**JUSTIFICATION STATEMENT**

**FOR FEDERAL FUNDING OF**

**NATIVE HAWAIIAN HEALTH PROGRAMS**

1. Introduction. This report is written to explain the legal and constitutional basis for federal funding to support Native Hawaiian health programs, and to provide justification for the specific health projects now seeking continuing federal funding. These projects, which have been funded pursuant to the Native Hawaiian Health Care Improvement Act of 1992, Pub.L. 102-396, specifically target the health needs of Native Hawaiians and are described in more detail elsewhere in this report.

The significant health problems facing the Native Hawaiian population have been extensively documented elsewhere, and are presented graphically in the attachments to this report. The life expectancy of the Native Hawaiians (68 years as of 1990) is shorter than that of any of the other ethnic groups living in Hawai'i (which range from 79 to 83 years), and it has declined since 1980 (when it was 74 years). Native Hawaiians have a substantially higher rate of death than any other ethnic group from heart disease, cancer, strokes, diabetes, and accidents, and these rates have increased since 1980 in each category except for accidents. Infant mortality is also higher than any other ethnic group, as is the suicide rate. (Blaisdell) Native Hawaiians are underrepresented in all the health professions, and currently only

3 percent of the practicing doctors are of Hawaiian ancestry (compared to 19-20 percent of the population as a whole).

The health problems of the Native Hawaiian people cannot, however, be understood solely by referring to statistics and data. The Native Hawaiian people have a culture that is profoundly different from Western cultures, and any program designed to protect and promote their health must recognize these substantial differences. The clash of cultures between Hawaiian and Western values has been written about at length by observers who have examined the physical and mental health of the Native Hawaiians:

> Native Hawaiians are a unique cultural group with long-standing traditional patterns of personal, family, and social behavior that still contribute to the identity and security of individuals in their daily lives. As a result, the causes of mental health problems, their perceptions by native Hawaiians, and the appropriate means by which they are resolved differ markedly from non-Hawaiians. The Hale Ola Project summarizes the situation as follows:
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> > ....A significant part of the problem is perhaps that there are no real alternatives that one can freely turn to aside from the dominant Western lifestyle. A great deal of evidence has been accumulated in particular on how a native Hawaiian child who wants to retain the Hawaiian lifestyle is heavily penalized in the state educational system.
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> (Native Hawaiians Study Commission, vol. I, pp. 109-10)

Many commentators have focused on this cultural dislocation as a major contributing factor to the health problems of Native Hawaiians:

** "[T]he psychological despair and sense of being a conquered people in their own homeland is a factor on the health condition of Native Hawaiians." (Native Hawaiians Study Commission, vol. II, p. 149).

** "Persistent, grim Kanaka Maoli [Native Hawaiian] social, educational and economic indices extending into the 1990s support the hypothesis that societal, as well as lifestyle, factors are major determinants in Kanaka Maoli illhealth. These factors appear to include Kanaka Maoli depopulation and minority status from continuing foreign transmigration, colonial exploitation with Kanaka Maoli landlessness and economic dependency, coercive assimilation, cultural conflict and despair, adoption of harmful foreign ways and institutional racism." (Blaisdell, p.2.)

The programs funded pursuant to the Native Hawaiian Health Care Improvement Act of 1992 are filling a crucial need in addressing some of these structural issues and--if maintained--have the potential to increase significantly the number of Native Hawaiian health care professionals and also to improve Native Hawaiian health by working within and through the Native Hawaiian culture.

2. Justification. The federal and state courts in Hawaii have ruled consistently and repeatedly that preferential and separate programs for Native Hawaiians are constitutional if they are rationally related to the goals of self-determination, self-sufficiency, and cultural preservation. These decisions follow decisions of the U.S. Supreme Court that apply this "rational basis" level of judicial review to preferential or separate programs for Native Americans generally. The leading case recognizing this approach is Morton v. Mancari, 417 U.S. 535

