

HAWAIIAN LAND DISPUTES: HOW THE UNCERTAINTY OF THE NATIVE HAWAIIAN INDIGENOUS TRIBAL STATUS EXACERBATES THE NEED FOR MEDIATION

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Many people see the Hawaiian Islands as a paradise in the Pacific Ocean.¹ However, most are unaware that history has left an unpleasant and permanent scar on the original inhabitants of the islands, the Native Hawaiians. It is often forgotten that the islands were once ruled by its monarchy. In fact, the Hawaiian Kingdom was not overthrown until 1893,² and the islands did not reach statehood until 1959.³ Despite this however, Native Hawaiians have never officially been considered an indigenous tribe.⁴ This lack of recognition from the federal government has caused a strong sense of injustice that is prevalent throughout the Native Hawaiian community.⁵

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¹ JAMES MAK, DEVELOPING A DREAM DESTINATION: TOURISM AND TOURISM POLICY PLANNING IN HAWAII 1 (2008). (“When it comes to tourist destinations, Hawaii consistently ranks among the very best. . . . For millions of people around the world, Hawaii is a dream destination—the vacation of a lifetime.”).

² NORRIS WHITFIELD POTTER, LAWRENCE M. KASDON & ANN RAYSON, HISTORY OF THE HAWAIIAN KINGDOM 157 (2003) (the Hawaiian monarchy was overthrown on January 17, 1893).

³ *Id.*

⁴ Davianna Pomaika'i McGregor, *Recognizing Native Hawaiian Rights: A Quest for Sovereignty*, in ASIAN AMERICAN STUDIES. NOW: A CRITICAL READER 99, 101 (Jean Yu-Wen Shen Wu et al. eds., 2010) (explaining that no law in the United States gives “explicit and formal recognition that Native Hawaiians are a sovereign people, with the right of self-governance and self-determination”).

⁵ Larry Keller, *Hawaii Suffering From Racial Prejudice: Hawaii Has a Racism Problem*, SOUTHERN POVERTY LAW CENTER, <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2009/fall/prejudice-in-paradise>. See also Jon M. Van Dyke & Melody K. MacKenzie, *An Introduction to the rights of the Native Hawaiian People*, 10-JUL HAW. B. J. 63, 63 (2006). (“Although considerable disagreement exists among different Native Hawaiian groups, the momentum behind the movement for a return of land and a restoration of sovereignty remains strong and continues to grow.”).

Because Native Hawaiians are not federally recognized as an indigenous tribe,⁶ they have little say about their ancestral land.⁷ Although Native Hawaiians technically have rights to ceded land,⁸ these rights are often complicated or severely limited due to a long history of convoluted legislation and case law. In many cases, it is unclear whether Native Hawaiians, the State of Hawaii, or the federal government holds superior title over the ceded lands. While some supporters of Native Hawaiian sovereignty are extreme,⁹ others promote valid and justifiable desires to gain the same rights afforded to other indigenous tribes in the United States. There has been much debate as to whether Native Hawaiians should be federally recognized as independent sovereigns.¹⁰ What might be an even more productive discussion, however, is the potential to use Alternative Dispute Resolution (“ADR”) to mitigate existing conflicts with the United States government, regardless of federal status. The Native Hawaiian struggle to obtain federal recognition only exacerbates the need for mediation in land disputes.

Though there are systems of ADR in place in some parts of Hawaii, this Note will focus specifically on the need for ADR in Native Hawaiian land disputes. This Note will begin with a general discussion about ADR and the benefits of implementing mediation as opposed to arbitration, then describe the growing problem of Native Hawaiian land disputes. This will be followed by a summary of the current status of Native Hawaiians, and why they seek

⁶ McGregor, *supra* note 4, at 101.

⁷ *Id.* at 102 (Native Hawaiians “lack control over the resources of their ancestral lands . . .”). See also Neil M. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848, 848 (1975) (“In less than 200 years of contact with Western civilization, Native Hawaiians . . . have lost control of the great bulk of their homeland.”).

⁸ An Act to Provide for Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, 73 Stat. 4 (1959).

