

# CALIFORNIA INDIAN LAW NEWSLETTER



California Indian Law Association  
Joanne Willis Newton, Editor

## Message from the President

Ay yu kwee, Greetings,

Welcome to the first edition of the California Indian Law Association (CILA) Newsletter. It has been an exciting year for CILA. We have a dynamic board this term that has been busy working on many aspects of CILA.

We have made many improvements to our website, adding information about events and helpful links. If you haven't already, I invite you to check us out online at [www.calindianlaw.org](http://www.calindianlaw.org). We have also created a list serve for our members in order to send relevant information relating to Indian Law in California via e-mail.

We will be awarding the Allogan Slagle Scholarship again this year to a native law student. We are still accepting recipient applications and donations for this year. For more information on applying for the scholarship or donating to the scholarship fund please visit our website and click on "News & Events."

Finally, I invite you all to attend our Seventh Annual Indian Law Conference, October 11, 2007 at the Pechanga Resort and Casino in Temecula, California. This year's conference is going to be full of information on the latest topics relating to Indian Law in California, and continuing education credits will be offered for all you state bar members. A conference agenda and registration form is included with this newsletter.

## About CILA

The California Indian Law Association (CILA) was formed in 2000 with the purpose of serving as the representative of the Indian law legal profession in California. It is incorporated under the laws of the Hoopa Valley Tribe.

CILA is dedicated to enhancing the legal profession and tribal justice systems in California by promoting professional growth, high standards of professional competence and ethical conduct. CILA seeks to provide quality educational programs to Indian law practitioners, tribal justice personnel, law students

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Whether you are a sole practitioner, in-house counsel, attorney for a government agency, part of a firm, tribal employee or officer, professor or student your contribution to the practice of Indian Law in California is critical to those whom we all serve, the tribes of California and the native people of this land. Thank you, on behalf of the Board of Directors, for your continued dedication to this field.

Respectfully,

Christine Williams  
President of the Board  
Member of the Yurok Tribe



and the public. The organization also works to promote the study of Indian law and related topics in public and higher education and to provide guidance and assistance, through mentoring, scholarships and other activities, Native American students in their pursuit of law studies and the legal profession.

CILA strives to promote the sound administration of justice to advance the status of Indian tribes and American people in the law. CILA is dedicated to helping Indian tribes in California achieve self-determination, self-sufficiency and to protect tribal sovereignty.

## California Strikes Again at Tribal Sovereignty

By Carole Goldberg

*Originally published in Indian Country Today as an Op-Ed piece at [www.indiancountry.com](http://www.indiancountry.com), Dec. 29, 2006.*



By a closely divided 4 - 3 vote, the California Supreme Court has allowed the state's Fair Political Practices Commission to sue tribes in state court for violating state election campaign reporting laws. This decision flies in the face of federal law guaranteeing tribes immunity from lawsuits without their consent, as well as language in the U.S. Constitution committing Indian affairs to the federal government, not the states. It also fits a pattern of California carving out exceptions for itself from federal Indian law. As early as the first years of statehood, when California's governor was literally calling for the extermination of Indian people, the state defied U.S. Supreme Court precedent in extending state authority over tribal groups still living on their ancestral lands. In more recent times, California has refused to recognize tribal jurisdiction in the wake of Public Law 280, a position it reversed less than 10 years ago.

What may be most disturbing about the California Supreme Court's decision, however, is its treatment of the sovereign gestures that the tribe involved, the Agua Caliente Band of Cahuilla Indians, made to the state to resolve the dispute without litigation. The Agua Caliente offered to make voluntary compliance with the state's campaign reporting laws, and to enter into a government-to-government agreement with the state binding them to adhere to state requirements. As the tribe pointed out, this arrangement would satisfy all of the state's needs for election monitoring while respecting tribal sovereignty. Yet the California Supreme Court dismissed the tribe's proffered alternative as inadequate and "uncertain." "Absent the threat of a lawsuit," said the court, "we see no incentive for the tribe to agree to comply with the [state's] reporting requirements."

That assertion could not be further from the truth, as one look at the area of tribal/state tax agreements reveals. If it were true that Indian nations refuse to make agreements unless they are subject to suit, one would expect to see no such tax agreements. Although the U.S. Supreme Court has said that states can apply their sales taxes to on-reservation cigarette or gasoline purchases by non-Indians, and tribal sellers can even be required to collect these taxes on behalf of the state, there is no way for states to sue tribes that refuse to turn over the tax money. Tribal sovereign immunity - the same sovereign immunity that the California Supreme Court should have recognized - protects Indian nations from such suits. Nevertheless, tribes regularly make tax agreements with

states regarding collection of such taxes. In fact, as the National Conference of State Legislatures recently noted, "Nearly every state that has Indian lands within its borders has reached some type of tax agreement with the tribes." Thirty-four such agreements exist with the state of Oklahoma alone.

Why do tribes make such agreements, even without the threat of litigation? They do so for the same reason that governments make agreements in the international realm - to achieve gains through cooperation, avoid conflict and curry favor with powerful actors. For example, the tribal/state tax agreements provide creative ways to improve the economic situation of both tribes and states, often facilitating economic development and developing revenue streams that would not otherwise exist. In the case of Indian nations, the additional incentive to make agreements is the plenary power that Congress claims in the realm of Indian affairs, a power that Congress has often used to the detriment of tribes.

*"The California Supreme Court ... could not envision California tribes as responsible actors making agreements with the state on a government-to-government basis."*

Given the greater representation and influence that states have in the Congress, Indian nations must always be mindful of the possibility that Congress will act to strip tribes of their jurisdiction or sovereign immunity if they appear to be too uncooperative. Even apart from such threats, however, tribes have reason to make agreements because they must coexist in the United States with states, counties, municipalities and other units of government. All of these governments are interdependent. For example, no one unit can effectively regulate in areas such as zoning and the environment, which transcend political boundaries.

Elections and initiative campaigns perfectly illustrate the reasons why tribes would want to make compacts with states. The whole purpose of campaign contributions is to influence outcomes in the donor's favor. But if Indian

See *California Strikes Again* on page 5

## AB 1729: Possession of Non-Game Bird Parts & Feathers

By Michelle LaPena

This legislative session, the California Fish and Game Department (the “Department”) proposed legislation, AB 1729, which updates the entire California Fish and Game Code (“Code”). The bill is sponsored by the Assembly Committee on Water, Parks and Wildlife (Wolk, Chair, Maze, Vice Chair, Caballero, Huffman, Lieu, Mullin, Nava, and Salas), and is viewed as a “non-controversial” measure that will pass through the legislature to become law.

Currently, the Code prohibits the possession of non-game bird parts and/or feathers, and there is no exemption for California Indians (or members of other tribes) who use many of these bird parts and feathers in cultural and ceremonial activities. Without amendment, existing law prohibits all people, including American Indian people from acquiring and possessing non-game bird feathers and parts, including hawks, flickers, woodpeckers, and others.

