

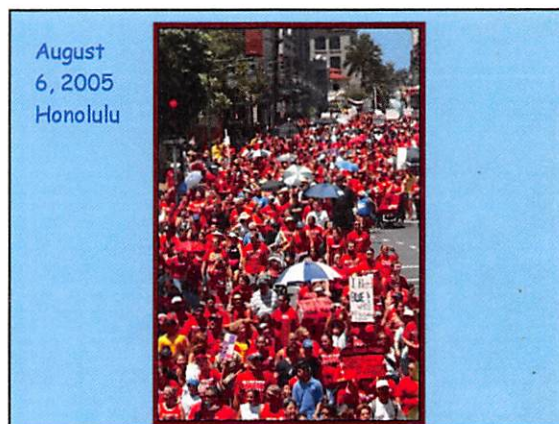
The Native Hawaiian People

The present population of **Native Hawaiians** in Hawaii is about 200,000, making them **one of the largest groups of indigenous peoples in the United States**.

But they are also **the only indigenous group in the United States that has never had** either a **settlement** with or a **claims commission** established by the federal government.

The rules governing federal recognition of Indian tribes apply only to the continental United States.







## Maui



## March 19, 2007 - Protesting the Expansion of the Turtle Bay Resort



## Kalakaua Avenue, Saturday, Jan. 17, 2009

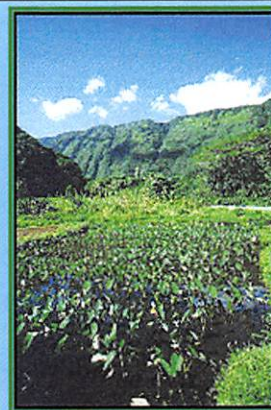


## Pre-Contact Hawaii

*Pre-contact Hawaiians honored the natural life forces which took many forms.*

*They made no distinction between living and nonliving things.*

*All natural life forces exerted an energy beyond human origin or control.*



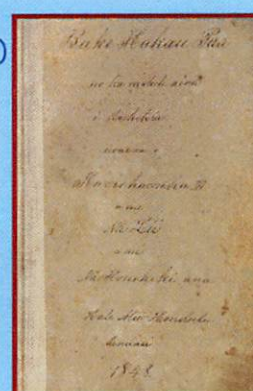
## Pre-Contact Hawaii

*The 'Aina (land) was not a commodity to be owned or traded, because such actions would disgrace and debase one's family and oneself.*

*The Hawaiians were said to have had an organic relationship with the 'Aina, and the 'Aina was part of the 'ohana (extended family), which connected individuals with each other.*



## King Kamehameha III (Kauikeaouli) (1813-1854)





### The Mahele -- 1848

Kauikeaouli (Kamehameha III) divided the lands.

*The original principle was that the lands should be divided into thirds – between the Mo'i (King), the Ali'i (Chiefs), and the maka'ainana (commoners).*

*Later, the idea developed that the Mo'i should take a third, and the remainder should be divided among the Government, the Alii, and the maka'ainana.*



### The Mahele -- 1848

*In fact, the Mo'i took about 1,000,000 acres.*

*The other Alii received 1,500,000 acres.*

*The Government received 1,500,000 acres,*

*And the maka'ainana received only about 28,000 acres.*



1863

**Alexander Liholiho (Kamehameha IV)** died at age 29 without a will.

His older brother **Lot (Kamehameha V)** became Mo'i, but the "King's Lands" were also claimed by Alexander Liholiho's heirs – his wife **Queen Emma** and his father Mataio Kekuanao'a.



### Estate of His Majesty Kamehameha IV (1864)

The Hawaii Supreme Court (in an opinion written by **Justice George M. Robertson**) ruled

(1) *that the lands were designed to support the Crown and should go to the new Mo'i (Lot), but also*

(2) *recognized the power of the new Mo'i to manage and transfer the land, and*

(3) *recognized the "dower" rights of Queen Emma* (and hence recognized that the lands were "private" at least in a sense).



