

## **Rice v. Cayetano (2000)**

### **What Are the Options?**

**\* *Organize a quasi-sovereign political body.*** This organization probably must have a specific membership/enrollment element to it – a voluntary association, rather than including all persons of Native Hawaiian ancestry.

**\* *Define the membership*** of this organization – ***what does it mean to be a “Native Hawaiian”?***

**\* *Seek recognition from the federal and state governments.***

'AHA KUKA I NA KUPUNA  
O  
HAWAI'I NEI

*"Gathering of Our Living Treasures"*

August 10 - 12, 2001  
Lahaina, Maui, Hawai'i

'AHA 'ELELE HANA KUMU KANAWAI  
(Constitutional Convention)

Led by Na Kupuna O Hawai'i Nei, the 'Aha 'Elele Hana Kumukanawai, will create an environment to develop friendly relations among individuals and families in the Hawaiian community as well as the general public. Based on respect for the principle of equal rights and self determination of peoples, the vision is to take "all the time necessary" to enter into dialogue and discussion with one another on all issues, legal challenges & factual information affecting the Hawaiian community.

A Hawaiian 'Aha 'Elele Hana Kumukanawai is like a Pu'uhonua (refuge) in which it protects and insures the Hawaiian people, their political, economic, social and cultural educational advancement, their just treatment and their protection against abuses. An opportunity of this magnitude would allow our people the time to make well educated decisions concerning the protection of Hawaiian Rights and Entitlements as well as the Right to Self-Determination and Self-Governance, including Independence.

BENEFITS

of a

'AHA 'ELELE HANA KUMU KANAWAI

1. The Emergence of a provisional "Body of Authority"
2. A provisional "Body of Authority" to negotiate with all:
  - Government agencies and entities
  - Financial Institutions
  - Multi-National Corporations
  - Ali'i Private & Public Trusts
3. A provisional "Body of Authority" to Protect Hawaiian Rights, Entitlements & Programs such as:
  - OHA (*Rice v. Cayetano*)
  - DHHL (*Barrett v. Cayetano*)
  - Kamehameha Schools (*racial discrimination*)
  - Lunalilo Home (*an example of such abuses*)
  - Queen Emma Foundation (*Queens Hospital*)
  - Queen Kapiolani (*Kapiolani Maternity*)
  - Queen Lili'uokalani (*youth programs*)
  - ALL Other Benefits (*unknown at this time*)

BENEFITS

of a

'AHA 'ELELE HANA KUMU KANAWAI

4. A provisional "Body of Authority" to protect Hawaiian people against Political abuses on Self-Determination & Self-Governance including Independence.
  - Under International Law (customary) *Article 1, Section (2) under the United Nations Charter*
  - Under State of Hawai'i Law (internal) *Hawaii Legislative Bills, Acts & Resolutions (Hemmings, OHA, SCHAA bills etc.)*
  - Under United States Law *U.S. Congressional Bills, Acts & Resolutions (Akaka Bill, Federal Task Force etc.)*
5. A provisional "Body of Authority" to prepare for the convening of the 'Aha 'Elele Hana Kumukanawai
  - Hold the elections of delegates

(note: U.S. Constitution took 11 years to Create)
6. A provisional "Body of Authority" to develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples, and to take other appropriate measures to strengthen universal peace.

NA HALE O NA 'AHA 'ELELE HANA KUMUKANAWAI O NA KUPUNA O HAWAI'I NE'I

LONG STANDING ISSUES & LEGAL CHALLENGES

AFFECTING THE HAWAIIAN COMMUNITY

**DEPT. OF HAWAIIAN HOME LANDS**  
1920 Hawaiian Homes Commission Act  
• Housing

**OFFICE OF HAWAIIAN AFFAIRS**  
1978 Constitutional Convention  
• Economic development

**1909 QUEEN LILI'UOKALANI CHILDRENS CENTER**  
• Youth  
• Community development

**1884 KAMEHAMEHA SCHOOLS**  
• Education

**1881 QUEEN KAPI'OLANI MATERNITY**  
• Health care / maternity

**1877 LUNALILO HOME**  
• Kupuna (elderly)

**1859 QUEEN EMMA**  
• Health care

NA  
KUPUNA  
O  
HAWAI'I NE'I  
  
PEOPLE

**U. S. Public Law 103-150**  
"An Act of War"

*CHARTER of the UNITED NATIONS*  
**PURPOSES & PRINCIPLES**  
Chapter I, Article 1, sec. 2

