

**United States Senate Committee on Indian Affairs  
Chairman Byron Dorgan  
August 6, 2009 – 2:15 pm  
Dirksen Senate Office Building**

**Testimony of  
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President & Chief Executive Officer  
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**S. 1011 - Native Hawaiian Government Reorganization Act of 2009**

Aloha Chairman Dorgan, Vice Chairman Barrasso, Senator Inouye, Senator Akaka and other Members of the Committee. Thank you for your invitation to provide testimony on behalf of the Council for Native Hawaiian Advancement regarding the Native Hawaiian Government Reorganization Act of 2009, S.1011.

My name is Robin Puanani Danner. I am native Hawaiian and a resident of Hawaiian Home Lands, the trust lands created under the enactment of the Hawaiian Homes Commission Act of 1920.

I submit this testimony in my capacity as President of the Council, founded to unify Native Hawaiian groups and organizations to promote the cultural, economic and community development of Native Hawaiians. Similar in purpose to the Alaska Federation of Natives and the National Congress of American Indians, CNHA achieves its mission through a strong policy voice, capacity building and connecting resources to the challenges in our communities. Today, CNHA has a membership of 102 Native Hawaiian organizations. We are governed by a 15-member board of directors elected by our member organizations.

I would like to express CNHA's **strong support** for S. 1011 **with revisions**. As President of CNHA, I have worked for many years with extraordinary Native leaders and others to improve the opportunities and resolve challenges faced by Native Hawaiians. This legislation, first introduced in 2000 is perhaps the single most important piece of public policy to advance solutions from within our communities and in partnership with the federal government and state of Hawaii.

The Native Hawaiian Government Reorganization Act is important legislation that recognizes the economic, cultural, and political rights and interests of Native Hawaiians. The Act is intended to facilitate the Native Hawaiian people's efforts to reorganize our native government to promote our best interests. This legislation has been before Congress for almost 10 years, and it is particularly appropriate that Congress enact this legislation in 2009, the 50<sup>th</sup> anniversary of Hawaii's statehood.

Since Hawaii's overthrow as an independent nation and subsequent annexation to the United States, our Native Hawaiian people have sought justice. While Queen Liliuokalani, our last reigning monarch prior to the overthrow, was alive, she maintained our claims and passed the torch to Prince Jonah Kuhio Kalaniana'ole. One of his most significant achievements was the enactment of the Hawaiian Homes Commission Act of 1920 (HHCA). Modeled after the 1906 Native Allotment Act for Alaska Natives and American Indians enacted by Congress, the HHCA established trust lands for residential, agricultural and pastoral homesteading by native Hawaiians.

Yet the HHCA was only a partial solution. A Native Hawaiian government, recognized by the federal government and accountable to Native Hawaiians, represents the full measure of the federal policy of self-determination and self-governance, which is achieved in S. 1011. The state agencies, Department of Hawaiian Home Lands and Office of Hawaiian Affairs, are vital partners yet cannot fulfill this role. As the Supreme Court pointed out in *Rice v. Cayetano*, these agencies are state government agencies founded in state law. Passage of S. 1011 authorizes a

process by which the Native Hawaiian people are able to reorganize a Native Hawaiian government to speak on our behalf as native people and to work in a government to government relationship with the state of Hawaii and our federal government.

### **Background**

I would like to include in the record, background information relevant to S. 1011 and the historical context which makes clear that passage of S. 1011 is exactly the next step in the journey of Native Hawaiians with the federal government.

### **Original People of the Hawaiian Islands**

The Hawaiian Islands form the apex of the Polynesian triangle that extends from New Zealand (Aotearoa) to Easter Island (Rapa Nui) and north to Hawaii. The Polynesian triangle includes eight distinct cultures: Hawaiian, Maori, Rapa Nui, Marquesan, Samoan, Tahitian, Tongan and Tokelauan.

Our people settled the Hawaiian Islands approximately 2,000 years ago, arriving from the South Pacific through extraordinary feats of navigation. Our early Native Hawaiian ancestors established a complex society based on agriculture and aquaculture. By farming taro, breadfruit and sweet potatoes, raising animals, and using fish traps and harvesting seafood, our people had a self-sufficient, sustainable economy. As Congress recognized, the Native Hawaiian people “lived in a highly organized, self-sufficient, subsistence social system based on a communal land tenure with a sophisticated language, culture, and religion.” Apology Resolution, Public Law No. 103-150, 107 Stat. 510.