⁹ Keller, *supra* note 5 (explaining that some supporters of Native Hawaiian sovereignty have “made it a racial thing[.]” and promote violence towards non-Hawaiians. In her 1999 book, *From A Native Daughter: Colonialism and Sovereignty in Hawaii*, a Hawaiian Studies professor at the University of Hawaii, Haunani-Kay Trask, wrote: “[J]ust as all exploited peoples are justified in feeling hostile and resentful toward those who exploit them, so we Hawaiians are justified in such feelings toward the *haole* [whites]. This is the legacy of racism, of colonialism.”). HAUNANI-KAY TRASK, *FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII*, 174 (1999). See also Francis Harris, *Defiant Hawaiian Unfurls the Flag of Freedom*, DAILY TELEGRAPH, July 15, 2006, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1523995/Defiant-Hawaiian-unfurls-the-flag-of-freedom.html> (William Burgess, a lawyer who founded the anti-sovereignty movement Aloha for All, said: “Sovereignty means that native Hawaiians would be the supreme, absolute rulers of the islands and everyone else would be subservient to them.”).

¹⁰ See *Bill to Grant Native Hawaiians Sovereignty Passes House*, FOX NEWS, Feb. 24, 2010, <http://www.foxnews.com/politics/2010/02/24/grant-native-hawaiians-sovereignty-passes-house/>.

federal recognition. The lack of a federally recognized indigenous tribal status exacerbates the need for mediation in Native Hawaiian land disputes. Next, this Note will explore mediation methods previously and currently used in Federally recognized indigenous tribes like the Native Americans and the Alaskan Natives. Finally, it will discuss the implications of The Native Hawaiian Government Reorganization Act of 2011,¹¹ a controversial piece of legislation currently waiting to be decided on by Congress,¹² which would grant Native Hawaiians federal recognition as an indigenous tribe. Ultimately, the issue is not whether Native Hawaiians should be officially recognized as an indigenous tribe, but how we can deal with current land use problems. If the Act is passed, land disputes may still be a prevalent problem throughout Hawaii,¹³ and having a mediation system in place will help to facilitate speedier resolution. If the Act does not pass, and Native Hawaiians are denied federal recognition, they still have a valid and important interest in the Hawaiian Islands. Thus, regardless of tribal status, a system of mediation should be implemented as soon as possible in order to maintain peace and respect with the Native Hawaiians.

I. BACKGROUND OF ADR

Alternative Dispute Resolution, or ADR, is an alternative to America's default system of adversarial litigation.¹⁴ Our legal system is adversarial in nature, and focuses on achieving redress from the responsible party.¹⁵ According to some scholars, the reason why litigation, and not ADR, remains "the most common avenue

¹¹ Native Hawaiian Government Reorganization Act, S. 675, 112th Cong. (2011) available at <http://www.indian.senate.gov/issues/2011-03-30.cfm>.

¹² As of September 13, 2012, the Committee on Indian Affairs was "ordered to be reported with an amendment in the nature of a substitute favorably." *Id.*

¹³ Carl H. Johnson, *A Comity of Errors: Why John v. Baker is Only a Tentative First Step in the Right Direction*, 18 ALASKA L. REV. 1, 7 (2001) ("the Department of the Interior, and later, Congress declared the inherent sovereignty of tribes in Alaska and their status as federally recognized tribes. Despite this declaration, state courts continue to deny the sovereign status of tribes in Alaska.").

¹⁴ Julia Ann Gold, *ADR Through A Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2005 J. DISP. RESOL. 289, 302-304 (2005) ("Adversarial litigation [remains] the primary American dispute resolution mechanism . . . Litigation . . . continues to be the most common avenue to address grievances.").

¹⁵ *Id.* at 303 (Litigation is "designed to identify an individual's grievance, assert a formal claim against the perceived responsible party, and seek redress. Litigation is based on assumptions of right and wrong, entitlement, blame, and fault-finding.").

to address grievances”¹⁶ is due to the American culture.¹⁷ More specifically, American culture demands¹⁸ “vindication, protection of rights, an advocate to fight for them, and a declaration that they are right and the other person is wrong.”¹⁹ Some feel that ADR is ineffective in achieving these outcomes.²⁰

Regardless of this attitude, forms of ADR have increasingly been used since the late 1980s.²¹ ADR has much to offer, and can often be more efficient than traditional forms of dispute resolution. In ADR, the processes can be less formal,²² and disputants have more control²³ and voice.²⁴ Native Hawaiian land disputes could benefit greatly from the federal implementation of ADR.

