

**SUMMARY OF PROPOSED AMENDMENTS,
WITH
FOCUS ON ISSUES RAISED BY OHA,
TO THE
AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO
S. 1011
THE NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT**

Background

This document contains proposals for amendments to the substitute amendment to S. 1011, the Native Hawaiian Government Reorganization Act, that was favorably reported to the full Senate without further amendment by the Senate Indian Affairs Committee December 17, 2009.

The proposals are organized into the following sections:

- (1) Governing Authority and Powers of the United States, the State of Hawaii and the Native Hawaiian Governing Entity;
- (2) Claims; Applicability of Certain Federal Laws;
- (3) Findings, Purpose, Definitions, Formation of the Roll;
- (4) Conforming Amendments.

Governing Authority and Powers

1. Amendment to the Activities authorized for the Interim Governing Council (section 8(c)(1)(I)(dd)).

(dd) the protection and preservation of the rights vested on the date of enactment of this Act of the those Native Hawaiians who are eligible to reside on the Hawaiian homelands under the authority of the Hawaiian Homes Commission Act, 1920 (42 Stat. 108, chapter 42) and

Rationale: With the application of the Indian Civil Rights Act (whether in the organic governing documents of the Native Hawaiian governing entity or by inclusion in the section on the Applicability of Other Federal Statutes), the Native Hawaiian governing entity will not be able to “deny to any person within its jurisdiction **the equal protection** of its laws or deprive any person of liberty or property without due process of law;”.

Accordingly, the Native Hawaiian governing entity could not accord special protection to the rights of those Native Hawaiians eligible under the Hawaiian Homes Commission Act to an assignment of land under the authority of that Act, without arguably violating the equal protection rights of other Native Hawaiian citizens of the Native Hawaiian governing entity. A provision of the Native Hawaiian governing entity’s organic governing documents protecting such rights – affirmed by the United States in the certification process – could afford protection for the rights of Native Hawaiians who are eligible to receive an assignment of land under the authority of the Hawaiian Homes Commission Act.

Claims; Applicability of Certain Federal Laws

1. Amendment to Indian Civil Rights Act Section (section 10(c)).

[(c) Indian Civil Rights Act of 1968.-The Council and the subsequent governing entity recognized under this Act shall be an Indian tribe, as defined in section 201 of the Indian Civil Rights Act of 1968 (25 U.S.C. 1301) for purposes of sections 201 through 203 of that Act (25 U.S.C. 1301-1303).]

Rationale: This section is proposed for deletion and for inclusion of language in the organic governing documents of the Native Hawaiian governing entity that makes clear that the protections of the Indian Civil Rights Act apply to the citizens of the Native Hawaiian governing entity, in order to remove the internal conflict or ambiguity that is generated by section 10(d)(2) which provides that the terms “Indian” and “Indian tribe”

as used in Federal statutes or regulations in force prior to the United States' recognition of the Native Hawaiian governing entity shall not apply to the Native Hawaiian governing entity or its members. Because the Indian Civil Rights Act is one such statute, if the provision in this Act that deems the Native Hawaiian governing entity to be "an Indian tribe" for purposes of the Indian Civil Rights Act is not removed, the two provisions [section 10(d)(2) and section 10(c)] are arguably in conflict with one another or at a minimum give rise to an ambiguity when seeking to harmonize the two provisions.

This conflict is proposed to be addressed by the inclusion of clarifying language in the organic government documents of the Native Hawaiian governing entity that the civil rights to be protected by the Native Hawaiian governing entity also include those rights protected under the Indian Civil Rights Act. Section 10(d)(2) is set forth below:

"(2) Applicability of other terms.-In Federal statutes or regulations in force prior to the United States' recognition of the Native Hawaiian governing entity, the terms "Indian" and "Native American", and references to Indian tribes, bands, nations, pueblos, villages, or other organized groups or communities, shall not apply to the Native Hawaiian governing entity or its members, unless the Federal statute or regulation expressly applies to Native Hawaiians or the Native Hawaiian governing entity."

