which means "the life of the land is perpetuated in righteousness." HAW. REV. STAT. § 5-9 (Supp. 1985).

252. Letter from James Watt, *supra* note 250, at 2-3; TASK FORCE REPORT, *supra* note 235, at 22. Section 204(4) of the HHCA, *supra* note 140, provides in part: "The Department of Hawaiian Home Lands may, with the permission of the Governor and the Secretary of the Interior . . . exchange the title to available lands for land publicly owned of an equal value." (Emphasis added.) As of 1980, only five of the numerous land exchanges had been submitted to the Department of the Interior for approval, the last one on March 16, 1967. Letter from James Watt, *supra* note 250, at 3. In addition, 1,700 acres of trust lands that had been surrendered had not been replaced, including lands that had been surrendered as early as 1962. *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, No. CV 75-0260 (D. Haw. Sept. 9, 1976) (Finding of Fact 32), *rev'd on other grounds*, 588 F.2d 1216 (9th Cir. 1978), *cert. denied*, 444 U.S. 826 (1979).

253. LEGISLATIVE AUDITOR, STATE OF HAWAII, FINAL REPORT ON THE PUBLIC LAND TRUST, REPORT TO THE LEGISLATURE OF THE STATE OF HAWAII (Dec. 1986) (Report No. 86-17); Telephone interview with Kamuela Price, Federal-State Task Force on the Hawaiian Homes Commission Act, Apr. 12, 1986.

for extremely low rental fees.²⁵⁴ In the face of these breaches of trust on the part of the state, Native Hawaiians have brought numerous suits to enforce the provisions of the Act,²⁵⁵ but have been unable to ameliorate the situation. The Hawaiian Home Lands Trust has thus been ineffective in returning Native Hawaiians to the lands set aside for them by Congress.

Despite this failure, some Native Hawaiians live in distinctively native communities throughout the state.²⁵⁶ The existence of these communities is important because some authorities require a showing that an aboriginal group inhabits distinct communities as part of the test used to establish tribal status.²⁵⁷ Most live on the island of O'ahu²⁵⁸ in towns such as Wai'anae populated primarily by Native Hawaiians.²⁵⁹ Similar distinctive communities also exist on other islands. For example, the Ke'anae Peninsula on the north coast of Maui is populated almost entirely by Native Hawaiians who maintain large traditional taro patches.²⁶⁰ The most distinc-

254. Some land was leased to the United States Department of Defense for \$1 per acre, and 16,000 acres were under lease to the Hawaiian Department of Land and Natural Resources for \$5 per acre per year. Brief of Hou Hawaiians as Amici Curiae, *supra* note 72, at 29. Other lands have been leased to private concerns for equally low prices: 15,620 acres on Maui for \$2 per acre per year, and 33,180 acres to the Parker cattle ranch on the island of Hawai'i for \$3.85 per acre per year.

255. See, e.g., Price v. State, No. CV 84-2444 (D. Haw. 1984) (action to compel state to apply proceeds from trust lands to betterment of Native Hawaiians), *aff'd*, 764 F.2d 623 (9th Cir. 1985); *Keaukaha*, No. CV 75-0260 (challenging state use of trust lands for flood control project); Aki v. Beamer, No. CV 76-0144 (D. Haw. 1976) (challenging validity of executive order setting aside trust lands as a park). See Letter from William Clark, Secretary of the U.S. Department of the Interior, to Kamuela Price, member of the Hou Hawaiians (May 8, 1984) (discussing suit by Hou concerning the proper administration of the HHCA).

256. This is due primarily to the fact that, as land values skyrocket as a result of resort and other development, the number of areas in which Native Hawaiians can live or afford to purchase real estate continues to dwindle. Levy, *supra* note 72, at 866.

257. See, e.g., Montoya v. United States, 180 U.S. 261, 266 (1901) ("By a tribe we understand a body of Indians . . . inhabiting a particular though sometimes ill-defined territory"); 25 C.F.R. § 54.7(b) (1980) (group must inhabit "a specific area").

258. STATE OF HAWAII, THE STATE OF HAWAII DATA BOOK, A STATISTICAL ABSTRACT 8 (1974). The number is around 70 percent. While urban Native Hawaiians are severed from the land that forms such an important part of their cultural heritage, there is evidence to show that urban Indians do not lose their cultural identity. See 1 AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT 434 (1977).

259. Telephone interview with Kamuela Price, Federal-State Task Force on the Hawaiian Homes Commission Act, Apr. 25, 1986. Other towns with primarily Native Hawaiian populations on the island of O'ahu include Nanakuli, Papakaleo, and Waimanalo.

260. Taro is a large tropical plant with broad leaves and a starchy, edible rootstalk. The root is cooked and pounded into a paste called *poi*, the staple of the Native Hawaiian diet.

tively native community in Hawaii is the island of Ni'ihau, where all but a handful of the inhabitants are Native Hawaiians and where Hawaiian is still spoken as a daily language.²⁶¹

In review, the Native Hawaiian people possess collective rights in 200,000 acres of land set aside for their benefit by the United States.²⁶² Both the state of Hawaii and the United States maintain a trust relationship, one that is similar in many ways to the trust relationship with the mainland Indians, with the Native Hawaiian people with regard to those lands to ensure that the land benefits the Native Hawaiian people. Thus, this collective right in land satisfies the third element in determining tribal status.

Intertribal Relations: Mai lou i ka 'ulu i luna lilo, o lou hewa i ka ulu 'a'iole, eia iho no ka 'ulu i ke alo.²⁶³

While there is little evidence that Native Hawaiians have been historically treated as a tribe by other Indian tribes, the absence of recognition lies not in a lack of grounds to be so considered by other tribes, but in a lack of geographic proximity to them. The unique geographic position of Hawaii has prevented Native Hawaiians from being treated as an Indian tribe by other mainland tribes. An isolated volcanic archipelago located in the central Pacific Ocean thousands of miles from the nearest populated land areas,²⁶⁴ Hawaii is the only state not a part of the continental land mass of the United States. This isolation has prevented contacts between Native Hawaiians as a group and other mainland tribes.²⁶⁵ Nonetheless, Native Hawaiians have been historically treated as a distinct group by other Polynesian peoples. For example, in 1854 the Hawaiian government appointed Charles St. Julian as minister-at-large to the governments of the South Pacific

261. The entire island of Ni'ihau is owned by the Robinson family and serves as a ranch. Almost all of the island's inhabitants are Native Hawaiians who work for the ranch.

262. That Native Hawaiians share a collective interest in land is also evident from the fact that, despite poverty-level incomes, many are ineligible for public legal aid programs because of their interest in the trust lands. BREACH OF TRUST, *supra* note 7, at 7.

263. Don't marry a stranger, but one you know (literally: Don't reach for the breadfruit that is far away as it might not be as good as the one in front of you). Hawaiian proverb.

264. The Hawaiian Islands are one of the most isolated places on earth. Located in the middle of the Pacific Ocean, Hawaii is almost 3,000 miles from California. UNIVERSITY OF HAWAII, ATLAS OF HAWAII 9 (1973); H. STEVENS, THE GEOGRAPHY OF THE HAWAIIAN ISLANDS 3-5 (1955).