It is important to keep in mind, however, that ADR is an umbrella term encompassing many forms of alternative dispute resolution. In order to appropriately address the concerns of the Native Hawaiians, a closer look at specific methods of ADR is necessary to identify the method best suited to resolve Hawaii’s unique circumstances.

A. *Arbitration*

In one form of ADR, arbitration, parties have the power to choose a neutral decision-maker,²⁵ the arbitrator, as well as the power to customize proceedings.²⁶ Arbitration can be more efficient than litigation, since an arbitrator’s decision is binding.²⁷ Parties do not have to go through lengthy and expensive appeals processes.²⁸ Other benefits of arbitration include: “speedier reso-

¹⁶ *Id.* at 304.

¹⁷ *Id.* (“Litigation . . . continues to be the most common avenue to address grievances . . . because litigation reflects certain key values consistent with dominant American culture.”).

¹⁸ Gold, *supra* note 14, at 304. (“These goals of litigation reflect cultural values consistent with dominant American culture.”).

¹⁹ *Id.* at 304.

²⁰ *Id.* (stating “the grievant has goals that typically cannot be achieved in mediation”) (citing Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 *JUST. SYS. J.* 151, 153 (1984)).

²¹ *Id.* at 307.

²² Gold, *supra* note 14, at 307.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 306.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 307 (“[A]rbitral decisions are final and binding. There is no right to appeal an arbitral award, and grounds for vacating an award are extremely limited.”).

lution, less costly, limited discovery, informal proceedings, privacy, the choice of a decision-maker who understands the dispute, limited rights of appeal, and avoiding a legal precedent.”²⁹

Arbitration is often used to resolve “domestic, international, public or commercial”³⁰ disputes. However, “not every dispute should be arbitrated.”³¹ Instead, “[a]rbitration’s suitability should be based upon the nature of the agreement, the dispute, and the parties.”³² There are a number of potential problems when considering arbitration in the context of Native Hawaiian land disputes. First, it would be difficult to find a neutral arbitrator or arbitration panel that would be impartial to both the Native Hawaiians and the Federal Government. Although there have been numerous successful international arbitration outcomes³³ between countries, there is little precedent of arbitration between the federal government and a state. Second, arbitration involving multiple parties would be difficult since parties are “rarely joined to an action”³⁴ and “each dispute may need to be arbitrated separately.”³⁵ In other words, since arbitration involves each side making its case by introducing evidence,³⁶ arbitration between such large parties, like the Native Hawaiians and the federal government, may end up being extremely lengthy and more costly than other alternative dispute forms. Third, arbitral awards are not published, and the proceedings are kept confidential.³⁷ Considering the large population³⁸ affected by the arbitration to be used, the lack of public disclosure in arbitral proceedings is a major drawback. In this dispute, Native Hawaiians risk losing so much; namely their land rights, so transparency and accountability are important. Thus, although arbitration may be an option, it is likely not the ideal method for this situation.

²⁹ *Id.*

³⁰ Jean T. Carney, *Beginner's Guide to Resolving Transnational Disputes Through Arbitration*, 68-Nov. N.Y. St. B.J. 10, 11 (1996).

³¹ *Id.* at 13.

³² *Id.*

³³ See generally REPORTS OF INTERNATIONAL ARBITRAL AWARDS, UNITED NATIONS, available at <http://www.un.org/law/riaa/>.

³⁴ Carney, *supra* note 30, at 14.

³⁵ *Id.*

³⁶ *Id.* at 11.

³⁷ See *id.*

³⁸ As of 2012, roughly 138,855 Native Hawaiians live in Hawaii. See STATE & COUNTY QUICK FACTS, UNITED STATES CENSUS BUREAU, available at <http://quickfacts.census.gov/qfd/states/15000.html>.