Findings, Purpose, Definitions, Formation of the Roll

1. Amendment to Finding 7 (section 2(7)).

(7) approximately 8,039 [6,800] Native Hawaiian families reside on the Hawaiian Home Lands, and approximately 38,811 [18,000] Native Hawaiians who are eligible to reside on the Hawaiian Home Lands are on a waiting list to receive assignments of Hawaiian Home Lands;

Rationale: These are updated figures supplied by the Department of Hawaiian Home Lands in the fall of 2009 which represent the Department's records of the number of people residing on the homelands and the number of people on the Department's waiting list.

2. Amendment to Finding 12 (section 2(12)).

(12) through the [Sovereign Council of Hawaiian Homelands Assembly] Native Hawaiian homestead associations, Native Hawaiian civic associations, charitable trusts established by the Native Hawaiian ali'i, nonprofit native service providers and other community associations, the Native Hawaiian people have actively maintained native traditions and customary usages throughout the Native Hawaiian community and the Federal and State courts have continuously recognized the right of the Native Hawaiian people to engage in certain customary practices and usages on public lands;

Rationale: The reference to the Sovereign Council of Hawaiian Homelands Assembly is proposed for deletion and in its place the the words "Native Hawaiian homestead associations" are proposed for inclusion so that all Native Hawaiian homestead associations are included.

3. Amendment to Finding 13 (section 2(13)).

(13) on November 23, 1993, Public Law 103-150 (107 Stat. 1510) (commonly known as the "Apology Resolution") was enacted into law, extending an apology on behalf of the United States to the [native] Native Hawaiian descendants of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii [people of Hawaii] for the United States' role in the overthrow of the Kingdom of Hawaii;

Rationale: The Apology Resolution specifically provides that the apology of the United States is being extended to the Native Hawaiian descendants of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii. The Apology Resolution *does not* employ the words “native Hawaiian people of Hawaii” as the people to whom the apology is being extended.

4. Amendment to Finding 16(B) (section 2(16)(B)).

(B) there is clear continuity between the aboriginal, indigenous, native people of Hawaii [native citizens of the Kingdom of Hawaii] and their successors, the Native Hawaiian people today;

Rationale: To apply the definition used in the Act of “aboriginal, indigenous, native people” of Hawaii, and to take into account that the Act is premised upon the continuity between the aboriginal, indigenous, native people of Hawaii and the Native Hawaiian people today, *not* just the continuity between the native citizens of the Kingdom of Hawaii and the Native Hawaiian people of today – consistent with the definition of “Qualified Native Hawaiian Constituent” contained in the substitute amendment to S. 1011.

5. Amendment to subsections of Section 4. United States Policy and Purpose (section 4(3)(B)).

(B) other sources of authority under the Constitution for legislation on behalf of the indigenous, native people[s] of the United States, including Native Hawaiians, include but are not limited to the Property, Treaty, and Supremacy Clauses, War Powers, and the Fourteenth Amendment, and Congress hereby relies on those powers in enacting this legislation; and

Rationale: The inclusion of the word “indigenous” tracks the term as defined in the Definitions section of this Act, as there is no definition of the term “native peoples” and the deletion of the plural is intended to address the consistently-expressed objection of the State Department to the use of the term “peoples” given the meaning associated with the term under international law, which is not intended to be applied in this Act.

6. Amendment to Definition 10 (section 3 (10)).

(10) Native Hawaiian [membership] Organization.-The term "Native Hawaiian [Membership] Organization" means an organization that-

(A) serves and represents the interests of Native Hawaiians, has as a primary and stated purpose the provision of services to Native Hawaiians, and has expertise in Native Hawaiian affairs;

(B) has leaders who are elected democratically, or selected through traditional Native leadership practices, by members of the Native Hawaiian community;

(C) advances the cause of Native Hawaiians culturally, socially, economically, or politically; and

[(D) is a membership organization or association; and]

(E) has an accurate and reliable list of Native Hawaiian members.

Rationale: The term "Native Hawaiian Organization" has been employed in a range of Federal statutes to mean an organization that serves and represents the interests of Native Hawaiians. The inclusion of the word "membership" would *exclude* from this definition (and the application of the definition in meeting the criteria for "Qualified Native Hawaiian Constituent") such significant Native Hawaiian organizations including Alu Like, Inc., the Native Hawaiian trusts such as the Queen Lili'uokalani Trust, the Queen Lili'uokalani Children's Center, Queen Emma Trust, the Bishop Museum Trust, the Lunalilo Trust and Home, Native Hawaiian charter schools, non-profit Native Hawaiian organizations that are certified as such by the Small Business Administration, and Papa Ola Lokahi, the Native Hawaiian organization that administers the funding for the Native Hawaiian health care systems under the Native Hawaiian Health Care Improvement Act.

