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Chair Rowena M.N. Akana and OHA Trustees
Office of Hawaiian Affairs
711 Kapiolani Boulevard, Suite 500
Honolulu, Hawai`i 96813

Subject: Use of Public Trust Revenues for All Hawaiians, Regardless of Blood Quantum

Dear Chair Akana and OHA Trustees:

Executive Summary. This memorandum addresses the question whether the revenues that OHA receives from the Public Land Trust can be used to benefit all persons of Hawaiian ancestry, without regard to the amount of Hawaiian blood they have. Current federal and state statutes limit such expenditures to programs "for the betterment of the conditions" of persons with 50% or more Hawaiian blood. But this restriction was imposed without the support of anybody from the Hawaiian community and must be revisited. The right to define membership is a central component of the right to self-determination. All other native groups have the right to determine who is in their group and most also have the right to determine who is eligible to share in their assets and revenues. Although the federal government sometimes imposes limits on who can share in the distribution of revenues, limitations as high as the 50%-blood-quantum requirement are only rarely found. The Native Hawaiian People are entitled to determine their own membership for themselves and should press to amend the governing statutes in order to vindicate their right to self-determination and self-governance, and to allow their resources to be

used by all members of their native community.

Introduction. Since the establishment of OHA, its Trustees have struggled with the restraints on revenue expenditures included in the constitutional provisions and statutes that establish the Office. This memorandum provides background analysis of this issue, explains the rights of the Native Hawaiian People in defining their own membership and controlling their resources, and offers suggestions regarding the approach that can be taken to address this problem. In preparing this memorandum, I have been assisted by the research of Kevin Teruya, second year law student at the William S. Richardson School of Law, University of Hawai`i at Manoa, and by discussions with Sherry P. Broder, OHA's Board Attorney. I have also drawn from a memorandum prepared by Sherry Broder to Daniel J. Mollway of the Hawaii State Ethics Commission dated February 16, 1999, which addressed some of the issues relevant to this discussion.

Background -- The Governing Statutory and Constitutional Provisions. The first reference to a 50% blood quantum requirement appeared in Section 201(7) of the Hawaiian Homes Commission Act, 1920, 42 Stat. 108 (1921), which defines the term "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Section 207 of this statute then authorized leases of lands controlled by the Department of Hawaiian Home Lands to persons meeting this definition. (A later amendment to Section 209 allows leases to be conveyed to spouses or children who are "at least one-quarter Hawaiian," but original lessees must still meet the 50%-blood-quantum requirement.) No person of Hawaiian ancestry favored this 50% requirement at the time the

Hawaiian Homes Commission Act was being enacted by Congress, but this limitation was included because of pressure from sugar interests in Hawai`i, who wanted to limit the number of persons who would be eligible for homesteads. Melody Kapilialoha MacKenzie, *Native Hawaiian Rights Handbook* 17 (1991)(citing H.R. Rep. No. 839, 66th Cong., 2nd Sess. (1920) and Marilyn M. Vause, *The Hawaiian Homes Commission Act, History and Analysis* (unpublished Master's thesis, June 1962)). The 1921 Legislature of the Territory of Hawai`i passed Senate Concurrent Resolution No. 8, which recommended changing the definition of "native Hawaiian" from 1/32 to ½ Hawaiian blood, and the U.S. Congress accepted this proposal. Alan Murakami, *The Hawaiian Homes Commission Act,* in *Native Hawaiian Rights Handbook, supra,* at 47.

The 1959 Admission Act, Pub. L. No. 86-3, 73 Stat.4, states in Section 5(f) that the lands conveyed from the United States to the State of Hawai`i were to be held by the State "as a public trust" and should be used for five stated purposes, including "for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended." By referring to the Hawaiian Homes Commission Act, this language thus requires that the revenues be used for the Hawaiians with a 50% blood quantum. The other four stated purposes are purposes that all members of the public can share – supporting educational institutions, promoting farm and home ownership, making public improvements, and providing land for public use – and, therefore, it has always been clear that revenues from the public land trust can also be used for Hawaiians with less than 50% blood quantum. And, in fact, the State Legislature has each year granted funds to OHA from the general fund to match OHA's trust funds, to enable OHA to support programs that benefit Hawaiians below the 50% blood quantum line.