265. Some scholars propound a theory that certain mainland Indian tribes had early contacts with Native Hawaiians. See, e.g., T. HEYERDAHL, *supra* note 84 (contacts with Pacific Coast Indians; use of similar words in some local placenames).

basin.²⁶⁶ The leaders of Tonga, Fiji, and the government of Australia accepted St. Julian as the accredited diplomatic representative of a sovereign people.²⁶⁷ In 1877, the "Old Men"²⁶⁸ of Tapiteuea²⁶⁹ sent a communication to the Hawaiian government and Hawai'i's King Kalakaua recognizing Hawai'i's sovereignty and asking the King to annex the island.²⁷⁰ Similarly, in 1881 the High Chief of Butaritari and Apaiang²⁷¹ recognized the sovereign status of the Hawaiian people in a letter requesting that Hawai'i assume a protectorate over the islands.²⁷² Finally, in 1886, King Kalakaua appointed ambassadors to Samoa and Tonga,²⁷³ and a year later his envoy to Samoa concluded a convention with the Samoan king, Malietoa, with an eye toward forming a political confederation.²⁷⁴ A treaty was concluded, and each signatory recognized the other as an independent and sovereign people.²⁷⁵

With the annexation of the Hawaiian Islands by the United States, the Native Hawaiian people were no longer able to maintain relations as a sovereign nation with other Polynesians. However, modern transportation and communication brought Native Hawaiians increased contacts with the United States and has resulted in their recognition as an independent aboriginal people by mainland Indians. For example, the National Congress of American Indians recently admitted Native Hawaiians as an associate member group of that organization.²⁷⁶

266. 3 R. KUYKENDALL, *HAWAIIAN KINGDOM*, *supra* note 69, at 307. For a discussion of Hawai'i's diplomatic relations with its neighbors during this period, see J. Horn, "Primacy of the Pacific Under the Hawaiian Kingdom" (unpublished thesis in University of Hawaii Library).

267. 3 R. KUYKENDALL, *HAWAIIAN KINGDOM*, *supra* note 69, at 307-08. In addition, the Kingdom of Hawaii was recognized as a sovereign entity by the governments of France, the United Kingdom, and Russia.

268. *Na elemakule*, or chiefs. M. PUKUI & S. ELBERT, *HAWAIIAN DICTIONARY* (1971).

269. Tapiteuea is an island in the Gilbert group, a chain of sixteen atolls comprising 375 square miles in the central Pacific Ocean.

270. 3 R. KUYKENDALL, *HAWAIIAN KINGDOM*, *supra* note 69, at 313.

271. Two atolls in the Gilbert Island group.

272. See REPORT OF THE MINISTRY OF FOREIGN AFFAIRS, app. at lxxxvi-xciii (1886) (available in the State of Hawaii Archives).

273. 3 R. KUYKENDALL, *HAWAIIAN KINGDOM*, *supra* note 69, at 313.

274. *Id.*; R. KUYKENDALL, *HAWAII: A HISTORY*, *supra* note 67, at 168.

275. 3 R. KUYKENDALL, *HAWAIIAN KINGDOM*, *supra* note 69, at 313. The kingdom also had relations with a large number of Western countries, including France, the United Kingdom, Russia, and Denmark. R. KUYKENDALL & A. DAY, *HAWAII: A HISTORY* 63, 72 (1961). Additionally, diplomatic representatives from most European countries and Japan attended the 1883 coronation of King David Kalakaua. *Id.* at 165.

276. In addition, the Office of Hawaiian Affairs, through its Culture Division, is a

Although the Native Hawaiian people were geographically prevented from being recognized as a tribe by other Indian tribes, Native Hawaiians were treated as a "tribe" by other Polynesian aboriginal groups such as the Tongans, Tahitians, and Samoans. And with increased contacts with the mainland, Native Hawaiians are being recognized as a tribe by mainland Indian groups. Native Hawaiians as a group thus meet the fourth criterion used to establish tribal status.

Native Hawaiian Political Authority: Mai nana i ka la'au malo'o, 'a'ole mea loa'a malaila.²⁷⁷

Although initially the government of the Islands was divided between numerous chiefs, the Native Hawaiian people were united under a single central government in 1795 that ruled until overthrown with the help of United States troops in 1893. Native Hawaiians were thus forbidden the exercise of their traditional form of tribal government. However, just as mainland Indian tribes adjusted their tribal policies and organizations to the realities of life under the influence of a dominant non-Indian culture, so too did the Native Hawaiian people adapt their ways to exercise what limited sovereign rights they could under American rule. Members of the royal family continued to provide for the benefit of their people, and though native laws were supplanted by American jurisprudence, the new court system upheld certain native legal rights. Gradually, Native Hawaiians regained limited political control through various governmental bodies. Thus, Native Hawaiians satisfy the fifth and final consideration in determining tribal status.

Government authority in presettlement Hawaii was vested solely in the *ali'i*, whose rule over the majority of the common population was absolute.²⁷⁸ Early Native Hawaiians were not united under a single king, but under a collection of feudal rulers whose dominions varied in size according to the fortunes of war.²⁷⁹ The ruler of each dominion was the *ali'i nui* or great chief, whose position

member of the Native American Rights Fund. See *OHA Gets National Membership*, KA WAI OLA O OHA, Sept., 1987, at 15.

277. Don't look at the dead limbs of a tree, you will get nothing from it. (or, Dead hopes are like dead trees, nothing is gained from watching and waiting for something to grow from them.). Hawaiian proverb.

278. 1 R. KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 69, at 8-9; E. HANDY, *supra* note 68, at 35-45.

279. E. HANDY, *supra* note 68, at 37. See also E. BRYAN, ANCIENT HAWAIIAN LIFE 2-20 (1938).

was not solely hereditary but was dependent on his rank in the general nobility and his natural abilities.²⁸⁰ A complex system of subchiefs, each of whom owed a duty of fealty to the *ali'i nui*, existed under each great chief and functioned as an advisory council. The high chief was assisted in governing by two officials: the *kahuna nui* or high priest, who oversaw religious affairs, and the *kalaimoku*,²⁸¹ the prime minister, who acted as the principal adviser on temporal matters.²⁸²

This fractured feudal system continued unchanged until King Kamehameha I united the five main islands under his rule in 1795.²⁸³ Kamehameha thus became the *ali'i nui* of the entire island group, and although preserving the traditional system of fealty, he appointed governors, *kia'aina*, for each island.²⁸⁴ However, pressure from a growing number of white merchants and Protestant missionaries resident in the Islands began to accelerate changes in the traditional system of government. In 1826, the monarch concluded the Islands' first treaty with a foreign power,²⁸⁵ and in 1835 the first penal code, heavily influenced by the missionaries, was proclaimed.²⁸⁶ The traditional advisory council of chiefs evolved into a legislative body similar to the early English House of Lords, and in 1840 the first constitution was promulgated creating a constitutional monarchy patterned in part after England's, though the King retained a greater measure of power than his British counterpart.²⁸⁷

The growing economic power and diminishing numbers of

280. E. HANDY, *supra* note 68, at 36-37.

281. Literally, manage island. M. PUKUI & S. ELBERT, *supra* note 268.

282. R. KUYKENDALL, HAWAII: A HISTORY, *supra* note 67, at 8.

283. That the islands were not under a unified government until 1795 has no bearing on the position that Native Hawaiians constitute an Indian tribe. There is no requirement that an aboriginal group be unified under one government prior to their "discovery" by whites in order later to qualify as a tribe. Mainland Indian groups such as the Iroquois and Creeks have consolidated politically, yet are considered to be tribes. 1982 HANDBOOK, *supra* note 2, at 799 n.10. *Accord*, 25 C.F.R. § 54.7(e) (1990) (present tribe "may have descendency . . . from historical tribes which combined and functioned as a single autonomous entity").

