Testimony of Jacqueline Agtuca, Acting Director,
Office of Tribal Justice, U.S. Department of Justice
On S. 2899 – A Bill to Express the Policy of the United States
Regarding its Relationship with Native Hawaiians

Chairman Campbell, Vice Chairman Inouye, and members of the Committee. I am the Acting Director of the Office of Tribal Justice in the United States Department of Justice. Thank you for the opportunity to present views on S. 2899.

At the outset, I should explain that the Office of Tribal Justice coordinates Department policy on its dealings with American Indians, Alaska Natives, and Native Hawaiians. Department of Justice policy recognizes the principle of government-to-government relations in its work with tribal governments. See Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes, at 1 (June 1, 1995); http://www.usdoj.gov/otj/sovtrb.htm. Pursuant to this policy, the Office of Tribal Justice has been integrally involved in the Reconciliation Process between the United States and the Native Hawaiian people pursuant to Public Law 103-150 (S.J. Res. 19), 107 Stat. 1510 (1993), the Native Hawaiian Apology Resolution. S. 2899 would provide the Native Hawaiian people with an opportunity to reorganize a representative, self-governing body to promote Native Hawaiian interests.

I will begin with a brief background of the relevant history of United States-Native Hawaiian relations and a discussion of the Reconciliation Process under Public Law 103-150 before turning to some of our specific comments on the bill.

I. Background of Native Hawaiian - United States Relations

The Native Hawaiian people are the indigenous people of Hawaii. Historically, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistence social system based on communal land tenure. The Native Hawaiians have a highly developed and distinctive language, culture, and religion. The first encounter between Native Hawaiians and Europeans occurred when Captain James Cook sailed into Hawaiian waters in 1778. At that time, even though indigenous Hawaiians were all one people, the eight islands were governed by four independent Hawaiian chiefdoms.

In 1810, King Kamehameha I united the islands into the Kingdom of Hawaii. Between 1826 and 1893, the United States recognized the Kingdom as a sovereign nation and entered into several treaties with it. During that same period, Americans gained control of most of Hawaii's commerce and began to dominate the Kingdom's political affairs. Resulting social and economic changes had a "devastating" effect on the Native Hawaiian population and on their "health and well-being." Public Law 103-150, 107 Stat. 1510, 1512.

In 1893, Queen Lili'uokalani sought to re-establish Native Hawaiian control over the Kingdom's governmental affairs through constitutional reform. Fearing a loss of power, a group representing American commercial interests overthrew the Kingdom with the unauthorized aid of the United States Minister to Hawaii, who caused an armed U.S. naval force to invade Hawaii. Under this threat of military force, Queen Lili'oukalani abdicated her throne. A provisional government was established, which immediately sought Hawaii's annexation by the United States. President Cleveland refused to recognize the provisional government and called for restoration of the monarchy. However, Congress later enacted a joint resolution annexing Hawaii, which President McKinley signed into law in 1898. As part of annexation, the provisional government, without compensation to the Native Hawaiian people, ceded 1.8 million acres of the Kingdom's former crown, government, and public lands to the United States (the "ceded lands").

After annexation, the conditions of Native Hawaiians continued to deteriorate, and in 1920, territorial representatives sought assistance for the Native Hawaiian people from Congress. Explaining that the Native Hawaiian people had been "frozen out of their lands and driven into the cities," and that the "Hawaiian people are dying," the representatives recommended allotting land to the Native Hawaiians so that they could reestablish their traditional agricultural way of life. H.R. Rep. 839, 66th Cong., 2d Sess. 4 (1920). Recognizing the unique relationship between the United States and the Native Hawaiian people, the Secretary of the Interior joined in the recommendation, stating that Native Hawaiians are "our wards . . . for whom in a sense we are trustees," that they were "falling off rapidly in numbers," and that "many of them are in poverty." Id. Additionally, Congress found constitutional precedent for the HHCA in part in previous enactments that allotted individual lands to American Indians. The recommendations led to the enactment of the Hawaiian Homes Commission Act ("HHCA"), Pub. L. No. 67-34, 42 Stat. 108 (July 9, 1921), which designated 200,000 acres of lands as homelands for "Native Hawaiians" of ½ blood or more.