We had a complex system of ali'i (chiefs), laws that governed the conduct of our people and all of us had an interest in the land. Hawaii's State Motto, *Ua mau ke`ea o ka`aina i ka pono* ~ “The life of the land is perpetuated in righteousness” reflects the respect that all people of the State of Hawaii have for the cultural traditions and values of Hawaii's indigenous people. In the same sense as other Native Americans are native to the other 49 states, Native Hawaiians are the “aboriginal, indigenous, native people of Hawaii.”

### **The Kingdom of Hawaii**

By 1810, King Kamehameha had consolidated the rule of the Hawaiian Islands into the Kingdom of Hawaii. Many foreign nations recognized and promulgated treaties with the Kingdom of Hawaii as an independent sovereign nation, and the United States entered into treaties with the Kingdom of Hawaii in 1826, 1849, 1875, and 1887. In the 1849 Treaty with the Kingdom of Hawaii, the United States pledged “perpetual peace and amity.”

In 1840, the Kingdom of Hawaii became a constitutional monarchy, which confirmed that the lands of Hawaii belonged to the chiefs and the Native Hawaiian people subject to the management of the land by the King. From 1845 to 1848, the Hawaiian lands were divided between the ali'i (1,690,000 acres), King Kamehameha III (984,000 acres), and the Government (1,523,000 acres). It was recognized that the King held the Government lands in trust for benefit of the Native Hawaiian people.

## **The Overthrow of the Kingdom of Hawaii**

The first foreigners to come to Hawaii beginning in 1778 came as explorers and missionaries. The next generation began sugar and pineapple plantations. In 1892, when Queen Liliuokalani sought to restore the place of the Monarchy through a constitutional revision, foreign business interests organized against her. In 1893, armed with assistance of the U.S. government minister and the support of the U.S. naval forces, the American and European plantation owners overthrew the Kingdom of Hawaii in violation of the United States' treaties of friendship and commerce.

Queen Liliuokalani sought to avoid bloodshed and rather than rally armed forces, filed diplomatic protests with the United States. Although President Cleveland agreed that the U.S. forces had acted in violation of international law and called for the restoration of the Kingdom, the Provisional Government refused to yield, declaring itself the Republic of Hawaii. In 1898, the McKinley Administration accepted the annexation of Hawaii through a joint resolution of Congress, although the Native Hawaiian people sent petitions objecting to annexation.

The Kingdom of Hawaii's Crown lands and Government lands were transferred to the United States as the "ceded lands," by the Republic of Hawaii. The Hawaii Organic Act of 1900 formally made the Hawaiian Islands a territory of the United States and retained most of the laws created by the Kingdom of Hawaii, including ahupua'a tenant land rights, and the recognition of "Hawaiian tradition and custom". Ref: U.S. Department of the Interior and Justice Report: "From Mauka to Makai: The River of Justice Must Flow Freely," (2000), explaining Hawaii Organic Act, 31 Stat. 141, 56<sup>th</sup> Cong. 1<sup>st</sup> Sess. (April 30, 1900).

Queen Liliuokalani continued to seek justice for the Native Hawaiian people until her death in 1917. She never voluntarily relinquished her claims to sovereignty on behalf of the Native Hawaiian people. In addition, she actively continued to seek the return of the Crown lands for the Native Hawaiian people.

## **The Hawaiian Homes Commission Act**

Prince Jonah Kuhio Kalaniana'ole, the Kingdom of Hawaii's heir to the throne, participated in a rebellion against the Republic of Hawaii in 1895 and was jailed for a year. After his release, he travelled widely in Europe and served in the British Army in Africa, returning to Hawaii in 1901 to take up his duties as an advocate for our Native Hawaiian people. He was elected to Congress and served from 1903 until his death in 1922. One of his most singular achievements was the enactment of the Hawaiian Homes Commission Act of 1920, which set aside approximately 200,000 acres of the ceded lands for homesteading by native Hawaiians (½ or more Hawaiian blood).