While not often enforced, citations for violating Code Section 3801.6 carry a heavy fine (\$5,000) and the cost and time to oppose the citation in court – as well as confiscation of the feathers and/or parts. The fact that

a tribal cultural practitioner can be cited for possession of culturally significant bird feathers and parts is just unacceptable. The fact that the Department is seeking to change the status quo and provide an exemption in the law for Indian people is a change in the right direction.

Since introduced by the Committee on March 13, AB 1729 has gone through three revisions. There were a few problems with the earlier version of the bill. The first problem was that the exemption did not extend to members of California tribes that were not federally-recognized. With over 50 non-federally-recognized tribes indigenous to California, the exemption needed to be broadened to include those tribal members. Moreover, the draft bill limited the acquisition of non-game birds and parts to “tribal lands”. This limitation would not prevent those tribal members who picked up “roadkilled” or birds that were already dead, or otherwise obtained them legally, from being charged with a “taking” of the non-game bird and cited.

See *AB 1729* on page 5

## Akaka Bill Seeks Recognition for Native Hawaiians

By Mark D. Myers

**The Akaka Bill: Would Its Effects Be Felt Outside Hawaii?**

Every session for the past eight years, Hawaii’s Senator Daniel Akaka has introduced bills to formally recognize Native Hawaiians as an indigenous people<sup>1</sup> and to give them the opportunity to organize to form a governing entity that could negotiate a government-to-government relationship with the United States like that enjoyed by federally-recognized Indian tribes. At the time of this writing, the latest version of this bill, titled the Native Hawaiian Government Reorganization Act of 2007<sup>2</sup> (or, less formally, the Akaka Bill) is in committee.

The bill both enjoys some bipartisan support, particularly in Hawaii,<sup>3</sup> and has also drawn criticism from both conservatives and Native Hawaiian advocates.<sup>4</sup> Some opposition also appears to be based on the design of the bill and the political situation in

California is home to over 220,000 Native Hawaiians.



Hawaii.<sup>5</sup> It is unclear whether the Akaka Bill will achieve passage this session but, if not, its history suggests it will be reintroduced next session. Decisions such as the Supreme Court’s ruling in *Rice v. Cayetano*<sup>6</sup> are perceived as threatening governmental programs for Native Hawaiians and therefore pressing the issue.

Should the bill be enacted, its greatest impact would be in Hawaii itself. However, with large numbers of Native Hawaiians residing outside Hawaii, it is unclear what legal and governmental impact the bill would have in other states – most notably in California. This article attempts to address that question. Of necessity, these answers are predictions, based on existing laws and the language of the bill.

See *Akaka Bill* on page 8

## Important New Child Welfare Legislation Takes Effect

By Joanne Willis Newton



In 2005, the United States Government Accountability Office (GAO) published a report affirming that states, including California, continue to struggle to comply with the Indian Child Welfare Act (ICWA).<sup>1</sup> For those who practice in this area of law, the GAO's findings came as no surprise, even though ICWA has been in place for more than a quarter of a century.<sup>2</sup>

Among the compliance problems advocates for Tribes and/or Indian families in ICWA proceedings in California encounter are the following:

- Failure to provide notice or failure to provide sufficient information in the notice to permit Tribes to determine the child's membership status;
- Refusal to place Indian children with preferred placements without good cause;
- Refusal to acknowledge that ICWA applies to probate guardianships or in family law proceedings where the court awards custody to a non-parent over the objection of a parent;
- Refusal to recognize services provided by tribal agencies as meeting the requirements of a parent's reunification plan; and
- Failure to make active efforts to prevent the removal of Indian children from their families or to reunify the family after the child's removal.

Although ICWA was intended to ensure that Tribes have a meaningful opportunity to participate in Indian child custody proceedings, this goal is frustrated by the fact that even when a Tribe intervenes in such cases, its recommendations may be disregarded by the court and County child welfare agencies. In fact, in one critical area - permanency planning in juvenile dependency cases -- state law generally ensured that any recommendation other than termination of parental rights would be rejected.<sup>3</sup>

While the number of Tribes and the diversity between them make generalizations difficult, if not impossible, it is safe to say that many Tribes are fundamentally opposed to the involuntary termination of parental rights. The concept is foreign to their customs and traditions. In some cases the objection is that the parent-child relationship is a sacred one, established by the Creator, and therefore cannot, and should not, be terminated. In some cases the objection is that

the parent-child relationship is an integral part of the child's identity and standing in the Tribe and therefore beneficial regardless of the role the parent plays in the child's life.

That is not to say that tribal custom dictates that a child must be raised by his or her parent. In many tribal communities, the concept of family is broader and more fluid than the nuclear family model. The extended family plays an important role in childrearing, and it is not uncommon for different family members to assume the role of primary caregiver or mentor through the Indian child's life. Although tribal custom may include the concept of adoption, such arrangements do not necessarily entail termination of the relationship or all the rights of the child's biological parents.

It was this fundamental conflict between state law and tribal custom that led to the development of what would become the most comprehensive legislation in any state to address implementation of the ICWA. After two years of effort -- spearheaded by the Pala Band of Mission Indians, California Indian Legal Services and Senator Denise Moreno Ducheny -- SB 678 took effect on January 1, 2007.

One of the key accomplishments of the bill is the addition of a new exception to termination of parental rights in juvenile dependency cases. Now, in cases involving Indian children, state law authorizes the juvenile court to select a permanent plan other than adoption through termination of parental rights. This avenue is available when "there is a compelling reason for determining that termination of parental rights would not be in the best interest of the child."<sup>4</sup> Examples of a compelling reason include, but are not limited to: 1) when termination of parental rights would substantially interfere with the child's connection to his or her tribal community or tribal membership rights; or 2) the child's Tribe has identified guardianship, long-term foster care with a fit and willing relative, or another planned permanent living arrangement for the child.

In large part, SB 678 seeks to improve compliance with the requirements of ICWA and related law<sup>5</sup> by simply codifying these standards in state law. The intent in

See *New Child Welfare Laws* on page 6

*AB 1729* from page 3

The second problem raised by earlier drafts of the bill was that it requires a form of tribal enrollment verification as proof that the person falls under the "Indian exemption". The original language was troubling to some because it appeared to require a tribal ID card to apply the exemption. Some people read the bill as a requirement that tribal people would need to carry tribal ID cards to ceremonies. However, the Department of Fish and Game does not seek out tribal gatherings to enforce the current law - that is not the purpose of the Department. The Department may not infringe upon private tribal ceremonies under other laws and regulations.

The issue being addressed by the proposed bill is that a game warden is required to enforce the Code if they find someone possessing the feathers and/or parts of non-game birds in the course of their duties. Therefore, it is a good idea to carry your enrollment information, whatever form it comes in, with you in your vehicle if you possess and transport such items. Game wardens in the Department say they do not want to issue a ticket for possession of bird parts and feathers, but without some way to know who falls under the exemption, they do not have much of a choice.