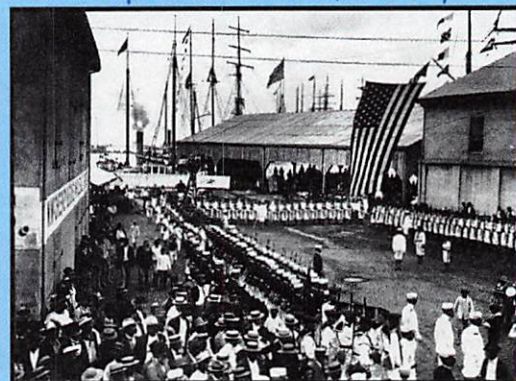
### Act of January 3, 1865

*The Legislature enacted a statute stating that the Crown Lands could not be sold or transferred (thus transforming them into "public" lands) and setting up a procedure to pay off the debts.*

*Lot (Kamehameha V) accepted this statute.*



### US Troops Come Ashore, January 1893





### Lowering the Hawaiian Flag, 1898



### Hawaiian Homes Commission Act

In 1921, Congress enacted the Hawaiian Homes Commission Act, 1920 which designated 203,000 acres of the ceded public lands for exclusive homesteading by Native Hawaiians, thereby affirming the trust relationship between the United States and the Native Hawaiians.

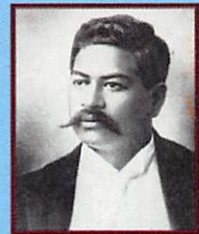
• See Health Care Act, Findings, par. 13; Education Act, Findings, par. 8

Prince  
Jonah  
Kuhio  
Kalanianaʻole



### Prince Jonah Kuhio Kalanianaʻole (1920)

"My one desire is to point out how these lands... *in which a one third interest of the common people had been recognized, but ignored in the division, and which had reverted to the Crown, presumably in trust for the people*, were taken over by the Republic of Hawaii.... By annexation these lands became a part of the public lands of the United States, and by the provisions of the organic act are under the custody and control of the Territory of Hawaii."



### Representative Charles F. Curry, Chair, House Committee on the Territories (1920)

"...these **crown lands** never really vested in the Federal Government *except in trust for the common people*.... they were placed in trust for the common people when in possession of the king...."



### 1959 -- Statehood.

About 1,400,000 acres were transferred to the new State of Hawaii, and the federal government retained about 350,000 acres (for national parks and military bases).

Section 5(f) of the Admission Act says that the revenues from the Public Lands should be used for five purposes, including the "betterment of the conditions of native Hawaiians."

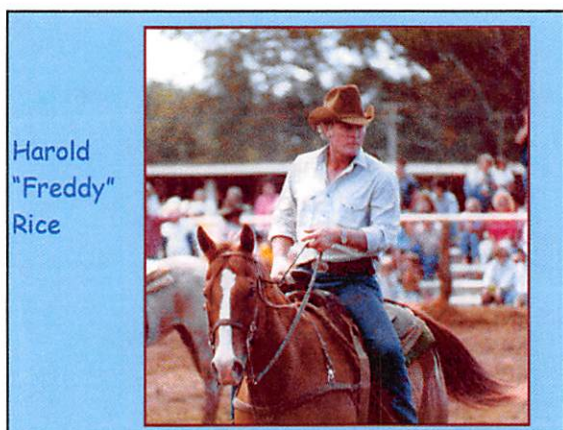






1978 Hawai'i Constitutional Convention

- \* Better funding for Hawaiian Homelands
- \* **Creation of Office of Hawaiian Affairs**
- \* Hawaiian becomes an official language
- \* Hawaiian language immersion programs
- \* Protection of traditional and customary rights



Harold "Freddy" Rice at the Supreme Court

John Roberts (now Chief Justice) represented the interests of Native Hawaiians

Rice v. Cayetano (2000)

**Holding:**

- \* **The election of Trustees of the Office of Hawaiian Affairs solely by persons of Hawaiian ancestry violates the Fifteenth Amendment.**
- \* No *Mancari* exception (for native peoples) exists under the Fifteenth Amendment.
- \* **"'Racial discrimination' is that which singles out 'identifiable classes of persons...solely because of their ancestry or ethnic characteristics.'"**

Rice v. Cayetano (2000)

**What level of judicial scrutiny should apply to governmental enactments that provide separate or preferential programs for Native Hawaiians?**

- \* Strict scrutiny?
- \* Rational basis?