*To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.*

Create Committees on:

✓ **GOVERNMENT**  
• Protect Hawaiian Rights & Entitlements  
• Any City, State and Federal Laws  
• Legislation, Acts or Resolutions

**I. GOVERNMENT**  
1. Protect Hawaiian Rights & Entitlements  
• Gathering Rights

• Self-Determination & Self-Governance  
• Under International Law  
• Under State & U.S. Law

2. Self-determination and Self-governance  
• Independence • Free Association • Integration

✓ **FINANCIAL INSTITUTIONS**

**II. FINANCIAL INSTITUTIONS**  
1. First Hawaiian Bank  
2. Bank of Hawaii  
3. American Savings  
4. Bank of America

✓ **ALI'I, PRIVATE & PUBLIC TRUSTS**

✓ **MULTI NATIONAL CORPORATIONS**

**III. MULTI - NATIONAL CORPORATIONS**  
1. Big 5 corporations  
2. ??? corporations

**KUMU**

**1840 to 1887 HAWAII CONSTITUTION**  
• Keanu Sai  
• Dennis Ragsdale

• Henry Noa  
• Bill Amona

**MONARCHY:**  
• Geneological ties

**RE-ESTABLISHED 1893**  
**1893 DRAFT CONSTITUTION**  
• Queen Lili'uokalani  
(abrogates 1887 constitution)

**UNITED NATIONS**  
United Nations Article 73  
• Poka Laenui  
• Dr. Kekuni Blaisdell

**NEWLY -ESTABLISHED**  
1995 Nation of Hawai'i Constitution  
• Pu'uhonua K. Kanahahele  
1999 Native Hawaiian Convention  
• Arthur Hoke

**NATION WITHIN NATION**  
• SCHAA  
• Ka Lahui Hawai'i  
• Native Hawaiian Federal Coalition  
• Any Others Not Mentioned

## Rice v. Cayetano (2000)

### Options to Pursue:

\* Develop *a specific land claim* and file it, arguing that the taking of the Crown and Government Lands were an unlawful and uncompensated taking.

\* This approach would serve to transform the Native Hawaiian People into claimants with specific property rights (*claims are property rights*) that define their unity.

### Problems:

- \* Statute of limitations
- \* Sovereign immunity
- \* Defining the class of claimants

## Can Programs for Native Hawaiians Meet the “Strict-Scrutiny/Compelling-State-Interest” Test?

Yes – The Department of Hawaiian Home Lands, for instance, is carefully designed to promote the self-governance and self-sufficiency of the native people, which is certainly an overriding goal of our nation, reinforced by emerging norms of international law.

*The right to self-determination* is the most basic of human rights under federal and international law, and efforts to facilitate the exercise of this right are mandated by fundamental principles of human rights and human decency.

**Ninth Circuit:** “[E]ven if the voting restriction must be subjected to *strict judicial scrutiny* because the classification is based explicitly on race, it survives because the restriction is rooted in the special trust relationship between Hawaii and descendants of aboriginal peoples who subsisted in the Islands in 1778 and still live there – which is not challenged in this appeal. Thus, *the scheme for electing trustees ultimately responds to the state’s compelling responsibility to honor the trust*, and the restriction on voter eligibility is *precisely tailored* to the perceived value that a board [should be chosen from among those it represents].” 146 F.3d at 1082.

**Judge Ezra:** The State’s interest in conducting the Native Hawaiian Vote was “perhaps even *compelling* in light of...the state’s unique obligation to Native Hawaiians as demonstrated by its constitution and the HHCA.” 941 F.Supp. at 1544.

## **Options for OHA**

**\* Privatize? Does that eliminate the potential problems?**

**\* NonHawaiian Support Groups Should Urge All NonHawaiians to Abstain from Voting for OHA Trustees.**

**\* OHA Should Establish a Litigation Fund to Protect All Native Hawaiian Entitlement Programs**

**Rice v. Cayetano** (2000)

\* Challenge the Supreme Court's decision before *the Inter-American Human Rights Commission* (in San Jose, Costa Rica).