There was also a concern that the proposed bill was an attempt to regulate or prohibit the possession or use of eagle feathers. Contrary to assertions by an out-of-state organization that has a different agenda, AB 1729 does not apply to eagles, which are "fully-protected species". Tribal members can still apply for a federal eagle feather permit and also request eagle feathers and parts from the Federal Eagle Repository as they have been authorized to do for many years. AB 1729 does NOT apply to eagles, which are fully-protected, just as it does not apply to "game birds" which are regulated by hunting license regulations.

The bill was amended again before it passed out of the Assembly and new amendments will be considered in Senate hearings. This latest version is more comprehensive and clarifies a number of issues.<sup>1</sup> While it will still need clarification to implement on state-owned lands, it is a more inclusive bill with the inclusion of California Native American tribes listed on the NAHC California Tribal Consultation list. Moreover, it now protects tribal members from being charged with a "take" by merely picking up a bird that was already dead along a roadway, or other location so long as it is picked up without creating a threat to public safety or creating a hazard, and it was not killed intentionally. The bill also provides a mechanism for tribal members to obtain salvaged birds from the Department instead of them being destroyed.

If you are eligible for enrollment or are already enrolled in a California or other tribe, contact your tribal office and ask if the tribe issues tribal ID cards or other verification. Tribal enrollment officers regularly provide documentation to tribal members when needed for programs that require verification of tribal enrollment. Let them know that you need proof of enrollment to protect your rights to possess non-game bird feathers and parts for traditional cultural purposes. In the alternative, you may consider carrying a certificate of degree of Indian blood (CDIB) if you have that form in your possession already, although a tribal ID card is the best form.

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*California Strikes Again* from page 2

nations acquire a reputation for flouting state campaign-reporting requirements that the general public views as necessary for fair elections, tribally favored candidates and causes will be rejected. Indian nations in California, as elsewhere, depend on state government support to achieve important goals, such as beneficial gaming compacts, adherence to the Indian Child Welfare Act, and retrocession of Public Law 280 jurisdiction. A state government that views tribes as undermining state elections will be less favorably disposed on such matters.

The California Supreme Court could only imagine Indian nations responding to a show of force through lawsuits against them in state court; it could not envision California tribes as responsible actors making agreements with the state on a government-to-government basis. The state needs to break out of its old pattern, and join the modern era of federal Indian law.

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### *New Child Welfare Laws from page 4*

doing so was to make these requirements more readily accessible and knowable to those involved in Indian child custody proceedings. However, as with the adoption exception mentioned above, the bill also covers new territory. The bill includes new standards designed to clarify ambiguities in the law, ensure the spirit and intent of the Act are met and promote the unique best interests of Indian children. This article highlights some of these new standards.

Since ICWA applies in state court proceedings involving the foster care placement, guardianship, or adoption of Indian children, SB 678 amends the three state codes that address such proceedings: the Welfare and Institutions Code, the Family Code and the Probate Code. Each of the three amended codes now contains a clear statement of policy, which affirms that the Indian child has an interest in *establishing*, not just maintaining, a social, political and cultural relationship with the child's tribe and tribal community.<sup>6</sup> This new language provides a stronger message from the Legislature to the judiciary and child welfare agencies that ICWA is intended not just to preserve existing ties but to promote the establishment of such ties even for Indian children who have not yet developed them.

ICWA does not afford any rights to non-federally-recognized Tribes or apply to children who are member of such Tribes. As a result of SB 678, state law now provides non-federally-recognized Tribes an opportunity to participate in certain child custody proceedings involving their members.<sup>7</sup>

The bill also fills a gap in ICWA concerning the transfer of jurisdiction to tribal court. ICWA requires state courts to transfer Indian child custody proceedings involving off-reservation Indian children to the tribal court unless a parent objects or good cause exists not to do so.<sup>8</sup> ICWA also addresses on-reservation Indian children who are members of Tribes that retain exclusive jurisdiction over Indian child custody proceedings.<sup>9</sup> However, ICWA is silent as to on-reservation children whose Tribes lack exclusive jurisdiction as a result of Public Law 280.<sup>10</sup> That is, ICWA contains no express authority for a state court to transfer an Indian child custody proceeding involving an on-reservation Indian child to a Tribe lacking exclusive jurisdiction. This gap in the law is particularly significant in California since California Tribes lack exclusive jurisdiction over Indian child custody proceedings.<sup>11</sup> State law now requires that Indian child custody proceedings involving on-reservation children whose Tribes lacks exclusive

jurisdiction also be transferred to tribal court.<sup>12</sup>

The bill also provides guidance for state courts on what may or may not constitute good cause not to transfer an Indian child custody proceeding to tribal court. For example, the bill makes it clear that it is not appropriate for state courts to engage in an analysis of whether the child's Tribe is essentially worthy of transfer. State law affirms that good cause not to transfer does *not* include the "socioeconomic conditions" of the child's Tribe or the "perceived adequacy of tribal social services or judicial systems."<sup>13</sup>

SB 678 also codified provisions formerly found only in the Rules of Court applicable to juvenile proceedings and makes these provisions applicable in all Indian child custody proceedings, whether in family court, probate court or juvenile court. For example, state law now allows Tribes to participate in Indian child custody proceedings even if they have not formally intervened and to participate through a representative who is not an attorney.<sup>14</sup>

In order to improve compliance with the notice requirements of ICWA, each of the three amended state codes now contains a detailed notice provision, which incorporates all of the notice requirements previously spread out among the Act, federal regulations and appellate decisions.<sup>15</sup>

To ensure that Indian child custody proceedings are properly identified, state law now affirms that courts, social worker, probation workers and other parties seeking guardianship, foster care or adoption have an "affirmative and continuing duty" to inquire whether a child in a custody proceeding is or may be an Indian child. The inquiring party must gather detailed family history information by interviewing the parents and, if necessary, contacting extended family members, the child's Tribe and any other person who might reasonably be expected to hold the relevant information about the child's tribal membership status.<sup>16</sup>

With respect to the ICWA requirement that "active efforts" be made to provide services designed to prevent the breakup of the Indian family, state law now affirms that child welfare agencies must utilize resources that are available through the child's Tribe, extended family, and tribal or Indian social services agencies.<sup>17</sup> Similarly, when seeking an appropriate placement for the Indian child or supervision of such placement, courts and child welfare agencies must use

See *New Child Welfare Laws* on page 7

*New Child Welfare Laws from page 6*

the available services of the child's Tribe.<sup>18</sup> When a person or agency seeks to remove, or continue the removal of, an Indian child from his or her parent, or to terminate parental rights, ICWA requires that they provide expert witness testimony on whether continued custody by a parent is likely to cause a child serious physical or emotional damage.<sup>19</sup> The bill addresses some of the problem areas in this regard. For example, the bill affirms that the witness cannot be an employee of the person or agency recommending removal or termination of parental rights. The bill also requires that the witness testify in person, rather than simply submitting a declaration or affidavit, unless the parents knowingly waive the requirement for live testimony.<sup>20</sup>