OHA was created by the 1978 Constitutional Convention in order to facilitate the process

whereby persons of Hawaiian ancestry would gain the rights that other native people have, in particular the rights to "self-determination and self-government." *See* Committee of the Whole Rpt. No. 13, 1 *Proceedings of the Constitutional Convention of Hawaii of 1978* at 1018-19.

Also in 1978, Article XII, Section 4 was added to Hawai`i's Constitution, which states that lands received by the State from the federal government in 1959 "shall be held by the State as a public trust for native Hawaiians and the general public." The intent in using the term "native Hawaiian" was to use those words in the same way they are used in the Hawaiian Homes Commission Act, 1920, but the proposal defining the terms was not deemed to have been adopted by the voters, because of the manner in which the ballot was constructed. *See Kahalakai v. Doi*, 60 Hawai`i 324, 590 P.2d 543 (1979). That glitch leaves the constitutional provision somewhat ambiguous.

Although the proposals offered to the voters by the 1978 Constitutional Convention left the governing definition of a "native Hawaiian" unchanged, the delegates understood that this definition was controversial and wanted it to be reexamined. *See, e.g.,* Stand. Comm. Rep. No. 59, *in* 1 *Proceedings of the Constitutional Convention of Hawaii of 1978* at 644 ("Although your Committee was tempted to change this outmoded [blood quantum] rule from the 1920s, your Committee concluded that this responsibility should be assumed by the Office of Hawaiian Affairs"), *quoted in Price v. Akaka*, 3 F.3d 1220, 1226 (9th Cir. 1993). *See also* Committee of the Whole Report No. 13 (Sept. 5, 1978), 1 *Proceedings of the Constitutional Convention of Hawaii of 1978* at 1018-19 (the delegates expected that the creation of OHA would "unite Hawaiians as a people.")

Sections 10-3(1) and (2) of the Hawai`i Revised Statutes, which were enacted in 1980, state that the purposes of OHA include "[t]he betterment of conditions of native Hawaiians" and

"the betterment of conditions of Hawaiians," and Section 10-1 includes long definitions of these terms:

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

Most of the provisions in H.R.S. Chapter 10 instruct OHA to act for the betterment of both "native Hawaiians" and "Hawaiians," but Sections 10-1(a) and 10-5(4) restate the special obligation to protect the rights of "native Hawaiians," and Sections 10-13.3 and 10-13.5 state explicitly that the revenues used from the public land trust are to be expended "for the betterment of the conditions of native Hawaiians." H.R.S. Chapter 673-1(b)(1) states that "native Hawaiian public trust" established under Article XII (4-6) of Hawai`i's Constitution must be administered "in the sole interests of its beneficiaries," but adds that nonbeneficiaries may receive collateral benefits "so long as the primary benefits are enjoyed by beneficiaries, and the collateral benefits do not detract from nor reduce the benefits enjoyed by the beneficiaries."

In summary, the governing state statutes now say that the revenues OHA receives from the public land trust are to be used "for the betterment of the conditions" of persons with 50% or more Hawaiian blood. But initiatives to amend these statutes have been frequent, and numerous court decisions have recognized the legitimacy of making such a change.

In 1988 and 1990, OHA conducted two mail referenda to determine the position of its beneficiaries on the blood quantum issue and the voter response was overwhelmingly in favor of the change. In 1988, the OHA Trustees adopted the Resolution Relating to Ho`okani No Mana

E`we, which included the finding that "the arbitrary requirement of 50% blood quantum is contrary to Native Hawaiian culture and tradition and was a requirement develolped and approved by those with no Native Hawaiian blood." Quoted in paragraph 10, Findings of Fact, *Kepo`o v. Burgess*, No. 88-2987-09 (Haw. 1st Cir. 1988), *aff'd*, *memo opinion,* Haw. Sup. Ct., No. 88-2987 (1991).

In 1987, at its meeting in Waiakea, Hilo, Hawai`i, the State Council of Hawaiian Homestead Associations (SCHHA) voted to support a "sliding scale" approach toward lowering the blood quantum requirement in the Hawaiian Homes Commission Act, 1920, and suggested, for example, to drop the blood quantum to one-fourth in the year 2001, to one-sixteenth in 2011, and to a 1/32 share in 2021.

