

Summary of Important Provisions in Amended S. 1011

Discussions between Hawai'i's Congressional delegation, the White House, the Department of Justice, and the Department of Interior resulted in proposed amendments to H.R. 2314 and S. 1011, the Native Hawaiian Government Reorganization Act. Senator Daniel K. Akaka's office has indicated that these amendments maintain the intent of "extend[ing] the federal policy of self-governance and self-determination to Native Hawaiians for the purposes of a federally recognized government-to-government relationship," while at the same time addressing policy concerns identified at an August 6, 2009, Senate Indian Affairs Committee hearing.

On December 16, 2009, the House Natural Resources Committee passed the un-amended version of H.R. 2314.

On December 17, 2009, the Senate Indian Affairs Committee approved the amended version of S. 1011.

Representative Abercrombie has indicated that when H.R. 2314 comes up for a vote in the U.S. House, he will move to amend H.R. 2314 to make it consistent with the amended version of S. 1011.

This summary of the amendments to S. 1011 focuses exclusively on the most significant amendments and *does not* include all changes in the bill. The Office of Hawaiian Affairs has an excellent side-by-side comparison of the two bills at www.nativehawaiians.com. This summary should be read in conjunction with the side-by-side comparison for a more complete understanding of the two bills. Throughout this summary, S. 1011 refers to the bill as amended and approved by the Senate Indian Affairs Committee while H.R. 2314 refers to the un-amended bill as passed by the House Natural Resources Committee.

Explanation of Significant Amendments

Section 2 – Findings

S. 1011 more clearly identifies the U.S. Constitutional provisions giving Congress the authority to address the conditions of the indigenous, native people of the U.S., including Native Hawaiians.

S. 1011 adds specific language to several of the findings acknowledging that Native Hawaiians are a "distinctly native community" and that Native Hawaiians have actively maintained native traditions and customary usages through participation in Native organizations, trusts, and other organizations. This language is important to show that Native Hawaiians are not just bound together by common ancestors but continue to constitute a distinct native group. Courts look to a native group's cohesiveness and interconnectedness as a factor in determining whether Congress has the authority to recognize that group as a sovereign entity.

S. 1011 more thoroughly sets out the history of the relationship between the U.S. and Native Hawaiians.

Section 3 – Definitions

In S. 1011, the term "Qualified Native Hawaiian Constituent" (QNHC) replaces both "Native Hawaiian" and "Adult Member" in the definition section. Generally, a QNHC must be:

An indigenous, native person of Hawai'i and a direct lineal descendant of the aboriginal, indigenous, native people who resided and exercised sovereignty in Hawai'i on or before January 1, 1893; OR
An indigenous, native person of Hawai'i that was eligible in 1921 under the Hawaiian Homes Commission Act (HHCA) or a direct lineal descendant.

In addition, a QNHC must wish to participate in the reorganization of a Native Hawaiian governing entity (NHGE) and be a U.S. citizen of least 18 years of age. Furthermore, a QNHC must have maintained a significant cultural, social, or civic connection to the Native Hawaiian community. This requirement reinforces the fact that Native Hawaiians comprise an interconnected and cohesive community with cultural and social ties as well as civic and political institutions. Some native groups have adopted blood quantum requirements as an indication of cohesiveness, but such requirements can sometimes lead to discord and division because they can exclude community members with meaningful cultural, familial and other ties to the group. Instead of imposing a potentially divisive blood quantum requirement, S. 1011 seeks to be as inclusive as possible, while still addressing the concern that those participating in reorganizing the NHGE comprise a "distinctly native community."

A significant cultural, social, or civic connection to the Native Hawaiian community can be shown by meeting at least two of ten listed criteria:

1. Hawai'i resident;
2. If not a Hawai'i resident then must have lived in Hawai'i and individual, spouse, or parent must have left to serve in the U.S. military, or for a federal job, or for higher education;
3. Eligible under the HHCA *and resides or resided on* Hawaiian homelands, or the child or grandchild of that individual;
4. Eligible under the HHCA (but residency on Hawaiian homelands is not required);
5. Child or grandchild of someone eligible for HHCA;
6. Resides on or has an ownership interest or has a parent or grandparent who resides on or has an ownership interest in kuleana land owned in whole or in part by a lineal descendant of the person who received the original title to the kuleana land;
7. Has attended or is the child or grandchild of someone who has attended a Hawaiian immersion or other school operated primarily for the benefit of Native Hawaiians for at least 1 year;
8. Membership since 9/30/2009 in 1 Native Hawaiian membership organization;
9. Membership since 9/30/2009 in 2 Native Hawaiian membership organizations;
10. Is regarded as a Native Hawaiian and whose mother or father is or was regarded as a Native Hawaiian as evidenced by affidavits from 2 QNHCs with expertise in the social, cultural, and civic affairs of the Native Hawaiian community.

S. 1011 also defines a "Native Hawaiian Membership Organization," as an organization that serves and represents the interests of Native Hawaiians, has elected leaders or leaders selected through traditional leadership practices, advances the cause of Native Hawaiians, is a membership organization, and keeps an accurate list of Native Hawaiian members.

Section 7 - Department of Justice

Unlike H.R. 2314, S. 1011 provides for a Department of Justice representative to assist with implementation of the Act to ensure that all constitutional parameters, rights, and protections are observed. This provision was included in earlier versions of the bill.