**Does the government have a compelling interest to provide separate or preferential programs for Native Hawaiians?**

**Does it matter whether the federal or state government has established the program?**



### President Clinton Signing the Apology Resolution, 1993



Congress acknowledged and admitted that the overthrow of the Kingdom of Hawaii was **"illegal."**

### 1993 Apology Resolution

US Congress admitted that the overthrow of the Kingdom of Hawaii was "illegal" and resulted in the **"suppression of the inherent sovereignty of the Native Hawaiian people"** and the **deprivation of Native Hawaiians' right to self-determination."**



### 1993 Apology Resolution

- The Apology Resolution expressed the commitment of Congress and the President of the United States to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support **reconciliation** efforts between the United States and Native Hawaiians.



### 1993 Apology Resolution

Whereas the Republic of Hawaii also ceded **1,800,000 acres of crown, government, and public lands** of the kingdom of Hawaii, **without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government.**



### Hawaii Legislature Confirmed Historical Accuracy of Apology Resolution

The Hawaii Legislature confirmed the historical accuracy of the Apology Resolution in Section 1 of Act 329 (1997) and called it **an accurate recounting of "the events of history relating to Hawaii and Native Hawaiians."**



### 1993 Apology Resolution

- The Apology Resolution expressed the commitment of Congress and the President of the United States to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support **reconciliation** efforts between the United States and Native Hawaiians.





### What Is Reconciliation?

It requires something more than being nice or showing respect.

*It requires positive steps to correct a wrong, to make amends, to achieve a "settlement" or "resolution" of the dispute.*



### Hawaii Supreme Court



### OHA v. State (Hawai'i Supreme Court 2001)

The Hawaii Supreme Court acknowledged that "***the State's obligation to native Hawaiians is firmly established in our constitution***" and recognized the "***right of native Hawaiians to benefit from the Ceded Lands trust.***"



v.



### What Was OHA v. HCDCH About?

- The land claims and property rights of the Native Hawaiian people
- The Trust Responsibility of the State of Hawaii, agreed to in the compact of Admission 1959
- The Special Relationship between the State of Hawaii and Native Hawaiians



### OHA v. HCDCH

The Office of Hawaiian Affairs sought a ***moratorium on the sale or transfer of any of the "ceded lands"*** – which were the Government and Crown Lands under the Kingdom of Hawaii – until the claims of the Native Hawaiian People are resolved.

Based on similar court rulings in ***New Zealand, Alaska, and by the US Supreme Court (regarding Pueblo Indians in the Southwest)***, freezing lands pending the resolution of native claims.



[Protests on Maui]



### Pueblo Indian Moratorium

Pueblo Indians held title to 460,000 acres when the United States acquired sovereignty over the surrounding territory from Mexico in 1853.

The US Supreme Court enjoined the United States from disposing of their lands as public lands of the United States.

*Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919).



### Maori Moratorium -- Aotearoa

The New Zealand Court of Appeals declared in 1987 that it would be unlawful for the government to transfer any public lands, even to a state-owned enterprise, without ensuring that the rights of the Maori people to those lands were fully protected.

Because the NZ government owed "fiduciary" duties to the Maori, *the government's responsibility was "not merely passive but extends to active protection of the Maori people in the use of their lands and waters to the fullest extent practicable."* NZ *Maori Council v. AG* (1987).

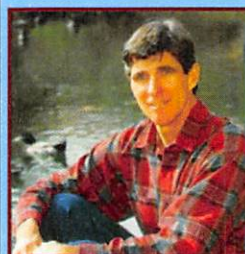


Davianna McGregor

Pualani Kanaka`ole Kanahele



David Getches & James Anaya



### Hawaii Supreme Court (Jan. 31, 2008)



- \* **Restricted sale of ceded lands**
- \* **Issued an injunction**
- \* **Found that reconciliation is ongoing**

### OHA v. HCDCH (Hawaii Sup. Ct. 1-31-08)

\* Unanimous Opinion.

\* Written by Chief Justice Ronald

Moon

\* Quoted the Apology Resolution in its entirety & recognized it as law (along with similar state enactments).

\* Concluded that "we believe Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands, which were taken without consent or compensation and which the native Hawaiian people are determined to preserve, develop, and transmit to future generations."





### The State's Fiduciary Duty

The Court relied upon

\* ***Pele Defense Fund v. Paty*** (Hawaii 1992) for holding that native Hawaiians have **standing to sue** for

violations of the terms of the ceded lands trust, and

\* ***Ahuna v. Dep't of Hawaiian Home Lands***, (Hawaii 1982) for holding the State as trustee to the "highest fiduciary duties" & the "most exacting fiduciary standards," and analogizing those duties to those owed by the US to other native Americans.

