111TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
111–412

NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT OF 2009

FEBRUARY 22, 2010.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. RAHALL, from the Committee on Natural Resources, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 2314]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 2314) to express the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process for the recognition by the United States of the Native Hawaiian governing entity, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 2314 is to express the policy of the United States regarding the United States' relationship with Native Hawaiians and to provide a process for the recognition by the United States of a Native Hawaiian governing entity.

BACKGROUND AND NEED FOR LEGISLATION

H.R. 2314 would authorize a process leading to the reorganization and recognition of a Native Hawaiian governing entity. A Native Hawaiian government will not be recognized immediately upon enactment of this measure. Instead, a process is established that requires the Secretary of the Interior to certify that the organic governing documents of a Native Hawaiian government are con-

sistent with federal law and with the political and legal relationship between the United States and the indigenous people of the United States. Upon such certification, H.R. 2314 authorizes the federal recognition of a Native Hawaiian government.

Historical background

Native Hawaiians are the indigenous, native people of Hawaii, with whom the United States has a trust relationship. Congress has repeatedly recognized the unique status of Native Hawaiians since 1921. The long-standing policy of the United States has been to protect and advance Native Hawaiian interests.

Beginning in the 106th Congress, the House Committee on Natural Resources and the Senate Committee on Indian Affairs have held extensive hearings on the reorganization of a Native Hawaiian government. Both Committees have filed reports [1] setting forth a detailed cultural and political history of the aboriginal people living in what is now the State of Hawaii. Rather than repeat this detailed history, those documents are hereby incorporated into this report. Reference should be made to those reports, in particular S. Rept. No. 108–85, for a detailed account of the history of the Native Hawaiian people and the islands, including their relations with the "outside" world: the pre-contact period and the initial encounter with Captain James Cook of the British Royal Navy in 1778; the consolidation of power under King Kamehameha in the early 19th Century, followed by several decades of increasing contact and influence of foreigners and foreign powers; relations with the United States, with which the Kingdom executed a series of treaties and conventions between 1826 and 1887; the overthrow of the Kingdom and Queen Lili'uokalani in 1893; the formation of the Republic of Hawaii and its annexation by the United States five years later; the establishment of the Territory of Hawaii in 1900; and, finally, the admission of the State of Hawaii into the Union in 1959. The following short summary of information places the issue in context.

The Great Mahele

In the middle of the 19th century, influential non-Hawaiians sought to limit the absolute power of the Hawaiian king and to implement property law so that they could accumulate and control land. As a result of foreign pressure, in 1840, King Kamehameha III promulgated a new constitution. Soon thereafter, the King authorized the Great Mahele ("division"), in which the King conveyed about 1.5 million acres to the konohiki, or main chiefs; he reserved about 1 million acres for himself and his royal successors ("Crown Lands"), and allocated about 1.5 million acres to the government of Hawaii ("Government Lands"). All lands remained subject to the rights of native tenants. In 1850, after the division was accomplished, an act was passed permitting non-natives to purchase land in fee simple. Upon annexation in 1898, the remaining Government Lands and Crown Lands were ceded by the Republic of Hawaii to the United States. These lands came to be known as the "Ceded Lands."

[1] See "Legislative History" below.

Republic of Hawaii

On January 17, 1893, a group of American citizens and others, who acted with the support of the United States Minister John Stephens and a contingent of United States Marines, overthrew the government of the Kingdom of Hawaii. Supporters of this revolutionary movement organized the Republic of Hawaii. Notwithstanding strong opposition from within the Native Hawaiian community, officials of the Republic of Hawaii succeeded in having the Hawaiian Islands annexed by the United States. In 1898, Congress adopted the Joint Resolution for Annexing the Hawaiian Islands to the United States.[2] Soon thereafter, Congress passed the Hawaii Organic Act[3] establishing a government for the newly created Territory of Hawaii.

Hawaiian Homes Commission Act

By 1920, many were concluding that Native Hawaiians were a "dying race" and that if they were to be saved from extinction, they must have the means of regaining their connection to the land.[4] Then Secretary of the Interior Franklin Lane attributed the declining population to health problems like those faced by the "Indian in the United States" and concluded the Nation must provide similar remedies.[5] In an effort to "rehabilitate" Native Hawaiians by returning them to the land, the Congress enacted the Hawaiian Homes Commission Act.[6] The Act sets aside approximately 203,500 acres of the Ceded Lands for Native Hawaiian homesteading.[7] Congress compared the Act to "previous enactments granting Indians . . . special privileges in obtaining and using the public lands."[8]

In hearings on the matter, Secretary of the Interior Franklin Lane explained the trust relationship on which the statute was premised: "One thing that impressed me . . . was the fact that the natives of the islands who are our wards, I should say, and for whom in a sense we are trustees, are falling off rapidly in numbers and many of them are in poverty."[9]

Secretary Lane explicitly analogized the relationship between the United States and Native Hawaiians to the trust relationship between the United States and other Native Americans, explaining that programs for Native Hawaiians are fully supported by history and "an extension of the same idea" that supports such programs for other Indians.[10]

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[2] 30 Stat. 750 (July 7, 1898).
[3] 31 Stat. 141 (April 30, 1900).
[4] H. Rept. 66–839 (1920).
[5] Id., at 5.
[6] 42 Stat. 108 (July 9, 1921).
[7] Id., § 203.
[8] H. Rept. 66–839, at 11 (1920).
[9] H. Rept. 66–839, at 4 (1920).
[10] Hearings before the Committee on the Territories, House of Representatives, 66th Cong., 2d Sess., on Proposed Amendments to the Organic Act of the Territory of Hawaii, February 3, 4, 5, 7, and 10, 1920, at 129–30 (rejecting the argument that legislation aimed at "this distinct race" would be unconstitutional, Secretary Lane stated that "[w]e have got the right to set aside these lands for this particular body of people, because I think the history of the islands will justify that before any tribunal in the world," and citing a Solicitor's opinion that stated that the setting aside of public lands within the Territory of Hawaii would not be unconstitutional, relying in part on the congressionally authorized allotment to Indians as precedent for such an action); see, also, id. at 127 (colloquy between Secretary Lane and Representative Monahan, analogizing status of Native Hawaiians to that of Indians) and at 167–70 (colloquy between Representative Curry, Chair of the Committee, and Representatives Dowell, and Humphreys, mak-

Continued

The 1921 Act authorizes a Native Hawaiian to lease Ceded Lands for a term of ninety-nine years, provided that the lessee occupy and use or cultivate the tract within one year after the lease is entered into. A restriction on alienation, like those imposed on Indian lands subject to allotment, was included in the lease. Also like the general allotment acts affecting Indians,[11] the leases were intended to encourage rural homesteading so that Native Hawaiians would return to rural subsistence or commercial farming and ranching. In 1923, the Congress amended the Act to permit one-half acre residence lots and to provide for home construction loans.[12] Thereafter, the demand for residential lots far exceeded the demand for agricultural or pastoral lots.[13]

Hawaii Admission Act

Congress again recognized the unique status of Native Hawaiians when Hawaii gained Statehood in 1959. Upon its admission into the Union of States, the Ceded Lands were conveyed to the State of Hawaii.[14] Section 5(f) of the Hawaii Admission Act requires that the Ceded Lands and the revenues derived therefrom be held by the State of Hawaii as a public trust for five purposes—one of which was for the betterment of Native Hawaiians.[15] Moreover, as a condition of admission into the Union, the Hawaii Admission Act[16] also required the new State to assume management of the homesteading program established under the Hawaiian Homes Commission Act[17] and to adopt that Federal law, as amended, as a provision of its Constitution.