B. Mediation

Alternatively, a focus on mediation may prove to be more helpful to resolve Hawaii's current land dispute problem. Mediation, a "significant component of the ADR movement,"³⁹ "has generated a great deal of praise in the last decade as a more efficient and effective conflict resolution method than resorting to the courts"⁴⁰ and is the "'wave of the future.'"⁴¹ Mediation can be less formal than arbitration⁴² in that an impartial third party facilitates negotiations between disputants.⁴³ While the mediation is not binding, it is persuasive and can help the parties come to an understanding or agreement.⁴⁴

This Note explores numerous systems of mediation as a solution to the Native Hawaiian land dispute problem. Not only is mediation now the most widely used ADR process in the United States,⁴⁵ "[it is [also] well known that many Native cultures, including some of Alaska's Native groups, traditionally prefer mediation-style dispute resolution to our adversarial system."⁴⁶ Thus, the right mediation system can offer a multitude of benefits specifically for the Native Hawaiian community.

II. THE PROBLEM: LAND DISPUTES IN HAWAII

A. Background for Land Disputes in Hawaii

The issue of land ownership in Hawaii is complicated and messy. In 1848, King Kamehameha II distributed virtually all⁴⁷ of Hawaii's lands amongst reigning chiefs⁴⁸ and government offi-

³⁹ Neghin Modavi, *Mediation of Environmental Conflicts in Hawaii: Win-Win or Co-Optation?*, 39 SOC. PERSP. ENV'T CONFLICT 301, 301 (1996).

⁴⁰ *Id.*

⁴¹ Robert D. Garrett, *Mediation in Native America*, 49 DISP. RESOL. J. 38, 45 (1994).

⁴² Gold, *supra* note 14, at 309.

⁴³ *Id.*

⁴⁴ *Id.* ("impartial third part[ies] . . . ha[ve] no authoritative decision-making power. Settlement in mediation is voluntary; the mediator assists the disputing parties to reach their own mutually acceptable resolution.")

⁴⁵ *Id.*

⁴⁶ Johnson, *supra* note 13, at 39-40.

⁴⁷ McGregor, *supra* note 4, at 106 (99.2% of land was granted).

⁴⁸ *Id.* (land was distributed amongst 245 chiefs).

cials,⁴⁹ leaving little land ownership for the vast majority of people in Hawaii at the time.⁵⁰ After the Hawaiian government was overthrown in 1893,⁵¹ the United States annexed Hawaii through the Newlands Resolution⁵² of 1898.⁵³ Although the Newlands Resolution was intended to establish “a special trust relationship between the United States and the inhabitants of Hawaii”⁵⁴ by mandating that Hawaiian lands be “used solely for the benefit of the inhabitants of the Hawaiian Islands for education and other public purposes”, this essentially stripped Native Hawaiians of their land rights⁵⁵ by giving Congress control over the land previously belonging to Hawaiian chiefs and governing officials.⁵⁶

It was not until 1959 that Hawaii became one of the fifty states within the United States through the Hawaii Admission Act. This statute essentially reaffirmed the Newlands Resolution Act since it continued to give Congress control over the Hawaiian lands (today, the federal government controls around 370,000 acres of land),⁵⁷ with the goal of creating a “trust relationship” between the United States and the Native Hawaiians.⁵⁸ To further this relationship, Congress also “transferred responsibility for administration”⁵⁹ of about 1,200,000 acres⁶⁰ to the State of Hawaii to be used as ceded public lands.⁶¹

⁴⁹ *Id.*

⁵⁰ *Id.* (“Less than one percent of the lands were given to 28 percent of the people, leaving 72 percent of the people landless.”).

⁵¹ McGregor, *supra* note 4, at 106-07 (In 1883, “the United States Minister and the naval representative of the United States caused 162 armed naval forces of the United States to invade the sovereign Hawaiian Nation in support of the overthrow of the indigenous and lawful Government of Hawai’i and the United States Minister thereupon extended diplomatic recognition to a provisional government declared by eighteen conspirators, mostly American, without the consent of the native people of Hawai’i or the lawful government of Hawai’i, in violation of treaties between the two nations and of international law.”).

⁵² Newlands Resolution Act, Resolution No. 55, 2nd Session, 55th Congress, July 7, 1898, 30 Stat. at L. 750, 2 Supp. R. S. 895, *available at* <http://www.bartleby.com/43/44.html>.

⁵³ McGregor, *supra* note 4, at 108.

⁵⁴ *Id.*

⁵⁵ *Id.* (“Native Hawaiians were thereby denied the mechanism for expression of their inherent sovereignty through self-government and self-determination, their lands and ocean resources.”).

