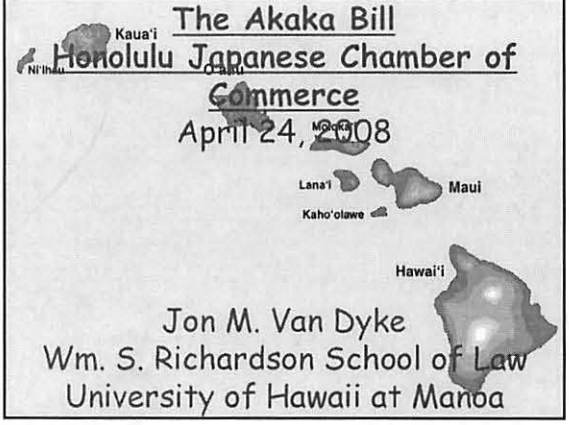
The Akaka Bill
Honolulu Japanese Chamber of Commerce
April 24, 2008



Jon M. Van Dyke
Wm. S. Richardson School of Law
University of Hawaii at Manoa

The Native Hawaiian Government Reorganization Act (The Akaka Bill)

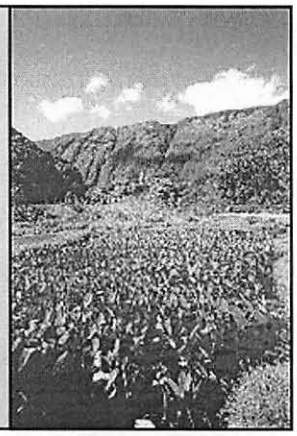
* Contains strong findings
* ***Establishes a process to organize a Native Hawaiian governing entity***
* ***Guarantees federal recognition after organizing process is complete***
* ***Calls for negotiations for the transfer of land, natural resources and other assets and governmental authority over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

Pre-Contact Hawaii

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

They made no distinction between living and nonliving things.

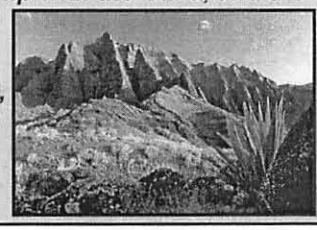
All natural life forces exerted an energy beyond human origin or control.



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.



Why Did Kamehameha III Divide Up the Lands?

He was concerned that Hawaii would lose its sovereignty to one of the imperialist powers.

He was convinced that if the lands were held by private parties, the imperialist conqueror would respect the private property rights, even after taking over the islands.

He thus thought that by moving the lands to private hands, he could maintain Native Hawaiian control of the lands.

King Kamehameha III (Kauikeaouli) (1813-1854)

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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.

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 Moi to manage and transfer the land*, and

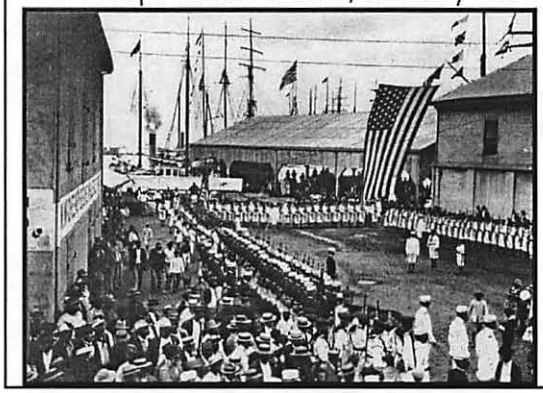
(3) *recognized the "dower" rights of Queen Emma* (and hence recognized that the lands were "private" at least in a sense).