These explicit delegations of federal authority to be assumed by the new State were not discretionary or permissive. Instead, the United States retained responsibility for the administration and amendment of the Hawaiian Homes Commission Act, and continues to oversee the use of Ceded Lands and the income or proceeds therefrom. Sections 4 and 5 of the Hawaii Admission Act clearly contemplate a continuing Federal role.

The federal government retains the right to enforce the trust responsibility for Native Hawaiians.[18] In fact, the Hawaii Admission Act provided that the use of the Ceded Lands and revenues for any use other than the five specified uses shall constitute a breach of trust for which suit may be brought by the United States.'[19] Likewise, sections 204 and 223 of the Hawaiian Homes Commission Act require the Secretary of the Interior to consent to certain exchanges of trust land and reserves to Congress the right to amend that Act. Federal and state courts have repeatedly concluded that the United States retains the authority to bring an enforcement action against the State of Hawaii for breach of the trust responsibilities set forth in section 5 of the Hawaii Admission Act.[20] These re-

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ing the same analogy and rejecting the objection that "we have no government or tribe to deal with here").

[11] 25 U.S.C. §§ 334, 348, 349, 354, e.g.

[12] 42 Stat. 1222, § 3 (Feb. 3, 1923).

[13] Office of State Planning, Office of the Governor, State of Hawaii, Pt. 1, Report on Federal Breaches of the Hawaiian Home Lands Trust, 4–6 (1992).

[14] Section 5 of Public Law 86–3, (March 18, 1959) (the "Hawaii Admission Act").

[15] Id., § 5(f); Haw. Const. Art. XII, § 4.

[16] Id., § 4.

[17] 42 Stat. 108 (July 9, 1921).

[18] Id.

[19] Public Law 86–3, § 4.

[20] See e.g., *Han* v. *United States*, 45 F. 3d 333 (9th Cir. 1995).

sponsibilities are also enforceable by the Native Hawaiian beneficiaries themselves.[21]

1978 Amendments to the Hawaii Constitution

In 1978, the Hawaii State constitution was amended to further the special relationship with Native Hawaiians and to protect Native Hawaiian sub-sistence rights, hunting and gathering rights, their right to self-determination and self-governance, and their attempts to preserve their culture and language. The 1978 amendments established a quasi-independent state agency, the Office of Hawaiian Affairs. Pursuant to the 1978 amendments, the Office was to be governed by nine trustees who are Native Hawaiian and who are to be elected by Native Hawaiians.

Hawaii's adoption of amendments to the State constitution to fulfill the special relationship with Native Hawaiians is consistent with the practice of other states that have established special relationships with the native inhabitants of their areas. Fourteen states have extended recognition to Indian tribes that are not recognized by the federal government, and thirty-two states have established commissions and offices to address matters of policy affecting their indigenous citizenry.

Apology resolution

One hundred years after the illegal overthrow of the Native Hawaiian government, a resolution extending an apology on behalf of the United States to Native Hawaiians for the illegal overthrow of the Native Hawaiian government and calling for a reconciliation of the relationship between the United States and Native Hawaiians was enacted into law (Apology Resolution).[22] The Apology Resolution acknowledges that the overthrow of the Kingdom of Hawaii occurred with the active participation of agents and citizens of the United States and further acknowledges that the Native Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people over their national lands to the United States, either through their government or through a plebiscite or referendum.

Reconciliation report

In response to the Apology Resolution, the Departments of the Interior and Justice initiated a process of reconciliation in 1999 by conducting meetings in Native Hawaiian communities on each of the principal islands in the State of Hawaii. At each meeting, Native Hawaiians identified what they believe are the necessary elements of a process to reconcile the relationship between the United States and the Native Hawaiian people. Although the two departments made several recommendations, the principal recommendation was "that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal

[21] See, e.g., *Keaukaha-Panaewa Community Ass'n* v. *Hawaiian Homes Comm'n*, 739 F. 2d 1467 (9th Cir. 1984) (finding that Section 5(f) of the Hawaii Admission Act, which set aside lands held in trust under the Hawaiian Homes Commission Act, creates a federal right in the Native Hawaiian beneficiaries enforceable prospectively against the State of Hawaii under 42 U.S.C. 1983); *Napeahi* v. *Paty*, 921 F.2d 897 (9th Cir. 1990), *cert. denied*, 502 U.S. 901 (1991) (same, concerning lands which were assets of the land trust created under Section5(f) of the Hawaii Admission Act but which were not Hawaiian Home lands.).

[22] Public Law 103–150.

law, as do Native American tribes . . . [and] [t]o safeguard and enhance Native Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body."[23]

Rice v. Cayetano

On February 23, 2000, the United States Supreme Court issued a ruling in the case of Rice v. Cayetano.[24] The Supreme Court held that the provision of state law requiring those voting for the office of Trustee of the Office of Hawaiian Affairs to be Native Hawaiian violated the Fifteenth Amendment of the United States Constitution. The Court in Rice specifically stated that it need not decide whether Native Hawaiians have the same status as Indian tribes because of its finding that the provision violated the Fifteenth Amendment. The Court found that the Office of Hawaiian Affairs is an agency of the State of Hawaii, funded in part by appropriations made by the state legislature. Therefore, the election for the trustees of the Office of Hawaiian Affairs must be open to all citizens of the State of Hawaii who are otherwise eligible to vote in statewide elections. Accordingly, all Hawaiian citizens may vote for the candidates for the trustee positions and may themselves be candidates for these offices.[25] Consequently, Native Hawaiians have been divested of the mechanism that, since 1978, has enabled them to give expression to their rights as indigenous, native people of the United States to self-determination and self-governance. H.R. 2314 would address these developments by extending the federal policy of self-determination and self-governance to Native Hawaiians.