⁵⁶ Newlands Resolution Act, Resolution No. 55, 2nd Session, 55th Congress, July 7, 1898, 30 Stat. at L. 750, 2 Supp. R. S. 895, *available at* <http://www.bartleby.com/43/44.html>.

⁵⁷ JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI’I? 270 (2007).

⁵⁸ McGregor, *supra* note 4, at 111.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

However, even though the statute seemed to be returning some land control to Hawaii, Congress retained ultimate control because it had the sole ability to “enforce the trust, including the power to approve land exchanges and legislative amendments affecting the rights of beneficiaries under the act . . . [and] retaining the legal responsibility of oversight over the State for the betterment of the conditions of Native Hawaiians”⁶²

In 1978, Hawaii’s Constitution was amended in an effort to give Native Hawaiians full advantage of the recent transferred responsibility of ceded lands:

they created the Office of Hawaiian Affairs (OHA), they required the state legislature to allocate a pro rata share of the revenues from the Public Lands to OHA to be used explicitly for the betterment of Native Hawaiians, . . . they clarified the funding for the Department of Hawaiian Home Lands, and they imposed limits on the ability to claim land through adverse possession.⁶³

As well intended as these amendments were, however, they ultimately caused more “conflict and confusion because of the difficulty in agreeing on what lands were included . . . and how [they] should be defined.”⁶⁴ Although these Acts intended to make Native Hawaiians the beneficiaries, very few have actually acquired any real property rights. In fact, as of 1991:

less than 20% of the Hawaiian home lands, or approximately 38,000 acres, have been allotted to Native Hawaiian beneficiaries. Over 17,000 Native Hawaiians are on a waiting list to become homesteaders. After remaining on the waiting list for periods of up to 30 years, some have died before their applications were granted or even considered.⁶⁵

Thus, although some steps have been taken to recognize Native Hawaiian rights, these efforts are insufficient. In other words, “[t]his effort, while well-intentioned, does not allow for self-governance and self-determination by Native Hawaiians. Instead, it has resulted in the State of Hawai’i managing native lands and re-

⁶² McGregor, *supra* note 4, at 111.

⁶³ VAN DYKE, *supra* note 57, at 259.

⁶⁴ *Id.* at 260.

⁶⁵ Mark A. Inciong, *The Lost Trust: Native Hawaiian Beneficiaries Under the Hawaiian Homes Commission Act*, 8 ARIZ. J. INT’L & COMP. L. 171, 171 (1991).

sources on behalf of Native Hawaiians. Native Hawaiians, as a people, want to and need to manage their own resources.”⁶⁶

B. *Case Law Demonstrating Lack of Consideration for Native Hawaiian Interests*

Courts have also repeatedly refused to decide these tough policy issues and instead have passed the burden on to the legislature.⁶⁷ Through the judicial system, it has become increasingly clear that both federal and state courts are dismissing the interests of Native Hawaiians in land disputes. For example, in *In re Settlement of Boundaries of Paunau*,⁶⁸ the Hawaii Supreme Court attempted to explain the process in which land was distributed amongst the Native Hawaiians from the Kingdom of Hawaii.⁶⁹ The court acknowledged the many problems with determining the exact boundaries and the legitimacy of Native Hawaiian land titles,⁷⁰ and even attempted to remedy the confusion by allowing owners of lands not clearly awarded by land commissioners, or patented or conveyed by deed from the king or government, to file for an application to have the boundaries of their land decided and certified.⁷¹

In *Hawaii v. Office of Hawaiian Affairs*,⁷² the U.S. Supreme Court told the state of Hawaii that it could sell native trust land without the consent of Native Hawaiians.⁷³ In *Office of Hawaiian Affairs v. State*,⁷⁴ the state government also showed its indifference to the Native Hawaiian interest in the land. Under Hawaiian law 20% of all revenue derived from ceded lands must be paid to the Office of Hawaiian Affairs (“OHA”).⁷⁵ However, because the land in question was part of designated federal lands, the court de-

⁶⁶ *Oversight Hearing on Advancing the Federal-Tribal Relationship Through Self-Governance and Self-Determination*, 112th Cong. (2012) (statement of D. Noelani Kalipi, President, TiLeaf Group).