284. R. KUYKENDALL, HAWAII: A HISTORY, *supra* note 67, at 10.

285. For a discussion of this treaty, see *supra* notes 102-110 and accompanying text.

286. Laws of 1834, *He 'Olelo no na Kanawai o ko Hawai'i nei Pae 'Aina. Na Kau'ikea'ouli ke Ali'i* 2-15 (1834) (available in the archives of the Hawaii Historical Society). The missionaries' effect on Hawaii's first laws was pervasive. See, e.g., Law of Nov. 9, 1840, ch. 3, § 5, *reprinted in* TRANSLATION, *supra* note 192, at 32; and L. THURSTON, *supra* note 192, at 18 ("As for the idler, let the industrious put him to shame.").

287. R. KUYKENDALL, HAWAII: A HISTORY, *supra* note 67, at 54.

Native Hawaiians contributed to a decline in the power of the monarchy and resulted in the eventual overthrow of the reigning monarch, Queen Lili'uokalani.²⁸⁸ Upon the demands of the provisional government, the Queen was forced to surrender her authority in a document stating that she "yielded to the superior force of the United States."²⁸⁹ A new constitution was proclaimed on July 4, 1894, by the newly formed Republic of Hawaii prohibiting the "restoration or establishment of a monarchical form of government in the Hawaiian Islands."²⁹⁰ The Queen was forced to abdicate formally in 1895.²⁹¹ Native Hawaiian self-government was extinguished and the monarchy made illegal, a fate sealed when Hawaii became a territory of the United States in 1898.²⁹² With annexation, Native Hawaiians became a dependent indigenous people and lost most vestiges of their sovereignty, as did many of the mainland Indian tribes.²⁹³

With the overthrow of the monarchy, Native Hawaiians were forced to adjust their way of life under the influence of the dominant non-Hawaiian culture and exercise what remnants of sovereignty they could under the new system.²⁹⁴ The royal family, forbidden from ruling by the American government, continued to provide for the welfare of the Native Hawaiian people. For

288. Brief of Hou Hawaiians as Amici Curiae, *supra* note 72, at 20. For a description of the last days of the monarchy, see generally LILI'UOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN (1964 ed.).

289. 3 R. KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 69, at 603. The document read:

I, Liliuokalani . . . protest against any and all acts done against myself and the constitutional government of the Hawaiian Kingdom by certain persons claiming to have established a provisional government. . . .

That I yield to the superior force of the United States of America, whose minister . . . has caused United States troops to be landed at Honolulu and declared that he would support the said provisional government.

Now, to avoid any collision of armed forces and perhaps the loss of life, I do under this protest, and impelled by said force, yield my authority until such time as the . . . United States shall . . . undo the action of its representative and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.

Id. See *Liliuokalani*, 45 Ct. Cl. at 435 (quoting the document).

290. R. KUYKENDALL, HAWAII: A HISTORY, *supra* note 67, at 178-79.

291. *Id.*

292. H.R.J. Res. No. 55, *supra* note 134.

293. See *Montana v. United States*, 450 U.S. 544 (1981); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

294. Changes in tribal policy or organization attributable to adaptation to the dominant white culture do not act to destroy tribal status. *United States v. Washington*, 641 F.2d 1368, 1372-73 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). See Note, *The Unilateral Termination of Tribal Status*, 31 ME. L. REV. 153, 164 n.55 (1979).

example, Prince Jonah Kuhio Kalaniana'ole was elected in 1902 as a territorial delegate to Congress²⁹⁵ and sponsored the Hawaiian Homes Commission Act of 1921²⁹⁶ to provide for the improvement of the economic and social situation of his people.²⁹⁷ In addition to action in the political arena, members of the royal family also sought to better the situation of their people through the establishment of several charitable trusts. The largest of these,²⁹⁸ the Bishop Trust, established by the will of Princess Beatrice Pauahi Bishop, the heiress to the private lands of the Kamehameha family, provides for the education of Native Hawaiian children²⁹⁹ in the Kamehameha schools.³⁰⁰ The schools now educate some three thousand students, all of whom are part-Hawaiian, for academic and vocational careers.³⁰¹ The schools also provide an educational outreach program focusing on strengthening the cultural awareness of Native Hawaiians not enrolled in the Kamehameha schools.³⁰² In addition, the King Lunalilo Trust, established in 1874 by the will of King William Lunalilo, sought to ameliorate the condition of the Native Hawaiian people. Under the terms of the will,³⁰³ the King's estates were sold and the proceeds applied to the operation of a home "for the poor, destitute and infirm people of Hawaiian blood or extraction, giving preference to old people."³⁰⁴ Today the trust maintains a health-care residence for elderly Native Hawaiians.³⁰⁵ Finally, in 1909 the deposed Queen Lili'uokalani established the Queen Lili'uokalani Trust for the benefit of "orphan and other destitute children . . . in the Hawaiian Islands

295. R. KUYKENDALL, HAWAII: A HISTORY, *supra* note 67, at 196.

296. Brief of Hou Hawaiians as Amici Curiae, *supra* note 72, at 22.

297. *Report of the Joint Comm. on Hawaii, S. Doc. No. 151, 75th Cong., 3d Sess.* (1938).

298. The trust owns some 9 percent of the land in Hawaii. LEGISLATIVE RESEARCH BUREAU, STATE OF HAWAII, PUBLIC LAND POLICY IN HAWAII: AN HISTORICAL ANALYSIS 17 (1965) (Report No. 5).

299. *See* Will of Bernice Pauahi Bishop, ¶ 14, Equity File No. 2048 (Haw. Cir. Ct., 1st Cir., Dec. 2, 1884), *quoted in In re Estate of Bishop*, 53 Haw. 604, 499 P.2d 670, 674 (1972).

300. BEATRICE PAUAHI BISHOP ESTATE, EXCERPTS FROM THE WILL AND CODICILS OF PRINCESS BEATRICE PAUAHI BISHOP AND FACTS ABOUT THE KAMEHAMEHA SCHOOLS/BEATRICE PAUAHI BISHOP ESTATE 26 (1980).

301. 1982 HANDBOOK, *supra* note 2, at 807.

302. *See* Equity File No. 2048 (1st Cir. Ct. Haw. Oct. 22, 1962), *supra* note 299.