Congress' plenary authority

For more than 200 years, the United States Congress, the Executive Branch, and the United States Supreme Court have recognized certain legal rights and protections for America's indigenous peoples. Since the founding of the United States, Congress has exercised constitutional authority over indigenous affairs and has undertaken an enhanced duty of care for America's indigenous peoples. This has been done in recognition of the sovereignty possessed by the native people—a sovereignty which pre-existed the formation of the United States. Congress' constitutional authority is premised upon the status of the indigenous people as the original inhabitants of this nation who occupied and exercised dominion and control over the lands which eventually became the United States.

The United States has long recognized the existence of a political relationship with the indigenous people of the United States. The United States has recognized that Native Americans—American Indians, Alaska Natives, and Native Hawaiians—are entitled to different rights and considerations. Congress has enacted laws to

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[23] From Mauka to Makai: The River of Justice Must Flow Freely, Report on the Reconciliation Process between the Federal Government and Native Hawaiians Prepared by the Department of the Interior and the Department of Justice, p. 17, October 23, 2000.

[24] 528 U.S. 495 (2000).

[25] See, *Arakaki* v. *State of Hawaii*, 314 F.3d 1091 (9th Cir. 2002) (invalidating on similar grounds the requirement that candidates for that office to be Native Hawaiian).

give expression to the respective legal rights and responsibilities of the federal government and the native people. As the United States Supreme Court stated in Morton v. Mancari,[26] the United States relationship with Native Americans is "political rather than racial in nature"[27] and legislation providing a preference for members of such groups does not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution where "the special treatment can be tied rationally to the fulfillment of Congress' unique obligations toward the Indians[.]"[28]

The United States Supreme Court has so often addressed the scope of Congress' constitutional authority to address the conditions of native people that it is now well-established. The Court has characterized the authority of Congress as "plenary"[29] or as "plenary and exclusive."[30] In addition, the Court has frequently stated its views regarding the broad scope of Congressional authority with respect to native people[31] and other "dependent sovereign[s] that [are] not . . . state[s]."[32] The report filed with S. 344 during the 108th Congress sets forth a more extensive discussion of the constitutional sources of Congressional authority to legislate on matters relating to Native Americans, including the reorganization of a Native Hawaiian governing entity.[33]

United States v. Lara

In April, 2004, the United States Supreme Court issued its decision in United States v. Lara.[34] The Court expressed the view that Congress enjoys "'plenary' *grants* of power"[35] to legislate over matters relating to Indians and clarified its views of the sources of that power.[36]

The Lara decision is pertinent to H.R. 2314 because in finding that Congress has the authority to modify the contours of *inherent* Indian tribal sovereignty, the Court compared, and justified, the particular modifications in sovereignty involved in that case with some examples of "adjustments to the autonomous status of *other such dependent entities,*" including the Territory of Hawaii, the Northern Mariana Islands, the Philippines and Puerto Rico.[37] The Court acknowledged that Congress' plenary power over Indian affairs, which stems not only from the Indian Commerce Clause but also the Treaty Clause and the "necessary concomitants of nationality,"[38] includes the power to recognize, terminate and restore the

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[26] 417 U.S. 535 (1974).
[27] Id. at 553, n. 24.
[28] Id. at 554.
[29] Id.
[30] United States v. Lara, 541 U.S. 193 (2004).
[31] *Delaware Tribal Business Council* v. *Weeks*, 430 U.S. 73 (1977); *United States* v. *Sioux Nation*, 448 U.S. 371 (1980).
[32] Lara, 541 U.S. at 203.
[33] See, S. Rept. 108–85, at 22–36.
[34] 541 U.S. 193 (2004).
[35] Id., at 202; emphasis added.
[36] The Court noted that the power of Congress in Indian affairs derives not only from the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, but rests also "upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely powers that [the U.S. Supreme] Court has described as 'necessary concomitants of nationality.'" Id. at 200–201.
[37] Id., at 203–4; emphasis added.
[38] Id., at 201–2.

tribal status of Indian tribes.[39] In short, the plenary grants of power described by the Court should be more than broad enough to encompass the provisions of H.R. 2314.

Legislative history

In the 106th Congress, H.R. 4904 was introduced by Representative Abercrombie. A companion bill, S. 2899, was introduced in the Senate. Between August 28 and September 1, 2000, the Committee on Resources held a 5-day joint hearing with the Senate Committee on Indian Affairs on H.R. 4904 and S. 2899, in Honolulu, Hawaii, and received extensive oral and written testimony from witnesses. See S. Hrg. 106–753 and the addendum printed in S. Hrg. 106–1105. A hearing on S. 2899 was held in Washington D.C. on September 14, 2000. See S. Hrg. 106–795. H.R. 4904 was reported by the Committee on Resources with its accompanying report, H. Rept. 106–897, and passed the House of Representatives by voice vote on September 26, 2000. S. 2899 was reported from the Committee on Indian Affairs with its accompanying report, S. Rept. 106–424.

In the 107th Congress, H.R. 617 was introduced by Representative Abercrombie. It was ordered reported by the Committee on Resources with its accompanying report, H. Rept. 107–140. Companion bills, S. 746 and S. 1783, were introduced in the Senate. S. 746 (with its accompanying report S. Rept. 107–66) was ordered reported by the Committee on Indian Affairs.

In the 108th Congress, H.R. 665 and H.R. 4282 were introduced by Representative Abercrombie. H.R. 4282 was introduced to reflect negotiations between the State of Hawaii, the Hawaii Congressional delegation and the Administration. It was ordered reported by the Committee on Resources with its accompanying report, H. Rept. 108–742. A companion bill, S. 344, was introduced in the Senate. A hearing was held by the Committee on Indian Affairs on February 25, 2003, and it was ordered reported with its accompanying report, S. Rept. 108–85.

In the 109th Congress, H.R. 309 was introduced by Representative Abercrombie. S. 147 was introduced in the Senate, and after a hearing held on March 1, 2005, the Committee on Indian Affairs ordered the bill reported from the Committee on Indian Affairs with its accompanying report, S. Rept. 109–68. After S. 147 was reported from the Committee, S. 3064 was introduced to address concerns raised by the Department of Justice. It was placed directly on the Senate Legislative Calendar. On June 8, 2006, S. 147 failed to garner the necessary vote to invoke cloture.