(1974), which stated that preferences for native peoples are viewed as political rather than racial in nature, and are to be evaluated under the deferential rational-basis level of judicial review rather than under a compelling-state-interest or strict-scrutiny test. The Morton decision upheld a hiring preference for Indians for positions in the Bureau of Indian Affairs. The Court ruled that such a hiring preference was not "racial" but rather was "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency." Id. at 554. Among the many other U.S. Supreme Court cases that uphold preferential or separate programs for native peoples are Antoine v. Washington, 420 U.S. 194 (1975); Fisher v. District County Court, 424 U.S. 382 (1976); Moe v. Confederated Salish and Kootanai Tribes of Flathead Indian Reservation, 425 U.S. 463 (1976); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977); United States v. Antelope, 430 U.S. 641 (1977); Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S.463 (1979); Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979); and Washington v. Washington State Commercial Fishing Vessel Association, 443 U.S. 658 (1979). In each of these decisions, the Court ruled unanimously that special treatment for native peoples is permitted as long as the legislative program is rationally related to the government's responsibility to promote the welfare of these groups.

The U.S. District Court for the District of Hawai'i has ruled repeatedly that these precedents apply to preferential or separate programs for Native Hawaiians. The first explicit decision was Naliielua v. State of Hawaii, 795 F.Supp. 1009 (D.Haw. 1990), aff'd, 940 F.2d 1535 (9th Cir. 1991), where Judge David Ezra ruled that the preferential program established by the Hawaiian Homelands Act of 1920 was constitutional. Judge Helen Gillmor reached the same conclusion in Silva v. United States, Civ. No. 95-00148 HG (D.Haw. Oct. 19, 1995). The Silva ruling involved a challenge (on Equal Protection Clause grounds) to the requirement that the Trustees of the Office of Hawaiian Affairs be of Hawaiian ancestry. Judge Gillmor rejected the claim, relying on Naliielua, and noting that "the limitation on OHA Board membership is permissible because it promotes the legitimate goal of fostering Hawaiian self-government." Slip op. at 7. In Pai 'Ohana v. United States, 875 F.Supp. 680, 697 n.35 (D.Haw. 1995), aff'd, 76 F.3d 280 (9th Cir. 1996), Judge Ezra reaffirmed his conclusion in Naliielua and included the quote from the earlier case that "[a]lthough Hawaiians are not identical to the American Indians whose lands are protected by the Bureau of Indian Affairs, the court finds that for purposes of equal protection analysis, the distinction...is meritless. Native Hawaiians are people indigenous to the State of Hawaii, just as American Indians are indigenous to the mainland United States...."

This issue was given more direct focus and attention in the opinion in Rice v. Cayetano, 941 F.Supp. 1529 (D.Haw. 1996), issued

on September 6, 1996 by U.S. District Judge David Ezra. This case involved a challenge to the constitutionality of the "Native Hawaiian Vote," which was a mail vote held during the summer of 1996 to measure the support among Native Hawaiians for self-determination. The plaintiffs in Rice and the companion case Kakalia v. Cayetano argued that a vote limited to persons of Native Hawaiian ancestry violated the Equal Protection Clause of the U.S. Constitution. Judge Ezra addressed this argument in detail, rejecting the plaintiffs' contention and ruling that the State of Hawai'i can constitutionally adopt preferential and separate programs for Native Hawaiians as long as they are "rationally related to a legitimate state interest or the state's unique obligation to the Native Hawaiians." Id. at 1543. In reaching this conclusion, Judge Ezra explicitly rejected the argument that Morton v. Mancari did not apply to Native Hawaiians because they "are not yet a federally recognized tribe or quasi-sovereign tribal entity," citing U.S. Supreme Court cases that applied the rational basis test to preferential programs for nontribal Indians, i.e., United States v. John, 437 U.S. 634 (1978), and Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977). 941 F.Supp. at 1542.

Judge Ezra thus ruled that preferential or separate programs for Native Hawaiians are not governed by the cases of Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995), and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), which require preferential programs for racial groups generally to be meet the "compelling state interest" standard--and to be found

unconstitutional unless the government can demonstrate a compelling interest to support the preferential program. 941 F. Supp. at 1540-44.