303. As interpreted by the Hawaiian Supreme Court in *In re Estate of Lunalilo*, 4 Haw. 381 (1881).

304. Brief of Queen Lili'uokalani Tr. as Amicus Curiae, *supra* note 182, at 3 & n.5.

305. *Id.*

. . . [with] preference given to children of pure or part aboriginal blood."³⁰⁶ The trust now provides a variety of social services, including foster home placement, child care, and community development programs through six children's centers on the islands of O'ahu, Moloka'i and Hawai'i³⁰⁷ to more than five thousand Native Hawaiian children.³⁰⁸

Despite the overthrow of the Native Hawaiian government and the imposition of the American legal system in the Hawaiian Islands, a number of customary native rights predating annexation have been preserved by state and federal courts, and by the federal government, thus demonstrating the continuing, albeit limited, viability of traditional Native Hawaiian law. The state constitution obliges state courts to preserve and enforce certain traditional rights,³⁰⁹ and absent statute, traditional Hawaiian usage controls inconsistent state common law.³¹⁰ Custom is also often used to clarify ambiguous statutes.³¹¹ While some traditional legal rights have been made available to non-Hawaiians,³¹² most are applicable

306. *Id.* at 2.

307. 1982 HANDBOOK, *supra* note 2, at 807.

308. See [1985] QUEEN LILIUOKALANI CHILDREN'S CENTER ANNUAL REPORT.

309. See HAW. CONST. art. XXII, § 7. This section reads:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupuaa 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.

310. HAW. REV. STAT. § 1-1 (1980). HRS § 1-1 reads:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage.

(Emphasis added.) *Cf.* 25 U.S.C. § 1322(c) (giving effect to tribal ordinances and custom not inconsistent with state law where states have accepted a federal delegation of civil jurisdiction under Public Law 280). Before 1892, Anglo-American common law had no precedential value. *Thurston v. Allen*, 8 Haw. 392 (1892).

311. See, e.g., *In re Estate of Nakuapa*, 3 Haw. 342, 347-58 (1872) (custom used to interpret statute). *Cf.* *O'Brien v. Walker*, 35 Haw. 104 (1939), *aff'd*, 115 F.2d 956 (9th Cir. 1940), *cert. denied*, 312 U.S. 707 (1941) (custom used to interpret an issue in deed of trust). Custom can be ascertained through the testimony of *kama'aina* ("old timers") or Native Hawaiians, through personal testimony or through hearsay. See *In re Application of Kamakana*, 58 Haw. 632, 574 P.2d 1346 (1978); *State ex rel. Kobayashi v. Zimring*, 58 Haw. 106, 566 P.2d 725, 747-52 (1977); *In re Application of Ashford*, 50 Haw. 314, 440 P.2d 76 (1968) (discussing *kama'aina* witnesses). Federal courts in Hawaii also occasionally apply Hawaiian traditions in determining the law. See, e.g., *Sotomura v. County of Hawaii*, 460 F. Supp. 473 (D. Haw. 1978) (tradition used to determine the *makai*, or seaward, boundary of beach-front property).

312. See *Smith v. Laamea*, 29 Haw. 750 (1927); *Hatton v. Piopio*, 6 Haw. 334 (1882); HAW. REV. STAT. §§ 118-1 to -14 (1980).

only to Native Hawaiians. For example, Native Hawaiians traditionally had a right to gather materials from the land for subsistence, cultural, or religious purposes. This right was codified during the monarchy, and it is still in effect today.³¹³ In 1982 the Supreme Court of Hawaii ruled that regardless of the exclusivity traditionally associated with the non-Hawaiian concept of fee simple land ownership, Native Hawaiians may enter any undeveloped lands within the *ahupua'a*³¹⁴ in which they live to gather items for cultural purposes.³¹⁵ In addition to the judiciary, the federal government has also preserved some Native Hawaiian rights predating annexation. For example, before annexation, Native Hawaiians had a right to fish in coastal waters and along the shore regardless of who controlled the land off which they fished. In 1938, Congress reaffirmed this traditional right when it enacted a provision giving Native Hawaiians the exclusive right to fish along the shores of the Hawaii Volcanoes National Park.³¹⁶

313. HAW. REV. STAT. § 7-1 (1980), *construed in Kalipi*, 66 Haw. 1, 656 P.2d at 748-50 (1982):

Where the landlords have obtained . . . allodial titles to their lands, the people of each of their lands shall not be deprived of the right to take firewood [and other natural resources], from the land on which they live, for their own private use. . . .

The people shall also have a right to drinking water, and running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses which individuals have made for their own use.

For a detailed discussion of the right-of-way provision of HRS § 7-1, see generally Comment, *Hawaiian Beach Access: A Customary Right*, 26 HASTINGS L.J. 823 (1975); Town & Yuen, *Public Access to Beaches in Hawaii, "A Social Necessity,"* 10 HAW. B.J. 5 (1973). For a discussion of the old Hawaiian water rights system, see *Reppun v. Board of Water Supply*, 65 Haw. 531, 540, 656 P.2d 57, 64 (1982) (where the court stated: "[r]iparian rights in Hawaii are analogous to the federally reserved water rights accruing to Indian reservations"); E. HANDY, E. HANDY & M. PUKUI, *NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE, AND ENVIRONMENT* 56-67 (1972); Nakuina, *Ancient Hawaiian Water Rights*, reprinted in THURM'S HAWAIIAN ANNUAL 79 (1894); Note, *Hawaii Surface Water Law: An Analysis of Robinson v. Ariyoshi*, 8 U. HAW. L. REV. 603 (1986).

314. Although this land division was used in ancient times, the boundaries of many of the old *ahupua'a* still exist and are used to describe location. See, e.g., *Kalipi*, 66 Haw. at 1, 656 P.2d at 747 (plaintiff-appellant Kalipi lived in Molokai with a "taro patch in [the *ahupua'a* of] Manawai and an adjoining houselot in [the *ahupua'a* of] East Ohia"); HAW. REV. STAT. § 4-2(c) (1980) (setting a boundary "along the boundary to the *ahupua'a* of Kaonoulu").

315. *Kalipi*, 66 Haw. 1, 656 P.2d 745.

316. Act of June 20, 1938, ch. 530, § 3, 52 Stat. 781, 784 (amending Act of Apr. 19, 1930, ch. 200, 46 Stat. 227). The right to fish along the shore of the park is exclusive to Native Hawaiians. Three whites charged with illegally fishing off the shoreline are challenging the constitutionality of the provision in federal district court in Honolulu. See *Hawaiian's Fishing Rights Challenged*, Honolulu Advertiser, Mar. 5, 1986, at A-4, col. 1.