\* Solicit New Zealand to bring a claim against the United States before *the Human Rights Committee* (in Geneva) under Article 41 of *the International Civil and Political Rights Covenant*.

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## The Native Hawaiian Federation

Recount some history

Explain role of SCHHA and Hui Kakoo – linked to federal recognition

Explain Prince Kuhio and 1/32nd membership

State goals clearly

Quasi-sovereign political entity, but perhaps not the final incarnation.

Federation includes all organizations that are committed to common goal of promoting the self-determination, self-governance, and self-sufficiency of the Native Hawaiian People, and which have membership lists.

[Also open to individuals, who are eligible to participate through island or ahupuaa organizations]

To be governed by a Federation Council and a Federation Mo`i, who will be elected by the organizations, based on a weighted-voting system – i.e., one-Native-Hawaiian/one-vote principle-- based on the number of members in the organization. The Federation Council will consist of 21 persons, divided up among the organizations in terms of their membership numbers. The Federation Mo`i will be elected for a four-year term by the entire membership.

An opening structure needs to be outlined. One possibility:

SCHHA – 3 seats

Hui Kakoo – 2 seats

Ka Lahui – 2 seats

OHA – 3 seats

Native Hawaiian Convention – 3 seats

Kualoa Group – 2 seats

Ka Pakoukou (Dr. Blaisdell's Group) – 1 seat

Kingdom of Hawaii (Bumpy Kanahele's Group) – 1 seat

Hawaiian Civic Clubs – 2 seats

Others – 4 seats

Judicial branch to be developed shortly.

List of powers!!

Who should launch it? SCHHA & Hui Kakoo? OHA? Kapuna group? Coalition?

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## **Underlying Points In Support Of Proposed State Legislation Addressing Rice v. Cayetano**

- The Trustees of OHA believe it is essential after the Rice case that the integrity of OHA be preserved in accordance with the intent of the legislature and the will of the people.
- OHA was meant to be a transitional entity, to hold Hawaiian assets in trust for the benefit of the Hawaiian people until a sovereign nation becomes established.
- Under the present state of the law, OHA exists as a state agency governed by trustees whose elections are now open to all otherwise qualified electors.
- Without legislative intervention, the possibility exists that the general electorate, voting in November elections, will change the character of OHA as a Hawaiian entity forever.
- Having OHA fund its own elections will be ineffectual to change the root problem examined in Rice that OHA is, no matter how the elections are funded, a state organ operated by state officials. It is this structural situation which must be addressed.
- The Trustees of OHA deem it urgent to have legislation that acknowledges the present state of affairs and directs the Trustees to work on a transitional plan that examines the viability of establishing OHA as a legal entity empowered to carry out OHA's public purposes as a private Hawaiian organization.
- This enabling legislation gives all concerned time to recognize and possibly solve the myriad of problems post-Rice that will affect assets that belong to the Hawaiian people.
- The approach taken by the Trustees is the most responsible way, under the urgency created by Rice, to respect the integrity of OHA as a Hawaiian entity, with a specific mission to benefit Hawaiians.

## What Is the Ultimate Goal?

\* *Self-Governance/Autonomy/Independence*

\* *Land and Resources – How much?*

Is it realistic to imagine that a total and complete settlement could be reached, which would waive all future claims?

Why did the OHA Trustees vote to reject the Governor's proposal and abandon the negotiating process?

## Protective Strategies

- \* Create a Native Hawaiian Nation
- \* Settle the Land Claim
  
- \* Privatize the Trusts??
- \* Create a Political Subdivision??