In the 110th Congress, H.R. 505 was introduced by Representative Abercrombie and referred to the Committee on Natural Resources. It was ordered reported by the Committee by voice vote with no amendments on May 2, 2007, with its accompanying report H. Rept. 110–389. On October 24, 2007, H.R. 505 passed the House of Representatives on a vote of 261 yeas and 153 nays. It was

[39] Id. See, also, the Court's observations in *U.S.* v. *John*, 437 U.S. 634 (1978): "[I]n view of the elaborate history, recounted above, of relations between the Mississippi Choctaws and the United States, we do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaws than with the affairs of other Indian groups. Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them." Id., at 652–3.

placed on the Senate Legislative Calendar. A companion bill, S. 310, was introduced in the Senate. After a hearing, S. 310 was ordered reported with its accompanying report, S. Rept. 110–260.

COMMITTEE ACTION

H.R. 2314 was introduced on May 7, 2009 by Representative Abercrombie (D–HI). The bill was referred to the Committee on Natural Resources. On June 11, 2009, the Natural Resources Committee held a hearing on the bill. On December 16, 2009, the Committee met to consider the bill. A motion to postpone consideration of H.R. 2314 until February 24, 2010 made by Representative Hastings (R–WA) was not agreed to by a roll call vote of 9 yeas and 25 nays, as follows:

COMMITTEE ON NATURAL RESOURCES
U.S. House of Representatives
111th Congress

Date: 12/16/2009 Convened: Adjourned:

Meeting on: **HR 2314 - A motion to postpone consideration of HR 2314 until February 24, 2010 made by Mr. Hastings was NOT AGREED TO by a roll call vote of 9 yeas and 25 nays.**

Recorded Vote # 5

MEMBERS	Yea	Nay	Pres	MEMBERS	Yea	Nay	Pres
Mr. Rahall, WV		✔		*Mr. Wittman, VA*			
Mr. Hastings, WA		✔		Mr. Boren, OK		✔	
Mr. Miller, CA		✔		*Mr. Broun, GA*	✔		
Mr. Young, AK				Mr. Sablan, MP		✔	
Mr. Markey, MA				*Mr. Fleming, LA*	✔		
Mr. Gallegly, CA				Mr. Heinrich, NM		✔	
Mr. Kildee, MI		✔		*Mr. Coffman, CO*	✔		
Mr. Duncan, TN				Mr. Hinchey, NY		✔	
Mr. DeFazio, OR				*Mr. Chaffetz, UT*			
Mr. Flake, AZ				Mrs. Christensen, VI			
Mr. Faleomavaega, AS		✔		*Mrs. Lummis, WY*			
Mr. Brown, SC	✔			Ms. DeGette, CO		✔	
Mr. Abercrombie, HI		✔		*Mr. McClintock, CA*	✔		
Mrs. McMorris Rodgers, WA				Mr. Kind, WI		✔	
Mr. Pallone, NJ				*Mr. Cassidy, LA*	✔		
Mr. Gohmert, TX	✔			Mrs. Capps, CA		✔	
Mrs. Napolitano, CA		✔		Mr. Inslee, WA		✔	
Mr. Bishop, UT				Mr. Baca, CA		✔	
Mr. Holt, NJ		✔		Ms. Herseth Sandlin, SD		✔	
Mr. Shuster, PA				Mr. Sarbanes, MD		✔	
Mr. Grijalva, AZ		✔		Ms. Shea-Porter, NH		✔	
Mr. Lamborn, CO	✔			Ms. Tsongas, MA		✔	
Mrs. Bordallo, GU				Mr. Kratovil, Jr., MD		✔	
Mr. Smith, NE	✔			Mr. Pierluisi, PR		✔	
Mr. Costa, CA		✔					
				Total	9	25	

Markups - 1/3 to meet (16), 25 to report
February 18, 2010 (10:17am)

A motion to reconsider the vote was made by Representative Hastings. A motion to table the motion to reconsider made by Representative Miller (D–CA) was agreed to by a roll call vote of 23 yeas and 8 nays, as follows:

COMMITTEE ON NATURAL RESOURCES
U.S. House of Representatives
111th Congress

Date: 12/16/2009 Convened: Adjourned:

Meeting on: **HR 2314 - A motion to table the motion to reconsider made by Mr. Miller was AGREED TO by a roll call vote of 23 yeas and 8 nays.**

Recorded Vote # 6

MEMBERS	Yea	Nay	Pres	MEMBERS	Yea	Nay	Pres
Mr. Rahall, WV	✔			*Mr. Wittman, VA*			
Mr. Hastings, WA		✔		Mr. Boren, OK	✔		
Mr. Miller, CA	✔			*Mr. Broun, GA*		✔	
Mr. Young, AK				Mr. Sablan, MP	✔		
Mr. Markey, MA				*Mr. Fleming, LA*		✔	
Mr. Gallegly, CA				Mr. Heinrich, NM	✔		
Mr. Kildee, MI				*Mr. Coffman, CO*		✔	
Mr. Duncan, TN				Mr. Hinchey, NY	✔		
Mr. DeFazio, OR				*Mr. Chaffetz, UT*			
Mr. Flake, AZ				Mrs. Christensen, VI			
Mr. Faleomavaega, AS	✔			*Mrs. Lummis, WY*			
Mr. Brown, SC				Ms. DeGette, CO	✔		
Mr. Abercrombie, HI	✔			*Mr. McClintock, CA*		✔	
Mrs. McMorris Rodgers, WA				Mr. Kind, WI			
Mr. Pallone, NJ				*Mr. Cassidy, LA*		✔	
Mr. Gohmert, TX	✔			Mrs. Capps, CA	✔		
Mrs. Napolitano, CA	✔			Mr. Inslee, WA	✔		
Mr. Bishop, UT				Mr. Baca, CA	✔		
Mr. Holt, NJ	✔			Ms. Herseth Sandlin, SD	✔		
Mr. Shuster, PA				Mr. Sarbanes, MD	✔		
Mr. Grijalva, AZ	✔			Ms. Shea-Porter, NH	✔		
Mr. Lamborn, CO		✔		Ms. Tsongas, MA	✔		
Mrs. Bordallo, GU				Mr. Kratovil, Jr., MD	✔		
Mr. Smith, NE		✔		Mr. Pierluisi, PR	✔		
Mr. Costa, CA	✔						
				Total	23	8	

Markups - 1/3 to meet (16), 25 to report
February 18, 2010 (10:17am)

An amendment offered by Representative Lamborn (R–CO) to require approval of the organic governing documents of the Native Hawaiian Governing Entity by a referendum of all Hawaiian citizens was not agreed to by voice vote. An amendment offered by Representative Broun (R–GA) to grant the Supreme Court of the United States original and exclusive jurisdiction over any Constitutional challenges to any section or provision of the underlying Act was not agreed to by voice vote. An amendment offered by Representative Hastings (R–WA) to eliminate the gaming prohibition clause was not agreed to by voice vote. The bill was then favorably reported to the House of Representatives by a roll call vote of 26 yeas and 13 nays, as follows:

COMMITTEE ON NATURAL RESOURCES
U.S. House of Representatives
111th Congress

Date: 12/16/2009 Convened: Adjourned:

Meeting on: **HR 2314 -Favorably reported to the House of Representatives by a roll call vote of 26 yeas and 13 nays.**

Recorded Vote # 7

MEMBERS	Yea	Nay	Pres	MEMBERS	Yea	Nay	Pres
Mr. Rahall, WV	✔			*Mr. Wittman, VA*		✔	
Mr. Hastings, WA		✔		Mr. Boren, OK	✔		
Mr. Miller, CA	✔			*Mr. Broun, GA*		✔	
Mr. Young, AK				Mr. Sablan, MP	✔		
Mr. Markey, MA	✔			*Mr. Fleming, LA*		✔	
Mr. Gallegly, CA		✔		Mr. Heinrich, NM	✔		
Mr. Kildee, MI	✔			*Mr. Coffman, CO*		✔	
Mr. Duncan, TN				Mr. Hinchey, NY			
Mr. DeFazio, OR	✔			*Mr. Chaffetz, UT*			
Mr. Flake, AZ				Mrs. Christensen, VI	✔		
Mr. Faleomavaega, AS	✔			*Mrs. Lummis, WY*		✔	
Mr. Brown, SC				Ms. DeGette, CO			
Mr. Abercrombie, HI	✔			*Mr. McClintock, CA*		✔	
Mrs. McMorris Rodgers, WA		✔		Mr. Kind, WI	✔		
Mr. Pallone, NJ	✔			*Mr. Cassidy, LA*			
Mr. Gohmert, TX		✔		Mrs. Capps, CA	✔		
Mrs. Napolitano, CA	✔			Mr. Inslee, WA	✔		
Mr. Bishop, UT				Mr. Baca, CA	✔		
Mr. Holt, NJ	✔			Ms. Herseth Sandlin, SD	✔		
Mr. Shuster, PA		✔		Mr. Sarbanes, MD	✔		
Mr. Grijalva, AZ	✔			Ms. Shea-Porter, NH	✔		
Mr. Lamborn, CO		✔		Ms. Tsongas, MA	✔		
Mrs. Bordallo, GU				Mr. Kratovil, Jr., MD	✔		
Mr. Smith, NE		✔		Mr. Pierluisi, PR	✔		
Mr. Costa, CA	✔						
				Total	26	13	

Markups - 1/3 to meet (16), 25 to report
February 18, 2010 (10:18am)

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 sets forth the short title of the bill as the "Native Hawaiian Government Reorganization Act of 2009."

Section 2. Findings

Section 2 sets forth findings, including findings regarding the history of Native Hawaiians; their interactions with the United States; Congress' authority over Native Hawaiians; Congress' past declaration of the political and legal relationship with Native Hawaiians; and Native Hawaiians expression of their rights to self-determination, self-governance, and economic self-sufficiency.

Section 3. Definitions

Section 3 sets forth definitions of terms used in this Act, including definitions for the term "Native Hawaiian," which is defined as an individual who is one of the indigenous, native people of Hawaii and who is a direct lineal descendant of the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawaii on or before January 1, 1893 and who occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii, or an individual who is one of the indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act or a direct lineal descendant of that individual.

Section 4. United States policy and purpose

Section 4 reaffirms policies of the United States, including that Native Hawaiians are indigenous, native people; the United States has a political and legal relationship with Native Hawaiians; that Congress has the authority under Article I, section 8, clause 3 of the United States Constitution to enact legislation to address the conditions of Native Hawaiians and has done so in more than 150 federal laws; that Native Hawaiians have an inherent right to autonomy in their internal affairs, an inherent right of self-determination and self-governance, the right to reorganize a Native Hawaiian governing entity, and the right to become economically self-sufficient; and that the United States shall continue to engage in the process of reconciliation and political relations with Native Hawaiians.

This section also sets forth the purpose of this Act, which is to provide a process for the reorganization of a Native Hawaiian governing entity and the reaffirmation of the political and legal relationship between the United States and the Native Hawaiian governing entity.

Section 5. United States Office for Native Hawaiian Relations

Section 5 establishes the United States Office for Native Hawaiian Relations (Office) in the Office of the Secretary of the Department of the Interior and sets forth the duties of the Office. These duties include continuing the process of reconciliation with Native Hawaiians; effectuating and coordinating the political and legal relationship between the Native Hawaiian governing entity and the United States; consulting with the Native Hawaiian governing en-

tity before taking any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands; consulting with the Interagency Coordinating Group, other federal agencies, and the State of Hawaii on policies, practices, and proposed actions affecting Native Hawaiian resources, rights, or lands; and preparing and submitting an annual report containing certain information to specified Committees of Congress and providing recommendations for any necessary changes to federal law or regulations. This section does not apply to the Department of Defense but the Secretary of Defense may designate one or more officials as liaison to the Office.

Section 6. Native Hawaiian Interagency Coordinating Group

Section 6 establishes the Native Hawaiian Interagency Coordinating Group, which is to be composed of officials from each federal agency that administers Native Hawaiian programs, establishes or implements policies that affect Native Hawaiians, or whose actions may significantly or uniquely impact Native Hawaiian resources, rights, or lands, and the Office for Native Hawaiian Relations. The specific duties of the Interagency Coordinating Group are set forth but, generally, the Group will coordinate federal programs and policies affecting Native Hawaiians. This section does not apply to the Department of Defense but the Secretary of Defense may designate one or more officials as liaison to the Interagency Coordinating Group.

Section 7. Process for the reorganization of the Native Hawaiian governing entity and the reaffirmation of the special political and legal relationship between the United States and the Native Hawaiian governing entity

Section 7 addresses the process for the reorganization of the Native Hawaiian governing entity and provides for the reaffirmation of the political and legal relationship between the United States and the Native Hawaiian governing entity.

This section recognizes the right of Native Hawaiians to reorganize a single Native Hawaiian governing entity to provide for their common welfare and to adopt appropriate organic governing documents. A Commission is established to prepare and maintain a roll of the adult members of the Native Hawaiian community who elect to participate in the reorganization of the Native Hawaiian governing entity and to certify that the adult members of the Native Hawaiian community, who have submitted sufficient documentation and proposed for inclusion on the roll, meet the definition of "Native Hawaiian."