Bills have been introduced in the Hawai`i Legislature on a regular basis to accomplish this goal, and OHA Trustees have discussed this issue regularly during the past few years. Among the approaches that have been discussed has been the creation of an "All-Hawaiians Trust," which would generate income that could be spent for all persons of Hawaiian ancestry. Attached is a draft bill that was prepared for the Trustees several years ago to create such an "All-Hawaiians Trust." The benefit of this approach is that it does not diminish the benefits now flowing to those with 50% native blood.

During the 1999 legislative session, H.B. 559 has been introduced to amend the definition of "Native Hawaiian" in the Hawaiian Homes Commission Act to refer to "any descendant of a person who, prior to 1921, had not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." This proposed bill would also have given persons on the waiting list for a Homestead award as of January 1, 2000 a priority over others until the year 2021. If this bill were enacted, and if the definitions found in H.R.S. Section 10-1 were also

amended, then the restraints currently limiting OHA's flexibility would be lifted.

It is also important to note that the U.S. Congress has been enacting numerous bills during recent years that use the term "Native Hawaiian" to refer to any person of Hawaiian ancestry. The following laws classify Native Hawaiians as Native Americans and include them in benefit programs: the National Historic Preservation Act, sec. 4006(a)(6), 16 U.S.C. sec. 470a(d)(West Supp. 1998)(providing particular protection to properties with cultural and religious importance to Indian tribes and native Hawaiians); the National Museum of the American Indian Act, secs. 1-10, 13, 16, 20 U.S.C. secs. 80q to 80q-12, 80q-14 (1994)(providing for the return of Native Hawaiian human remains and funerary objects, as well as the creation of a museum exclusively for the preservation and study of the history and artifacts of Native Americans, a group of individuals statutorily defined to include Native Hawaiians); the Drug Abuse Prevention, Treatment and Rehabilitation Act, sec. 4106(d), 21 U.S.C. sec. 1177(d) (1994)(giving preference to grant applications aimed at combating drug abuse among Native Americans, a classification that expressly "include[es] Native Hawaiians"); the Native American Languages Act, 25 U.S.C. secs. 2901-12 (1994)(including Native Hawaiian languages in the ambit of Native American languages accorded statutory protection); the Workforce Investment Act of 1998, sec. 166, 29 U.S.C.A. sec. 2911 (West Supp. 1998)(supporting employment and training programs for Native Hawaiians and other Native Americans); the American Indian Religious Freedom Act, 42 U.S.C. sec. 1996(1994)(pledging to protect and preserve Native Hawaiian faiths as a subset of religions described in the statutory heading as "Native American"); the Native American Programs Act of 1974, 42 U.S.C. secs. 2991-92 (1994)(including Native Hawaiians in a variety of Native American financial and cultural benefit programs); the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and

Rehabilitation Act, sec. 311(c)(4), 42 U.S.C. sec. 4577(c)(4)(1994)(giving preference to grant applications aimed at combating drug abuse among Native Hawaiians and other Native Americans). For a sampling of other recent laws aimed at benefitting Native Hawaiians economically and culturally, see, for example, 20 U.S.C.A. sec. 4441 (West Supp. 1998)(providing funding for Native Hawaiian arts and cultural development); 20 U.S.C.A. sec. 7118 (West Supp. 1998)(providing funding for Native Hawaiian drug prevention programs); the Native Hawaiian Education Act, 20 U.S.C.A. secs. 7901-12 (West Supp. 1998)(establishing programs to facilitate the education of Native Hawaiians); the Native American Graves Protection and Repatriation Act, 25 U.S.C. sec. 3001-13(1994)(extending protection to American Indian and Native Hawaiian burial sites); 42 U.S.C. sec. 254s(1994)(providing for health care scholarships for Native Hawaiian students); the Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. secs. 11701-14(1994)(creating a number of programs aiming to improve health care for Native Hawaiians); the Cranston-Gonzalez National Affordable Housing Act, sec 958, Pub. L. No. 101-625, 104 Stat. 4079, 4422 (1990)(providing a preference for Native Hawaiians in HUD housing assistance programs). These recent statutes extend benefits to all persons who are in any way descendants of the Hawaiian aboriginal people, even if they possess less than 50% Hawaiian blood. *See, e.g.,* Native Hawaiian Education Act, sec. 9212, 20 U.S.C.A. sec. 7912(1) (West Supp. 1998); the National Museum of the American Indian Act, sec. 16(11), 20 U.S.C. sec. 80q-14(11) (1994); the Native American Graves Protection and Repatriation Act, sec. 2(10), 25 U.S.C. sec. 3001(10)(1994).