Prior to the overthrow, our people were devastated by foreign diseases and our suffering increased after the overthrow. Our difficult situation was made plain in the hearings before Congress. Before the House Committee on Territories, Territorial Senator John Wise testified:

*The Hawaiian people are a farming people and fishermen, out-of-door people, and when they were frozen out of their lands and driven into the big cities they had to live in the cheapest places, the tenements. That is one of the big reasons the Hawaiian people are*

*dying. Now, the only way to save them, I contend, is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them. We are not only asking for justice in the matter of division of the lands, but we are asking that the great people of the United States should pause for one moment and, instead of giving all of your help to Europe, give some help to the Hawaiians and see if you can not rehabilitate this noble people.*

In the same hearings, Secretary of the Interior Lane acknowledged our Native Hawaiian people as a native people to whom the United States owed a trust responsibility:

*One thing that impressed me there 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.... [T]hey are a problem now and they ought to be cared for by being provided homes out of the public lands; but homes that they could not mortgage and could not sell.*

H.R. Doc. No. 839, 66<sup>th</sup> Cong., 2d Sess. at 4 (1920).

In enacting the HHCA, Congress expressed its intention to, among other things, exercise its constitutional Indian affairs power to provide for Native Hawaiians by analogizing the Act to “enactments granting Indians ... special privileges in obtaining and using the public lands.” H.R. Doc. No. 839.

As Queen Liliuokalani’s heir, Prince Jonah Kuhio Kalanianaʻole provides a continuous link between the Kingdom of Hawaii and our native Hawaiian people in 1920. As its legislative history makes clear, the HHCA is a statutory recognition of Native Hawaiians as a native people to whom the United States owes a special trust responsibility. In other words, Native Hawaiians are a recognized native people within the area protected by Congress’s constitutional authority to provide for the betterment of America’s native peoples.<sup>1</sup> The Hawaiian Home Lands have assisted our people to maintain distinctly native communities throughout Hawaii.

For example, residents of Hawaiian Home Lands are organized through native Hawaiian homestead associations across the state, which function like city councils maintaining community cohesiveness and safety, addressing community issues and preserving community values and traditions. The membership of these associations consists of individual members that elect leadership to implement programs and projects within the homestead community.

In addition, our Native Hawaiian people maintain distinctly native communities on the island of Niihau, where our people reside with little interference from outsiders, and on other native lands, some of which date back to the Kuleana Act of 1850, and have never been relinquished from native control and occupation.

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<sup>1</sup> In 1938, Congress reaffirmed these principles through the Kalapana Extension Act, which was enacted to provide access, homesteading privileges and fishing rights to native Hawaiians within the Hawaii National Park. Public Law No. 75-680, 52 Stat. 784 (1938). Between 1921 and 1959, Congress enacted 20 other statutes for the benefit of Native Hawaiians.

### **The State Admissions Act and Other Statutes**

The State Admissions Act transferred more than 1,125,000 acres of the Ceded lands (former Kingdom of Hawaii Crown and Government lands) from the United States to the new State of Hawaii. The income and proceeds from any sales of such lands are to be used for 5 purposes, including “the betterment of the conditions of native Hawaiians” as defined by the HHCA. Public Law No. 86-3, 73 Stat. 4. The State’s use of the Ceded lands for any purpose other than those specified in the Act would constitute a breach of trust, which the United States retained authority to enforce in the courts.

In addition, the Admissions Act transferred the responsibility for administering the HHCA lands from the territorial government to the state government as follows: “the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State ... subject to amendment or repeal only with the consent of the United States.” In this way, the Admissions Act reaffirms the HHCA recognition of the Native Hawaiian people as a native people to whom the United States owes a unique trust responsibility.

Since the mid-1970s, Congress has enacted numerous statutes to provide for the betterment of Native Hawaiians as part of or analogous to congressional programs for other Native American peoples. In total, Congress has enacted more than 160 statutes that address Native Hawaiian issues.

### **The Clinton Administration**

On November 23, 1993, President Clinton signed the Native Hawaiian Apology Resolution into law. The Apology Resolution:

- Recognizes the Native Hawaiian people as the aboriginal, indigenous, native people of Hawaii and acknowledges that our people have never ceded our claims to sovereignty or our desire for self-determination;
- Recognizes that the United States, in violation of several treaties, through its minister and naval forces, was an active participant in the overthrow of the Kingdom of Hawaii; and
- Apologizes for the United States’ role in the overthrow and the deprivation of Native Hawaiian rights; and
- Pledges the Nation to a course of reconciliation with the Native Hawaiian people.