In 1959, Hawaii was admitted as a State. In the Hawaii Admissions Act, Pub. L. No. 86-3, 73 Stat. 4 (1959), Congress required the new State of Hawaii to adopt the HHCA as part of its constitution and transferred federal authority over administration of the HHCA lands to the State. Congress also placed an additional 1.2 million acres of the ceded lands into a trust to be managed by the State for five specified purposes, including "the betterment of the conditions of native Hawaiians." Id. § 5(f), 73 Stat. at 6.

The admission of Hawaii as a State did not alter the status of Native Hawaiians as an indigenous people, and thus, did not alter the political relationship between the United States and the Native Hawaiian people. After passage of the Hawaii Admission Act, Congress continued to recognize its special responsibility for the welfare of Native Hawaiians. Congress has established programs for the benefit of Native Hawaiians in the areas of health care, education, employment, and loans. Congress has also enacted statutes to preserve Native Hawaiian culture, language, and historical sites. Native Hawaiians have been classified as Native Americans in a number of federal statutes. These laws reflect Congress' view that its "authority . . . under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in

matters affecting the native peoples of . . . Hawaii." 42 U.S.C. § 11701(17). This acknowledgment of a distinct political relationship between the United States and the Native Hawaiians arose out of these historical events I have just described.

In 1980, Congress authorized a Native Hawaiians Study Commission to assess the cultural needs and concerns of Native Hawaiians (Public Law 96-565, Title III). The Commission, comprised of three Hawaiian residents, six federal officials, and support staff, conducted public meetings and other fact-finding activities throughout Hawaii from January to June in 1982. The Commission's final, two-volume report was submitted to Congress on June 23, 1983. The social and economic conditions of the Native Hawaiian population has not improved significantly since this 1983 study. Their employment, income, education, and health levels have remained lower than other ethnic groups in Hawaii. The Commission recommended coordinated actions by the federal, state, and local governments and private organizations to address specific needs of Native Hawaiians.

The Senate bill that is being considered today would begin this process of restoring self-governance to Native Hawaiians so they may better address their social, economic and cultural needs.

II. The Reconciliation Process under Public Law 103-150

In 1993, Congress enacted a Joint Resolution to acknowledge the 100th anniversary of the overthrow of the Kingdom of Hawaii and to apologize to the Native Hawaiian people for the role of the United States in that overthrow. In the Joint Resolution, Congress acknowledged that the overthrow of the Kingdom "resulted in the suppression of the inherent sovereignty of the Native Hawaiian people," that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States," and that "the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions." Pub. 103-150 (S.J. Res. 19), 107 Stat. at 1512, 1513 (1993). The Joint Resolution calls upon the President to promote further reconciliation between the United States and the Native Hawaiian people.

In March 1999, Senator Akaka wrote to the Attorney General, requesting that an office be designated within the Department of Justice to work in cooperation with the Department of the Interior to promote reconciliation between the United States and the Native Hawaiian people. The Attorney General designated the Office of Tribal Justice to work with the Department of the Interior on the Reconciliation Process. In December 1999, the Interior Department Assistant Secretary for Policy, Management and Budget and the Director of the Office of Tribal Justice visited Native Hawaiian sites and held a series of meetings with the Native Hawaiian people to promote reconciliation.

The site visits demonstrated to the Interior-Justice delegation the continuing, distinctly native character and culture of the Native Hawaiian people. The delegation visited Aha Punana Leo, a Native Hawaiian language immersion school on the Island of Hawaii. They were greeted by Native Hawaiian