⁶⁷ Inciong, *supra* note 66, at 261. See *Office of Hawaiian Affairs v. State*, 96 Haw. 388, 401 (2001) (stating “it is incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust”).

⁶⁸ 24 Haw. 546, 546 (1918).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 554.

⁷² 556 U.S. 163, 167 (2009).

⁷³ *Id.* at 168.

⁷⁴ *Office of Hawaiian Affairs*, 96 Haw., at 388.

⁷⁵ HAW. REV. STAT. § 10-13.5 (West 1980).

termined that federal law applied.⁷⁶ The court said that the Hawaii law conflicted with the provisions of federal law and was thus preempted and invalid.⁷⁷ Accordingly, the appellate court had no way of determining whether the OHA was entitled to the specific revenues sought in this suit. Ultimately, the Hawaii Supreme Court had to dismiss the case for lack of justiciability.⁷⁸

Cases such as *Carcieri v. Salazar*⁷⁹ further cement the federal government's failure to adequately consider Native Hawaiian interests. In *Carcieri*, the Supreme Court held that the Secretary of Interior lacked authority to accept land in trust for an Indian tribe.⁸⁰ Although this may seem irrelevant to Native Hawaiians, the case had an important effect because it made it even harder for Native Hawaiians to legitimize their land rights. The Court defined the term "Indian" as a member of a tribe "now" under federal jurisdiction.⁸¹ The word "now" referred to the time of enactment of the Indian Reorganization Act⁸² when the tribe in question was not federally recognized. The decision showed that even Native Americans must show that they were a tribe at the time of the Indian Reorganization Act⁸³ in order to get the recognition of an autonomous government.⁸⁴

The above cases demonstrate how much of an uphill battle Native Hawaiians have endured to establish their autonomous right to land. Courts have consistently rejected claims of indigenous status as a reason for granting Native Hawaiians land.

⁷⁶ *Office of Hawaiian Affairs*, 96 Haw., at 394.

⁷⁷ *Id.* at 397-98.

⁷⁸ *Id.* at 389.

⁷⁹ 555 U.S. 378 (2009).

⁸⁰ *Id.*

⁸¹ 25 U.S.C.A. § 479 (West 1934).

⁸² 25 U.S.C.A. § 461 (West 1934).

⁸³ *Id.*

⁸⁴ *Id.*

III. THE IMPORTANCE OF THE NATIVE HAWAIIAN TRIBAL STATUS

A. *What Does it Mean to be an Indigenous Tribe?*

There is no question that Native Hawaiians were the first peoples to inhabit the Hawaiian Islands.⁸⁵ After thousands of years of Native Hawaiians having sole possession over the Hawaiian Islands, the question remains: is this enough to make them recognized as an indigenous tribe by the federal government? Supporters of the ongoing sovereignty movement hold that because “Native Hawaiians, as an indigenous people, occupy a unique status akin to that of Indians and Alaskan Natives,”⁸⁶ they should be granted the same benefits. Thus far this similarity has proven insufficient to warrant an official recognition by the federal government. Currently, tribal status may only be obtained by an Act of Congress, by administrative procedures under 25 C.F.R. Part 83, or by decision from a United States federal court.⁸⁷ The Native Hawaiians have yet to achieve any such recognition through any of these processes.

Interestingly, the U.N. has developed five criteria in defining the term ‘Indigenous:’ “(1) self-identification; (2) historical continuity with preinvasion or pre-colonial societies; (3) nondominance; (4) ancestral territories, and (5) ethnic identity.”⁸⁸ It is unclear whether the United States Federal Government considers these criteria when determining whether a group may obtain indigenous status. Without a definite system to determine indigenous tribal status, courts are unsure whether to grant Native Hawaiians land rights when they come up on a case-by-case basis.⁸⁹ Thus, Native Hawaiians have been left with few and inconsistent answers in their quest to achieve tribal status.

⁸⁵ HELEN WONG & ANN RAYSON, *HAWAII’S ROYAL HISTORY*, 13-14 (1997) (the first Hawaiians travelled to Hawaii from other Polynesian Islands in the Pacific Ocean).

⁸⁶ Levy, *supra* note 7, at 848.

⁸⁷ INDIAN AFFAIRS — FAQs, <http://www.bia.gov/FAQs/index.htm> [hereinafter IA FAQs].