Act of January 3, 1865

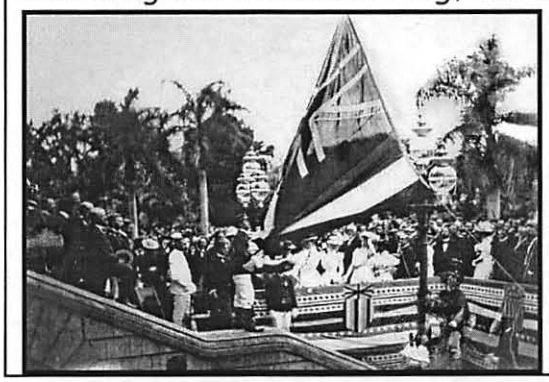
The Legislature enacted a statute stating that <u>the Crown Lands could not be sold or transferred</u> (thus transforming them into "public" lands) and setting up a procedure to pay off the debts.

Lot (Kamehameha V) accepted this statute.

US Troops Come Ashore, January 1893



Lowering the Hawaiian Flag, 1898



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1993 Apology Resolution

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

"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."***

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 Kalanianaole

Prince Jonah Kuhio Kalanianaole (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 are transferred to the new State of Hawaii, and the federal government keeps about 350,000 (for the 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."

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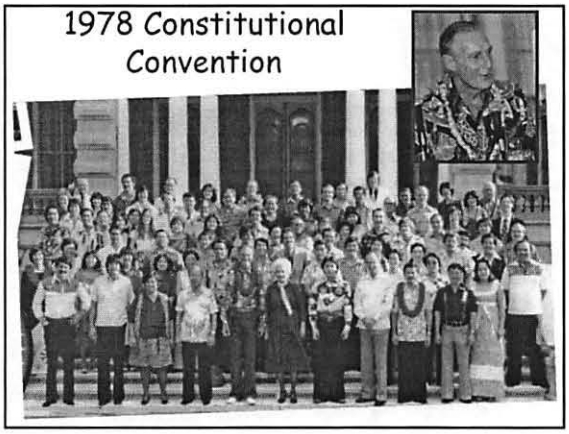
1978 Constitutional Convention



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

The 1978 Con Con Hawaiian Affairs Package

*** Affirmed the public trust status of the ceded lands, naming "native Hawaiians and the general public" as beneficiaries (Art. XII(4)).**

*** Stated that OHA should receive "income and proceeds from that pro rata portion of the [public lands] trust...for native Hawaiians" (Art. XII(6)).**

*** HRS Sec. 10-13.5 set the "pro rata share" at 20% (1980).**

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.***"

Past-Due Revenue Settlement (2008)

OHA Would Get:

* Land valued at $187 million.
* $13 million cash.
* A minimum of $15.1 million per year, which may be adjusted based on a State report every two years.

OHA Would Agree To:

* Waive its claim to Public Land Trust monies from Nov. 7, 1978, to June 30, 2008.
* Waive its claim to more money in the future as long as it is paid a minimum of $15.1 million annually.

OHA Would Not Be:

* Settling land claims traced to the overthrow of the Hawaiian kingdom.
* Settling ownership of ceded lands.

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, New Mexico**, freezing lands pending the resolution of native claims.

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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).

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

* Unanimous Opinion.
* Written by Chief Justice Ronald Moon
* Quotes the Apology Resolution in its entirety & recognizes it as law (along with similar state enactments).
* Concludes 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."

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."

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

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

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.**"

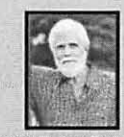
The injunction is permanent and it has no time limit.

The Court thus granted exactly what OHA and the Individual Plaintiffs asked for in this case.

Kuroiwa v. Lingle -- Six Non-Ethnic Hawaiians' Complaint for Breach of Trust and Deprivation of Civil Rights and to Dismantle Office of Hawaiian Affairs, Civ. No. 0800153, filed April 3, 2008

James Kuroiwa

Earl F. Arakaki



Thurston Twigg-Smith

Director, Hawai'i Laborers Employers Cooperation Educational Trust. Board member of Laborers Union Local 368. Former chairman of Republican Party of Hawai'i. Member, Hawaii Advisory Committee to US Civil Rights Commission.