In *Hoohuli v. Ariyoshi,* 631 F.Supp. 1153 (D.Haw. 1986), *aff'd and reversed on other issues,* 741 F.2d 1169 (9th Cir. 1984), U.S. District Judge Samuel King upheld the decision of the Hawai`i Legislature to create OHA and to disperse benefits to persons with less than 50%

Hawaiian blood. In reaching the conclusion that it was "rational" for the Legislature to create an organization designed to benefit everyone of Hawaiian ancestry, the court noted that:

> the legislature hoped that by addressing the needs of all people of Hawaiian ancestry, OHA would "bring to eventual reality the equal participation of Hawaiians in the ultimate homogeneous and perfectly equal society that we seek to achieve for all posterity." There was evidence that showed that the rationale for defining "native Hawaiian" in the HHCA in 1920 had become outmoded, and that many more Hawaiians other than half-blood Hawaiians need remedial legislation to address problems of crime, inadequate housing, education and welfare. In addition, defining "Hawaiian" to include all people of aboriginal blood could help alleviate divisiveness in the Hawaiian community resulting from blood quantum restrictions. Finally, the legislature drew support from numerous recent congressional acts, such as the Native American Programs Act, that extend benefits to "native Hawaiians," defined as "any individual whose ancestors were natives of the area which consists of the Hawaiian Islands prior to 1778."

631 F.Supp at 1161(quoting from Senate Journal, Session Laws of Hawaii 1979, at 1351-52, and citing to Native Hawaiians Study Commission Act, 42 U.S.C. sec. 2991a at sec 305 (1982) and Native American Programs Act of 1974, 42 U.S.C. secs. 2991, 2992c(3)(1982))

Similarly, in *Price v. Akaka*, 3 F.3d 1220, 1225-26 (9th Cir. 1993)(citing *Hoohuli)*, the federal appellate court stated that it was reasonable for the OHA Trustees to support a referendum to determine the views of Hawaiians on the blood-quantum issue, quoting from *Hoohuli*, because "evidence showed 'that the rationale for defining "native Hawaiian" in the HHCA in 1920 had become outmoded' and that 'defining "Hawaiian" to include all people of aboriginal blood could help alleviate divisiveness in the Hawaiian community resulting from blood quantum restrictions.'"

How Restrictive Are The Current Statutory Requirements? Although the language in the governing statutes requires that the public trust revenues be used "for the betterment of the conditions" of the Hawaiians with a 50% blood quantum, these statutes do not say the funding

must exclusively benefit these individuals. Cultural, spiritual, economic, and political programs that benefit Hawaiians with a lower blood quantum in addition to benefitting the 50% Hawaiians can be funded with these revenues. The phrase "betterment of the conditions of native Hawaiians" is not as strict as the language governing the Hawaiian Home Lands, which grants exclusive rights to the 50% Hawaiians.

The courts have held that "the betterment of the conditions" of the 50%-blood Native Hawaiians can be achieved in many ways. Programs that promote the Hawaiian language, Hawaiian culture and historical traditions, pride in the successes of members of the Hawaiian community, and self-determination are examples of activities that promote "the betterment of the conditions of native Hawaiians," even though all persons of Hawaiian ancestry would also benefit.