⁸⁸ Kent Mathewson, *Drugs, Moral Geographies, and Indigenous Peoples: Some Initial Mappings and Central Issues*, in *DANGEROUS HARVEST: DRUG PLANTS AND THE TRANSFORMATION OF INDIGENOUS LANDSCAPES* 14 (Michael K. Steinberg et al. eds., 2004) (citing Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/295 (Sept. 13, 2007)).

⁸⁹ See 556 U.S. at 164, 168 (2009). See also *Office of Hawaiian Affairs*, 96 Haw., at 388; *Carcieri*, 555 U.S. at 379, 380 (2009).

B. *Why Strive for Indigenous Tribal Status?*

Gaining the official status of an indigenous tribe has many benefits. Indigenous tribes have the right to the “lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”⁹⁰ Indigenous tribes will “not be forcibly removed from these lands”⁹¹ and they have the right to determine and develop priorities and strategies for the development or use of these lands.”⁹² Furthermore, tribal entities have a “government-to-government relationship with the United States, with the responsibilities, powers, limitations, and obligations attached to that designation, and [are] eligible for funding and services from the Bureau of Indian Affairs.”⁹³ They also possess “certain inherent rights of self-government (i.e., tribal sovereignty) and are entitled to receive certain federal benefits, services, and protections because of their special relationship with the United States.”⁹⁴ Tribes possess the right to form their own governments, to make and enforce laws, both civil and criminal, to tax, to establish and determine membership (i.e., tribal citizenship), to license and regulate activities within their jurisdiction to zone, and to exclude persons from tribal lands.⁹⁵

At present, there are 566 federally recognized American Indian and Alaskan Native tribes.⁹⁶ Through the Federal Indian Trust Responsibility,⁹⁷ Native American and Alaskan Native tribes enjoy:

A legally enforceable fiduciary obligation on the part of the United States to protect [their] tribal treaty rights, *lands*, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages. In several cases discussing the trust responsi-

⁹⁰ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/295 at 10 (Sept. 13, 2007).

⁹¹ *Id.* at 6.

⁹² *Id.* at 12.

⁹³ IA FAQs, *supra* note 87.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 19, 19 (2004) (“Although its roots are in the United States Constitution, the federal trust responsibility has been developed and defined through a series of opinions by the United States Supreme Court. Chief Justice John Marshall first invoked the concept in 1831, characterizing the relation of the Cherokee Nation to the United States as that of a ward to his guardian.”).

bility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the United States and the federally recognized tribes.⁹⁸

Thus, any decisions concerning the tribes, with regard to their property and citizenship, are made with their participation and consent.⁹⁹ The Bureau of Indian Affairs works with the tribes in the administration of approximately 56,200,000 acres of trust land and manages the natural resources for the use and benefit of the tribes and individual Indians.¹⁰⁰

Achieving federal recognition as an indigenous tribe may also have an indirect impact on the current status of Native Hawaiians. Studies have shown that in the 1990s, Native Hawaiians were more likely to earn lower incomes,¹⁰¹ hold lower-status jobs,¹⁰² and go to jail.¹⁰³ Native Hawaiians struggle both economically and socially¹⁰⁴ in comparison to other Hawaiian residents. Federal recognition may provide “control over key resources”¹⁰⁵ and may lead to the betterment of Native Hawaiians.

Conversely, ethnic and racial minorities that are not federally recognized as an indigenous tribe “do *not* enjoy the status of nationhood, they do *not* have the right of self-governance and self-determination, and the federal government does *not* have a trust responsibility for them.”¹⁰⁶ Due to the lack of rights and benefits, it is clear why Native Hawaiians strive for federal recognition.

⁹⁸ IA FAQs, *supra* note 87.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ McGregor, *supra* note 4, at 102 (“Native Hawaiians earned low incomes comparable to the most recently arrived immigrant groups . . .”).

¹⁰² *Id.*

¹⁰³ *Id.* (“In 1992, 35 percent of the adult inmate population in state correctional facilities were of Native Hawaiian ancestry.”).