7. Amendment to Definition 12 (section 3(12)).

(12) Qualified [native Hawaiian] Native Hawaiian Constituent.-For the purposes of establishing the roll authorized under section 8, and prior to the recognition by the United States of the Native Hawaiian governing entity, the term "Qualified Native Hawaiian Constituent" means an individual who the Commission determines has satisfied the following criteria and who makes a written statement certifying that he or she-

(A) is-

(i) an individual who is 1 of the indigenous, native people of Hawaii and who is a direct lineal descendant of the aboriginal, indigenous, native people who-

(I)resided in the islands that now comprise the State of Hawaii on or before January 1, 1893; and

[(II)] occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii; or

(II) who resided in the islands that now comprise the State of Hawaii and occupied and exercised sovereignty in the area that now constitutes the State of Hawaii prior to 1778;
or

(ii) an individual who is 1 of the indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act, 1920 (42 Stat. 108, chapter 42), or a direct lineal descendant of that individual;

Rationale: The inclusion of the standard definition of “Native Hawaiian” that has been employed in every Federal statute enacted into law since the 1970's for the benefit of Native Hawaiians will make clear that it is *not* the intent of the Congress to exclude those Native Hawaiians whom the Congress has deemed eligible to participate in Federal programs and services from the right to participate in the reorganization of the Native Hawaiian government.

8. Amendment to subsections of the Definition of “Qualified Native Hawaiian Constituent” (sections 3(12)(viii) and (ix)).

(viii) Has been a member since September 30, 2009, of one or more [at least 1] Native Hawaiian [Membership] Organizations.

[(ix) Has been a member since September 30, 2009, of at least 2 Native Hawaiian [Membership] Organizations.]

Rationale: These are conforming amendments to assure that Native Hawaiians who can demonstrate their close social and economic ties to the Native Hawaiian community through their participation in a Native Hawaiian organization are not excluded from these subsections merely because the Native Hawaiian organizations in which they actively participate are not “membership” organizations. In addition, the two criteria are proposed to combined into one criteria.

9. Amendment to the Formation of the Roll (section 8(c)(1)(B)).

(B) Formation of roll.-Each individual claiming to be a qualified Native Hawaiian constituent shall submit to the Commission documentation in the form established by

the Commission that is sufficient to enable the Commission to determine whether the individual meets the definition set forth in section 3; provided that –

(i) an individual presenting evidence that he or she satisfies the definition in Section 2 of Public Law 103-150 shall be presumed to meet the requirement of section 3(12)(A)(i), except that,

(ii) by satisfying such definition, such individual shall not be deemed to be eligible to qualify for or participate in any program authorized by the Hawaiian Homes Commission Act (42 Stat.108, chapter 42) for which the individual is not otherwise eligible."

Rationale: The proposed amendments would assure that the Commission has the authority to determine that the lineal descendants of those aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawaii and who occupied and exercised sovereignty in the area that now constitutes the State of Hawaii prior to 1778 qualify under the definitions of "Qualified Native Hawaiian Constituent", but further provides that the authorization for the Commission's determination *does not* provide authority for an individual to qualify for or participate in any program authorized by the Hawaiian Homes Commission Act, if that individual is not otherwise eligible to participate in the Act's programs.

Conforming Amendments

1. Conforming Amendment to Commission Membership Section (section 8(b)(2)(A)(ii)).

(ii) Consideration. – In making an appointment under clause (i), the Secretary may take into consideration a recommendation made by any Native Hawaiian [Membership] Organization.

Rationale: Proposed for deletion is the word "membership" to make clear that the Commission may take into consideration the recommendation of any bona fide Native Hawaiian organization, not just those organizations that have a membership governance structure. Such organizations could include for instance: Alu Like, Inc., the Native Hawaiian trusts such as the Queen Lili'uokalani Trust, the Queen Lili'uokalani Children's Center, Queen Emma Trust, the Bishop Museum Trust, the Lunalilo Trust and Home, Native Hawaiian charter schools, non-profit Native Hawaiian organizations that are certified as such by the Small Business Administration, and Papa Ola Lokahi,

the Native Hawaiian organization that administers the funding for the Native Hawaiian health care systems under the Native Hawaiian Health Care Improvement Act.