Although by 1923 Native Hawaiians had ceased to exert any political authority over their members through the monarchy, Hawaii's form of tribal government, all attributes of Hawaiian sovereignty have not been extinguished. Native Hawaiians exercise a limited version of self-government in two areas: the Hawaiian Homes Commission and the Office of Hawaiian Affairs. The Hawaiian Homes Commission was created in 1921,³¹⁷ and today functions as the executive board heading the Department of Hawaiian Home Lands, the state agency created in 1960 to administer the Native Hawaiian homelands program.³¹⁸ The Commission is composed of eight members, all of whom are of Native Hawaiian blood, and possesses governmental powers over the Hawaiian Homes Commission lands.³¹⁹ The lands are held in trust for the benefit of the native population and are to be distributed solely to Native Hawaiians for agricultural, pastoral, and residential homesteads. The powers of the Commission include the right to determine eligibility of Native Hawaiians for participation in the program,³²⁰ much in the same way that Indian tribal councils have the power to decide who may participate in tribal affairs as a member of the tribe.³²¹ Other powers are the ability to determine compliance with the Homes Commission Act, the successorship to the trust lands, and other governmental powers analogous to those exercised by other Indian tribal governing bodies.³²² Additionally, the Hawaiian Homes Commission is authorized to "undertake . . . activities having to do with the economic and social welfare" of Native Hawaiians receiving homesteads under the program.³²³

The second way Native Hawaiians exercise a form of self-government is through the Office of Hawaiian Affairs (OHA).³²⁴

317. HHCA, *supra* note 140, at § 202(a).

318. BREACH OF TRUST, *supra* note 7, at 9.

319. HHCA, *supra* note 140, at § 202(a).

320. *Id.* Participation is limited to those persons of 50 percent or more Native Hawaiian blood. Courts have upheld similar blood-quantum requirements for mainland Indian tribes. *See, e.g.,* Simmons v. Chief Eagle Seelatsee, 244 F. Supp. 808 (E.D. Wash. 1965), *aff'd*, 384 U.S. 209 (1966).

321. Indian tribes are free to determine their membership. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); The Cherokee Intermarriage Cases, 203 U.S. 76 (1906); Roff v. Burney, 168 U.S. 218 (1897). *See also* 1982 HANDBOOK, *supra* note 2, at 19-27.

322. *Hearings on S. 857, supra* note 17.

323. 1982 HANDBOOK, *supra* note 2, 803 (citing HHCA, *supra* note 140, at § 202).

324. For a discussion of the Office of Hawaiian Affairs, see Trustees of the Office of Hawaiian Affairs v. Yamasaki, 737 P.2d 446 (Haw.), *cert. denied*, 108 S. Ct. 234 (1987); Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. HAW. L. REV. 63 (1985).

OHA was established by Hawaii's 1978 Constitutional Convention³²⁵ and adopted as law by the voters of the state as a public trust entity for the benefit of Native Hawaiians.³²⁶ The purpose of OHA is to provide Native Hawaiians with the right to determine those priorities bringing about "the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race."³²⁷ OHA was designed to be a "receptacle for any funds, land or other resources earmarked for or belonging to Native Hawaiians, and to create a body that could formulate policy relating to all Native Hawaiians and make decisions on the allocation of those assets belonging to Native Hawaiians,"³²⁸ including any reparations due Native Hawaiians from the United States government.³²⁹ As such, OHA would hold title in trust to any property to be conveyed to Native Hawaiians as a group.³³⁰ The Committee on Hawaiian Affairs which formulated OHA at the Constitutional Convention closely examined the rights of mainland Indian groups who have traditionally enjoyed self-determination and self-government in internal matters even though, like Native Hawaiians, they no longer possess the full attributes of sovereignty.³³¹ The Committee intended OHA to grant similar rights to Native Hawaiians to "further the cause of Native Hawaiian self-government."³³² To vote or run for office in elections for the board of trustees, one must be of Native Hawaiian blood, another similarity to mainland Indian tribes where one must be an enrolled member of the tribe to vote in tribal elections.³³³

In addition to agencies under the auspices of the state government, there are numerous private organizations through which

325. See generally BREACH OF TRUST, *supra* note 7, at 12-14.

326. HAW. CONST. art. XII, §§ 5-6; HAW. REV. STAT. § 10-1 to -16 (Supp. 1984). See Brief of the Office of Hawaiian Affairs as Amicus Curiae, *supra* note 184, at 1.

327. 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 1018 (1980) (Comm. of the Whole Rep. No. 13).

328. *Id.* at 664 (Standing Comm. Rep. No. 59). OHA is currently fighting the state to ensure that 20 percent of all funds derived from the public land trust is allocated to the Office as required by HAW. REV. STAT. §§ 10-13.5. See, e.g., *Yamasaki*, 737 P.2d at 453-54.

329. HAW. REV. STAT. §§ 10-13.5. The Attorney General of Hawaii has issued an opinion stating that the creation of OHA is constitutional and relied on several cases such as *Morton v. Mancari*, which deal with mainland Indians, as precedent. Constitutionality of the Office of Hawaiian Affairs, Haw. Att'y Gen. Op. No. 80-8 (July 8, 1980).

330. Van Dyke, *supra* note 324, at 68.

331. *Id.*

332. *Id.*

333. *Id.*

Native Hawaiians seek to secure their legal rights and represent their interests as a people. For example, Alu Like, a nonprofit organization, assists in the development of economic and social self-sufficiency for Native Hawaiians.³³⁴ It maintains social centers on each of the five main islands providing employment and economic development programs reaching nearly 22,000 Native Hawaiians annually.³³⁵ 'Ahahui 'Ohana Moku Anuenue, a membership organization consisting of Native Hawaiians, promotes the right of Native Hawaiians to reside on and settle Hawaii's public trust lands.³³⁶ Finally, one of the more active and vocal groups advocating the right of Native Hawaiians is the Hou Hawaiians. The Hou are a Native Hawaiian 'ohana³³⁷ representing the interests of Native Hawaiian applicants for the Hawaiian homestead lands before the courts,³³⁸ legislatures,³³⁹ departments³⁴⁰ and administrative agencies.³⁴¹

In conclusion, Native Hawaiians were ruled over by a monarchy until that system of self-government was abolished in 1893. Though the traditional government was extinguished, Native Hawaiian self-government has continued in various forms until today, thus satisfying the fifth criterion for tribal status.

334. BREACH OF TRUST, *supra* note 7, at 6. *Alu like* means "acting together for a similar purpose."

335. Brief of Queen Liliuokalani Trust as Amicus Curiae, *supra* note 182, at 3.

336. Appellant's Supplemental App. at 47, *Price v. Hawaii*, 764 F.2d 623 (9th Cir. 1985) (No. 84-2444).

337. 'Ohana means family or kin group. Although most members of an 'ohana are related by blood, it can also include friends and those who are taken in or adopted by the group. Supplemental Memorandum, *supra* note 64, at 8-10.

338. See, e.g., *Price*, 764 F.2d at 625 (Hou Hawaiians seek to compel Hawaii to apply proceeds from Hawaiian trust lands to benefit of Native Hawaiians); Brief of Hou Hawaiians as Amici Curiae, *supra* note 72 (amicus brief filed in Hawaiian homelands case); *Hou Hawaiians v. Civiletti*, C.V. No. 80-1421 (D.D.C. Oct. 31, 1980) (dismissed without prejudice on Jan. 12, 1981) (Hou Hawaiians seek to compel Department of Justice to bring suit under HHCA on behalf of Native Hawaiians).