The Apology Resolution was viewed by Native Hawaiians as a great step forward towards justice and reconciliation with the United States. The leadership of our congressional delegation on this important issue was and continues to be deeply appreciated.

In February 2000 in *Rice v. Cayetano*, 528 U.S. 495 (2000), the Supreme Court reviewed the state laws restricting voting for the Board of Trustees of the State Office of Hawaiian Affairs (OHA) to Native Hawaiians to determine whether they violated the 14<sup>th</sup> and 15<sup>th</sup> Amendments to the Constitution. The Supreme Court held that the state law voting restriction based upon Native Hawaiian ancestry was unconstitutional under the 15<sup>th</sup> Amendment’s prohibition against any race

based limit on the right to vote. The Supreme Court rejected an analogy to Native American tribal elections, which are conducted by tribes as native sovereigns, from the state sponsored elections for a state office within a state agency.

In the *Rice* case, the Justice Department argued that state legislation on behalf of Native Hawaiians is permissible under the 14<sup>th</sup> Amendment because it is consistent with Federal laws for the betterment of Native Hawaiians, reasoning:

*Congress does not extend benefits and services to Native Hawaiians because of their race but because of their unique status as the indigenous people of a once-sovereign nation as to whom the United States has a recognized trust responsibility.*

The Justice Department explained further that so long as Congress rationally concludes that a native people remain a “distinctly” native community, Congress has authority to provide for the betterment of such community. That is true whether the native community is within the original or the subsequently acquired territory of the United States. See *United States v. Sandoval*, 231 U.S. 45-46 (1913). The Court did not reach the 14<sup>th</sup> Amendment claim that state statutes enacted for the betterment of Native Hawaiians violates the equal protection clause as race based laws.<sup>2</sup>

In 1999, in furtherance of the Apology Resolution, the Clinton Administration sent a delegation from the Departments of the Interior and Justice to Hawaii on a fact finding mission to meet with Native Hawaiians on all the major islands in furtherance of reconciliation.<sup>3</sup> After many meetings with Native Hawaiian people, state officials and our congressional delegation, the Departments produced a report entitled: “From Mauka to Makai: The River of Justice Must Flow Freely,” (2000). Issued in September 2000, after due consideration of the Supreme Court’s decision in *Rice v. Cayetano*, the Mauka to Makai Report explains that:

*It is evident from the documentation, statements, and views received during the reconciliation process undertaken by Interior and Justice pursuant to Public Law 103-150 (1993) that the Native Hawaiian people continue to maintain a distinct community and certain governmental structures and they desire to increase their control over their own affairs and institutions. As a matter of justice and equity, the Departments believe the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes. For generations, the United States has recognized the rights and promoted the welfare of Native Hawaiians as an indigenous people within our Nation through legislation, administrative action, and policy statements. To safeguard and enhance Native Hawaiian self-determination over their lands, cultural resources, and internal affairs, Congress should enact further legislation to clarify Native Hawaiians’ political status and to create a*

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<sup>2</sup> In a concurring opinion, Justices Breyer and Souter cast doubt on the 1778-based lineal descendent rule as being too remote in time.

<sup>3</sup> The Island of Niihau remained closed to the U.S. officials, but Native Hawaiians from Niihau travelled to Kauai to meet with the officials and expressed their desire for more autonomy for Native Hawaiians and better education and health services.

*framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body.....  
Mauka to Makai, Recommendation 1.*

The Akaka bill, S. 1011, responds and fulfills this recommendation. At the September 14, 2000 hearing on the first version of the Akaka bill, the Departments of Justice and Interior both expressed their “general support” for the bill with the exception of uncertainty concerning a definition of “Native Hawaiian” based upon a 1778 date.

### **The Obama Administration**

In the Senate, President Obama was a co-sponsor of the Akaka bill and he voiced further support for the bill on the presidential campaign trail.

We call upon Attorney General Holder and Secretary Salazar to support the Native Hawaiian Government Reorganization Act and to help our Native Hawaiian people secure its enactment in this session of Congress.