Commission members will be appointed by the Secretary of the Interior and must have not less than 10 years of experience in the study and determination of Native Hawaiian genealogy and an ability to read and translate into English documents written in the Hawaiian language. Duties of the Commission include preparing and maintaining a roll of the adult members of the Native Hawaiian community and certifying to the Secretary that each of the adult members proposed for inclusion on the roll meet the definition of "Native Hawaiian" set forth in this Act. The certified roll shall be published in the Federal Register. An appeal mechanism may be established by the Secretary for any person whose name is

excluded from the roll but who claims to meet the "Native Hawaiian" definition.

The adult members listed on the certified roll may develop criteria for candidates to serve on the Native Hawaiian Interim Governing Council, determine the structure of the Council, and elect members to service on the Council. This section sets forth the powers and activities of the Council, which include developing organic governing documents for the Native Hawaiian governing entity and holding elections to ratify such organic documents.

Following ratification, the organic governing documents shall be submitted to the Secretary. The Secretary must certify that the organic documents contain certain information, including civil rights protection for 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.

Upon certification of the organic governing documents and the election of officers of the Native Hawaiian governing entity, the political and legal relationship between the United States and the Native Hawaiian governing entity will automatically be reaffirmed and federal recognition shall be extended to the Native Hawaiian governing entity.

Section 8. Reaffirmation of delegation of Federal authority; negotiations; claims

Section 8 reaffirms the delegation of authority to the State of Hawaii to address the conditions of Native Hawaiians. It provides that upon reaffirmation of the political and legal relationship between the United States and the Native Hawaiian governing entity, the United States and the State of Hawaii may negotiate with the Native Hawaiian governing entity on certain issues. Negotiation topics include the transfer of lands, natural resources, and other assets, and the protection of existing rights related to such lands or resources; the exercise of governmental authority over any transferred lands, natural resources, and other assets, including land use; the exercise of civil and criminal jurisdiction; the delegation of governmental powers and authorities to the Native Hawaiian governing entity by the United States and the State of Hawaii; any residual responsibilities of the United States and the State of Hawaii; and grievances regarding assertions of historical wrongs committed against Native Hawaiians by the United States or by the State of Hawaii. Upon agreement of any matters, the parties may submit proposed amendments to federal or state law to the Congress or the State of Hawaii, respectively. Any governmental power or authority of the Native Hawaiian governing entity which is currently exercised by the state or federal governments shall only be exercised by the Native Hawaiian governing entity as agreed to in negotiations under this section.

Additionally, this section provides that this Act does not create a cause of action against the United States or any other entity or person; alter existing law regarding obligations on the part of the United States or the State of Hawaii with regard to Native Hawaiians or any Native Hawaiian entity; create obligations that did not exist in any source of federal law prior to the date of enactment of this Act; or establish authority for the recognition of more than one Native Hawaiian governing entity. In addition, nothing in this

Act creates any breach-of-trust actions, land claims, resource-protection or resource-management claims by or on behalf of Native Hawaiians or the Native Hawaiian governing entity and the United States retains its sovereign immunity from suit to any claim that exists prior to enactment of this Act which could be brought by Native Hawaiians or a Native Hawaiian governing entity. Any claims that may have already accrued and may be brought against the United States shall be rendered nonjusticiable.

The State of Hawaii also retains its sovereign immunity unless waived in accordance with state law. Finally, nothing in this Act may be construed as overriding section 5 of the Fourteenth Amendment or state sovereign immunity held under the Eleventh Amendment.

Section 9. Applicability of certain Federal laws

This section prohibits the Native Hawaiian governing entity and Native Hawaiians from conducting gaming as a matter of claimed inherent authority or under any federal law, including the Indian Gaming Regulatory Act in the State of Hawaii or within any other State or Territory of the United States.

The Secretary may not take land into trust for Native Hawaiians or on behalf of the Native Hawaiian governing entity. It makes clear that the Indian Trade and Intercourse Act does not, has never, and will not apply after enactment to lands or lands transfers present, past, or future, in the State of Hawaii. If a Court construes otherwise, any land transfers before the date of enactment of this Act shall be deemed to have been made in accordance with the Indian Trade and Intercourse Act.

Only one Native Hawaiian governing entity may be recognized pursuant to this Act. Any other groups shall not be eligible for the Federal Acknowledgment Process.

Nothing in this Act alters the civil or criminal jurisdiction of the United States or the State of Hawaii over lands and persons within the State of Hawaii, unless otherwise negotiated pursuant to section 8.

Native Hawaiians shall not be eligible for programs and services available to Indians unless otherwise provided under applicable federal law. The Native Hawaiian governing entity and its citizens shall be eligible for Native Hawaiian programs and services to the extent and in the manner provided by other applicable laws.

Section 10. Severability

The section provides that if any section or provision of this Act is found to be invalid, the remaining sections or provisions shall continue in full force and effect.

Section 11. Authorization of appropriations

This section authorizes such sums as necessary to carry out this Act.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

FEDERAL ADVISORY COMMITTEE STATEMENT

The functions of the proposed advisory committee authorized in the bill are not currently being nor could they be performed by one or more agencies, an advisory committee already in existence or by enlarging the mandate of an existing advisory committee.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

2. Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is to express the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process for the recognition by the United States of the Native Hawaiian governing entity.

4. Congressional Budget Office Cost Estimate. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

H.R. 2314—Native Hawaiian Government Reorganization Act of 2009

H.R. 2314 would establish a process for a Native Hawaiian government to be constituted and recognized by the federal government. CBO estimates that implementing this legislation would cost about $1 million annually in fiscal years 2010–2012 and less than $500,000 in each subsequent year, assuming the availability of appropriated funds. Enacting the bill would not affect direct spending or revenues.

The bill would establish the United States Office for Native Hawaiian Relations within the Department of the Interior (DOI) to consult and coordinate the relationship with the Native Hawaiian governing entity. Based on information from DOI, CBO expects that the office would require up to three full-time personnel. H.R. 2314 also would establish the Native Hawaiian Interagency Coordinating Group, consisting of officials from interested agencies. Finally, the bill would create a nine-member commission responsible for creating and certifying a roll of adult Native Hawaiians. Based

on information from DOI, CBO expects that this commission would need three years and three full-time staff to complete its work.

H.R. 2314 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments. Enacting this legislation could lead to the creation of a new government unit to represent Native Hawaiians. The transfer of any land or other assets, including land now controlled by the state of Hawaii, would be the subject of future negotiations.

The CBO staff contact for this estimate is Jeff LaFave. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

EARMARK STATEMENT

H.R. 2314 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW

If enacted, this bill would make no changes in existing law.

DISSENTING VIEWS

H.R. 2314 is described by its proponents as legislation to recognize Native Hawaiians for the purpose of organizing a single governing entity to represent them on a government-to-government basis with the State of Hawaii and the Federal government. This is a circuitous means of saying that H.R. 2314 creates a Native Hawaiian Indian tribe, one that could enroll up to 400,000 members (and more after it is recognized). This would be one of the largest tribes in the United States, accordingly with the largest expectation of taxpayer dollars during a time of historic federal deficits and debt.