339. See, e.g., *American Indian Religious Freedom Act: Hearings on S.J. Res. 102 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 2d Sess. 71-72 (1978) (statement of Maui Loa, head of the Hou Hawaiians); *The Propriety of Including Native Hawaiians in the Indian Education Act: Hearings on S. 857, supra* note 17, at 230-34 (statement of Kamuela Price, Hou Hawaiian Advisory Council); *Establishment of the Hawaiian Aboriginal Claims Advisory Study Commission: Hearings on S.J. Res. 155 Before the Senate Comm. on Interior & Insular Affairs*, 94th Cong., 2d Sess. 150-55 (1976) (statement of Maui Loa).

340. See Letter from William Clark, Secretary of the Interior to Kamuela Price, Member of the Hou Hawaiians (May 8, 1984); Letter of Cecil D. Andrus, Secretary of the Interior, to George Ariyoshi, Governor of Hawaii (Dec. 3, 1980).

341. Brief of Hou Hawaiians as Amici Curiae, *supra* note 72, at 1.

IV. *The Exclusion of Native Hawaiians from Indian Programs: Legislative and Administrative Solutions*

While it has been demonstrated that the Native Hawaiians satisfy the criteria for both Indian and tribal status, proposing solutions to the failure to include them in programs for the general benefit of Indians and Indian tribes is a difficult task. The first change that needs to be made is not in the law but in the minds of those who make the law. Still, Native Hawaiians, as members of the class of "Indians" and as an Indian tribe, are entitled to the same benefits as those groups. There are concrete changes both in the ways policymakers view Native Hawaiians and in the law that should be made as a matter of equity as well as of uniformity in treatment.

The easiest solution to the problem would be the inclusion by legislators and administrators of Native Hawaiians in programs for the benefit of other Indians. Before lawmakers will uniformly take that step, however, they must be educated to the fact that Native Hawaiians belong to the class of Indians and constitute a tribe, both groups that lawmakers have singled out for special attention. The next step is to make them aware of the problems confronting Native Hawaiians today, as well as those they have confronted in the past, and to point out the similarities to the problems that prompted Congress to promote special legislation for the mainland Indians.

The Native Hawaiian Study Commission established by Congress in 1980 to study the culture and needs of Native Hawaiians was a positive step in this direction.³⁴² It briefly focused attention on the plight of the Native Hawaiian, but was ineffective in proposing any real solutions to the problems faced by Native Hawaiians.³⁴³ But because of Hawai'i's distance from Washington and because Native Hawaiians have no effective lobbying presence there as do the mainland tribes,³⁴⁴ the topic needs to be brought before Congress and administrative agencies as often as possible. Although

342. Native Hawaiian Study Commission Act, Pub. L. No. 96-565, 94 Stat. 3324 (1980) (codified at 42 U.S.C. § 2991 (1982)).

343. See *supra* note 162.

344. For a short period ending in 1987, Native Hawaiians were represented in Washington by a Native Hawaiian student at Georgetown University Law School, Lawrence K. Kamakawiwo'ole, who served as OHA's Federal Liaison Officer. In contrast, mainland Indians are represented by a myriad of lobbying interests such as Arrow, Inc., the Coalition of Eastern Native Americans, and the Tribal Chairman's Association. For an extensive list of these organizations, see CONGRESSIONAL RESEARCH SERVICE, INDIAN AND INDIAN-INTEREST ORGANIZATIONS 40-50 (June 7, 1978) (No. 78-127 GOV) (R. Jones, author).

the natural voice for Native Hawaiians would seem to be the Hawaiian congressional delegation, the realities of politics often silence that voice when Native Hawaiian rights conflict with the interests of the state or a more powerful voting bloc such as the Islands' landed interests. Still, education of the nation's lawmakers is the first step in ensuring that Native Hawaiians receive the same benefits as other Native Americans.

There are, however, some more concrete steps that should be taken to equate the treatment of the Native Hawaiian people with that received by other Indians. The most comprehensive would be for Congress to provide for reparations for Native Hawaiians³⁴⁵ in the same way that it provided for Native Alaskans in the Alaska Claims Settlement Act of 1971 (ANCSA).³⁴⁶ Native Alaskans, like Native Hawaiians, were subjected to ever increasing demands on their lands after the "discovery" of the territory by whites in 1741.³⁴⁷ The Russian Empire laid claim to the whole of what now constitutes the state of Alaska, and when Russia sold that claim to the United States in 1867, the government concluded the agreement without ever considering the indigenous population or compensating them for their loss. Similarly, when the United States annexed the Hawaiian Islands in 1898, it did not do so with the support of the Native Hawaiian people³⁴⁸ but at the insistence of

345. For discussions of reparations for Native Hawaiians, see *Blondin, supra* note 14; *Hawaiian Reparations: Three Points of View*, KA WAI OLA O OHA, Feb., 1986, at 1, col. 1; Lopez-Reyes, *The Demise of the Hawaiian Kingdom: A Psycho-cultural Analysis and Moral Legacy—Something Lost, Something Owed*, 18 HAW. B.J. 3 (1983). A bill to provide for such reparations was introduced in the House of Representatives in 1974. Hawaiian Native Claims Settlement Act, H.R. 15666, 93d Cong., 2d Sess. (1974). The bill, however, was introduced very late in the legislative year and expired with the 93d Congress. Levy, *supra* note 72, at 881 n.253. For arguments against reparations, see Hanifin, *Hawaiian Reparations: Nothing Lost, Nothing Owed*, 17 HAW. B.J. 107 (1982).

346. Alaska Native Claims Settlement Act. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-1628 (1982)). For a detailed discussion of ANCSA, see generally Price, *A Moment in History: The Alaska Native Claims Settlement Act*, 8 U.C.L.A.-ALASKA L. REV. 89 (1979); Lazarus & West, *The Alaska Native Claims Settlement Act: A Flawed Victory*, 40 L. & CONTEMP. PROBS. 132 (1976).

347. For a discussion of Native Alaskans and their status as Native Americans, see generally D. CASE, *ALASKA NATIVES AND AMERICAN LAWS* (1984); and, for a discussion of their land claims see generally Lazarus, *Native Land Claims in Alaska*, 7 AM. INDIAN 39 (1958).

348. *Proposed Amendments-1921, supra* note 222, at 170 ("the Hawaiians were deprived of their lands without any say on their part, either under the kingdom, under the republic or under the United States government"). Native Hawaiians opposed annexation by a majority of five to one. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L.L. REV. 323, 371 n.200 (citing Trask, *Fighting the Battle of Double Colonization: The View of a Hawaiian Feminist*, in 2 CRITICAL PERSPECTIVES OF THIRD WORLD AMERICA 118, 131 (1984) (No. 1)).

American businessmen who had illegally overthrown the legitimate Hawaiian government with direct American support.³⁴⁹ The Republic's first act was to confiscate, without the consent of the Native Hawaiian people and without paying any compensation, some 2.5 million acres of land held in trust for Native Hawaiians.³⁵⁰ Even though the United States had previously recognized Native Hawaiian sovereignty over the land in a string of treaties, on annexation the United States ceded those lands to itself³⁵¹ without any payments being made to the Native Hawaiian people.³⁵² However, because the Republic had illegally seized the land, Native Hawaiian title was never extinguished. Thus, the Republic had no legal interest in those lands,³⁵³ and the United States did not acquire legal interest in the lands it acquired at annexation because the Republic had none to pass;³⁵⁴ title has thus not been extinguished.³⁵⁵ Although in 1959 the federal government returned 1.5 million acres to the state,³⁵⁶ it retained title to some 400,000 acres,³⁵⁷ including the entire island of Kaho'olawe which the U.S. Navy

349. In his report to Congress on the takeover, the President stated:

But for the notorious predilections of the United States Minister for Annexation, the Committee of Safety . . . would never have existed.

