



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 13 2005

The Honorable John McCain
Chairman
Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Department of Justice is pleased to provide the views of the Administration on S. 147, the "Native Hawaiian Government Reorganization Act of 2005." The Department has identified four serious policy concerns raised by the proposed legislation that the Administration believes can and should be addressed and resolved by changes to the text of the bill.

First, the legislation should include explicit language clearly precluding potential claims for equitable, monetary, or Administrative Procedure Act-based relief, whether asserting an alleged breach of trust, calling for an accounting, or seeking the recovery of or compensation for lands once held by native Hawaiians. The absence of such language in the current legislation, especially in combination with the reference in section 2(21)(B) of S. 147 to the "the lands that comprise the corpus of the trust" and the unusually long statute-of-limitations period for claims against the United States provided for in section 8(c)(2), could invite a flood of litigation and could create the prospect of enormous unanticipated liability for the United States and the State of Hawaii. In addition, because there exist some legal theories that might be construed to create potential claims that could not be precluded under an amended S. 147, the legislation should include a limitations period that is significantly shorter than the proposed 20-year period now contained in section 8(c)(2), and should bar courts from using the continuing-wrong and equitable-tolling doctrines, which are sometimes employed to expand statutes of limitations fixed by Congress.

Second, S. 147 should be amended to make clear that the consultation process contemplated in sections 5(b) and 6(d) may not be applied so as to interfere in any way with the operation of U.S. military facilities on Hawaii or otherwise affect military readiness. The potential for such interference is well illustrated by litigation currently pending in the U.S. Court of Appeals for the Ninth Circuit (*Ilioulaokalani Coalition v. Rumsfeld*) challenging a proposed base expansion.

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Third, the legislation should state clearly whether the federal Government, the State of Hawaii, or the native Hawaiian governing entity will have jurisdiction to enforce criminal laws on native Hawaiian lands. It is the Department's experience that a lack of clarity on this question can generate significant confusion and litigation. Similarly, the legislation should make clear that the proposed native Hawaiian governing entity will not be eligible to petition the Interior Department to take land into trust under the Indian Reorganization Act (which could have uncertain jurisdictional consequences, in addition to tax consequences for Hawaii).

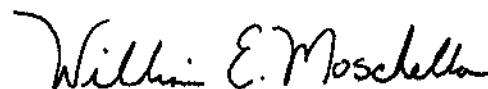
Fourth, the legislation should clearly provide that the Indian Gaming Regulatory Act will not apply to the native Hawaiian governing entity, and that the governing entity will not have gaming rights.

As you know, there are also questions concerning the constitutionality of the legislation. There is a substantial, unresolved constitutional question "whether Congress may treat the native Hawaiians as it does the Indian tribes," *Rice v. Cayetano*, 528 U.S. 495, 518 (2000), and hence whether Congress may establish and recognize a native Hawaiian governing entity, as S. 147 would do. In *Rice*, the Supreme Court noted that whether native Hawaiians are eligible for tribal status is "a matter of some dispute" and "of considerable moment and difficulty." Also, we note that the proposed legislation would require the Secretary of the Interior to appoint only native Hawaiians to the nine-member Commission that would certify the roll of members of the native Hawaiian community. This appointment requirement also raises a constitutional concern, which could be remedied by instead requiring only that appointees have knowledge and expertise about Native Hawaiian issues.

The Administration stands ready to work with Congress on specific language to address and resolve each policy issue discussed above, as well as other technical issues raised by S. 147.

Thank you for your interest in our views on this legislation. The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the President's program. If we can be of further assistance in this matter, please do not hesitate to contact this Office.

Sincerely,



William E. Moschella
Assistant Attorney General

cc: The Honorable Byron L. Dorgan
Vice Chairman