2. Conforming Change to Consultation Requirement for Commission (section 8(c)(1)(D)).

(D) Consultation.-In making determinations that each individual proposed for inclusion on the roll of qualified Native Hawaiian constituents meets the definition of qualified Native Hawaiian constituent in section 3, the Commission may consult with bona fide Native Hawaiian [Membership] Organizations, agencies of the State of Hawaii including but not limited to the Department of Hawaiian Home Lands, the Office of Hawaiian Affairs, and the State Department of Health, and other entities with expertise and experience in the determination of Native Hawaiian ancestry and lineal descendency.

Rationale: Deletion of the word “membership” to make clear that the Commission may consult with any Native Hawaiian organization, not just those organizations that have a membership governance structure. Such organizations could include for instance: Alu Like, Inc., the Native Hawaiian trusts such as the Queen Lili’uokalani Trust, the Queen Lili’uokalani Children’s Center, Queen Emma Trust, the Bishop Museum Trust, the Lunalilo Trust and Home, Native Hawaiian charter schools, non-profit Native Hawaiian organizations that are certified as such by the Small Business Administration, and Papa Ola Lokahi, the Native Hawaiian organization that administers the funding for the Native Hawaiian health care systems under the Native Hawaiian Health Care Improvement Act.

3. Conforming Amendment to the Activities authorized for the Interim Governing Council (section 8(c)(1)(I)(cc)).

(cc) the proposed civil rights and protection of the rights of the citizens of the Native Hawaiian governing entity and all persons affected by the exercise of governmental powers and authorities of the Native Hawaiian governing entity, including the rights protected under the Indian Civil Rights Act of 1968;

Rationale: The proposal is to delete the reference in section 10 (Applicability of Certain Federal Laws) to the Indian Civil Rights Act of 1968 and to include the reference to the Act in the formulation of the organic governing documents of the Native Hawaiian governing entity.

The section proposed for deletion is:

“(c) Indian Civil Rights Act of 1968. - The Council and the subsequent governing entity recognized under this Act shall be an Indian tribe, as defined in section 201 of the Indian Civil Rights Act of 1968 (25 U.S.C. 1301) for purposes of sections 201 through 203 of that Act (25 U.S.C. 1301-1303).”

A later section of the substitute amendment provides that: “In Federal statutes or regulations in force prior to the United States recognition of the Native Hawaiian governing entity, the terms “Indian” and “Native American” and references to Indian tribes, bands, nations, pueblos, villages, or other organized groups or communities, **shall not apply to the Native Hawaiian governing entity or its members**, unless the Federal statute or regulation expressly applies to Native Hawaiians or the Native Hawaiian governing entity.”

Thus there is an internal conflict in the substitute amendment between the two provisions, which can be resolved by making clear that the rights protected under the Indian Civil Rights Act will be part of the organic governing documents of the Native Hawaiian governing entity, and that subsection (c) is **not** in conflict with the section addressing the applicability of other Federal statutes.

4. Conforming Amendment to Certification Section (section (4)(A)(vi)).

The Secretary shall certify that the organic governing documents:

(vi) provide for the protection of the civil rights of the citizens of the Native Hawaiian governing entity and all persons affected by the exercise of governmental powers and authorities by the Native Hawaiian governing entity[;], including the rights protected under the Indian Civil Rights Act of 1968;

Rationale: Because Section 10(d)(2) [Applicability of Certain Federal Laws] of the Act provides that the terms “Indian” and “Indian tribes” used in Federal statutes or regulations that are in force prior to the United States’ recognition of the Native Hawaiian governing entity do not apply to the Native Hawaiian governing entity, and because the Indian Civil Rights Act of 1968 is one such statute, there is an internal conflict between the two sections of the Act. Deleting section 10 (c) which provides that the Native Hawaiian governing entity shall be an “Indian tribe” for purposes of the Indian Civil Rights Act, and inserting the application of the Indian Civil Rights Act in the organic governing documents is a means of retaining the application of the Act without conflicting with section 10(d)(2).