students with traditional Native Hawaiian songs, and they toured the campus grounds, which included areas planted with Taro, the traditional Native Hawaiian staple, and a fish hatchery, reflecting traditional aquaculture. Students had also planted native trees and plants on the campus to establish a conservation area. On the Island of Kauai, the delegation met with Native Hawaiian parents and students at Ni'ihau, a school run by Native Hawaiian teachers from Ni'ihau and Kauai. The Ni'ihau parents explained that their children learned Hawaiian as a first language in the home, so the focus at the school was on teaching the students to speak, read, and write English to ensure that the children are able to interact with non-Natives when they travel to neighboring islands. On the Island of Molokai, the delegation visited a Native Hawaiian group that is restoring a fish pond that is hundreds of years old for subsistence use. On Molokai, the delegation met with a Native Hawaiian kindergarten class, where all of the students are fluent in both Hawaiian and English, and visited with Native Hawaiian kupuna (elders), who explained the importance of being raised in a Hawaiian Homestead community in terms of language and cultural preservation. The delegation also met with and visited a number of Native Hawaiian organizations, including: the Alu Like, the Native Hawaiian Education advocacy organization; members of Native Hawaiian organizations advocating for self-governance; a Native Hawaiian Health Care Center; the Kamehameha schools; Hawaiian Home Land communities and land areas on Kauai, Oahu, and Maui; and several other distinctly Native Hawaiian communities. In addition, the delegation held public meetings and heard statements from several hundred Native Hawaiians.

Throughout these delegation site visits and public meetings, two things were made clear. First, the Native Hawaiians are a distinctly native community with a vibrant culture, traditions, and language and active social and political organizations. We learned from Native Hawaiians that Hawaiian Home Land settlements helped to maintain Hawaiian language and culture, which was particularly important from the 1920s through the 1960s when the use of the Native Hawaiian language and the practice of Native Hawaiian culture were often discouraged by state institutions. We also learned that since the 1960s, a number of Native Hawaiian advocacy groups have actively promoted Hawaiian language and culture and these efforts have gone hand-in-hand with efforts to enhance Native Hawaiian self-governance. To foster these efforts, the Native Hawaiian people maintain both social and quasi-governmental institutions, such as the Native Hawaiian Civic Clubs, Alu Like – the Native Hawaiian education organization, Papa Ola Lokahi – the Native Hawaiian health care organization, Native Hawaiian schools, and Native Hawaiian traditional justice programs, among others.

Second, the delegation heard the clear call of the Native Hawaiian people for self-governance. A majority of Native Hawaiians, from whom the delegation heard, support increased self-governance over their lands, resources, and affairs.[1] Some of the critical subjects that the Native Hawaiian people identified are increased control of Native Hawaiian lands and resources, education programs, health

1. While most Native Hawaiians appear to support increased Native Hawaiian control over native lands, resources, and affairs within the framework of Federal law, some members of the Native Hawaiian community have called for restoration of the Kingdom of Hawaii or another form of independence from the United States. The Interior-Justice delegation explained that its mission was to promote reconciliation within the framework of Federal law, and the Reconciliation Process does not have any bearing or implication concerning international law matters.

care delivery, Native Hawaiian housing, and an increased ability to engage the Federal Government in an ongoing dialogue concerning Native Hawaiian issues.

III. Comments on S. 2899 and H.R. 4904

The overthrow of the Kingdom of Hawaii frustrated the right of Native Hawaiians to control their own affairs. While Congress has enacted a number of measures to promote the welfare of the Native Hawaiian people, and Native Hawaiians have themselves worked to maintain their own distinct community, culture, language, and social and political institutions, they have not been afforded a clear opportunity to control their own affairs since 1893. This bill would enable the Native Hawaiians to reorganize their own representative governing body, which will promote control over their own affairs.

A. Goals of this Legislation

It is evident from the documentation, statements, and views received during the Reconciliation Process undertaken by the Interior-Justice delegation that the Native Hawaiian people continue to maintain a distinct community and certain governmental structures, and they desire to increase their control over their own affairs. For generations, the United States has recognized the unique relationship that exists between the United States and the Native Hawaiians, and has promoted the welfare of Native Hawaiians as an indigenous people within our Nation through legislation, administrative action and policy statements. The proposed legislation, by clarifying the political status of Native Hawaiians, would extend to Native Hawaiians the right of self-governance over their cultural resources and internal affairs.