The Court concluded that the **Apology Resolution and related state legislation** "give rise to the State's fiduciary duty to preserve the corpus of the public trust lands, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved."

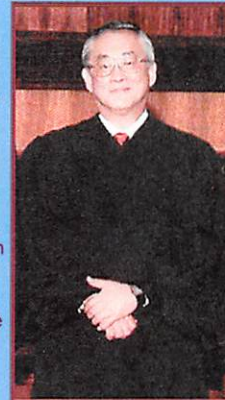


### OHA v. HCDCH (Hawaii Sup. Ct. 1-31-08)

The Court explained that the Apology Resolution is a just one step in the process or reconciliation.

"[I]n our view, the **Apology Resolution acknowledges only that unrelinquished claims exist and plainly contemplates future reconciliation with the United States and the State with regard to those claims.**"

"Clearly, the Apology Resolution is not per se a settlement of claims, but serves as the **foundation (or starting point)** for reconciliation, including the future settlement of the plaintiffs' unrelinquished claims."



### OHA v. HCDCH (Hawaii Sup. Ct. 1-31-08)

\* The Court relied on related state legislation.

\* The Court explained that the purpose of **Act 359 (1993)** was to "facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing"

\* **Act 354 (1993)** recognized the claims of Native Hawaiians.

\* In **Act 329 (1997)**, the Legislature attempted to set up a process for the "proper management and disposition of the lands subject to the public land[s] trust and the proceeds and income therefrom, and to effectuate article XII, section 6 of the Hawai'i Constitution" -- "The legislature recognizes that the lasting reconciliation so desired by all people of Hawai'i is possible only if it fairly acknowledges the past while moving into Hawai'i's future."



### OHA v. HCDCH (Hawaii Sup. Ct. 1-31-08)

The Court relied on the Oct. 23, 2000 report issued by the US Departments of Interior and Justice entitled "**From Mauka to Makai: The River of Justice Must Flow Freely.**"

The Court cited to the conclusions of the report, which included the proposition that **Hawaiians should have self-determination within the framework of federal law and that Congress should enact further legislation to facilitate that process.**



### OHA v. HCDCH (Hawaii Sup. Ct. 1-31-08)

"In this case, Congress, the Hawaii state legislature, the parties, and the trial court all recognize (1) the cultural importance of the land to native Hawaiians,

(2) that the **ceded lands were illegally taken from the native Hawaiian monarchy,**

(3) that future reconciliation between the state and the native Hawaiian people contemplated, and,

(4) once any ceded lands are alienated from the public lands trust, they will be gone forever."

US Troops Landing in Honolulu, Jan. 1893



### OHA v. HCDCH (Hawaii Sup. Ct. 1-31-08)

The Court further stated explicitly in its opinion that **"the ceded lands were illegally taken from the native Hawaiian monarchy."**





### Issuance of the Permanent Injunction

\* The Court quoted from Governor Lingle's commitment to resolve the ceded lands issue "once and for all" in her 2003 State of the State Address.



\* The Court pointed out that it was "keenly aware" as was Congress that "the health and well-being of the native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land."

\* The Court reasoned that further diminishment of the public lands would place native Hawaiians in a disadvantaged position & they might be forced to make concessions they would not otherwise make.

\* The permanent injunction is a way of "leveling the playing field during the pendency of the negotiations and reconciliation process contemplated by the Apology Resolution and related state legislation. . . ."

### OHA v. HCDCH (Hawaii Sup. Ct. 1-31-08)

The Hawai'i Supreme Court found in favor of OHA and the Individual Plaintiffs and issued an injunction preventing any future sale or transfer of any lands in the ceded lands trust to any third parties "until the claims of the native Hawaiians have been resolved."

The injunction is permanent & has no time limit.



### Injunction Issued by Judge Sabrina McKenna, June 4, 2008



#### **Permanent injunction entered:**

Enjoining State and its agents from directly or indirectly selling or otherwise transferring to third parties any ceded lands "until the unrelinquished claims of the Native Hawaiians are resolved;"

Except that the State and its agents may continue the practice of transferring remnants, and issuing licenses, permits, easements and leases concerning ceded lands.