### **S. 1011 - The Native Hawaiian Government Reorganization Act of 2009**

The Native Hawaiian Government Reorganization Act of 2009, S. 1011, does not create or newly establish federal recognition of the Native Hawaiian people - it reaffirms the status of Native Hawaiians as a recognized native people of the United States. Our people have been recognized as the aboriginal, indigenous, native people of Hawaii since the time of annexation:

- The Organic Act preserved the land tenure and other laws of the Kingdom of Hawaii;
- Through the HHCA, the Administration and Congress expressly recognized our Native Hawaiian people as a “native people” to whom the United States owed a trust responsibility;
- The Admissions Act reaffirmed the HHCA and its recognition of native Hawaiians and furthered that recognition through the preservation of the Ceded lands for the benefit of the native Hawaiian people, among other things; and
- Through more than 160 statutes, Congress has continued to provide for the betterment of the Native Hawaiian people.

The Akaka bill is a government reorganization bill, similar to the Indian Reorganization Act of 1934, 25 U.S.C. sec. 466-467. In summary, S. 1011 does the following:

- Defines the term “Native Hawaiian” based upon reference to the native citizens of the Kingdom of Hawaii at the time of the overthrow and their lineal descendants and also provides a definition based upon reference to the native Hawaiians eligible for HHCA lands and their descendants;
- Establishes its purpose to “provide a process for the reorganization of the single Native Hawaiian governing entity and the reaffirmation of the special political and legal

relationship between the United States and that Native Hawaiian governing entity for the purposes of a government-to-government relationship;

- Establishes the United States Office for Native Hawaiian Relations within the Department of the Interior and an Inter-agency working group to consult with the Native Hawaiian government on issues important to our people;
- Provides a process for reorganization of the Native Hawaiian Government and a process for establishing the initial roll of the Native Hawaiian community under the auspices of the Secretary of the Interior and provides for the adoption of a constitution and Native Hawaiian membership criteria by the Native Hawaiian government; and
- Has provisions concerning the federal, state and native government authority and claims against the United States and the state.

### **CNHA Comment on Definition**

As previously stated, CNHA strongly supports S. 1011 with revisions. We comment on the definition of Native Hawaiians for the benefit of the Committee and the Obama Administration.

### CNHA Supports Initial Definition of “Native Hawaiian” Because the Final Citizenship Rule Is to Be Determined by the Native Hawaiian Government

S. 1011 establishes an initial definition of “Native Hawaiian” for purposes of establishing a base roll. We believe that it is appropriate for the Department of the Interior to assist the Native Hawaiian community in this way because the United States has a direct trust responsibility to promote the welfare of the Native Hawaiian people. CNHA also believes that in the long run it is the right and duty of the Native Hawaiian people to take the next step and provide an ongoing rule for citizenship in the Native Hawaiian government.

CNHA understands that the lineal descent rule utilizing the 1778 date that Justices Breyer and Souter questioned in the *Rice* case would cause concern for the Justice Department. S. 1011 has improved on the state definition at issue in *Rice* by moving the timeline up by 115 years to 1893 in the first part of the definition and in the second part of the definition based upon the HHCA, the timeline is moved up by more than 140 years.

CNHA believes that the Akaka bill provisions that establish an initial definition of the term “Native Hawaiian” are constitutional and that is of the utmost importance. This definition must be based upon a solid legal foundation since it is one of the essential cornerstones of the Act. Indeed, it may be wise to bring forward the date of the HHCA definition by referring to those originally eligible, adding a reference to those now eligible, and including the lineal descendants of said individuals.

We note that Congress has used a base roll based upon lineal descent for Indian tribes. For example, The Modoc restoration act uses “lineal descendants” – 25 USC 861a(3):

*The Modoc Indian Tribe of Oklahoma shall consist of those Modoc Indians who are direct lineal descendants of those Modocs removed to Indian territory (now Oklahoma) in November 1873, and who did not return to Klamath, Oregon pursuant to the Act of March 9, 1909, as determined by the Secretary of the Interior, and the descendants of such Indians who otherwise meet the membership requirements adopted by the tribe.*

The date used for the Modocs, 1873, is more remote in time than the reference date of the overthrow of the Kingdom of Hawaii in 1893, yet Congress determined that it was appropriate because of the importance of the event in the life of the native community.