State law recognizes postadoption agreements as a means of allowing for postadoption contact and visitation between a child and his or her birth family. The law has been amended to allow for a child's Tribe to also be a party to such agreements. Although such agreements remain completely voluntary, the court may now order the parties to mediation if a prospective adoptive parent agrees to enter into a postadoption agreement before parental rights are terminated but subsequently fails to negotiate in good faith.<sup>21</sup>

The Probate Code was amended in several respects. The law now requires that petitions for guardianship include information about whether the child is or may

be an Indian child and, if so, the name and address of the child's Tribe.<sup>22</sup> Court-appointed investigators in probate proceedings must also consult with the child's Tribe and include any information provided by the Tribe in their court reports.<sup>23</sup> A child's Tribe is now included among the parties who may petition to terminate a probate guardianship.<sup>24</sup> Also, the provision which permits guardians to terminate parental rights through probate proceedings does not apply in cases involving Indian children.<sup>25</sup>

While it is too early to gauge the effectiveness of SB 678 as a means of improving ICWA compliance in California, it is clear that the bill provides important new avenues for advocates in Indian child custody proceedings to promote the interests of their clients, whether they be Tribes, parents, or Indian children.

*Joanne Willis Newton has her own San Diego-based Indian law practice, the Law Offices of Joanne Willis Newton, a Professional Corporation. Before going out on her own in 2005, she worked at California Indian Legal Services for over seven years and was the lead attorney responsible for drafting SB 678 and moving it forward through the Senate Judiciary Committee in the 2004-2005 legislative session. She is a member of the Cree Nation of Chisasibi, located in northern Quebec, Canada. For more information see [www.willisnewtonlaw.com](http://www.willisnewtonlaw.com)*

See endnotes at page 12

## ANNOUNCEMENTS

### LAW SCHOOL SCHOLARSHIP STILL AVAILABLE

California Indian Law Association is proud to continue to offer the Allogan Slagle Scholarship for full-time American Indian and Native Alaskan law school students. Applications are still being accepted for the 2007-2008 school year. The amount of this year's scholarship is \$2000. The deadline to apply is October 15, 2007. For further information see [www.calindianlaw.org](http://www.calindianlaw.org) or contact Mina Quintos at [quintos@law.ucla.edu](mailto:quintos@law.ucla.edu) to request an application.

**SPONSORS:** CILA is grateful to **Lerach Coughlin Stoia Geller Rudman & Robbins LLP** ([www.lerachlaw.com](http://www.lerachlaw.com)) for coming forward as our first sponsor for the 7<sup>th</sup> Annual Indian Law Conference (see pages 13-14). We are continuing to raise money for the conference and encourage any other interested persons to become a sponsor. Contact Joanne Willis Newton at [jwn@willisnewtonlaw.com](mailto:jwn@willisnewtonlaw.com) or Christine Williams at [christineawilliams@yahoo.com](mailto:christineawilliams@yahoo.com),

**CALL FOR MEMBERS:** If you would like to become a member of CILA, you may do so by submitting a completed registration form, available at [www.calindianlaw.org/contact](http://www.calindianlaw.org/contact). If you are a member, be sure to renew your membership. If you register for our annual law conference (see pages 13-14), the annual membership fee is waived, so act now!

**INTERESTED IN JOINING OUR BOARD?** Several of our Directors' terms are expiring this year and we have another vacancy to fill. Elections will be held at our annual law conference (see pages 13-14). Please be sure to register for membership and attend our annual conference if you are interested in serving on our Board.

*Akaka Bill* from page 3**How Many Native Hawaiians Are There?**

Unsurprisingly, the 2000 Census<sup>7</sup> reports that the state with the largest number of self-identified Native Hawaiians<sup>8</sup> is Hawaii itself, with over 280,000 Native Hawaiians comprising 23.3% of its population,<sup>9</sup> although other figures set the percentage lower.<sup>10</sup> Not far behind, however, was California with over 220,000. The figures begin to drop off after California, with Washington at over 40,000, Texas and New York at nearly 30,000 each, and Florida and Utah at over 20,000 each. Native Hawaiian population is highest in Western states, but every state had at least several hundred self-identified Native Hawaiians. The cities with the largest numbers are Honolulu, New York, Los Angeles, and San Diego.

Under § 7(b) of the *Akaka Bill*, status as a Native Hawaiian would be determined by a Commission. Adults who elect to participate in the new entity may apply to the Commission, which would in turn determine whether people on the list had demonstrated they were actually of Native Hawaiian descent.

Using census numbers as a guideline,<sup>11</sup> if the *Akaka Bill* is enacted, Native Hawaiians would quickly become the largest single indigenous group in the United States as well as in California, and possibly in other states as well. Furthermore, because of political savvy attributed to Native Hawaiians living on the mainland, some have predicted even higher registration.<sup>12</sup> Such an upsurge in the number of recognized indigenous people in California and other states, all of whom would be associated with one newly recognized political entity, has the potential for significant impact.

**What Impact Would Recognition Have Outside Hawaii?**

In response to concerns about earlier versions of the bill, the text has been amended to clarify and limit its application in such areas as gaming, eligibility for health care and other services, land claims,<sup>13</sup> the taking of land into trust, and criminal jurisdiction.<sup>14</sup>

Specific provisions also explain that the bill:

- would not create any new federal liability or alter any federal obligations (§ 8(c)(1));
- would not permit the recognition of additional Native Hawaiian entities (§§ 8(c)(1)(D) and 9(d));

- forbids the Secretary of the Interior to take land into trust on behalf of Native Hawaiians (§ 9(b));
- provides that the Indian Trade and Intercourse Act (25 U.S.C. 177) is inapplicable to Native Hawaiian lands (§ 9(c)) (preventing Native Hawaiians from reclaiming lands transferred other than with the approval of the United States);
- does not alter criminal or civil jurisdiction (§ 9(e); and
- would not make Native Hawaiians eligible for programs “any Indian program or service,” (§ 9(f)).

Native Hawaiians would continue to be eligible as before for various programs and services designated for Native Hawaiians (§ 9(g)).<sup>15</sup>

Although the text of the bill now prohibits gaming<sup>16</sup> and Hawaiian attitudes towards gaming are among the most negative in the nation,<sup>17</sup> some members of Congress and the public have expressed concerns that the bill could serve as a “back door” to permit Native Hawaiians — or groups within the Native Hawaiian community — to start their own gaming enterprises on the mainland.<sup>18</sup> Another question is whether the bill would stretch limited resources even thinner for already-recognized tribal entities.<sup>19</sup> Proponents of the bill have made efforts to eliminate this concern,<sup>20</sup> although opponents remain unconvinced.