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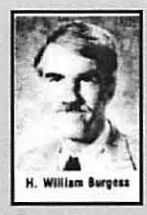
Arakaki v. Lingle (D.Haw. 2003)

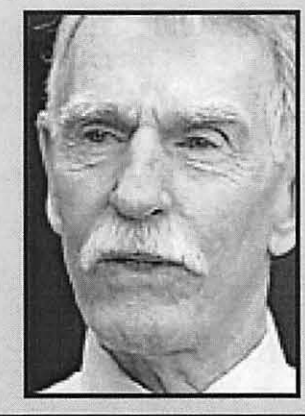
16 taxpayers alleged that they suffered specific legal injuries (as taxpayers) because state land and money is used to pay for programs for Hawaiians by the Office of Hawaiian Affairs and the Department of Hawaiian Home Lands.

The plaintiffs in this case are *Earl F. Arakaki*, Evelyn C. Arakaki, Edward U. Bugarin, Sandra P. Burgess, *Patricia Carroll*, Robert M. Chapman, Brian L. Clarke, Michael Y. Garcia, Roger Grantham, *Toby M. Kravet*, *James I. Kuroiwa Jr.*, Fran Nichols, Donna Scaff, Jack H. Scaff. Allen Teshima and *Thurston Twigg-Smith*.

H. William Burgess



1978 Con Con Photo



Aotearoa (New Zealand)

Population – 4,150,000

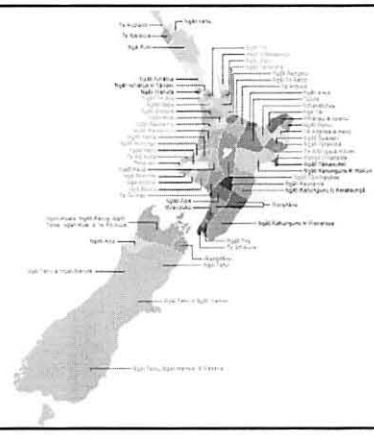
*** European ancestry – 79%**

*** Maori – 14%**

*** Other Pacific Islander – 4%**

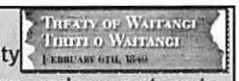
*** Asian ancestry – 3 %**

Maori Iwi (Tribal Groups) in Aotearoa (New Zealand)



Signing of Waitangi Tribunal, 1840

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 thereor 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 tive 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."

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Waitangi Tribunal

* Established by the Treaty of Waitangi Act 1975

* Consists of up to 16 members, appointed by the Governor-General upon recommendation of the Minister of Maori Affairs – half are Maori and half are Pakeha (non-Maori).

* Holds hearings and makes recommendations and determinations in respect of Crown forest land, railways land, State-owned enterprise land, and other public lands.

Waitangi Tribunal

* The Tribunal's process is more inquisitorial and less adversarial than that followed in the courts.

* It can conduct its own research so as to try to find the truth of a matter. Generally, a court must decide a matter solely on the evidence and legal arguments that the parties present to it.

* The Tribunal's process is flexible - the Tribunal is not necessarily required to follow the rules of evidence that generally apply in the courts.

Waitangi Tribunal

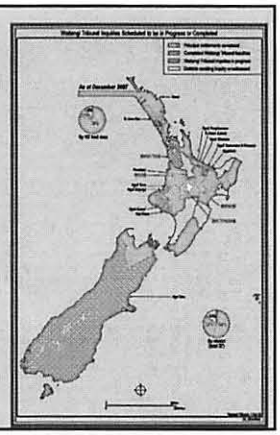
As at November 2007, 21 settlements, totaling more than NZ$700 million.

