



March 12, 2010

GENERAL MEMORANDUM 10-031

Native Hawaiian Government Reorganization Bill Clears House, Includes Substitute

On February 23, 2010, HR 2314, a bill to give Native Hawaiians the power to form a sovereign government, cleared the U.S. House of Representatives for the third time in ten years by a vote of 245-164. The Abercrombie Substitute amendment (see below) was included but two Republican amendments were not. Primary objections to the bill fall along party lines; Republicans claim the bill would create a "race based government" and would be a civil rights violation.

The bill sets forth a process by which Native Hawaiians would form a government and then negotiate with State and Federal governments for the control over their own lands, natural resources, schools, and financial assets. The bill recognizes that "the United States has a special political and legal relationship with the Native Hawaiian people, which includes promoting the welfare of Native Hawaiians." Nonetheless, the bill would maintain current federal and state civil and criminal jurisdiction and would specifically ban gaming. Additionally, the bill stipulates the reorganization and recognition of a Native Hawaiian governing entity does not automatically include Native Hawaiians in federal programs and services that designate "Indians" as eligible entities.

Changes Made by the Abercrombie Substitute.

The House voted to accept the substitute version proposed by Representative Abercrombie (the Substitute) which makes a number of changes and important clarifications to the bill as reported out of Committee.

First, the Substitute provides "for the exercise of inherent and other appropriate governmental authorities by the Native Hawaiian governing entity." This is a departure from prior versions which did not mention the exercise of inherent powers. The Substitute also adds a new section 9(b) which recognizes the governmental powers of the new Native Hawaiian governing entity and states that the new government "shall be vested with the inherent powers and privileges of self-government of a native government under existing law." These new provisions give the new Native Hawaiian governing entity a stronger hand in intergovernmental negotiations.

Second, for the purposes of determining the composition of the roll, the Substitute replaces the definition of "Native Hawaiian" with "Qualified Native Hawaiian Constituent." The new definition would require a Native Hawaiian who wants to join the Native Hawaiian governing entity to sign a statement that he or she wishes to be part of the

new entity and has maintained a "significant cultural, social or civic connection to the Native Hawaiian community." Of the ten criteria listed for demonstrating that connection, the applicant would need to satisfy two.

Third, the Substitute clearly states that the negotiation of an agreement between the new Hawaiian governing entity, the U.S., and the State of Hawaii includes the transfer of Hawaii state lands and surplus Federal lands, thus removing the previous prohibition on the power of the Secretary to take land into trust for the Native Hawaiian governing entity or Native Hawaiians.

Nonetheless, *allowing* for the negotiation of land into trust (among other provisions) and removing the prohibition on it would not automatically allow it to happen by virtue of the recognition of a Native Hawaiian governing entity. A new subsection is added, 9(c)(3), which addresses the rights of Native Hawaiians, the State of Hawaii, and the powers of the new Native Hawaiian governing entity during the period between the affirmation of the government-to-government relationship between the U.S and the Native Hawaiian governing entity and the enactment by Congress and the State of Hawaii of legislation to implement the negotiated agreement among the U.S., the State of Hawaii and the Native Hawaiian governing entity.

During that period, the Substitute states that there will be no "Indian Country" in Hawaii, the U.S. cannot take land into trust in Hawaii, members of the Native Hawaiian governing entity will be subject to Federal and State laws, nothing restricts the State's current powers, and the Native Hawaiian governing entity cannot exercise criminal, civil, adjudicative, legislative, regulatory, or taxation authority or jurisdiction over individuals who are not members of the Native Hawaiian governing entity, or corporations owned by the Native Hawaiian governing entity without their express consent.

The Substitute does, however, affirm the sovereign immunity of the Native Hawaiian governing entity during this period and excludes the governmental activities of the Native Hawaiian governing entity from the regulatory and tax jurisdiction of the State of Hawaii.

Process for Reorganization.

- A temporary, nine member, Commission would be appointed by the Secretary of Interior for the sole purpose of approving a roll of "qualified Native Hawaiian constituents."
- Once a roll is approved, the Commission would create the framework for a Council to be elected from members of the roll.
- The elected Council members would be tasked with the purpose of creating organic governing documents for the Native Hawaiian governing entity.

- After the organic governing documents are finalized, they would be voted on by members of the roll and certified by the Secretary of Interior provided that they meet the criteria set forth in this bill.
- The Council would then hold elections for officers to serve in the newly created, Native Hawaiian governing entity.
- The Native Hawaiian governing entity would enter into government-to-government negotiations with the State and Federal governments.
- The negotiated agreements would then proceed through the legislative process to be enacted by Congress and the State of Hawaii before they go into effect.

Legislative Outlook.

While the Administration has indicated support for the legislation and the Senate version of the bill, S 1011, was reported favorably out of the Committee on Indian Affairs after a December 17, 2009, markup session, the legislation has never fared well in the Senate and concerns remain as to its ability to do so in the current Congress. The changes included in the Senate markup as well as those in the Abercrombie Substitute have drawn Hawaii Governor Lingle's opposition to the bill in its current form and it is uncertain at this time whether the loss of Lingle's support will impact consideration of the bill on the Senate floor. On March 11, 2010, the Senate filed a report (S Rept. 111-162) detailing the changes made by the Senate substitute amendment; however, the text is not yet available and should be released later today.

We will continue to monitor the progress of the Native Hawaiian Government Reorganization Act. Please contact us if we may provide additional information.

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