The bill would likely clarify the status of Native Hawaiians and, assuming federal courts defer to Congressional findings, institutions would be permitted to target their services solely to Native Hawaiians without having to engage in protracted litigation as did Kamehameha Schools.<sup>21</sup>

Likewise, government bodies might be permitted to restrict participation to Native Hawaiians,<sup>22</sup> although this is less clear. “Native Hawaiian” would likely be considered a political rather than racial or ethnic status and, as such, laws directed specifically at Native Hawaiians would be subject to rationality review rather than strict scrutiny.<sup>23</sup> Initially, most of the impact would likely be felt in Hawaii because the most prominent institutions specifically for Native Hawaiians are located there. However, Native Hawaiian organizations do exist on the mainland,<sup>24</sup> and it is possible those organizations might attempt to establish schools or other institutions for Native Hawaiians that could eventually raise many of the same issues.

See *Akaka Bill* on page 9

*Akaka Bill* from page 8

Native Hawaiians on the mainland may benefit from participation in the governing entity's new access to funds intended for the benefit of Native Hawaiians. According to Robin Puanani Danner, an advocate for the bill who heads the Council for Native Hawaiian Advancement, "Right now, the state of Hawaii administers \$300 million in trust funds held for the native people. The Akaka bill enables the transfer of those funds to a native government. Your California Hawaiians would be part of that government — they would not only have access to the funds, but a say-so in how they are administered."<sup>25</sup>

In other respects where the bill is silent, the effect outside Hawaii would likely be minimal. Native Hawaiians are already covered by some of the same laws that govern Indians, such as the American Indian Religious Freedom Act, 42 U.S.C. §§ 1996 *et seq.*, and the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001 *et seq.* Obviously, these would not change as a result of Native Hawaiians being recognized as indigenous. The number of existing laws, however, makes it impossible to be certain, and even confusion about the application of a new law can have a significant effect.<sup>26</sup>

Continued litigation may, however, be more likely in the area of membership and citizenship. Section 3(10) of the bill sets forth general criteria for membership: anyone who can demonstrate descent in any degree from Native Hawaiians is eligible. The catch may be,

however, that whether a person has adequately demonstrated such ancestry is to be determined by the Commission created by § 7(b). The history of such commissions, such as the Dawes Commission, suggests that complaints about the commission's decisions are likely.<sup>27</sup> The Dawes Commission, for example, was charged with incompetence, corruption, and bias.<sup>28</sup>

The bill sets initial membership criteria, but then permits the governing council of the newly-established entity to set criteria for citizenship.<sup>29</sup> Already concerns have been raised that a Native Hawaiian entity, once recognized, could remove members who did not satisfy certain legal criteria such as having a particular blood quantum or living in Hawaii.<sup>30</sup> Based on membership disputes on the mainland, it is likely citizenship in the new entity would be the subject of political disputes and litigation.

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<sup>1</sup> The federal government has been dealing with Native Hawaiians as a distinct group at least as far back as 1921 when it enacted the Hawaiian Homes Commission Act.

<sup>2</sup> The full text of the Native Hawaiian Government Reorganization Act of 2007 ((S.310 and its identical house version H.R.505) is available online at <http://www.govtrack.us/congress/billtext.xpd?bill=s110-310>.

<sup>3</sup> The bill was co-sponsored by Senators Inouye (D-HI), Dorgan (D-ND), Cantwell (D-WA), Coleman (R-MN), Stevens (R-AK), Murkowski (R-AK), Smith (R-OR), and Dodd (D-CT). Hawaii's state legislature has repeatedly expressed its unanimous support for versions of the bill, and its governor, Linda Lingle (R) has addressed Congress twice in support of versions of the bill. See S.310, § 2(23). See also Jerry Reynolds, *Ten Ways of Looking at the Akaka Bill*, INDIAN COUNTRY TODAY, n.p., May 14, 2007 (remarks of Rep. Tom Cole (R-OK) ("[T]hose of my friends who are good conservatives, and I certainly consider myself one, this is the ultimate of conservative bills. . . . It's about allowing the people to govern their own affairs, to control their own property and their own destiny."))

<sup>4</sup> See, e.g., John Kyl, *Member of U.S. Senate Judiciary Outlines Constitutional Concerns of Akaka Bill*, HAWAII REPORTER, n.p., July 19, 2005 (remarks by John Kyl (R-AZ)); THE NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT OF 2005/A BRIEFING HELD BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS, Jan. 20, 2006, available online at <http://www.usccr.gov/pubs/060504NatHawBriefReport.pdf>; Maui Loa, *Akaka Bill Threatens Tribal Sovereignty*, INDIAN COUNTRY TODAY, n.p., Mar. 9, 2007; Reynolds, *supra* note 3 (remarks of Gregory Katsas, Department of Justice principal deputy associate attorney general, identifying Constitutional concerns); Reynolds, *Akaka Bill Revisions Draw Hawaiian Ire*, INDIAN COUNTRY TODAY, n.p., May 21, 2004; Le'a Malia Kanehe, *The Akaka Bill: The Native Hawaiians' Race for Federal Recognition*, 23 U. HAW. L. REV. 857, 897-902 (documenting opposition to earlier version of the bill); Dorothy Korber, *Culture in Motion Hula Narrates Past, Foreshadows Future as Hawaiians Press for Rights*, SACRAMENTO BEE, Sept. 16, 2005, at A1 (documenting complaints of opponents who prefer a more stringent definition of Native Hawaiian than the Akaka Bill provides, as well as other reasons put forward by Native Hawaiian advocates for opposing the bill).

<sup>5</sup> See Andrew Waldron, *Akaka Bill: Creating a Haven for Corruption?*, HAWAII REPORTER, n.p., June 6, 2007 (suggesting the bill would increase corruption).

## 2007 California Indian Law Cases

By Meredith Drent



In *San Manuel Indian Bingo & Casino v. National Labor Relations Bd.*, No. 05-1392 (D.C. Cir. Feb. 9, 2007), the District of Columbia Circuit Court of Appeals affirmed the National Labor Relations Board's ("Board") ruling that the National Labor Relations Act ("NLRA") applied to tribal enterprises. In 2004, the NLRB overturned a 30-year precedent of tribal self-governance of labor relations by applying the NLRA to the San Manuel Indian Bingo & Casino, a wholly-owned and operated tribal enterprise of the San Manuel Band of Mission Indians ("Band") located on the San Manuel Indian Reservation near Highland, California. *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004). According to the Board, the NLRA applied to tribal governments by its terms of general applicability, and that neither the law nor its legislative history suggested a tribal exemption. The Board then held federal policy regarding Indian tribes did not prohibit the law's application to the commercial activities of tribal governments. The Band maintained the NLRA did not include tribal enterprises, and that the Board's position was contrary to congressional intent and federal law.

In upholding the Board's decision, a three-judge panel first determined that NLRA's impairment of tribal sovereignty was "negligible." In its troubling analysis of tribal sovereignty, the court held "The principle of tribal sovereignty in American law exists as a matter of respect for Indian communities. It recognizes the independence of these communities as regards internal affairs, thereby giving them latitude to maintain traditional customs and practices."