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 Rangiteaorere	1993	760,000
Hauai	1993	715,682
Ngati Whakaue	1994	5,210,000
Waikato - Tainui Raupatu	1995	170,000,000
Waimakuku	1995	375,000
Rotoma	1996	43,931
Te Maunga	1996	129,032
Ngai Tahu	1997	170,000,000
Ngati Turangitukua	1998	5,000,000
Pouakani	1999	2,000,000
Te Uri o Hau	2000	15,600,000
Ngati Ruanui	2001	41,000,000
Ngati Tama	2001	14,500,000
Ngati Awa (inc. ancillary claims)	2003	43,390,000
Ngati Tuwharetoa (Bay of Plenty)	2003	10,500,000
Nga Rauru Kitahi	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
Total settlements		743,323,645

Maori/Aotearoa

* Predominately a coastal society, tied spiritually and economically to the ocean.

* *Waitingi Tribunal* ruled that the Waitangi Treaty secured and guaranteed Maori the right to engage in commercial as well as customary and subsistence fishing.

* *Maori Fisheries Act of 1989* – 10% of all quota to Maori.

* *Treaty of Waitangi (Fisheries Claims) Settlement Act (1992)* – 20% of all future quotas; 50% of Sealord Products Ltd.

* *Foreshore and Seabed Act (2004)*

Ngai Tahu - South Island

* Originally controlled 80% of the South Island

* 1844-64: British Crown "purchased" 34.5 million acres for 14,750 pounds, leaving the tribe with 35,757 acres (1/1,000).

* Waitangi Tribunal found that:

** The Crown had acted *unconsciously* in repeated breach of the Waitangi Tribunal.

** The Crown failed to provide the health, educational & land endowments necessary to give the tribe a stake in the economy.

** Cession of sovereignty by Maori was conditional, dependent on the Crown's protection of the tribe's *rangatiratanga*.

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Ngai Tahu - South Island

* 3 ½ year inquiry into claims
* 23 hearings; 900 submissions; 262 witnesses & 25 corporate bodies gave testimony.

Ngai Tahu - South Island

* Apology
* Aoraki (Mt. Cook) – renamed & returned to Ngai Tahu to be gifted back to the nation
* Maori place names for 78 locations
* Received New Zealand's largest commercial fishing operation – Sealord – worth $75-$100 million.
* $170 million (NZ) cash settlement – and opportunity to buy predetermined lands with this
* Right of first refusal on other Crown properties that become available
* Opportunity to reexamine settlement in light of other settlements (to maintain their preeminent position among Maori iwi)

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.

Ngai Tahu

* Total Assets (as of 2006) $561 million NZ
* Substantial activities in seafood, fishing activities, forest lands

Tainui Settlement (1994)

* 35,000 acres of public lands valued at $64 million & 74-acre former air force base, valued at $2.5 million – area just south of Auckland
* $41.6 million for a land acquisition trust
* Establishment of an economic base
* Formal apology by Queen Elizabeth II

Tribes present $400 million 'Treelord' proposal (4-4-08)

A proposal by the Central North Island Iwi Collective (five iwi, with 110,000 members) for a "Treelords" Treaty settlement involving about $400 million of forestry assets is close to what the Government can agree to, Treaty Negotiations Minister Michael Cullen says. If accepted it will be the largest ever Treaty deal -- dwarfing the commercial fisheries Sealord deal.

At the heart of settlement are 9 central North Island forests -- Kaingaroa, Horohoro, Whakarewarewa, Crater, Waimihia, Marotiri, Pureora, Waituhi and Taurewa.

It has taken 20 years for the iwi to agree on the plan. Along with Ngati Tuwharetoa, the iwi group includes Ngati Whakaue, Ngai Tuhoe, Ngati Rangitihi and Ngati Whare.

Kaingaroa Forest, showing recently logged area

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Economic Impact of Maori Settlements Through the Treaty of Waitangi

* Original "fiscal envelope" of $1 Billion (NZ) has been repudiated.
* $720 million (NZ) had been allocated in settlements, as of 2007.
* $90 million (NZ) is being spent annually, excluding the settlements themselves.

Q. Can the Waitangi Tribunal make recommendations involving private land?

A: The Tribunal can hear claims concerning private land, but it cannot recommend that the land be taken away from the current owners. The only exception to this is former Crown owned land that has been passed to State-owned enterprises and then sold to private owners. In these cases, the land is sold with a notation, or 'memorial', on the title, so that buyers understand that it may be the subject of a Tribunal recommendation.