But there is a key difference between the Hawaiian "tribe" recognized under H.R. 2314 and the tribes duly recognized through Treaty or Act of Congress: the former is not a tribe within the meaning of the Indian Commerce Clause of the Constitution (Article I, Section 8) because it does not share the historical and political relations of Indian tribes with Congress. While proponents often take pains to stress they do not propose to recognize a "tribe," but a "governing entity," the plain language of H.R. 2314 and the Akaka Substitute (discussed below) do extend tribal recognition.

Proponents argue that Congress possesses broad, plenary authority to recognize Indian tribes. They point to a number of Acts passed over the years, including some 160 federal programs benefiting Native Hawaiians because of their status as Native Hawaiians, as evidence that Congress recognizes Native Hawaiians' special status. The fact that federal, racially-based benefits have already been passed is hardly a valid argument on the merits for extending recognition to a Native Hawaiian tribe. This is like saying that the Democrats' $787 billion "stimulus" is evidence that more federal spending is warranted.

More importantly, the Supreme Court considered a case, Rice v. Cayetano, related to this controversy. The lawsuit involved a Hawaii state law that limited to Native Hawaiians the eligibility to vote in elections for trustees of the Office of Hawaiian Affairs (OHA). In a 7–2 decision the Supreme Court held that such a restriction is race-based and therefore prohibited by the 15th Amendment to the Constitution. Though the case did not involve a Native Hawaiian entity specifically recognized by Congress, the majority opinion noted that such a proposition "would raise questions of considerable moment and difficulty. It is a matter of some dispute . . . whether Congress may treat the native Hawaiians as it does the Indian tribes."

H.R. 2314 purports to recognize a Native Hawaiian tribe, but because this would exceed constitutional limits on who Congress can recognize as an Indian, it seeks to establish a race-based government. For this reason, a majority of the U.S. Commission on Civil Rights, which was established pursuant to the Civil Rights Act of

1957, recommended "against passage of the Native Hawaiian Government Reorganization Act . . . or any other legislation that would discriminate on the basis of race or national origin and further subdivide the American people into discrete subgroups accorded varying degrees of privilege."

In the June 11, 2009, hearing on this bill, the testimony of Civil Rights Commission Gail Heriot is instructive. She describes why granting tribal sovereignty to Native Hawaiians does not fit with the islands' history:

> The 1840 Constitution of Hawaii established a bicameral parliament whose members were multi-racial. By 1893 [when Hawaii's ruling monarchy was overthrown], ethnic Hawaiians were a minority of the population. Anyone who was born on Hawaiian soil or who swore allegiance to the Queen was considered a subject of the Queen and hence "Hawaiian," regardless of race. This was no kinship-based tribe. It is thus difficult to argue that ethnic Hawaiians in particular have a right to sovereignty that was violated by the overthrow.
>
> More important, all of this has been water under the bridge at least since 1959 when Hawaii was made a State . . . On June 27, 1959, 94.3% of Hawaiian voters cast ballots in favor of statehood.

Despite this overwhelming support for Statehood and one set of laws governing all Hawaiians, H.R. 2314 proposes to create a two-tiered system of governance in Hawaii based on one's race. Worse, it is impossible to say precisely how inclusive the entity will be even with respect to Native people of varying degrees of Hawaiian ancestry: under H.R. 2314 the governing entity may discard the carefully-crafted membership rules after it receives federal recognition, and construct an entirely new set of membership rules.

The Akaka Substitute

In the Committee markup of H.R. 2314, Hawaii Congressman Neil Abercrombie filed an amendment in the nature of a substitute that was informally called the "Akaka Substitute" after the Senator from Hawaii who oversaw its development. The Akaka Substitute was drafted in secret by Hawaiian advocates and the Obama Administration, to the exclusion of the participation of Hawaii's Governor and Attorney General. Sprung upon the Committee just prior to the markup as a kind of Midnight Surprise, the Akaka Substitute would have made a bad bill even worse.

As introduced, H.R. 2314 provides that matters such as transferring lands and preempting Federal and State civil, criminal, and tax jurisdiction, must be subject to negotiation with, and the concurrence of, the State of Hawaii and the U.S. Congress. The Akaka Substitute would have short-circuited this reasonable public process by immediately endowing the Hawaiian tribe with the inherent governing powers possessed by other recognized tribes, and preempting State civil and tax authority without the State's consent.

The Akaka Substitute was not offered by Mr. Abercrombie in a gesture of bipartisanship for which the Gentleman is to be commended. It must be noted that it was withdrawn after a letter was

submitted to the Committee by the Hawaii Attorney General on his behalf and Hawaii's Governor. While the Governor and Attorney General had been "strong advocates and supports of [Native Hawaiian Recognition legislation] for years", they strongly opposed the Akaka Substitute because it would "completely change the nature of the Native Hawaiian governing entity." In their words:

> These changes, taken together, change the bill from one where the status quo and the relations between the United States, the State of Hawaii, and the Native Hawaiian governing entity can be changed only *after* negotiations and *after* passage of implementing legislation, to a model in which the status quo *immediately* changes, pursuant to an Indian law model." (Emphasis in the original). (Letter to Chairman Rahall and Ranking Member Hastings, December 15, 2009).

If those secretly writing the Akaka Substitute seek to keep the Governor and Attorney General in the dark, then what exactly is the goal? Unfortunately, we will probably know only when H.R. 2314 is brought to the Floor, presumably with another substitute amendment drafted behind closed doors. This manner of legislating is not worthy of the grave subject matter at hand, regardless of one's position on it.

In the end, if H.R. 2314 passes, the days of this entity will be numbered. It may take years and millions of dollars in billable hours, but the Supreme Court will perform the job that Congress is duty-bound to undertake today: reject a race-based governing entity in violation of the Constitution. But how many dollars will be spent, and how many racial and political scars will be left on Hawaii's citizens when this controversy is concluded?

H.R. 2314 should be soundly rejected.

DOC HASTINGS.

Attachment: Letter from State of Hawaii Attorney General Bennett.