In a case involving a challenge to one of OHA's mail referendum seeking beneficiary input on the blood quantum issue, Judge Marie Milks specifically found that a variety of programs can better "the conditions of native Hawaiians," and that courts should generally defer to the decisions of the elected Trustees:

> 19. The Trustees have the discretion to act where a reasonable person believes an undertaking will better the conditions of native Hawaiians, which may or may not be pecuniary benefit....
>
> 21. The betterment of the conditions of native Hawaiians can be achieved in many ways. Programs such as the Single Definition Referendum that promote self-determination is one of the many ways to achieve the betterment of the conditions of native Hawaiians even though all Hawaiians would benefit.

Kepo'o v. Burgess, No. 88-2987-09 (Haw. 1st Cir. 1988), *aff'd*, *memo opinion,* Haw. Sup. Ct., No. 88-2987 (1991).

In *Price v. Akaka*, 3 F.3d 1220 (9th Cir. 1993), the U.S. Court of Appeals for the Ninth Circuit rejected the claim that the OHA Trustees had violated their fiduciary duties by expending

trust funds on a nonbinding referendum regarding the blood-quantum issue. The federal appellate court approved of Judge Milks's analysis and summarized her findings as follows:

> In an order denying a motion for preliminary injunction, Judge Milks found that there was no evidence that the Single Definition Requirement would not be for the betterment of conditions of native Hawaiians and that such Referendum is 'one of many ways to achieve the betterment of the conditions of native Hawaiians even though all Hawaiians would benefit.'

Id. at 1225. Another judicial decision recognizing the discretion that OHA Trustees have to determine how the public trust revenues should be spent is *Rice v. Cayetano,* 963 F.Supp.1547 (D.Haw. 1997), *aff'd* 146 F.3d 1075 (9th Cir. 1998), where Judge David Ezra said:

> The State of Hawaii, to comply with its obligation [under Section 5(f) of the 1959 Admission Act] to perform one of these five purposes, the betterment of Native Hawaiians, created OHA. OHA is given a 1/5 protion of the proceeds from the Section 5(b) lands. OHA has authority to spend this money, as well as money received by legislative allocation and other sources, *as it believes will fulfill the purpose.*

963 F.Supp. at 1554 (emphasis added).

The Right of Native People to Determine Their Membership Under U.S. Law. The central U.S. Supreme Court case recognizing the right of native people to determine their own membership is *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), where the Court recognized the necessity of allowing native peoples to "determine which traditional values will promote cultural survival and should therefore be preserved," and stated that care must be taken not "to destroy cultural identity under the guise of saving it." *Id.* at 54 (quoting from the opinion of the District Court). The case involved an ordinance passed by the Santa Clara Pueblo Council that denied tribal membership to the children of a female member who marries outside the tribe, but not to children of a man who takes a wife who is not a member of the tribe. The plaintiff, a

fullblooded female member of the tribe who married a Navajo, challenged this ordinance as a violation of the Indian Civil Rights Act, which prohibits enactments that deny "the equal protection" of tribal law to persons under the tribe's jurisdiction. The Court ruled that such a claim had to be pursued through the tribal courts, because tribes are "'distinct, independent political communities, retaining their original natural rights' in matters of local self-government... 'with the power of regulating their internal and social relations.'" *Id.* at 55(citing and quoting from *Worcester v. Georgia,* 6 Pet. 515, 559 (1832), and *United States v. Kagama,* 118 U.S. 375, 381-82 (1886)). The Court also reaffirmed that "tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* at 58.

In an important footnote at the end of the *Santa Clara Pueblo* opinion, the Court stated that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community," and that the federal judiciary should "not rush to...intrude on these delicate matters." *Id.* at 72 n.32 (citing *Roff v. Burney,* 168 U.S. 218 (1897), and *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906)). The *Burney* decision includes the language: "The citizenship which the Chickasaw legislature could confer it could withdraw." 168 U.S. at 222. Although the *Santa Clara Pueblo* opinion also states at several points that Congress has the ultimate power to determine what law applies to native groups, the result of the decision strongly reaffirms the power of a native group to determine who is in the group and who is not. By disallowing any challenge outside the tribal courts, the result of this decision is to leave the determination of who is in the tribe to the tribe itself.