The New Zealand coat of arms, adopted in 1911 & revised in 1956, identifies New Zealand as a bicultural country, with a European female figure on one side & a Māori rangatira (chief) on the other.

US Constitution - Art. I, Sec. 8, Cl. 3

The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, ***and with the Indian Tribes...***

Art. I, Sec. 2, Para. 3

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to **the whole Number of free Persons**, including those bound to Service for a Term of Years, and ***excluding Indians not taxed,*** **three fifths of all other persons ....**

Current Approach (Since 1970)

Recognizing that Native People Have a Separate & Distinct Status & Are Entitled to Autonomy.

The United States formally affirmed the legitimacy of native autonomy in **President Nixon's** Special Message to Congress of July 8, 1970.

Since then, federal recognition has been given to many tribes previously denied this status, and significant land settlements have been reached with a number of tribes.

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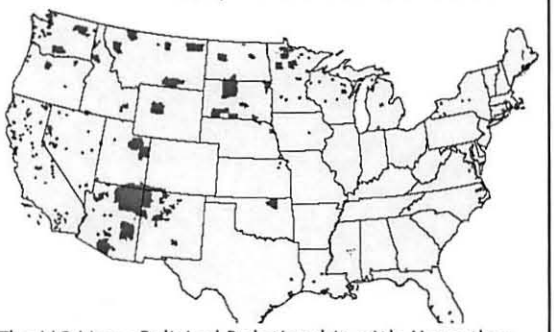
"Indian Country" in the United States



The US Has a Political Relationship with More than 550 Federally-Recognized Tribes

Alaska Native Claims Settlement Act of 1971

- Indigenous people who are not anthropologically "Indians" granted same political status as Indians.
- 44 million acres set aside for Alaska Natives, but extinguished aboriginal title
- $962.5 million cash settlement

Many Tribes Have Moved Beyond Gaming.

* The 3 tribes of Oregon's Warm Springs confederation generate $80 million/year through a power plant, timber operation, vacation resort & apparel company.

* Arizona's White Mountain Apaches manage 9 enterprises, including an aircraft parts plant, with revenues of $45 million.

* The Ak-Chin tribe in Arizona operates a $10 million agribusiness.

* The Yavapais tribe in Arizona maintains a hotel as well as a casino & has leased land for construction of a mall.

* Maine's Passamaquoddies run an auto parts plant, apparel operation, mini-mall & farm; license out a synthetic-fiber plant & environmental scrubber technology; & bought & sold a cement plant, for large profit.

* Wisconsin's Oneidas own a mobile-telephone company & a partial interest in a bank, participate in a joint venture to produce circuit boards & are moving to create metals fabrication & medical products companies.

* South Dakota's Rosebud Sioux are planning a large food-processing plant.

Mississippi Choctaws Find Economic Success -- Once-Impoverished Tribe Becomes Engine for Regional Growth (NPR July 17, 2004)

In rural Neshoba County, Miss., once one of the country's most economically depressed areas, a Native-American tribe has proven to be a powerful catalyst for growth. The 8,000 members of the Mississippi Band of Choctaw Indians have created an industrial and recreational empire in the region that's brought prosperity to themselves and their neighbors.

Choctaw Chief Phillip Martin, 78, is now one of the most influential persons in Neshoba County, Mississippi.

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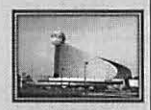
Mississippi Band of Choctaw Indians

In the 1960s, most members of the Choctaw band lived under miserable economic and health conditions. Nearly all houses on the reservation were considered substandard: 90 percent had no indoor plumbing; one-third had no electricity.



In the 1990s, the Choctaw band opened its first casino, which soon became a tourist destination. Its latest project is the Pearl River Resort, aimed at attracting families. Today, the tribe is Mississippi's second-largest employer.