Finally, it is noteworthy that while some will point to the 14<sup>th</sup> Amendment equal protection clause to undermine the right of Native Hawaiians to self-government and self-determination within the framework of federal law, we must remember that the text of the Amendment and the history of its ratification reaffirm the political status of Native American citizens as citizens of America's original sovereigns. The 14<sup>th</sup> Amendment's Citizenship Clause, which precedes the Equal Protection Clause, makes those persons who are at birth subject to the "jurisdiction" of the United States automatically citizens, yet the Supreme Court held that this American citizenship was not to include tribal citizens because they were first and foremost subject to the jurisdiction of their own native nations.<sup>4</sup> The 14<sup>th</sup> Amendment's Apportionment Clause, immediately following the Equal Protection Clause, repeats the original constitutional provision "excluding Indians not taxed" from apportionment. Since the original language of the Constitution is repeated, the framers of the 14<sup>th</sup> Amendment must have meant the original Indian affairs power – and by Indian they meant "native" – comfortably co-exists with the Equal Protection Clause.<sup>5</sup>

### **CNHA Requested Revisions**

CNHA recommends revisions to Section 8 and 9 of S. 1011, to ensure that our Native Hawaiian government authority is an effective means to embrace the responsibilities and challenges we face as a people. Any government reorganized by our Native Hawaiian people should be vested with the inherent powers of native self government and positioned to negotiate as intended with the state and federal governments to ensure effective administration of government.

### **CNHA Requests Revisions to Sections 8(b)(3) and 9(e) Because As Written, It Undermines the Inherent Authority and Jurisdiction of the Native Hawaiian People**

Sections 8(b)(3) and 9(e) of the Act may inadvertently undermine the inherent authority and jurisdiction of the Native Hawaiian people by conditioning our exercise of governmental functions upon the successful negotiation with the United States and the State of Hawaii over criminal and civil jurisdiction and all other aspects of government. Absent such agreement, the

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<sup>4</sup> American Indians had to be naturalized pursuant to treaty or statute. Accordingly, most American Indians were not citizens until the 1924 American Indian Citizenship Act.

<sup>5</sup> In fact, at the time of the 14<sup>th</sup> Amendment drafting, ratification and proclamation, the President and Congress were in the process of negotiating and ratifying numerous Indian treaties pursuant to the Indian Peace Commission, including Treaties with the Sioux, Navajo, Crow, Shoshone-Bannock, Cheyenne, Arapaho, Apache, Kiowa, and Comanche Nations.

Act would prohibit the Native Hawaiian government from exercising any power that is currently exercised by the Federal or state governments. This includes every aspect of government duties and functions, so as drafted the Act might prohibit the Native Hawaiian government from acting in furtherance of traditional laws and justice systems. For example, even the most basic programming of the care and welfare of children would be prohibited until negotiated.

In contrast, the Indian Reorganization Act vested Indian tribes with existing powers of native governments while authorizing tribes to negotiate with Federal and state officials. The Supreme Court has recognized that Indian tribes maintain inherent authority over their members and their territory, and in fairness, the Native Hawaiian government should have such authority to provide for the betterment of our people. Such authority includes the power to determine the form of government, the power to determine membership, the power to operate the native government and carry out government responsibilities, including services and programs, power to approve or veto the use or disposition of native government assets, the power to determine domestic relations and to enforce native law on native lands. The House of Representatives recently affirmed the same type of authority for the Virginia tribes in H.R. 1385, 111<sup>th</sup> Cong. 1<sup>st</sup> Sess. CNHA respectfully submits that Sections 8(b)(3) and 9(e) should be deleted and replaced with the following language:

*The Native Hawaiian government shall be vested with the inherent powers and privileges of a native government under existing law, with the exceptions set forth in Section 9(a) of this Act. These powers and privileges of self-government may be modified as agreed to in negotiations with the Federal and state governments pursuant to section 8(b)(1) of this Act 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 Hawaii Revised Statutes. Except as provided through such agreement, nothing in this Act shall preempt Federal or state authority over Native Hawaiians under existing Federal law, provided further that nothing herein shall authorize the State to regulate or tax the Native Hawaiian government in the exercise of its powers of self-government or management of native government lands or assets.*

#### CNHA Requests Revisions to Sections 8(c)(2) and 8(c)(3) Because As Written, It Extinguishes Claims without Compensation

Sections 8(c)(2) and 8(c)(3) seek to assert sovereign immunity for federal and state governments vis-à-vis existing Native Hawaiian land and breach of trust claims concerning the administration of HHCA and Ceded lands. 8(c)(2) would make these claims “nonjusticiable” and limits anyone other than the federal government from bringing such claims on behalf of the Native Hawaiian people. This raises both constitutional and policy problems.