Other U.S. Supreme Court decisions are equally explicit in stating that native groups have the "inherent power to determine tribal membership." *Montana v. United States*, 450 U.S. 544,

564 (1981)(citing *United States v. Wheeler*, 435 U.S. 313 (1978)). Lower court decisions reaching this same conclusion include *Smith v. Babbitt*, 100 F.3d 556, 558 (8th Cir. 1996)("a membership dispute is an issue for a tribe and its courts"); *Apodaca v. Silvas,* 19 F.3d 1015 (5th Cir. 1994)(holding that a tribe's action to remove a member did not create a federal cause of action because the tribe has the right to control its membership roster); *EEOC v. Fond du Lac Heavy Equip. and Constr. Co.*, 986 F.2d 246 (8th Cir. 1993)(membership dispute is for a tribe and its courts); *Johnson v. Eastern Band Cherokee Nation*, 718 F.Supp. 6 (N.D.N.Y. 1989)(dismissing a claim alleging wrongful denial of membership in an Indian nation on the ground that the court lacked subject-matter jurisdiction); *Martinez v. Southern Ute Tribe*, 249 F.2d 915, 920 (10th Cir. 1957), *cert. denied*, 357 U.S. 924 (1958)("The Courts have consistently recognized that in the absence of express legislation by Congress to the contrary, a tribe has complete authority to determine all questions of its own membership as a political entity"); *Patterson v. Council of Seneca Nation*, 157 N.E. 734 (N.Y. 1927).

Although the decision regarding membership of the native group is final for internal purposes, the U.S. Congress can impose restraints on how the membership of native groups is defined for purposes of distribuing trust revenues. The U.S. Court of Appeals for the Ninth Circuit stated, for instance, in *Baciarelli v. Morton*, 481 F.2d 610 (9th Cir. 1973), that:

> An Indian tribe has complete authority to determine tribal membership except in specific instances. The Secretary has jurisdiction to determine tribal membership for the purpose of distributing federal trust assets. 25 U.S.C. sec. 163; *Martinez v. Southern Ute Tribe of Southern Ute Res.*, 249 F.2d 915, 920 (10th Cir. 1947), *cert. denied*, 356 U.S. 960 (1958); *Fondahn v. Native Village of Tyonek*, 450 F.2d 520, 522 (9th Cir. 1971).

In *Simmons v. Chief Eagle Seelatsee*, 244 F.Supp. 808 (E.D.Wash. 1965), a three-judge district court upheld and enforced a Congressional statute that restricted individuals who could

participate in the benefits of trust estates to those with one-fourth or more blood of the relevant tribes. The court determined that it was rational for Congress "to classify Indians according to their percentages of Indian blood," *id.* at 814, and that for purposes of distributing assets Congress has the power to draw a line "between Indians and non-Indians." *Id.* at 815.

Although Congressional statutes usually defer to the decisions of native groups to determine who is a proper member of the group, numerous examples can be listed where Congress has defined the membership of native groups for purposes of limiting the distribution of trust funds to their members. *See, e.g.*, 25 U.S.C. sec. 564c (defining members of the Klamath Tribe for purposes of distributing a judgment of the Indian Claims Commission); 25 U.S.C. sec. 571 (authorizing the Secretary of the Interior to prepare the membership roll of the Shoshone Tribe of the Wind River Reservation in Wyoming to distribute a judgment fund); 25 U.S.C. sec. 657 (directing the Secretary of the Interior to revise the roll of the Indians of California); 25 U.S.C. sec. 677 et seq. (authorizing the Secretary to establish the roll of full-blood and mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation); *see* Felix Cohen's *Handbook of Federal Indian Law* 25 nn.48-52 (Rennard Strickland ed. 1982)(listing statutes and treaties in which the federal government participates in determining the enrollment of eligible natives). *See also Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996)(allowing tribal members who had been banished from the tribe and reservation to bring a habeas petition in federal court to challenge this punitive action and explaining that Congress's action in passing the Indian Civil Rights Act of 1968 may have limited a tribe's power to banish its members summarily).

Courts defer to Congressional enactments regulating natives, particularly regarding the distribution of revenues. *See, e.g., Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73

(1977)("The general rule emerging from our decisions ordinarily requires the judiciary to defer to congressional determinations of what is the best or most efficient use for which tribal funds should be employed"); *Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978)(Congressional enactment defining membership to participate in settlement distribution prevailed over more stringent requirements of the tribe).