# Protective Strategies

Analysis of Kri  
Goals

Existing Protections

→ Defense Act  
Act 302

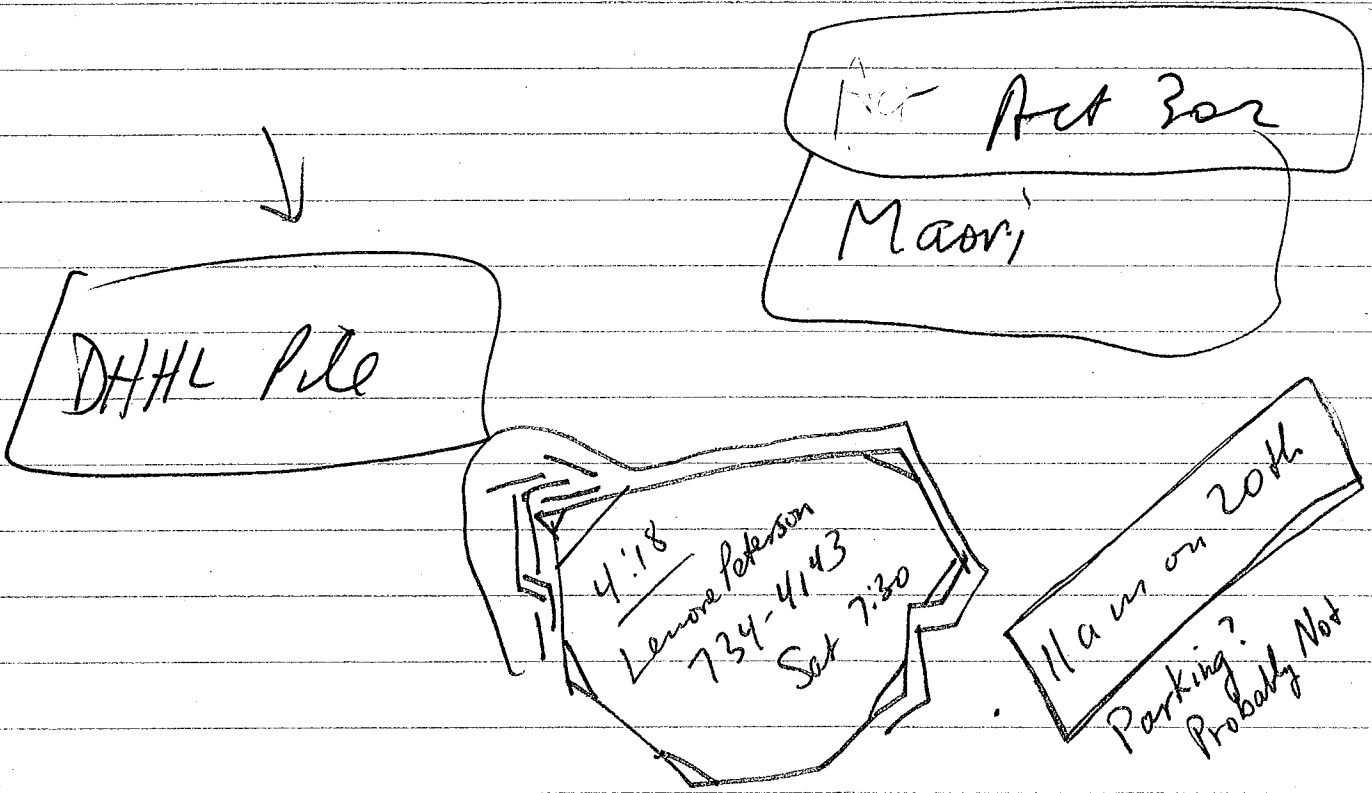
Models to look to

\* Privatize Trusts

\* Create a NH Nation!

\* Political Subdivision

Fix of John Carroll  
~~Sup Ct Fix~~  
~~Mayor Fix~~



## **The Land Base for the Native Hawaiian Nation**

- \* Kaho`olawe
- \* The Hawaiian Home Lands?
- \* 20% (by value) of the Public Land Trust (the “Ceded Lands”)?
- \* The Crown Lands?
- \* All of the Lands in the Public Land Trust?
- \* The Bishop Estate Lands and the Lands of the Other Ali`i Trusts?

**[§ 6K-9] Transfer. Upon its return to the State, the resources and waters of Kaho'olawe shall be held in trust as part of the public land trust; provided that the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii.**

**All terms, conditions, agreements, and laws affecting the island, including any ongoing obligations relating to the clean-up of the island and its waters, shall remain in effect unless expressly terminated.**

## Protective Strategies

- \* Create a Native Hawaiian Nation
- \* Settle the Land Claim
  
- \* Privatize the Trusts??
- \* Create a Political Subdivision??

