

PRIORITY #1: Formal "recognition for the Hawaiian people as native Americans with full access to federal programs benefitting natives.

Alternative ways to attain the objective:

1. Obtain recognition of Hawaiians as a "tribe" of "indians" and thereby automatically come within indian legislation and programs.

a) Probability of success: doubtful

1) Existing regulations (25 C.F.R. Part 54) are written so as to exclude aboriginal inhabitants whose habitat is outside the "continental" United States.

2) The criteria set forth in the regulations (25 C.F.R. 54.7(a)-(g)) must be met in order for tribal existence to be acknowledged. These criteria cannot, to a significant extent, be met.

a) e.g. 25 C.F.R. 54.7(a)

1. Repeated identification as a tribe by federal authorities
2. Longstanding relationships with state governments based on identification of the group as Indian
3. Repeated dealings with local government in a relationship based on the group's Indian identity.
4. Identification as an Indian entity by records in courthouses, churches or schools.
5. Identification as an Indian entity by anthropologists, historians, or other scholars.

6. Repeated identification as an Indian entity in newspapers and books
 7. Repeated identification and dealings as an Indian entity with recognized Indian tribes or national Indian organizations
- b) Obviously these seven criteria beg the question. Substitute "aboriginal inhabitant" or "Hawaiian" for "Indian" in each of the criterion and Hawaiians would fit. However, the other criteria set forth in 25 C.F.R. 54.7(c) and (d) are even more difficult to meet because they concern "continuous" political existence and self-governance.
- 3) Nevertheless, it is unlikely that an application for recognition of the Hawaiians as a "tribe" would succeed. The question then becomes: Would a court challenge of the bureaucratic determination succeed? This does not seem to have a high enough probability of success to warrant the commitment of resources required for litigation.
- a) Litigation would require an attack on the regulations themselves as having been improperly written so as to exclude Hawaiians: while they were so written, there seems to be no impropriety.
1. These are regulations of the Bureau of Indian Affairs (BIA) within the Department of Interior.
 2. The BIA wrote the regulations to provide a mechanism whereby groups of Indians could obtain bureaucratic recognition as tribes and thereby come within the vast amount of legislation dealing with Indian tribes. The regulations

were never intended to be "aboriginal inhabitant" regulations but rather regulations relating to a specific ethnic group. Hawaiians are not in that ethnic group.

3. It is irrefutable that the BIA was created to deal with a specific ethnic group and not a class consisting of aboriginal inhabitants.

b) Why would the Hawaiians want to be classified as a tribe?

1. They would come under BIA jurisdiction.
2. They would be viewed in the law as a "dependent race", one over which the federal government (and therefore Congress) exercises a "guardian" type of power. This statement is based upon extensive case law which defines the status of Indians.
3. Numerous laws would automatically be applied to Hawaiians. If they are a "tribe", all federal laws relating to "tribes" could be applied. Many of these laws are onerous, others are irrelevant.
4. The only advantages appear to be:
 - a) Recognition as a tribe is a recognition that the tribe is a sovereign entity. Case law has clearly established that indian tribes derive their authority from aboriginal sovereignty and not from the federal government.

- b) Within the defined geographic bounds of the tribal territory Indian tribes have self-government (in highly varying degrees).
 - c) The mere fact that there are "tribal lands" ^{would} gives ^{Hawaiians} them a land base for their governance and from which Hawaiian values, Hawaiian forms of social organization and interaction, and the rediscovery/reaffirmation of Hawaiians' historical relationship to the land can develop.
 - d) Being able to take advantage of the money available for indian tribal use or to be included in programs benefitting indian tribes.
5. a) If the goal is a recognition of Hawaiian sovereignty as a function of the existence of the Hawaiian race it seems that seeking BIA recognition as a "tribe" is an awkward way to accomplish ^{that goal} ^ There seems to be a low probability of success, and being subject to the BIA and "dependent" race status of indians is too high a price to pay. Other avenues to assert Hawaiian sovereignty should be explored.
- b) It is obvious that the historic geographic bounds of the Hawaiian race is the entire island chain. There is zero probability of the historic geographic boundaries of the Hawaiian race being recognized as that area within which Hawaiians might exercise self-government. Hawaiian Homelands might be