The definitions used to determine who is a native range widely. The Indian Reorganization Act of June 18, 1934, 25 U.S.C. sec. 479, defines "Indian" as any person of Indian descent who is a member of an Indian tribe, or who is a descendant of a person who was a member of a tribe in 1934, and "all other persons of one-half or more Indian blood." Many Indian tribes and federal statutes use one-fourth blood as the cut-off, but a few require as much as one-half blood, a number use one-eighth as the minimum, and some permit any descendant of a member to be enrolled, regardless of the blood quantum. American Indian Policy Review Commission, *Final Report* 108-09 (95th Cong., 1st Sess. 1977); Cohen, *supra*, at 22-23. An example of a federal statute permitting persons with one-eighth native blood to be enrolled is 25 U.S.C. sec. 1300g-7, regarding the Ysleta Del Sur Pueblo.

The Right of Native People to Determine Their Membership Under International Law. The international community also recognizes the fundamental right of native people to define their own membership. This principle is recognized, for instance, in Article 32 of the Draft United Nations Declaration on the Rights of Indigenous Peoples, adopted by the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities on August 26, 1994, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 105 (1994): "Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and

traditions." Also instructive is the most recent decision of the Human Rights Committee regarding this issue -- *Kitok v. Sweden*, Communication No. 197/1985, Report of the Human Rights Committee, U.N.GAOR, 43rd Sess., Supp. No. 40, at 207, U.N.Doc. A/43/40, Annex 7(G)(1988) (views adopted July 27, 1988). The Human Rights Committee is an 18-member body based in Geneva that responds to complaints regarding violations of the International Covenant on Civil and Political Rights, a universal human rights treaties that most nations, including the United States, are parties to. Ivan Kitok was ethnically a native Saami, but had lost his membership in his ancestral village and had been denied readmission. The Swedish Reindeer Husbandry Act reserved reindeer herding exclusively for enrolled members of Saami villages. The Committee concluded that this legislation was appropriate as a means of ensuring the viability and welfare of the Saami as a whole, and thus that the Saami had the power to determine their own membership.

Summary and Conclusion. The Native Hawaiian People, like other native people, have the ultimate responsibility to determine the requirements for membership in their native community. For most purposes and in most situations, the state and federal governments will defer to that determination, but federal statutes do establish membership criteria for other natives with respect to the distribution of shared resources. The 50%-blood-quantum requirement relevant to the distribution of revenues that OHA receives from the public land trust dates historically from the 1921 enactment of the Hawaiian Homes Commission Act, and it reflects a restrictive view that no person of Hawaiian ancestry supported. Surveys of Hawaiians repeatedly indicate support for modifying this 50% requirement, and the State Council of Hawaiian Homestead Associations also supports a change. The current language allows for some

flexibility, because expenditures need not be exclusively for persons with 50% Hawaiian blood, so long as the programs do support "the betterment of the conditions" of those with 50% blood.

Because of the language and definitions in Hawaiian Homes Commission Act, 1921, and the 1959 Admission Act, and because courts almost always defer to federal legislative enactments regarding natives, it will be necessary to amend these statutes before OHA can have the greater freedom it needs to use the funds it receives from the public land trust to benefit all persons of Hawaiian ancestry. To accomplish this goal, it will also be necessary to amend the provisions of Chapter 10 of the Hawai`i Revised Statutes that define "Native Hawaiians" as persons with 50% Hawaiian blood. The approach used in Bill 559 introduced in the 1999 state legislative session provides an appropriate model for this effort. The consistent action of the U.S. Congress in recent years to enact legislation that benefits all persons of Hawaiian ancestry indicates strongly that it would be receptive to such an approach. (Another possible approach would be for the State Legislature to establish a separate trust for all persons of Hawaiian ancestry, as indicated in the attached draft statute.)

I would recommend that OHA embark on a concerted educational campaign to explain the inherent right of the Native Hawaiian People to define their own membership, accompanied by a strong lobbying effort to have the state and federal legislatures amend the relevant statutes listed above. This effort is an important part of the self-determination process and should lead to greater self-government for the Native Hawaiian People. Please let me know if I can assist in any further manner regarding this issue.