But for the landing of United States forces upon false pretexts respecting the danger to life and property the committee would never have exposed themselves to the pains and penalties of treason by undertaking the subversion of the Queen's Government.

But for the presence of the United States forces in the immediate vicinity and in position to afford all needed protection and support, the [American merchants] would not have proclaimed the provisional government from the steps of the government building. . . . [B]ut for the lawless occupation of Honolulu under false pretexts by the United States forces . . . the Queen and her government would never have yielded. President of the United States, MESSAGE RELATING TO THE HAWAIIAN ISLANDS, H.R. EXEC. DOC. NO. 47, 53d Cong., 2d Sess. XIII (1893). See 3 R. KUYKENDALL, HAWAIIAN KINGDOM, *supra* note 69, at 622.

350. Blondin, *supra* note 14, at 29.

351. H.R.J. Res. No. 55, *supra* note 134, at § 1.

352. The Hawaii Organic Act left open the possibility of future settlement of any land claims, as did the Alaska Organic Act. Compare Hawaii Organic Act, Act of Apr. 30, 1900, ch. 399, § 73, 31 Stat. 141 with Alaska Organic Act, ch. 53, 23 Stat. 24, 26 (1884).

353. Blondin, *supra* note 14, at 29.

354. *Id.* The Latin maxim for this is *nemo dare potest quod non habet*, or "a man cannot give that which he has not." *Fleta*, Lib. 3, ch. 15, § 8. In addition, a nation does not automatically gain title to privately held lands over which it asserts political sovereignty. See *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

355. For a discussion of aboriginal title, see M. PRICE & R. CLINTON, LAW AND THE AMERICAN INDIAN 527-78 (1983); Annotation, *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41 A.L.R. FED. 425 (1977).

356. Blondin, *supra* note 14, at 29.

357. LEGISLATIVE RESEARCH BUREAU, STATE OF HAWAII, PUBLIC LAND POLICY IN HAWAII: MAJOR LANDHOLDERS 99 (1967) (Report No. 3) (R. Horowitz, author).

uses as a bombing target despite the protests of the Hawaiian people.

Under the Indian Claims Commission Act,³⁵⁸ Native Hawaiians as Indians would have been eligible to sue the United States for monetary claims based on these actions.³⁵⁹ Congress, after dealing with Indian claims against the United States by passing special jurisdictional legislation each time a claim was presented,³⁶⁰ established the Indian Claims Commission to hear all Indian claims against the United States.³⁶¹ But because Hawaii was not admitted to the Union³⁶² before the deadline for filing claims expired,³⁶³ Native Hawaiians were ineligible to assert any claim for losses based on the United States' less than "fair and honorable dealings"³⁶⁴ with them, as did many mainland Indians.³⁶⁵

358. Act of Aug. 13, 1946, ch. 959, 66 Stat. 1049 (codified at 25 U.S.C. §§ 70 to 70v-3 (1982)). For a discussion of the legislative history surrounding the Act, see *Otoe & Missouri Band of Indians v. United States*, 131 F. Supp. 265 (Ct. Cl.), *cert. denied*, 350 U.S. 848 (1955).

359. The Act allowed Indians to file claims arising out of a taking by the United States without compensation of lands owned or occupied by the claimant, and for claims based "upon fair and honorable dealings" not recognized by any rule of law or equity. 25 U.S.C. § 70a. For a successful suit brought by a group in a position similar to that of the Native Hawaiians, see *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946) (*Alcea I*), where the Supreme Court ruled that the Tillamooks, a group not recognized as a tribe by the United States, could bring suit to prove their aboriginal title to designated lands and demonstrate that their interest in that land was taken without their consent or any compensation. This situation is remarkably analogous to that faced by Native Hawaiians.

360. M. PRICE & R. CLINTON, *supra* note 355, at 566. Congress had enacted 142 ad hoc jurisdictional statutes for the benefit of Indians prior to 1946.

361. For a detailed survey of the Commission's work, see generally UNITED STATES INDIAN CLAIMS COMM'N, FINAL REPORT (1978); Pierce, *The Work of the Indian Claims Commission*, 63 A.B.A. J. 227 (1977).

362. The Act allowed Indians "residing within the territorial limits of the United States or Alaska" to file claims. 25 U.S.C. § 70a. Because Hawaii was not a part of the United States until after the expiration date for filing claims, Native Hawaiians were precluded from filing.

363. All claims were required to be filed within five years of the enactment of the Act. The Commission expired on September 31, 1978. M. PRICE & R. CLINTON, *supra* note 355, at 567.

364. For a discussion of the "fair and honorable dealings" provision, see Annotation, *Application and Effect of "Fair and Honorable Dealings" Clause of Indian Claims Commission Act (25 U.S.C.S. § 70a(5)) to Claims of Indians Against United States*, 45 A.L.R. FED. 680, § 6 (1977). Congressman Mundt indicated that moral considerations weighed heavily in the provision: "If any Indian tribe can prove it has been unfairly and dishonorably dealt with by the United States, it is entitled to recover." 92 CONG. REC. A4923 (1946) (extension of remarks).

365. See, e.g., *Gila River Pima-Maricopa Indian Community v. United States*, 467 F.2d 1351 (Ct. Cl. 1972); *Upper Chehalis Tribe v. United States*, 155 F. Supp. 226 (Ct.

Congressman Henry Jackson, one of the Act's sponsors, had said of the bill: "Let us pay our debts to the Indian tribes . . . let us make sure that when the Indians have their day in court they have an opportunity to present all their claims of every kind, shape, and variety, so that the problem can be solved once and for all."³⁶⁶ The problem, however, was not settled once and for all. Many Native Alaskans had not been able to take advantage of the Claims Commission Act.³⁶⁷ Partly as a response to this omission, Congress enacted ANCSA to provide the compensation that equity required. Similarly, Native Hawaiians have not had their day in court, and Congress should enact legislation similar to ANCSA for Native Hawaiians. As previously noted, Native Hawaiians were ineligible to sue for compensation under the Indian Claims Commission Act. In addition, Native Hawaiians are precluded from filing a claim for compensation arising from the actions of the United States during annexation in the United States Court of Claims.³⁶⁸

Because the court doors have been closed to Native Hawaiians, Congress should enact legislation to provide for some form of compensation for the actions of the United States. As the House committee report on the approval of ANCSA noted:

It has been the consistent policy of the United States in its dealings with Indian Tribes to grant them title to a portion of the lands they occupied, to extinguish the aboriginal title to the remainder of the land by placing such land in the public domain, and to pay the fair value of the title extinguished.³⁶⁹

While Congress has arguably granted Native Hawaiians title to the 200,000 acres of land under the Hawaiian Homes Commission Act,³⁷⁰ extinguished title to all but 400,000 acres of the re-

Cl. 1957); *Osage Nation of Indians v. United States*, 97 F. Supp. 381 (Ct. Cl. 1951). Almost \$670 million have been awarded to Indians under the Act.