### State of Hawaii v. Office of Hawaiian Affairs

State of Hawaii petitioned for a writ of certiorari to the US Supreme Court, May 2, 2008, represented by former Solicitor General Seth Waxman.



October 1, 2008 – Supreme Court granted certiorari.

February 25, 2009 – Oral argument.



### The State's Arguments - 2008 WL 1934869

\* Hawaii Supreme Court relied primarily on the federal Apology Resolution & misinterpreted it.



\* The Hawaii Court's references to "related state legislation" was not central to the decision.

\* The Apology Resolution says nothing about a settlement and does not support the injunction.

\* The Hawaii Court's misinterpretation prevents the State from properly managing the lands and distorts the reconciliation process.



### Amicus Curiae Briefs Filed

\* 32 State Governments

\* New Mexico State Commissioner of Lands



\* Pacific Legal Foundation (challenging preferences for native Hawaiians, which the State said – in its Reply Brief -- was not involved in this case)



\* Mountain States Legal Foundation

\* US Solicitor General







Attorney General  
Mark Bennett


Kannon  
Shanmugam

Co-Counsel for OHA - Sherry Broder, [Neal Katyal,] Melody MacKenzie, Jon Van Dyke

Bill Meheula




Judicial Notice of Akaka Bill

**Footnote 7:** Additionally, we note that the trial court found that the federal legislation commonly referred to as the "Akaka Bill" was passed out of the Senate Committee on Indian Affairs on September 21, 2001....


The Akaka Bill, if enacted[,] ... provides that the federal government is authorized to negotiate with the State and the reorganized [n]ative Hawaiian government **for a transfer of land and resources to a [n]ative Hawaiian government....**

**We take judicial notice that the current version of the Akaka Bill was passed by the House of Representatives on October 24, 2007.**



The Native Hawaiian Government Reorganization Act of 2007 (The Akaka Bill) (Reintroduced Jan. 17, 2007)



- \* Contains strong findings
- \* **Establishes a process to organize a Native Hawaiian governing entity**
- \* **Guarantees federal recognition after organizing process is complete**
- \* **Calls for negotiations for the transfer of land, natural resources and other assets and governmental authority over them**
- \* Settles no claims against the United States



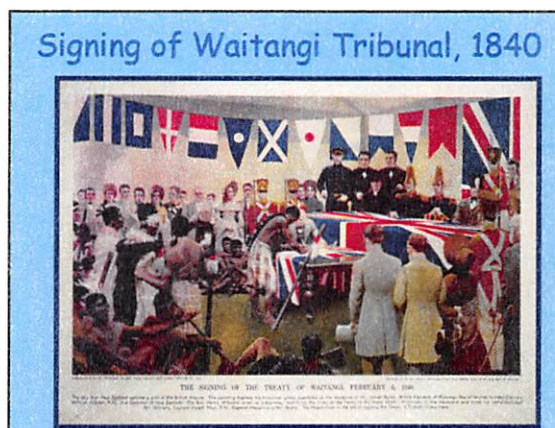
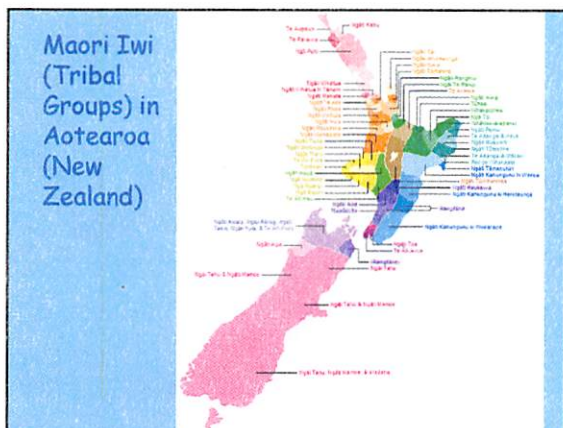
Aotearoa (New Zealand)

**Population – 4,150,000**

- \* **European ancestry – 79%**
- \* **Maori – 14%**
- \* **Other Pacific Islander – 4%**
- \* **Asian ancestry – 3 %**





**Treaty of Waitangi (1840)**

**English Text:** "Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess..."

**Maori Text:** "The Queen of England assures and agrees to give to the chiefs, the subtribes and all the Maori people of New Zealand the full authority of their lands, those places where the fires burn and all those things important to them."