LINDA LINGLE
GOVERNOR

MARK J. BENNETT
ATTORNEY GENERAL

LISA M. GINOZA
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
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December 15, 2009

The Honorable Nick J. Rahall, II, Chair
The Honorable Doc Hastings, Ranking Minority Member
House Committee on Natural Resources
1324 Longworth House Office Building
Washington, D.C. 20515

Re: H.R. 2314 - Native Hawaiian Government Reorganization Act

Dear Chair Rahall and Ranking Minority Member Hastings:

As Hawaii's Attorney General and chief legal officer, I write to express the strong opposition of Hawaii Governor Linda Lingle and myself to many of the proposed changes (in a "markup") to the Native Hawaiian Government Reorganization Act, H.R. 2314, also known as the "Akaka Bill." It is my understanding that H.R. 2314 will be marked-up in the House Committee on Natural Resources on Wednesday, December 16, 2009. We were only provided copies of the proposed changes today by the Committee's Minority Staff (yesterday we received an informal copy of two sections of the new bill). None of the changes were drafted with our input or knowledge. As noted, we strongly oppose a number of the changes, but note we have not had the opportunity to carefully study and analyze many of the changes in the new bill.

Governor Lingle and I have been strong advocates and supporters of the Akaka Bill for seven years. We have worked with the Hawaii Congressional Delegation to craft a bill that had strong bipartisan support. The version of the Akaka Bill which we support is the current version of H.R. 2314.

The changes under consideration will completely change the nature of the Native Hawaiian governing entity. The current version of the bill states (in section 8(b)(3)):

> **"Any governmental authority or power to be exercised by the Native Hawaiian governing entity which is currently exercised by the State or Federal Governments shall be exercised by the Native Hawaiian governing entity only as agreed to in negotiations** pursuant to section 8(b)(1) of this Act and **beginning on the date on which legislation to implement such agreement has been enacted by the United States Congress, when applicable, and by the State of Hawaii, when applicable.** This includes any required modifications to the Hawaii State Constitution in accordance with the Hawaii Revised Statutes." (Emphasis added).

Section 9(b)(3) of the proposed new bill will change the above-quoted language to the following wholly different language:

> **"The Native Hawaiian governing entity shall be vested with the inherent powers and privileges of self-government of a native government under existing law,** except as set forth in section 10(a).[1] **Said powers and privileges may be modified by agreement between the Native Hawaiian governing entity, the United States, and the State** pursuant to paragraph (1), subject to the limit described by section 10(a). Unless so agreed, nothing in this Act shall preempt Federal or State authority over Native Hawaiians or their property under existing law or authorize the State to tax or regulate the Native Hawaiian governing entity." (Emphasis added).

The following language in the current bill (in section 9(e)) will be removed in its entirety:

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[1] Section 10(a) of the new bill relates only to gambling.

> "(e) Jurisdiction-**Nothing in this Act alters the civil or criminal jurisdiction of the United States or the State of Hawaii over lands and persons within the State of Hawaii. The status quo of Federal and State jurisdiction can change only as a result of further legislation, if any, enacted after the conclusion, in relevant part, of the negotiation process established in section 8(b).**" (Emphasis added).

The new bill will also provide in section 10(c) that "The [Native Hawaiian Interim Governing] Council and **the subsequent governing entity recognized under this Act shall be an Indian tribe** [pursuant to certain sections of the Indian Civil Rights Act of 1968]…." (Emphasis added).

These changes, taken together, change the bill from one where the status quo and the relations between the United States, the State of Hawaii, and the Native Hawaiian governing entity can be changed only after negotiations and after passage of implementing legislation, to a model in which the status quo immediately changes, pursuant to an Indian law model.

The magnitude and potential impact of such changes cannot be overstated. The present version of the bill preserves all the rights and interests of the State of Hawaii until the Congress and the State Legislature can evaluate the result of negotiations. The proposed revisions make immediate changes to the rights and interests of the State of Hawaii. These changes may immediately incorporate into the law governing native Hawaiians a vast body of Indian law, much of which is unsuited for the State of Hawaii, and none of which (to our knowledge) has been evaluated for its impact on Hawaii.[2]

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[2] That the bill does not preempt State authority over Native Hawaiians or their property does not change the fact that many "inherent" powers and privileges of "self-government" are immediately transferred to the Native Hawaiian governing entity. Moreover, the fact that the Native Hawaiian governing entity may be considered an Indian tribe only for some purposes, increases rather than decreases the uncertainty created by the new bill.

These changes are extensive, have been not part of any bill which we have supported, and have an enormous potential to negatively impact Hawaii and its citizens. We note, moreover, that there has been no public hearing reflecting this new model in at least the last seven years. The views of Hawaii's citizens, native Hawaiian and non-native Hawaiian alike, have not been heard (certainly not recently) with regard to this new model.

The implications of forever changing the relationship between native Hawaiians and the State of Hawaii, and simply deciding native Hawaiians are an Indian tribe (for at least some purposes), are potentially enormous.[3] We oppose these changes. And, we do so mindful of the fact that Governor Lingle and I have been among the strongest supporters of the Akaka Bill for seven years.

We also note that the new bill has a new term—"Qualified Native Hawaiian Constituent"—which is defined in six pages of the bill. There have never been public hearings on this new term and its significance, and we have not had the opportunity to study it in detail.[4]

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[3] Some may argue that many (or even most) rights of an Indian tribe are tied to tribal land. However, even if this is so (and there is litigation throughout the country on this issue), the impact of the new bill on Hawaii, and the meaning of "the inherent powers and privileges of self-government of a native government under existing laws," in the Hawaii context is, at best, unclear. It appears, however, that the language could incorporate those rights in 25 U.S.C. § 476 of the Indian Reorganization Act, which are themselves substantial, and which have never applied in Hawaii. And, the new bill will certainly engender new disputes over the status of much of the land in Hawaii.

[4] Part of the definition requires a person to meet two or more of ten newly set forth criteria, none of which, to our knowledge, has been discussed with the native Hawaiian community.

We also oppose other changes to the bill, including removing the current language in section 8(c)(3), which sets forth the State of Hawaii's complete retention of its sovereign immunity (unless waived in accord with State law), and which makes clear that nothing in the bill shall be construed to constitute an override of Hawaii's Eleventh Amendment sovereign immunity pursuant to section 5 of the Fourteenth Amendment.

We continue to believe the Akaka Bill in its present form is important and needed legislation that has strong bipartisan support. We also believe that the changes we oppose will affect and erode the basis for such support.

We respectfully ask that the changes to the Akaka Bill which we oppose not be made. We also respectfully ask the Committee to hold a public hearing, with testimony, as the new bill is so different from the current version. We are available to discuss the Akaka Bill and this letter at your convenience, and thank you in advance for your consideration of this letter.

Very truly yours,

Mark J. Bennett
Attorney General
State of Hawaii

cc: Members of the House Committee on Natural Resources
The Honorable Neil Abercrombie
The Honorable Mazie K. Hirono
The Honorable Daniel K. Akaka
The Honorable Daniel K. Inouye
Governor Linda Lingle

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