Mississippi Band of Choctaw Indians

Today the tribe runs a casino, construction firm, printing plant, shopping center, and other businesses that collectively generate revenues of $300 million a year.

* Jobs are increasingly technical and professional.

* Average annual family incomes have climbed from $2,000 in the mid-1970s to more than $1 today.

* The number of Choctaws on welfare has fallen dramatically; education, health, and housing have sharply improved.

Panobscot Indians, Maine

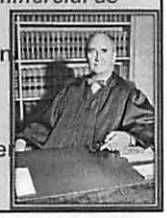
This tribe (3,000 members) became federally recognized through the 1980 Maine Land Claims Act.

Under the terms of the agreement, the Penobscot and Passamaquoddy tribes received a settlement of $81.5 million.

They live on a reservation at Indian Island, near Old Town.

United States v. Washington, 384 F.Supp. 312 (D.Wash. 1974)

* U.S. District Judge George Boldt interpreted the right to take fish "in common with all citizens of the territory" to mean that treaty Indians and nonnative residents of Washington were each entitled to *a 50-50 share of the total harvestable catch, and that the tribes' 50% share encompassed commercial as well as personal uses.*



* In accordance with congressional intent to increase tribal self-government, Judge Boldt also established the tribes as co-managers of the resources.

Pacific Northwest Native Americans

* Most treaty tribes now maintain a fisheries management staff, although several tribes have joined together to form collective fishery management organizations.

* Northwest Indian Fisheries Commission (1974)

Northwest Indian Fisheries Commission

Serving the Treaty Indian Tribes in Western Washington

N H Government Reorganization Act

Findings

* United States has a "special responsibility" for the welfare of Native Hawaiians.

* Native Hawaiians are a "distinct indigenous group" within the scope of the federal government's Indian affairs power.

* The United States has delegated broad authority to administer a portion of its trust responsibility to the State of Hawaii.

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Office of Native Hawaiian Relations

* Established in the Office of the Secretary of the Interior with the **responsibility to "continue the process of reconciliation with the Native Hawaiian people."** Consolidated Appropriations Act of 2004, Pub.L. 108-199, 118 Stat. 3, div. H, sec. 148 (2004).

* This Office was established by the Secretary of the Interior in Order No. 3254, June 24, 2004, and the Interior Department began recruiting staff members for this office in January 2005.

NH Government Reorganization Act

* **9-Member Commission** (appointed by Secretary of Interior upon recommendations of Native Hawaiian organizations, members must have experience in genealogy and must read Hawaiian) will prepare a Roll of Native Hawaiians.

* **Native Hawaiian Interim Governing Council** will be elected by persons on the Roll

* **Referendum** will be conducted to determine elements of governing documents

NH Government Reorganization Act

"Native Hawaiian" is defined as a person who is descended

*from the aboriginal, indigenous, native people who lived in Hawaii in 1893 or

* from an individual who had 50% Native Hawaiian blood in 1921

*****

The Interim Council and the Native Hawaiian governing entity can subsequently change the criteria for citizenship

NH Government Reorganization Act

* Based on Referendum, Council will develop **a Governing Document**.

* Persons on Roll will **vote** on whether to approve the Governing Document

* Secretary of Interior determines if it meets stated criteria, and if it does, **Federal Recognition is extended to the Native Hawaiian people.**[If it does not, amendments, followed by another vote.]

* **Negotiations begin for transfer of land & resources** & delegation of governmental powers to the NH Governing Entity.

The Native Hawaiian Nation

The Crown Lands should form the core of the land base for the Native Hawaiian Nation (about 1,000,000 acres), along with

*** the Hawaiian Home Lands (203,000 acres)**

*** Kaho`olawe (about 29,000 acres)**

*** the Ali`i Estates (?)**

U.S. District Judge Samuel P. King (1994):

The Supreme Court decision of 1864 and the Act of Jan. 3, 1865, and the actions of the revolutionists in 1893 resulted in a land grab at the expense of the Kamehameha line of 971,463 acres.