The proposed process of reorganizing a Native Hawaiian governing body has precedent in Federal legislation promoting self-governance for American Indian and Alaska Native peoples. The government-to-government relationship that exists between the United States and American Indian and Alaska Native communities is firmly established in federal law and policy. From its earliest days, the United States recognized the sovereign status of Indian tribes. Indian tribes were independent, self-governing societies long before their contact with European nations. See National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985); F. Cohen, Handbook of Federal Indian Law, 229 (Strickland ed. 1982). The retention of inherent sovereignty forms the basis for the exercise of tribal power. Today American Indian tribes and Alaska Native villages and corporations control many programs affecting their communities, including, for example, programs affecting their lands and natural resources, schools and colleges, health, housing, water, sewer, and sanitation services, public safety, and transportation infrastructure on native lands. In addition, acknowledged governmental leaders facilitate the government-to-government relationship, which enables tribal governments to advocate effectively for their community interests.

The proposed bill responds to the call of the Native Hawaiian people for increased self-governance within the framework of domestic Federal law. It recognizes that Native Hawaiians were a self-governing people prior to contact with the European nations, and that the clarification of their political status vis-a-vis the United States is a legitimate exercise of Congress' Indian affairs power. The reorganization of a Native Hawaiian governing body that the bill affords the Native Hawaiian people to constitute could assist the Native Hawaiians to better address their community needs and goals in the context of federal law, and could facilitate the government-to-government relationship between the Federal Government and the Native Hawaiian community. Enhancing the government-to-government relationship between the Native Hawaiians and the United States could ensure that the Native Hawaiian people have greater control over activities affecting their rights and resources. See Executive Memorandum on Government-to-Government Relations with Native American Tribal Governments (April 29, 1994).

B. Findings

The bill's legislative findings establish Congress' intent to exercise authority pursuant to its Indian affairs power. Section 1(1) states that "the Constitution vests Congress with the authority to address the conditions of the indigenous, native peoples of the United States." Subsections (2) and (3) find that the Native Hawaiian people are an aboriginal, indigenous, native people with a special trust relationship to the United States and that Congress has legislated on behalf of the Native Hawaiian people as such. The legislative findings concerning the Hawaiian Homes Commission Act are important because they reflect an early congressional effort to promote the welfare of the Native Hawaiian people by fostering the continuation of traditional Native Hawaiian agricultural endeavors on aboriginal lands under the protection of Federal law. The HHCA embodies a congressional determination that the Native Hawaiians, as defined in that Act, are an indigenous, aboriginal people under the protection of the United States. The legislative findings also reflect the fact that the Native Hawaiian people today maintain a distinctly Native Hawaiian culture, language, social and political institutions, and community. These policy declarations make clear that Congress intends to reaffirm the right of Native Hawaiians to self-governance, within the framework of Federal law, and intends to continue to promote reconciliation between the United States and the Native Hawaiian people.

C. Definition of Native Hawaiian

In modern Federal legislation dealing with American Indians and Alaska Natives, Congress commonly relies on a tribe's determination of its own membership. However, because the Native Hawaiian governing body has not yet been reorganized, an interim Federal law definition of "Native Hawaiian" is necessary for the operation of the legislation.

We have several comments on the definition of "Native Hawaiian" set forth in section 2(6), and section 7. First, the Department finds it important that the definition includes only those Native Hawaiians who voluntarily choose to affiliate with the Native Hawaiian governing body. Section

7(a)(1)(A) does exactly this by establishing a roll that includes the names of "the adult members of the Native Hawaiian community who wish to become members of a Native Hawaiian governing body."

Second, the interim definition of Native Hawaiian set forth in section 7(a) ties membership to "lineal descendants of the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawaii on January 1, 1893, and who occupied and exercised sovereignty in the Hawaiian archipelago."

The Supreme Court's decision in Rice v. Cayetano, 120 S. Ct. 1044 (2000) left open the question "whether Congress may treat the native Hawaiians as it does the Indian tribes." Rice, 120 S. Ct. at 1057. Accordingly, in invoking its established constitutional authority with respect to Indian Tribes in the present context – namely, by providing Native Hawaiians with much the same opportunity to reorganize and establish a self-governing body that Congress has furnished to the Indian Tribes elsewhere in the United States that the Court referred to – it would make the most sense to adopt an interim definition that draws upon past practices under Congress' Indian affairs power.