Because of the commercial nature of the Band's casino, which employs and caters to a largely non-Indian population, the NLRA's "total impact on tribal sovereignty . . . amounts to some unpredictable, but probably modest, effect on tribal revenue and the displacement of legislative and executive authority that is secondary to a commercial undertaking," the court found the impact was insufficient to warrant exclusion from the NLRA.

After finding that the NLRA did not substantially infringe on tribal sovereignty, the court analyzed the Board's decision, which held the NLRA's definition of "employer" included San Manuel's commercial enterprise, under the two-part analysis set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). The court first

found that Congress had not directly spoken to the issue of whether tribes were exempt from the NLRA and had implicitly delegated authority to the NLRB to decide it. Applying the second part of the *Chevron* analysis, the court determined that the NLRB's interpretation of the term "employer" in the NLRA constituted "a permissible construction of the statute."

The court also found the Board "could reasonably conclude that Congress' decision not to include an express exception for Indian tribes in the NLRA was because no such exception was intended or exists." The court rejected the Band's arguments that the NLRA conflicted with the Indian Gaming Regulatory Act, and refused to apply the canon of statutory construction that statutes of specific applicability trump statutes of general applicability. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000). "We find no indication that Congress intended to limit the scope of the NLRA when it enacted IGRA, and certainly nothing strong enough to render the Board's interpretation of the NLRA impermissible." *San Manuel*, No. 05-1392 (D.C. Cir. Feb. 9, 2007).

The court recognized that its analysis was inconsistent with other circuit case law as to the applicability of general federal laws to Indian tribes. Without resolving such conflicts, the court instead held "in some cases at least, a statute of general application can constrain the actions of a tribal government without at the same time impairing tribal sovereignty."

On June 8, 2007, the court denied the Tribe's petition for a rehearing *en banc*. *San Manuel Indian Bingo v. National Labor Relations Board*, No. 05-1392 (D.C.Cir. 06/08/2007).

In *California Commerce Casino, Inc. v. Schwarzenegger*, 146 Cal. App. 4th 1406, 53 Cal. Rptr. 3d 626 (Cal. Ct. App. 2007), a non-tribal casino appealed the dismissal of its challenge to five Class III gaming compacts entered into between the State of California and five federally-recognized Indian tribes pursuant to the Indian Gaming Regulatory Act. The compacts were ratified by the legislature in 2004. The appellants challenged the constitutionality of the

See *2007 Cases* on page 11

*2007 Cases from page 10*

statute, AB 687, 11 months later in 2005. The superior court dismissed the lawsuit as untimely filed. California Commerce Department filed an appeal 47 days after entry of judgment. The California Court of Appeals for the Second Appellate District dismissed the appeal as untimely filed, finding that the time period for filing appeals from validation actions, was limited to 30 days.

**In *Friends of the Sierra R.R. v. Tuolumne Park & Recreation Dist.***, No. F050117 (Cal. Ct. App. Jan. 12, 2007) the Tuolumne Park and Recreation District, a public agency, sold land containing a historic railroad right-of-way to the Tuolumne Band of Me-Wuk Indians, a federally-recognized Indian tribe in Tuolumne, California. The transfer occurred without an environmental review pursuant to the California Environmental Quality Act (CEQA). The Tuolumne Band owned surrounding property and was known to plan on developing it, but never presented any development plans to any agency. The superior court denied a petition for a writ of mandamus directing the Tuolumne Park and Recreation District to reverse its action. Appellant Friends of the Sierra Railroad argued that the transfer fell within CEQA's definition of a "project" requiring environmental review because it was reasonably foreseeable that the land would be developed and the development would have an impact on the historical resource. The court held that the transfer was not a project requiring CEQA review because, although some development of the property surrounding the historical resource was reasonably foreseeable, review of conceivable impacts on the historical resource itself would have been premature in the absence of any concrete development proposals.

**In *People v. Ramirez***, No. C048138 (Cal. Ct. App. March 28, 2007), two police officers for the Jackson Rancheria Band of Miwok Indians (Tribe) suspected possible narcotics activity in the parking garage of the Tribe's casino. The two officers searched the vehicle and found drugs and drug paraphernalia. In criminal proceedings in state court, the defendant successfully suppressed the evidence under the exclusionary rule, which requires courts, in criminal matters, to exclude evidence obtained in violation of the Fourth Amendment. The matter was dismissed shortly thereafter. On appeal, the state argued that the evidence should not have been suppressed under the exclusionary rule because Indian tribes are not

subjected to the Fourth Amendment of the United States Constitution.

In a case of first impression, the California Court of Appeals held that in passing the Indian Civil Rights Act, which contains identical language to the Fourth Amendment of the U.S. Constitution, Congress intended to "subject [tribal governments] to the same restrictions understood to be applicable to the federal and state governments. . . ." Thus, the court held, Congress intended state and federal courts to apply the exclusionary rule to evidence seized by tribal police officers in violation of the Indian Civil Rights Act's prohibition of unlawful searches and seizures.

**In *County of Amador v. City of Plymouth***, No. C050066 (Cal. Ct. App. April, 17, 2007), the California Court of Appeals affirmed the Superior Court's invalidation of a Municipal Services Agreement (MSA) between the Lone Band of Miwok Indians (Tribe) and the City for failure to comply with the California Environmental Quality Act (CEQA). In the MSA, the City agreed to support the Tribe's application to take 228 acres of land into trust for purposes of a gaming facility, and the Tribe agreed to provide funding to mitigate the impacts of its development and compensate the City for municipal services provided to the property.

The County of Amador contested the MSA, stating the City's actions constituted a project subject to CEQA, and that the City was obligated to review the environmental impacts of the activities falling within CEQA's scope. The superior court agreed, and invalidated the MSA for failure to comply with CEQA.

The Court of Appeal rejected the Tribe's arguments that the MSA did not fall under CEQA because it requires the City to vacate a city road to provide access to the casino hotel, to remodel the existing fire station, and to construct connections to the casino's sewer and water systems, which in turn, would require an increase in those services. In addition, the MSA did not fall under any exceptions to CEQA, and the provisions subject to the statute could not be severed from the remainder of the MSA. Accordingly, the MSA and the City's letter of support for the Tribe's trust acquisition were invalidated.

See *2007 Cases* on page 12

*2007 Cases from page 11*

In *Hesperia Citizens for Responsible Development v. City of Hesperia*, No. D049614 (Cal. Ct. App. May 30, 2007), the Timbisha Shoshone Tribe (Tribe) entered into a Municipal Services Agreement (MSA) with City of Hesperia and other local agencies regarding the provision of municipal services to a planned gaming facility. Hesperia Citizens for Responsible Development (Citizens) challenged the MSA on several grounds, and the superior court granted the defendant's motion for summary judgment.