The Fifth Amendment provides that recognized native lands may not be taken without just compensation. Claims for recognized lands are also protected property rights under the Fifth Amendment. Congress may not extinguish these claims without compensation.

Moreover, the Native Hawaiian Government Reorganization Act is intended to facilitate reconciliation between the Native Hawaiian people and the United States, and a statutory barrier to existing claims by Native Hawaiians would create further injustice. Even when Indian tribes were subject to termination, Congress preserved land claims for appropriate adjudication and resolution. *See* 25 U.S.C. sec. 750 (“Nothing in this subchapter shall deprive any Indian tribe ... of any right, privilege, or benefit ... including the right to pursue claims against the United States as authorized by the Act”). Fairness indicates that this Act should not determine or limit any existing claims of the Native Hawaiian people, so a savings clause would be appropriate. The Supreme Court has recently ruled that the Apology Resolution provision is neutral in meaning, so it should be employed in this Act as well. It says simply.....

*Nothing in this Act is intended to serve as a settlement of any claims against the United States or the State of Hawaii.*

This provision should replace sections 8(c)(2) and 9(e) of the current bill.

#### CNHA Requests Section 9(b) and 9(c) be Deleted Because As Written, It Prohibits Land Into Trust

Section 9(b) would prevent the Secretary of the Interior from taking land into trust for the Native Hawaiian government. This is contrary to the interests of the Federal, state, and Native Hawaiian governments. As was shown in the case of Kaho’olawe where the 28,000 acre Island was placed in trust for the Native Hawaiian government, it may be advantageous to the Federal, state and Native Hawaiian governments to preserve this option to address future land issues.

As to the Trade and Intercourse Act protection against the alienation of native lands, the Act either did or did not apply in the past, that cannot be changed by legislation today and there is no principled reason why this protection should not apply prospectively to Native Hawaiian lands. Accordingly, Section 9(c) should be deleted as well.

#### CNHA Requests Language to Define the Role of the Department of Justice Because It Provides Proper Assistance in Line with the Federal Trust Responsibility

The original versions of this bill envisioned a specific role for the Department of Justice, which we believe is important to the implementation of the bill once enacted. Language from H.R. 1711 as follows:

*The Attorney General shall designate an appropriate official within the Department of Justice to assist the United States Office for Native Hawaiian Affairs in the implementation and protection of the rights of Native Hawaiians and their political, legal, and trust relationship with the United States, and upon the recognition of the Native Hawaiian government as provided for in section 8(c)(6) of this Act, in the implementation and protection of the rights of the Native Hawaiian government and its political, legal, and trust relationship with the United States.*

## CNHA Requests Section 5(c) and Section 6(e) be Deleted Because It Is Unnecessary

These sections are unnecessary, as the Department of Defense is currently required to participate in consultation with the Native Hawaiian community through various federal acts, for example, the Native American Graves Protection and Repatriation Act, the National Historic Preservation Act, and the National Environmental Policy Act.

### **Conclusion - Enact S. 1011 as Revised**

Thank you for the opportunity to provide testimony. As one of many Native Hawaiian community leaders that participated in the Reconciliation Hearings held by the Department of Justice and Interior in 1999, as well as a participant on Senator Akaka's Working Group in 2000 which engaged community leaders, constitutional scholars, state officials and others that resulted in the first initial legislation to address this long standing issue, I respectfully request the Committee's support.

In this, the 50<sup>th</sup> year of statehood, 2009 is the year that Congress should enact S. 1011. As Native Hawaiians, we want to be responsible for our resources and for our communities. We want to be a full and active partner with the state and federal governments in resolving challenges and applying solutions in our communities. S. 1011 represents a pathway to once again having our own voice to govern our own affairs, and to take our rightful place in truly applying the talent, knowledge and opportunities in our homeland that will enrich the lives of all in Hawaii.