In the course of...correcting past wrongs, ...it would not be unjust for the state...to transfer whatever is left of the crown lands, one half to the...Bishop Estate for the education of the children of Hawaii, and one-half to the Queen's Hospital for its health programs....

Or better yet, all of these lands could be transferred to the Office of Hawaiian Affairs to form the beginnings of a land base for the benefit of all Hawaiians.

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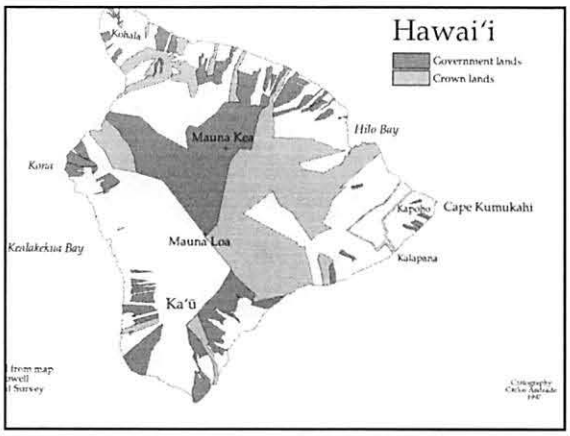

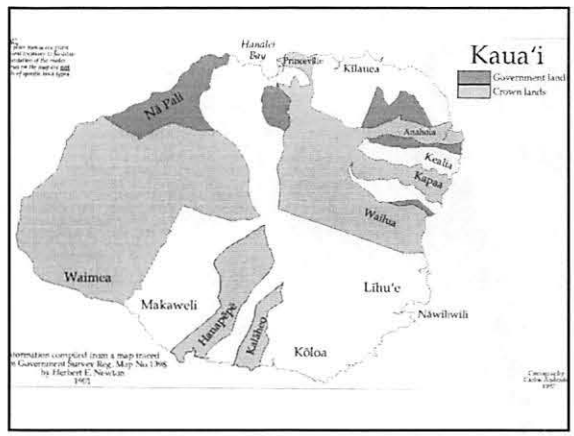

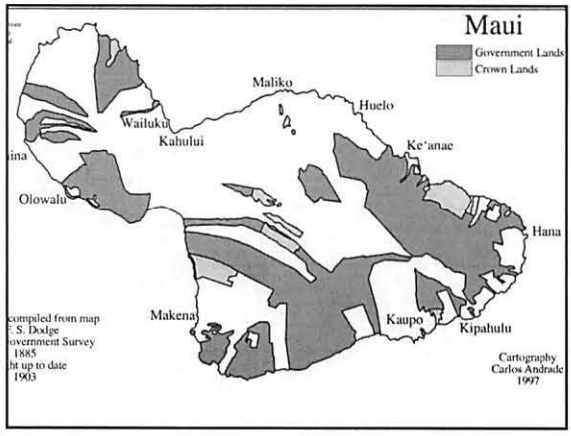

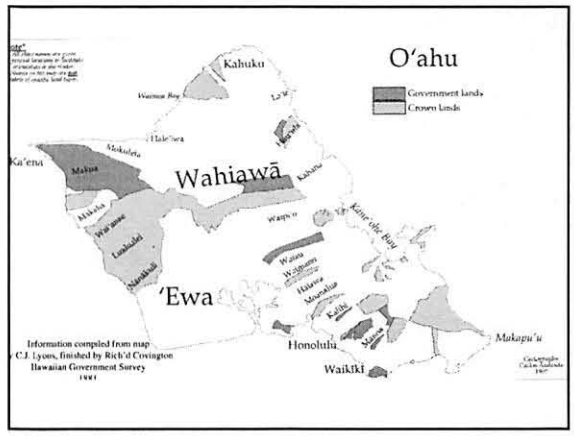

Who Owns the Crown Lands of Hawai`i?

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.

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