The court of appeals affirmed the judgment, rejecting Citizens' arguments that the MSA was unlawful. First, the court found that the Hesperia Community Redevelopment Agency did not violate section 33426.4 of the Health and Safety Code, which prohibits redevelopment agencies from assisting businesses in the development of gaming facilities. The agency's activities did not constitute direct or indirect

assistance to a gaming development. Second, the defendants did not violate the Community Redevelopment Law because it does not obligate the defendants to mandate the Tribe's compliance with redevelopment law. The court also noted that Citizens' arguments challenged the merits of the underlying gaming project, which was outside the scope of the lawsuit. Finally, the court held the defendants did not unlawfully relinquish sovereign authority by entering into the MSA because the acquisition of land into trust is a federal function, not a function of the MSA.

*Meredith Drent is a Staff Attorney with the San Manuel Band of Serrano Mission Indians and Associate Justice for the Supreme Court of the Osage Nation. She is a member of the Osage Nation and descendant of the native Chamorro people of Guam.*

*Endnotes from New Child Welfare Laws from page 4*

<sup>1</sup> 25 U.S.C. §1901 *et seq.* *Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States*, April 2005, GAO-05-290.

<sup>2</sup> ICWA was enacted in 1978.

<sup>3</sup> Welf. & Inst. Code § 366.26, subd. (c)(1), required the court to terminate parental rights unless one of five narrowly-interpreted exceptions applied: 1) a beneficial parent-child relationship exists; 2) a child 12 years of age or older objects; 3) the child is in a residential treatment facility and adoption is unlikely or undesirable; 4) the child is living with a relative or foster parent who is unable or unwilling to adopt; and 5) substantial interference with a pre-existing sibling relationship.

<sup>4</sup> Welf. & Inst. Code § 366.26, subd. (c)(1)(F).

<sup>5</sup> This includes 25 C.F.R. § 23.1 *et seq.*, California Rules of Court, rules 5.530 (formerly rule 1410), 5.534 (formerly rule 1412), and rule 5.664 (formerly rule 1439), and federal and state appellate decisions. Also incorporated in SB 678 were standards set forth in the "Guidelines for State Courts" (44 Fed.Reg. 67584 (Nov. 26, 1979)) promulgated by the Bureau of Indian Affairs.

<sup>6</sup> Welf. & Inst. Code § 224; Fam. Code § 315; Probate Code § 1459. Although the Welfare and Institutions Code and Family Code contained earlier versions of this policy provision (Welf. & Inst. Code § 360.6 and Fam. Code § 7810), the Probate Code did not.

<sup>7</sup> Welf. & Inst. Code § 306.6; Fam. Code § 185.

<sup>8</sup> 25 U.S.C. § 1911, subd. (b).

<sup>9</sup> 25 U.S.C. § 1911, subd. (a).

<sup>10</sup> 18 U.S.C. § 1163; 28 U.S.C. § 1360.

<sup>11</sup> *Doe v. Mann* (2005) 415 F.3d 1038. The exception to this rule is the Washoe Tribe of California and Nevada, which reassumed exclusive jurisdiction under 25 U.S.C. § 1918, subd. (a).

<sup>12</sup> Welf. & Inst. Code § 305.5, subd. (b); Fam. Code § 177, subd. (a); Probate Code § 1459.5, subd. (b). Such transfers are subject to the same limitations that apply in cases involving off-reservation Indian children.

<sup>13</sup> Welf. & Inst. Code § 305.5, subd. (c); Fam. Code § 177, subd. (a); Probate Code § 1459.5, subd. (b).

<sup>14</sup> Welf. & Inst. Code § 224.4; Fam. Code § 177, subd. (a); Probate Code § 1459.5, subd. (b). See rules 5.534(i) (formerly rule 1412(i)) and 5.530(b)(7) (formerly rule 1410(b)(7)).

<sup>15</sup> Welf. & Inst. Code § 224.2; Fam. Code § 180; Probate Code § 1460.2.

<sup>16</sup> Welf. & Inst. Code § 224.3; Fam. Code § 177, subd. (a); Probate Code § 1459.5, subd. (b). This requirement formerly only applied in juvenile proceedings through rule 1439(d)-(g) (now rule 5.664(d)-(g)).

<sup>17</sup> See, e.g., Welf. & Inst. Code § 361.7; Fam. Code § 177, subd. (a); Probate Code § 1459.5, subd. (b).

<sup>18</sup> Welf. & Inst. Code § 361.31; Fam. Code § 177, subd. (a); Probate Code § 1459.5, subd. (b).

<sup>19</sup> 25 U.S.C. § 1912, subds. (e) and (f).

<sup>20</sup> Welf. & Inst. Code § 224.6; Fam. Code § 177, subd. (a); Probate Code § 1459.5, subd. (b).

<sup>21</sup> Fam. Code § 8616.5.

<sup>22</sup> Probate Code § 1510.

<sup>23</sup> Probate Code § 1513.

<sup>24</sup> Probate Code § 1601.

<sup>25</sup> Probate Code § 1516.5.

## Seventh Annual Indian Law Conference

Thursday, October 11, 2007

8:30 AM – 5:00 PM

Pechanga Resort & Casino  
Pechanga Indian Reservation  
Temecula, California

- 8:30 AM - 9:00 AM **Registration**  
*Continental Breakfast* (courtesy of Lerach Coughlin Stoia Geller Rudman & Robbins LLP)
- 9:00 AM *Opening Prayer*
- 9:00 AM - 10:25 AM **Panel Discussion: Implementation of the American Indian Probate Reform Act of 2004**  
*Moderator:* Joanne Willis Newton, Law Offices of Joanne Willis Newton, A Professional Corp.  
*Panelists:* Cecelia Burke, Deputy Director, Institute for Indian Estate Planning and Probate at Seattle University School of Law  
Michele Fahley, Staff Attorney, California Indian Legal Services  
JoAnn Koda, Deputy Superintendent of Trust Services, Southern California Agency, Bureau of Indian Affairs
- 10:25 AM - 10:35 AM **Break**
- 10:35 AM - 12:00 AM **Panel Discussion: San Manuel v. NLRB and Related Issues** (*holding Nat'l Labor Relations Board may apply Nat'l Labor Relations Act to employment at tribal gaming facility*)  
*Moderator:* Timothy C. Seward, Partner, Hobbs, Strauss, Dean & Walker, LLP  
*Panelists:* To Be Announced
- 12:00 AM - 1:00 PM *Lunch on your own*
- 1:00 PM - 1:30 PM **Keynote Address: Chairman Mark Macarro, Pechanga Band of Luiseño Indians**
- 1:30 PM - 2:00 PM **CILA Organizational Matters: Board Elections and Other Business**
- 2:00 PM - 3:25 PM **Panel Discussion: Tribal, Federal & State Responses to the Colorado River Indian Tribes v. NIGC Decision** (*affirming IGRA does not authorize the NIGC to implement or enforce minimum internal control standards for Class III gaming*)  
*Moderator:* Joanne Willis Newton, Law Offices of Joanne Willis Newton, a Professional Corp.  
*Panelists:* Philip Hogen, Chairman, National Indian Gaming Commission  
Cyrus J. Rickards, Chief Counsel, California Gambling Control Commission  
John N. Roberts, Executive Director, San Pasqual Gaming Commission & Chairperson of the Association Regulatory Standards Taskforce
- 3:25 PM - 3:35 PM **Break**
- 3:35 PM - 5:00 PM **Panel Discussion: California Indian Law Update, 2007 Legislation & Case Law**  
*Moderator:* Bryan H. Wildenthal, Professor of Law, Thomas Jefferson School of Law  
*Panelists:* Michelle L. LaPena, LaPena Law Corporation  
Pat Sekaquaptewa, Executive Director, Nakwatsvewat Institute

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Endnotes from *Akaka Bill*, cont'd from page 9

<sup>6</sup> 528 U.S. 495 (2000); *see especially id.* at 521-22 (reasoning that, because Native Hawaiian was a racial and not a political classification as described in *Morton v. Mancari*, 417 U.S. 535 (1974), the state of Hawaii could not use that classification as a basis for restricting the right to vote for Office of Hawaiian Affairs trustees).