366. 92 CONG. REC. 5312 (1946).

367. Native Alaskans, for the most part, did not take advantage of the Act because "the great bulk of the aboriginal titles claimed by the Natives have not been taken or extinguished by the United States. The United States simply has not acted." H.R. REP. NO. 523, 92d Cong., 1st Sess. 4, reprinted in U.S. CODE CONG. & ADMIN. NEWS 2192, 2193-94 (1971).

368. "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (1982).

369. H.R. REP. NO. 523, *supra* note 367.

370. Because Native Hawaiians are only beneficiaries of the trust lands and lease it for periods of ninety-nine years, it is highly questionable whether they actually possess title.

maining land in Hawaii and returned that land to the public domain,³⁷¹ it has not paid any compensation for the extinguishment of that title. Congress should, therefore, enact companion legislation to ANCSA to provide for Native Hawaiians. As it did under ANCSA, Congress should place a dollar value on the Hawaiian land claim³⁷² and avoid the lengthy and costly litigation associated with a claims system.³⁷³ The payment would then be turned over to the Office of Hawaiian Affairs for either disbursement on a per capita basis or for cooperative development.³⁷⁴ This is a far more realistic solution to the problem than any suggestion that Congress turn over land now used as active military bases³⁷⁵ or set aside as national parks. In conclusion, a claims settlement act would provide a comprehensive solution to the omission of Native Hawaiians from the benefits that Congress has afforded other Indians.

A simpler legislative solution would be for Congress to denominate the Native Hawaiian people an Indian tribe. Congress has passed similar legislation for other Indian groups³⁷⁶ and could do so for Native Hawaiians based on their status as an indigenous people.³⁷⁷ The Congress could simply enact legislation making Native Hawaiians eligible for "services and assistance provided to Indians because of their status as Indians,"³⁷⁸ thus allowing Native Hawaiians to take advantage of programs enacted for other

371. Blondin, *supra* note 14, at 29.

372. Cf. H.R. 15666, *supra* note 345, at § 5(a).

373. See Levy, *supra* note 72, at 884 n.282. As one scholar has posed the question: "[H]ow much sense does it make for the judges, anthropologists, lawyers, and Congressmen to go through incredible contortions to determine what occurred one hundred years ago and base compensation on such a determination?" M. PRICE, *LAW AND THE AMERICAN INDIAN* 356 (1973).

374. Cf. H.R. 15666, *supra* note 345, at § 6. The Office of Hawaiian Affairs was created to serve just such a function. HAW. REV. STAT. § 10-3(6) (Supp. 1979). This would allow Native Hawaiians to govern directly the disposition of the fund.

375. This does not apply to the island of Kaho'olawe. There is no base on the island; its sole function is to serve as a target for U.S. Navy bombs and shells. Despite the continued protests of the Native Hawaiian people, the Navy refuses to halt its bombings, even though there are several ancient *heiau* or temples on the island. In 1981, Kaho'olawe was designated a National Historic Site. The Navy agreed to discontinue bombing one-third of the island, but has mistakenly bombed that portion of the island as recently as the fall of 1987. Akaka, *He 'Onipa'a Ka 'Oia 'I'o, KA WAI OLA O OHA*, Sept., 1987, at 2.

376. See, e.g., Act of Sept. 18, 1978, Pub. L. No. 95-375, 92 Stat. 712 (codified at 25 U.S.C. §§ 1300f to f-2 (Supp. V 1981)).

377. See *supra* notes 67-77 and accompanying text.

378. Act of Sept. 18, 1978, *supra* note 376.

Indians for reasons that apply equally to the Native Hawaiian people.³⁷⁹

In addition to the legislative branch of government, the executive branch can take steps to ensure that Native Hawaiians receive the benefits to which they are entitled as Indians and an Indian tribe. The most important involves the Department of the Interior. Interior should promulgate a new rule to replace section 83.4 of its regulations governing federal recognition of tribal status,³⁸⁰ which allows every Indian group in the United States except Native Hawaiians to petition for federal acknowledgment as a tribe.³⁸¹ Rewording this section would at least allow Native Hawaiians to apply for recognition,³⁸² an option from which they are now unfairly precluded.³⁸³

Should the Department prove hesitant to change its stand, Congress has given the President the authority to implement the same change. Title 25 of the United States Code authorizes the President to "prescribe such regulations as he may think fit in carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs."³⁸⁴ Therefore, the President could himself change the wording and thus the effect of section 83.4. Regardless of who instigates it, it is a change that should be made. Steps must be taken to ensure that Native Hawaiians are not arbitrarily excluded from programs

379. See *supra* notes 4-15 and accompanying text.

380. 25 C.F.R. § 83.4.

381. Section 83.4 reads: "Any Indian group in the continental United States which believes it should be acknowledged as an Indian tribe, and can satisfy the criteria of § 83.7, may submit a petition requesting that the Secretary [of the Interior] acknowledge the group's existence as an Indian tribe."

382. Simply striking the word "continental" from the section would suffice.

383. Aside from being patently unfair, this provision is constitutionally questionable. While not prohibiting legislation based on class, the equal protection clause requires that any classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated shall be treated alike. Native Hawaiians, as members of the class of Indians, are entitled to the same legal treatment as mainland Indians.

Exclusion by the Department of the Interior of the Native Hawaiian people from a class to which they belong based solely on geographic considerations is arbitrary and not rationally related to the object of congressional legislation which Interior's rule seeks to implement. In short, excluding Native Hawaiians and only Native Hawaiians from petitioning for federal recognition as a tribe when they would otherwise be eligible is unconstitutional. See Blondin, *supra* note 14, at 28.

384. 25 U.S.C. § 9 (1982).

meant to reach Indians and Indian tribes, and something must be done to improve the status of Native Hawaiians.

Conclusion

Only with the implementation of a comprehensive legislative or administrative solution to the failure to include Native Hawaiians in most programs for other Indians will the Native Hawaiian people receive the benefits to which they are entitled as an indigenous people of the United States. There is no bar to including Native Hawaiians in programs for Indians because Native Hawaiians are members of the class of Indians. In addition, there exists no rational basis to preclude Native Hawaiians from benefits afforded Indian tribes because an informed examination of the history of the Native Hawaiian people shows that they constitute an Indian tribe. As a people, the Native Hawaiians have experienced a history of Western contact and domination similar to that experienced by the mainland tribes, and they should be included in these programs because the concerns motivating Congress to enact legislation for other Native Americans exist equally among the Native Hawaiian people. In the absence of any comprehensive solution to the exclusion of Native Hawaiians from these programs, they will continue to fall far below the basic educational, health, and economic levels for which this country prides itself. The federal government must lay to rest the harsh consequences of its failure to address adequately and properly the Native Hawaiian problem and lift Hawaii's status as islands of neglect.