His opinion also emphasizes the many statutes enacted by the U.S. Congress that group Native Hawaiians along with other Native Americans and that recognize the "special relationship" that exists between the U.S. government and Native Hawaiians. He notes that a refusal to apply the "rational basis" level of judicial review to Native Hawaiians would "effectively nullif[y]" "over two decades of Congressional legislation regarding this aboriginal group." Id. at 1543 n.17. The statutes listed by Judge Ezra (id. at 1542) include: the Native American Programs Act of 1974, Pub. L. No. 93-644, 88 Stat. 2324 (1975), 42 U.S.C. sec. 2991 et seq.(1976); the American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978), 42 U.S.C. sec. 1996; the National Museum of the American Indian Act, Pub.L. 102-185, 103 Stat. 1336 (1989), 20 U.S.C. sec. 80q et seq.; the Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990), 25 U.S.C. sec. 3001 et seq.; the National Historic Preservation Act of 1966, Pub. L. 89-665, 80 Stat. 915 (1966), 16 U.S.C. sec. 470 et seq.; and the Native American Languages Act, Pub.L. 101-477, 104 Stat. 1153 (1990), 25 U.S.C. sec. 2901 et seq.; the Native Hawaiian Education Act (20 U.S. C. sec. 7902 et seq.; and the Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. sec. 11701 et seq..

U.S. District Judge Alan C. Kay quoted the key language in the Rice opinion, that the Native Hawaiians have a "special relationship" with the state and federal governments and that the "rational basis" level of judicial review applies, in his opinion in Office of Hawaiian Affairs v. Dept. of Education, Civ. No. 96-00030 ACK (Order Granting Defendants' Motion for Partial Judgement on the Pleadings and Remanding State Claims, Oct. 23, 1996). Thus all three of Hawaii's active federal district judges are on record as agreeing that Native Hawaiians are governed by the same principles that govern other Native Americans, and that a "special relationship exists between Hawaii's native people and the state and federal governments.

Similar conclusions have been reached by the Hawaii Supreme Court in Ahuna v. Dept. of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161 (1982)(holding that principles developed in decisions involving American Indians also apply to native Hawaiians), and Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 79 Haw. 425, 903 P.2d 1246 (1995)(recognizing and explaining the traditional and customary rights of native Hawaiians). The Ahuna opinion cites Pence v. Kleppe, 529 F.2d 135, 138-39 n.5 (9th Cir. 1976), where the federal appellate court wrote that "the word 'Indian' is commonly used in the United States to mean 'the aborigines of America.'" 64 Haw. at 339, 640 P.2d at 1168-69. Opinion 80-8 (July 8, 1980) of the State of Hawai'i Department of the Attorney General also concludes, after careful analysis, that preferential or separate programs for native

Hawaiians should be evaluated under the deferential rational-basis standard of judicial review.

It has thus been firmly established, without any judicial dissent, that preferential or separate programs for Native Hawaiians are legitimate and constitutional as long as they are rationally related to the "special relationship" that exists between the federal and state governments and the Native Hawaiian people. Programs that are aimed at promoting self-determination and self-sufficiency or at maintaining or restoring Native Hawaiian culture meet this requirement. Certainly a program designed to promote the health of the Native Hawaiian people would meet this standard, because such a program would foster self-sufficiency. In addition, a successful program would include efforts to strengthen Native Hawaiian culture and thus to provide a firm basis for the physical and mental health of the Native Hawaiian people.

Non-Duplication--why are the needs of Native Hawaiians not being addressed with the funds provided by the State?

The State of Hawai'i has health programs designed for the people of Hawai'i, but these programs fail to meet the needs of Native Hawaiians because they are not focused on the separate needs of the Native Hawaiian people. The Native Hawaiians have a special and unique set of health problems because of their indigenous culture and because of the dramatic dislocations they have suffered during the past two hundred years. Their population numbers have declined dramatically, in part because they lacked the immunities

from Western diseases and in part because they were unprepared for the cultural shocks brought about by contact with the West. Their religion was overthrown, their lands were distributed and past into non-Hawaiian hands, their cultural hierarchy fell apart, their monarchs were forced to cede power and then were overthrown completely. Persons from other ethnic groups were imported to work in the agricultural fields and the Native Hawaiians became during the present century a minority in their own islands.