Section 8 – Process for Reorganization of the Native Hawaiian Governing Entity (NHGE)

In both versions of the bill, a 9-member Commission is to be appointed by the Secretary of the Interior to establish a membership roll of Native Hawaiians.

S. 1011 does not substantially change the function of the 9-member Commission. The Commission, however, has an additional responsibility to convene a minimum of 3 meetings, each of at least 2 working days, of the QNHCs on the roll in order to:

- develop eligibility criteria for Native Hawaiian Interim Governing Council candidates;
- determine the number of Interim Governing Council members; and
- elect the Interim Governing Council members.

H.R. 2314 contains no specific mechanism to create or establish the Interim Governing Council.

S. 1011 more clearly defines the Interim Governing Council’s responsibility to:

- hold a referendum on the contents of organic governing documents;
- draft organic governing documents that would, among other things, establish the criteria for membership in the NHGE and provide authority for the NHGE to negotiate with the Federal and State governments;
- give notice and make copies of the draft documents available; and
- conduct a ratification vote on the documents no sooner than 180 days after the draft is published.

S. 1011 also requires the Interim Governing Council to hold an election for NHGE officers if the governing documents are ratified.

Section 9 – Reaffirmation of Delegation of Federal Authority; Negotiations; Claims**(b) Negotiations**

It is expected that once recognized, the Native Hawaiian governing entity will negotiate with the United States and the State of Hawai‘i over numerous issues. These issues include: the transfer of lands, natural resources, and other assets; civil and criminal jurisdiction; residual responsibilities of the Federal and State governments; and grievances over historical wrongs. S. 1011 adopts several important changes in the negotiations section.

S. 1011 limits negotiations regarding lands to State of Hawai‘i lands and “surplus” Federal lands.

H.R. 2314 denies the NHGE the ability to exercise any aspect of governmental power until it completes negotiations with the Federal and State governments, which could potentially preclude the NHGE from taking actions in furtherance of traditional laws and justice systems, such as providing basic social services and caring for the welfare of children. S. 1011, on the other hand, vests the Native Hawaiian governing entity with the inherent self-governing powers and privileges of a native government during the process of negotiation with federal and state officials.

S. 1011 provides that once Federal recognition has been extended, the United States will recognize and affirm the inherent authority of the NHGE. The concept of inherent authority is based on the fundamental principle that sovereign, self-governing native communities retain all rights and powers of self-government and self-determination that have not been expressly extinguished. Inherent authority

is a power that arises organically from the community's identity as a sovereign political entity, as opposed to delegated authority, which is authority that is **granted to** native communities by the Federal or State governments. In essence, recognizing inherent authority affirms that self-governing power rests with the native community to retain or transfer as it wishes. Inherent authority also places native communities on a more equal footing with the Federal and State governments in negotiations.

Inherent authority includes the right to determine the form of government, the power to determine membership, the power to operate the native government and carry out responsibilities, and the power to approve or veto the use or disposition of native government assets. In contrast, some natural resource protection and enforcement powers, such as authority under the Clean Air Act, are viewed as delegated authority given to native governments by Congress.

(c) Claims and Sovereign Immunity

The un-amended language in H.R. 2314 on claims and sovereign immunity raises several constitutional problems. H.R. 2314 prevents claims from being brought against the Federal and State governments for breaches of trust, land, and resources by affirming the sovereign immunity of those governments. H.R. 2314 also renders these claims, and any similar or related claims, incapable of being decided in a court of law. Under H.R. 2314, individual Native Hawaiians and the NHGE are barred from bringing claims in situations where other individuals could. This raises strong Equal Protection concerns. In addition, by making these claims incapable of being heard in a court of law, the language violates the Fifth Amendment, which prohibits the government from taking property without just compensation. This is because protected property rights include recognized native lands and claims for recognized lands. Additionally, H.R. 2314 states that the claims could not be heard in a court of law unless raised by the Federal government, which creates a situation where the Federal government would have to bring a claim against itself.

S. 1011 eliminates the constitutional problems and the unusual situation in which the Federal government would sue itself. Moreover, S. 1011 clarifies that past claims already adjudicated cannot be revived, future claims are not affected, and defenses to future claims are not affected. This protects the Native Hawaiian governing entity, the United States, and the State of Hawai'i by ensuring that no party has any advantages or rights it would not otherwise have.

Section 10 – Applicability of Certain Federal Laws

H.R. 2314 effectively prevents the Native Hawaiian government from placing lands into trust with the Secretary of Interior. S. 1011 eliminates that provision, thereby keeping that option open for the future. S. 1011 also reaffirms the NHGE's inherent authority by removing a provision in H.R. 2314 stating that the Act does not alter State and Federal jurisdiction.

S. 1011 clarifies that the Indian Trade and Intercourse Act was not applicable *prior to* Federal recognition of the NHGE.

S. 1011 further strives to recognize and protect the rights of individual QNHCs and members of the reorganized Native Hawaiian government by applying the Indian Civil Rights Act to actions of the Interim Council and the NHGE. The Indian Civil Rights Act expressly forbids native governments from abridging a member's civil rights, including free speech, equal protection and due process, and secures to members rights against unreasonable searches and seizures, double jeopardy, and cruel and unusual punishment, among a host of other protections.