*\* Energize Politically*

## What to Do Next?

- \* Reinstate interim fixed-amount funding
  
- \* Reopen negotiations for transfer of lands to the Sovereign Native Hawaiian Nation, and support the establishment of the Nation
  
- \* Establish a Tribunal like the Waitangi Tribunal to determine claims and recommend settlement arrangements

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# Buy Land

C. Brewer Land on the Big Island  
Is for Sale

For instance:

About 3600 acres just north  
of Hilo is available for  
\$11,000,000

## **Should We Wait Until the Hawaiians Unite?**

Remember the Civil Rights period –

We now remember Martin Luther King and his dynamic leadership, but the African-American Community was not in fact united behind him.

H. Rap Brown  
Stokely Carmichael  
Malcolm X

We have similar divisions among the Native Hawaiians, but their failure to unite does not undercut the justice of their cause.

1963 – Civil Rights time – my minister told us when I was an undergraduate at Yale, that this was not a struggle of Blacks vs. Whites, but rather, Whites and Blacks together vs. Injustice.

Today, we have a similar struggle in Hawai`i for social justice:

Not Hawaiians vs. NonHawaiians, but

Hawaiians & NonHawaiians vs. Injustice

## What Needs to Happen Next?

*Congress Needs to Establish a Procedure for Formal Recognition of an Organization Representing the Native Hawaiian People.*

### Examples:

\* **Indian Reorganization Act**, 25 U.S.C. sec. 476.

\* **Menominee Restoration Act of 1973**, Pub. L. No. 93-197, 87 Stat. 770, codified at 25 U.S.C. secs. 903-903f. (Under this enactment, federal officials conducted elections to determine the desired form of government for this group of Indians, whose tribal status had earlier been terminated.)

\* **Alaska Native Claims Settlement Act** (1971)

## What Is the Next Step?

\* The Native Hawaiian People Must Gather Together to Determine the Form of Governance for the Native Hawaiian Nation.

\* Through Elected Representatives?

\* How Should this Event Be Organized and Funded?

\* Is It Appropriate for the **State** and/or the **Federal Governments** and/or the **Office of Hawaiian Affairs** to Provide Funding?

*These bodies all receive revenues and benefits from the lands claimed by the Native Hawaiian People, so it would appear logical for some of their revenues to be used to assist the self-determination process of the Native Hawaiian People.*

Native Hawaiian Sovereignty is economically  
advantageous to everyone –

federal money

jobs

sense of commitment to the community

Maine

Wisconsin

New Zealand (Aotearoa)

Everyone prospers in the long run when  
everyone in the community feels they are getting  
a fair shake.

## **Potential Powers of the Native Hawaiian Nation**

\* to adopt ordinances for the health, safety, and welfare of members of the Hawaiian community--and operate schools, police, fire protection, welfare system

\* to receive and manage lands, resources, and funds

\* to levy taxes, issue bonds, zone trust lands, produce income from such lands, and regulate conduct on trust lands

\* to allot lands to members of the Hawaiian community

\* to regulate hunting, fishing, access and other traditional rights and practices of members of the Hawaiian community

\* Lands and Resources controlled by Native Hawaiian Nation would not be subject to taxation by the State Government.

\* *sovereign immunity*

## Self-Determination Options

- \* ***Tribe***
  - \*\* Federal Recognition  
(Nation within a Nation)
  - \*\* State Recognition  
(State within a State)
  
- \* ***Tribal Corporation*** (Alaskan Natives)
  
- \* ***Municipality/Political Subdivision***  
(Nunavut (Canada))
  
- \* ***Autonomous Affiliated Political Entity***  
(Commonwealth of the Northern  
Mariana Islands (U.S.); Greenland  
(Denmark))
  
- \* ***Freely Associated State***  
(Federated States of Micronesia(U.S.);  
Cook Islands (New Zealand))
  
- \* ***Independent Country***

## **The Native Hawaiian Nation--**

### **Centralized or Decentralized?**

- \* **One Nation or Several Nations?**
- \* **A strong Centralized Nation?** (With Island Councils that have an advisory role.)
- \* **A "Federal" Nation,** with strong Island Councils that have real power over the resources on their islands?
- \* **A Centralized Nation with a Bicameral Legislature?**
  - \*\* one branch based on population
  - \*\* one branch based on island geography