The State of Hawai'i has failed to develop programs to address these issues. The State does have some health programs, but these programs do not recognize the distinctive culture of the Native Hawaiians and their distinctive health needs. Recently, the State has cut back its outreach programs because of fiscal constraints, and thus those seeking State services must now come to centralized urban areas. The State does not have programs aimed at rural areas, and thus many Native Hawaiians are unable to take advantage of the State programs that do exist.

The federal government has a particular responsibility to assist in developing and funding appropriate health programs because of its participation in the 1893 overthrow of the Kingdom of Hawai'i. In 1993, the U.S. Congress enacted the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawai'i, Pub.L. 103-150, 107 Stat. 1510 (1993), which acknowledged the actions of U.S. diplomats and military officials in supporting the overthrow and concluded that the overthrow would not have been successful "without the active

support and intervention of the United States diplomatic and military representatives." This Apology Resolution characterized the 1893 overthrow as "illegal" and also acknowledged that 1,800,000 acres of "crown, government and public lands of the Kingdom of Hawaii" were ceded to the United States "without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government." In a provision important to the present discussion, the Resolution recognized that "the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land," and then added that "the long-range economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastating to the population and to the health and well-being of the Hawaiian people." In its conclusions, the Resolution urges the support for "reconciliation efforts between the United States and the Native Hawaiian people."

The United States still holds title to some 400,000 acres of the lands ceded after the illegal overthrow, and thus continues to deprive the Native Hawaiian people of lands that once belonged to their Kingdom. The United States has a special and continuing responsibility to address these losses, and to assist with the health problems linked to the destruction of the Hawaiian culture and the taking of Hawaiian land by the United States.

A. Why is the State of Hawai'i not providing these services to native Hawaiians, given that native Hawaiians are citizens of

the State and the State has a responsibility to provide services to all of its citizens?

The State of Hawai'i is battling with the Office of Hawaiian Affairs with regard to a number of significant financial issues and has been reluctant to provide the revenues owed to the Native Hawaiian people. In Office of Hawaiian Affairs v. Housing Finance & Development Corp., Civ. No. 94-4207-11 (Order denying Defendant's Motion for Partial Summary Judgment, Haw. 1st Cir., July 23, 1996), the Office of Hawaiian Affairs (OHA) and other Hawaiian groups are challenging the State's efforts to sell and transfer segments of the public land trust, which is composed of lands ceded (without compensation) to the United States in 1898 and then transferred to the State of Hawai'i when it was established in 1959. In Office of Hawaiian Affairs v. State of Hawai'i, Civ. No. 94-0205-01 (Haw. 1st Cir. 1996), OHA is trying to obtain 20 percent of all of the revenues generated by lands in the public land trust, as the Constitution and statutes of the State require, but the State is opposing this effort arguing that some revenue sources should not be shared with the Native Hawaiians. On October 23, 1996, Judge Daniel G. Heely ordered the State to pay the full amounts owed, but the State has now appealed this ruling. In addition, in July 1996, the State withheld paying to OHA its share of the airport landing fees, some $7.2 million, and further litigation appears likely to address and resolve this dispute. As these controversies illustrate, the current State Administration has taken an adversary position toward the Native Hawaiians, and is not forthcoming in

providing the resources and programs that the Native Hawaiian people are entitled to.

B. Is the State actively discriminating against native Hawaiians in the State's provision of services to this population, and if the State is discriminating (on the basis of race), why haven't legal actions been initiated against the State?

As the answer to Question A, above, indicates, legal actions are being pursued against the State, and additional actions are contemplated. Another current court action, central to the restoration of the Hawaiian culture, concerns the Hawaiian-language immersion programs. Office of Hawaiian Affairs v. Dept. of Education, Civ. No. 96-00030 ACK. The Hawaiian language is listed in Hawaii's Constitution as an official language of the State of Hawai'i, and the prohibition on the use of the Hawaiian language during most of the twentieth century was recently described by the U.S. Congress as "causing incalculable harm to a culture that placed a very high value on the power of language." Native Hawaiian Education Act of 1994, 20 U.S.C. sec. 7902 Findings para. 19. Nonetheless, the State of Hawaii's Department of Education has failed to fund properly the Hawaiian-language immersion programs, and OHA is litigating this issue in both state and federal court to challenge that failure.