<sup>7</sup> The following figures are taken from THE NATIVE HAWAIIAN AND OTHER PACIFIC ISLANDER POPULATION: 2000/CENSUS 2000 BRIEF, U.S. CENSUS BUREAU (Dec. 2001), available online at <http://www.census.gov/prod/2001pubs/c2kbr01-14.pdf>.

<sup>8</sup> The term "Native Hawaiian" as I use it here includes all persons self-identifying as Native Hawaiians on the 2000 census, whether solely as Native Hawaiian or Native Hawaiian in combination with other ethnic groups, such as other Pacific Islander. The Office of Hawaiian Affairs documents two common definitions, "Native Hawaiian" referring to anyone of Hawaiian ancestry regardless of blood quantum, and "native Hawaiian" (with a lower case "n") referring to persons with 50% or more Hawaiian ancestry. NATIVE HAWAIIAN DATA BOOK, OFFICE OF HAWAIIAN AFFAIRS (June, 2002) at 44, available online at [http://www.oha.org/pdf/databook\\_6\\_02.pdf](http://www.oha.org/pdf/databook_6_02.pdf).

<sup>9</sup> Source: <http://www.census.gov/prod/2001pubs/c2kbr01-14.pdf>.

<sup>10</sup> Ron Staton, *Finally, a Vote on Sovereignty/Native Hawaiians Would Get Federal Recognition*, S. FLA. SUN-SENTINEL, July 18, 2005, at 3A (identifying Native Hawaiians as representing roughly 17% of Hawaii's 1.2 million people).

<sup>11</sup> Under the Akaka Bill, status as a Native Hawaiian would be determined by a commission and any person who can satisfy the Commission that they are descended in any degree from a Native Hawaiian qualifies. Depending on the number of applicants and the Commission's stringency or leniency, the actual numbers could be much higher or much lower than the Census figures.

<sup>12</sup> *See* Korber, *supra* note 4 (noting cultural leaders' early documentation of Native Hawaiians in California, in anticipation of passage of the bill: "So far, we have registered more Native Hawaiians in California than they have registered in Hawaii. . . . Here in California, you know, we have the akamai — the know-how. Our people are politically savvy. In Hawaii, they're somewhat worried because we're moving so fast.")

<sup>13</sup> Certain lands in Hawaii originally belonged to the Kingdom of Hawaii and were eventually given to the state of Hawaii. These are referred to as "ceded land." Philip Burnham, *The Akaka Bill: Endangered Species?*, INDIAN COUNTRY TODAY, n.p., Mar. 22, 2005 (part one of an interview with Rep. Neil Abercrombie (D-HI)).

<sup>14</sup> S. 310, §§ 8(c) and 9(a)-(g).

<sup>15</sup> *See Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827, 847-49 (9<sup>th</sup> Cir. 2006), (briefly outlining federal remedial legislation for Native Hawaiians), *cert denied*, 127 S.Ct. 2160 (2007).

<sup>16</sup> S. 310, § 9(a).

<sup>17</sup> Philip Burnham, *The Akaka Bill: Endangered Species?*, INDIAN COUNTRY TODAY, n.p., Apr. 4, 2005 (part three of an interview with Rep. Neil Abercrombie (D-HI)).

<sup>18</sup> Veronika Oleksyn, *S147 — Native Hawaiian Government Reorganization Act of 2005*, CONGRESSIONAL QUARTERLY BILL ANALYSIS, n.p., Aug. 12, 2005 (remarks by Rep. Tom Coburn (R-OK)).

<sup>19</sup> *Id.* (remarks by Rep. James Inhofe (R-OK)).

<sup>20</sup> *Id.* ("[T]he panel adopted a substitute amendment that, according to the committee report, sought to clarify that individuals who became eligible for citizenship in the newly reorganized native Hawaiian entity would not, by virtue of that citizenship alone, become eligible to receive Indian programs and services.")

<sup>21</sup> *Kamehameha Schools*, 470 F.3d 827.

<sup>22</sup> *Rice*, 528 U.S. 495 (2000); *see especially id.* at 521-22 (reasoning that, because Native Hawaiian was a racial and not a political classification as described in *Morton v. Mancari*, 417 U.S. 535 (1974), the state of Hawaii could not use that classification as a basis for restricting the right to vote for Office of Hawaiian Affairs trustees).

<sup>23</sup> *Morton v. Mancari*, 417 U.S. 535, 554 n.24 (1974) (holding that status as an Indian is a political, not racial, classification); *id.* at 555 (holding that special treatment of Indians need only be rational in order to withstand scrutiny).

<sup>24</sup> *See* Korber, *supra* note 4 (mentioning Hawaiian cultural organizations in California).

<sup>25</sup> *Id.*

<sup>26</sup> *See* William J. Hapiuk, Jr., Note, *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN. L. REV. 1009 (2001) (illustrating unintended consequences of the Indian Arts and Crafts Act of 1990 by relating the story of the Museum of the Five Civilized Tribes' closure for two months following the law's enactment, because the museum feared becoming a "test case").

<sup>27</sup> *See* Peter Kirsanow, *Disunited States/Multiculturalism Run Amok*, NATIONAL REVIEW ONLINE, Jan. 18, 2007 (raising concerns of potential for fraud).

<sup>28</sup> *See* Hapiuk, *supra* note 6, at 1034 (quoting sources charging Dawes Commission with omitting applicants because of inaccuracy and corruption); Carla D. Pratt, *Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity*, 35 SETON HALL L. REV. 1241, 1256 (2005) (suggesting that non-Indians were included on Dawes rolls due to fraud and bribery) (citing KENT CARTER, THE DAWES COMMISSION AND THE ALLOTMENT OF THE FIVE CIVILIZED TRIBES, 1893-1914 12, 73-74 (1999)).

<sup>29</sup> S. 310, § 7(b)(iii)(aa).

<sup>30</sup> *A Hawaiian Punch to E Pluribus Unum*, NATIONAL REVIEW ONLINE, May 24, 2006 (expressing concern that a "hereditary caste" of Native Hawaiians would be "defined however the interim government chooses to define them").

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