Thus, we recommend an alternative interim definition that references the Hawaiian Homes Commission Act (HHCA), Pub. L. No. 67-34, 42 Stat. 108 (1921). There are several reasons for this recommendation. First, the HHCA was itself an exercise of Congress' Indian affairs power not long after annexation, and it thus represents an established Federal law process for determining who is a Native Hawaiian for federal purposes. See H.R. Rep. 839, 66th Cong., 2d Sess. 4 (1920) (statement of Secretary Lane expressly mentioning the trust relationship that exists between the United States and Native Hawaiians). Second, the HHCA presents a definition that is tied to those Native Hawaiians who are eligible to reside on distinctly native Hawaiian lands, and which can reasonably serve as an indication of those Native Hawaiians who maintain close ties to the Native Hawaiian community. Third, insofar as lineal descendancy is concerned, this definition traces to 1778, the date of European contact, rather than 1893, a date long after the arrival of Europeans, Asians, and Americans. Finally, the Department of Hawaiian Home Lands maintains a record keeping system regarding eligibility for HHCA lands, which will make the interim reorganizational process more definitive and thus less complicated. This recommendation is intended to ensure that this legislation serves as an enduring measure to provide a strong foundation for Native Hawaiian self-governance within the framework of federal law.

Accordingly, we recommend the following interim definition of the term Native Hawaiian:

A Native Hawaiian is any person:

(a)(i) who is eligible to hold Hawaiian Home lands as a Native Hawaiian directly or by devise under the Hawaiian Homes Commission Act, Public Law 67-34, 42 Stat. 108, as amended, and (ii) who voluntarily affiliates with the Native Hawaiian people as a political community; or

(b)(i) who is a lineal descendant of a Native Hawaiian who is or was eligible to hold Hawaiian Home Lands directly or by devise under Public Law 67-34, 42 Stat. 108, as amended, (ii) who is recognized by the Native Hawaiian community as a Native Hawaiian, and (iii) who voluntarily affiliates with the Native Hawaiian people as a political community.

Finally, it is important to note that the purpose of the interim definition is to provide a means of implementing this legislation, which first seeks to establish a Native Hawaiian Interim Governing Council. Once that is accomplished, the Native Hawaiian people may then determine their own membership just as other native communities. This is important, because a tribe's "right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978). Section 7(c)(7)(D) expressly states that the organic documents of the governing body will vest it with the power to "determine the membership in the Native Hawaiian governing body."

D. Transfer of Authority Over HHCA and Ceded Lands Trust to the Native Hawaiian Governing Body

Section 9(a) of the bill reaffirms the delegation of authority by the United States to the State of Hawaii over the HHCA in Hawaii's Admissions Act. Section 9(b) then authorizes the United States to negotiate an agreement between the State and the Native Hawaiian governing body that would transfer authority over "lands, resources, and assets dedicated to Native Hawaiian use under existing law" to the Native Hawaiian governing body. We support the premise of providing the Native Hawaiian governing body with primary authority over these programs.

However, we recommend an alternative provision that would authorize the State and the Native Hawaiian governing body to negotiate a transfer of authority over governmental services provided by the State to the Native Hawaiian governing body, subject to the approval of the Secretary. This alternative provision better serves the Native Hawaiian community because the State, not the United States, is the administrator of the HHCA and the ceded lands trust. Our alternative provision would also provide express protection for the justified expectations of Native Hawaiians under the HHCA.

Conclusion

In conclusion, the Department of Justice generally supports S. 2899, and is committed to working closely with the Native Hawaiian people and the Congress, upon enactment of this legislation, to address successfully the steps to Federal recognition, self-determination, and self-governance for the Native Hawaiian people. There are a number of prospective matters that the Federal Government may have to work out with the Native Hawaiian governing body and the State of Hawaii, through future legislation. These challenges may include:

- potential land claims that Native Hawaiians may assert against the United States, the State of Hawaii, or private landowners;

- the nature and extent of the rights, obligations and benefits in extending Federal recognition to Native Hawaiians under the Native American Indian statutes;

- the Federal Government's trust and fiduciary responsibilities for any federal lands that may be transferred to the Native Hawaiian community; and

- the relative responsibilities of the Native Hawaiian community and the State of Hawaii and its local governments in providing schools, law enforcement, and other public services.