C. If the State is providing services on a nondiscriminatory basis to all State citizens, why have native Hawaiians been disproportionately foreclosed from access to such programs?

The answers listed above illustrate the controversies that continue between the State and the Native Hawaiian people. It also needs to be reemphasized that it is inadequate simply to provide services on a nondiscriminatory basis. Because the Native Hawaiian people have a unique culture and unique health needs, special programs must be offered to them. They health maintenance programs that may be adequate for other ethnic groups will not be appropriate for Native Hawaiians. Only if the State develops programs that are culturally sensitive and focused on the special needs of Native Hawaiians will it be providing adequate health programs for them.

D. What data are available to document the fact that native Hawaiians do not have access to State-funded programs that are made available to other State citizens?

Although quantitative data are difficult to obtain on this topic, qualitative information provides dramatic illustrations of the problems faced in delivering quality health programs to Native Hawaiians. The Western health model has proved to be inadequate for Native Hawaiians. Many will not go willingly to Western doctors. Some are intimidated by the structure of a Western health clinic or doctor's office. Some lack transportation to these facilities, or knowledge about what is available. Some Native

Hawaiians continue to rely on traditional healing methods, going to their elders, or kapunas, for assistance. Some recent evidence indicates that Native Hawaiian adolescents who sought help from Native Hawaiian healers had lower scores for depressive and anxiety symptoms than those who used Western doctors. (Andrade et al.) Those who rely on traditional healers are sometimes reluctant to explain to a Western doctor the traditional healing methods they are using for fear of being laughed at or rejected.

The approach of the Native Hawaiians thus stands in sharp contrast with that of members of immigrant ethnic groups. The immigrant made a conscious choice to come to the United States and participate in our multicultural pluralistic society, and thus typically wants to assimilate and understand the practices of the dominant culture. The Native Hawaiian, on the other hand, made no decision to participate in a multi-cultural society. The Native Hawaiian was here first, and then the other cultures came, and the Natives soon found themselves to be in the minority. Unlike the immigrants, the Natives have not chosen to leave their homeland to seek a better life, and, unlike the immigrants, the Natives have no incentive or desire to assimilate or change their lifestyle.

A successful medical program for Native Hawaiians must, therefore, focus on their culture and their needs, and only with such a focus will the Natives participate and benefit.

E. If the State programs are not meeting the needs of native Hawaiians what data exists to prove that federal funding will not be duplicative of, or will not duplicate, state efforts?

The State of Hawai'i is not providing medical services that focus on the unique culture and health needs of the Native Hawaiians, and therefore any federal programs that provide this focus will not be duplicative of state efforts.

F. If the State programs are not meeting the needs of native Hawaiians, why is there a federal responsibility to do so?

This question is addressed in the opening section of Part 3. The U.S. Congress has acknowledged that the participation of U.S. agents was critical to the success of the illegal overthrow of the Kingdom of Hawai'i in 1893 and that the U.S. government received 1.8 million acres of land without compensation to or the consent of the Native Hawaiian people. The U.S. government continues to control some 400,000 of these acres and to use them for federal purposes. Congress has repeatedly recognized the "special relationship" between the United States and the Hawaiian people, most explicitly in the Native Hawaiian Health Care Improvement Act of 1992, Pub. L. 102-396, and the Native Hawaiian Education Act of 1994, Pub. L. 103-382, 108 Stat. 3794, 20 U.S.C. sec. 7902. Judge Ezra wrote that "Congress has clearly indicated that the Native Hawaiians have a special relationship with the United States government that closely parallels that of the American Indians" in Rice v. Cayetano, supra, 941 F. Supp. at 1542. As with the

"special relationship" that the U.S. Government has with other Native Americans, the United States continues to have responsibilities to assist the Native Hawaiians. The 1993 Apology Resolution urges a "reconciliation" between the United States and the Native Hawaiian people. Continuing to provide funding to promote and protect the health of the Native Hawaiian people is certainly one way to promote such a reconciliation.

**References**

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