considered "tribal" lands but any effort to establish self-government within those areas would require Congressional action. Such action is very improbable. Moreover, is it the desire of the Hawaiian community to create geographic enclaves which by virtue of their self-governance and racially exclusive population would serve to isolate those segments of the Hawaiian population within the enclaves from the mainstream of Hawaiian political and economic life? If creation of Hawaiian "reservations" is viewed as a goal of the Native Hawaiian Legal Project, it should be clearly defined and all of the consequences of the goal explored.

^{however,}
It is recognized that Hawaiian Home Lands have

de facto

created such enclaves of primarily Hawaiian residents and ^{such enclaves already to} ~~unfortunately that population is,~~ ^{to be} ~~in fact,~~ to greater or lesser degrees, outside the mainstream of Hawaiian political and economic life. However, taking action which would reinforce such isolation exacerbates the problem. A more creative way to encourage the Hawaiian identity and to give the Hawaiians a land base than creating "reservations" must be found.

- c) If one of the primary purposes for seeking "tribal" recognition is to be able to take advantage of federal funds which are available

for indian tribes, the most efficient way to accomplish this is not by way of the back door by being recognized as a tribe but rather by direct Congressional action.

2. Specific Congressional Action. Draft legislation for Congress which acknowledges specifically that the Hawaiians are either "Native Americans", "aboriginal inhabitants" or a "race" which has aboriginal sovereignty.

a) The recognition should be included in a bill which specifically defines those programs which, although originally designed for indians or eskimos, ought to include Hawaiians.

1. This will require a thorough survey of the potentially applicable statutes and the exercise of judgment as to whether or not they ought to be applied to Hawaiians. Although this is a sizeable task it can be done without too sizeable a commitment of resources. An additional benefit of the survey will be to develop an inventory of programs that have been designed to benefit at least one class of native Americans.

b) Any such legislation ought to also impose a mandatory requirement that any future legislation, federal regulations or federal programs which are designed to benefit aboriginal inhabitants who are subject to the jurisdiction of the U.S. shall include Hawaiians. The idea is to require federal agencies and those preparing legislation to consider whether or not the benefits of the programs should include Hawaiians.

c) Probability of success: unknown.

1. In ^{light} ~~view~~ of the views of the Reagan administration, the legislation would have a higher probability of enactment

if it does not carry a price tag on it but merely opens up existing programs to Hawaiians.

2. The probability of success is higher than attempting to gain recognition as a "tribe". Consideration should be given to having such legislation give official U.S. recognition ^{to} of the Office of Hawaiian Affairs as the agency/entity which will administer those programs to the extent they are to be applied to Hawaiians. If OHA can receive a federal charter or some sort of Congressionally mandated existence, that would be desirable.

- as things stand now an amendment to the Hawaii Constitution could abolish OHA or severely limit the scope of its activities.
- a federal charter would give OHA existence separate and apart from anything the state might do. Even if the State Constitution were to be abolished, OHA would continue to exist.
- Being a creation of both state and federal law, OHA could serve as a link or bridge between the state and federal programs affecting Hawaiians.
- If dealt with properly, the federal charter (or whatever) could be the beginning of a form of governance of Hawaiians, i.e., OHA could be viewed as the repository of some of the attributes of chieftenship.
- Political authority, a measure of self-governance and existence as an autonomous entity is necessary to effectively have sovereignty. If recognition

of sovereignty is a goal, then some repository of
sovereignty needs to exist. It is not sufficient
to simply say sovereignty is in the people. Although
ultimate sovereignty is in the people -
~~that statement is accurate~~ as a function of
international ^{law} (at least ^{must be} in democratic societies) -
nevertheless there is some governing body which is,
to a greater or lesser extent, the repository
of such sovereignty.

- a careful and continuous enhancement of OHA's powers,
functions and responsibilities will go far to
reestablishing Hawaiian sovereignty. This must be
viewed as a decades-long process.