**TREATY OF WAITANGI**  
THIRTI O WAITANGI  
FEBRUARY 6TH, 1840

**Waitangi Tribunal**

As at November 2007, 21 settlements, totaling more than NZ\$700 million.

Settlements have generally included:

- \* financial redress
- \* a formal Crown apology for breaches of the Treaty
- \* recognition of the group's cultural associations with various sites

Claimant Group	Year Settled	Value of Settlement (NZ\$)
Fisheries	1992	170,000,000
Ngati Rangiteaere	1993	760,000
Hatua	1993	715,682
Ngati Whakaue	1994	5,210,000
Waikato - Taimu Rauapu	1995	170,000,000
Waimakuku	1995	375,000
Rotoma	1996	43,931
Te Maunga	1996	129,032
Ngai Tahu	1997	170,000,000
Ngati Turangitukia	1998	5,000,000
Pouakani	1999	2,000,000
Te Uri o Hau	2000	15,600,000
Ngati Raukawa	2001	41,000,000
Ngati Tama	2001	14,500,000
Ngati Awa (inc. ancillary claims)	2003	43,390,000
Ngati Tuharetoa (Bay of Plenty)	2003	10,500,000
Nga Rauiri Kaitiaki	2003	31,000,000
Te Arawa (Lakes)	2004	2,700,000
Ngati Mutunga	2005	14,900,000
Te Roroa	2005	9,500,000
Te Arawa Affiliate Iwi and Hapu	2006	36,000,000
<b>Total settlements</b>		<b>747,323,645</b>

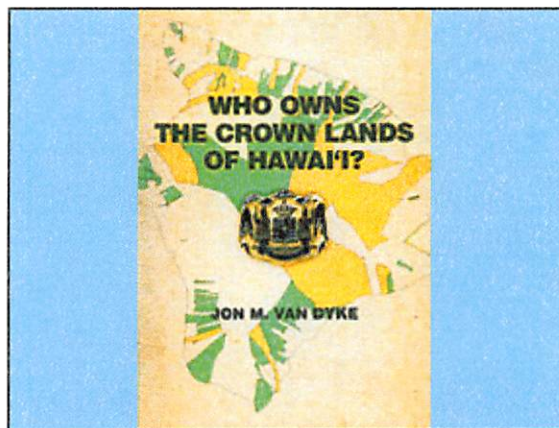
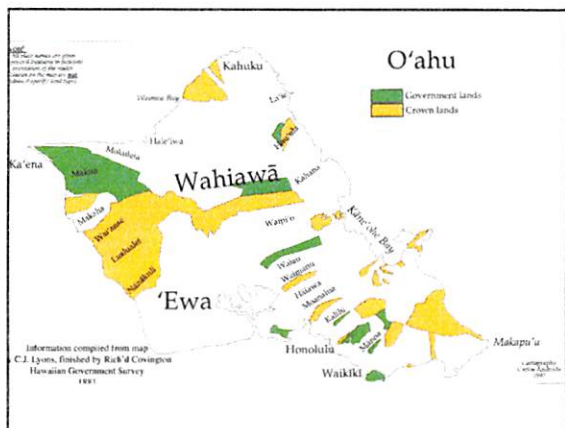
Prime Minister Jim Bolger and Ngai Tahu leader Sir Tipene O'Regan hongi after signing the Ngai Tahu deed of settlement in 1997.

Charles Crofts (Negotiator for Ngai Tahu) and Doug Graham (Minister in Charge of Treaty of Waitangi negotiations) hongi after signing the Ngai Tahu settlement, 24 September 1997.









## Who Owns the Crown Lands of Hawai'i?

*Native Hawaiians are on the verge of a new era in which they will once again control land and resources and govern their own affairs.*

***Native Hawaiians need and deserve to have a land base today.***

*The best way to view the Crown Lands now is as a shared resource of the Native Hawaiian people.*



*These varied and wonderful lands would provide a substantial core to help launch the reorganized Native Hawaiian Nation and to enable Native Hawaiians to prosper once again.*

## Hawaii State Constitution - Preamble

We, the people of Hawaii,  
grateful for Divine Guidance, and  
mindful of our Hawaiian heritage  
and uniqueness as an island State,  
dedicate our efforts to fulfill the  
philosophy decreed by the Hawaii  
State motto, “Ua mau  
ke `ea o ka `aina i ka  
pono.”