¹⁰⁴ *Id.* (There is a “high degree of alienation [of Native Hawaiians] from the social system and the political power structure of modern Hawai’i.”). See also Van Dyke & Mackenzie, *supra* note 5, at 63 (“Native Hawaiians are now at the bottom of the socio-economic scale in their own islands.”).

¹⁰⁵ McGregor, *supra* note 4, at 102.

¹⁰⁶ *Id.* at 100.

C. *Efforts to achieve sovereignty*

In 2000, the Supreme Court in *Rice v. Cayetano*¹⁰⁷ recognized that Native Hawaiians had a “shared purpose with the general public in the islands.”¹⁰⁸ However, the Court refused to weigh in on the issue of federal recognition for Native Hawaiians when it stated: “[i]t is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. . . . We can stay far off that difficult terrain however.”¹⁰⁹

Given that Native Hawaiians, like Native Americans, were the original inhabitants of Hawaii, it is perplexing that the United States has failed to afford Native Hawaiians the same recognition and rights that the government has provided to Native Americans.¹¹⁰ Before colonization, Native Hawaiians were “a distinct population, possessed clearly defined geographical boundaries, enjoyed a succession of rulers for at least a thousand years, and [were] governed by a legitimate political system recognized as such by the Hawaiian people.”¹¹¹ During colonization, many Native Hawaiians lost their right to land that had been legitimately obtained from the Hawaiian monarchy.¹¹² The Hawaii Admission Act of 1959¹¹³ officially established the island as one of the fifty states, subjecting it to the laws of the federal government.

It is interesting to note that from 1906 to 1998, Congress enacted a multitude¹¹⁴ of laws that “explicitly included Native Hawaiians in the class of Native Americans.”¹¹⁵ Unfortunately,

¹⁰⁷ See generally *Rice v. Cayetano*, 528 U.S. 495 (2000).

¹⁰⁸ McGregor, *supra* note 4, at 100. The Supreme Court held that “in the November 2000 election for the trustees of the Office of Hawaiian Affairs, all registered voters, regardless of Native Hawaiian ancestry, were allowed to cast votes and to run for these offices.” *Rice*, 528 U.S. at 495.

¹⁰⁹ *Rice*, 528 U.S. at 518-19 (2000).

¹¹⁰ Levy, *supra* note 7, at 848 (“Native Hawaiians, as an indigenous people, occupy a unique status akin to that of Indians and Alaskan Natives . . .”).

¹¹¹ Kauila Clark, *Pondering Sovereignty for Native Hawaiians*, in *FOUNDATIONS OF FIRST PEOPLES’ SOVEREIGNTY: HISTORY, EDUCATION & CULTURE* 43-44 (Ulrike Wiethaus ed. 2008).

¹¹² MICHAEL J. SHAPIRO, *METHODS AND NATIONS: CULTURAL GOVERNANCE AND THE INDIGENOUS SUBJECT* 1 (2004) (“Among the most significant consequences [of the colonization] for the native population was the displacement of Hawaiian commoners from the lands held on the basis of ancient grants bestowed by Hawaiian chiefs.”).

¹¹³ An Act to Provide for Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, 73 Stat. 4 (1959).

¹¹⁴ McGregor, *supra* note 4, at 100 (Congress enacted 183 federal laws).

¹¹⁵ *Id.* (“Some of the laws extended federal programs set up for Native Americans to Native Hawaiians, while other laws represented recognition by the U.S. Congress that the United States bore a special responsibility to protect Native Hawaiian interests.”). *Id.* at 100-01.

however, these laws were never given any legal permanence.¹¹⁶ There is still no law granting “explicit and formal recognition that Native Hawaiians are a sovereign people, with the right of self-governance and self-determination.”¹¹⁷ Thus, Native Hawaiians remain unique from other groups. Their political status can only be described as a quasi-indigenous tribe. Although they are recognized at the State level through the Native Hawaiian Recognition Act,¹¹⁸ and the creation of the Office of Hawaiian Affairs (OHA),¹¹⁹ they have not yet been recognized at the federal level.

Since their original monarchy was overthrown, Native Hawaiians have continuously tried to regain some of the control and rights they once had through different political and social means. One major avenue that Native Hawaiians and the Hawaiian government have pursued is an appeal to Congress. The Native Hawaiian Government Reorganization Act of 2011¹²⁰ (“Act”) is a proposed piece of legislation that would federally recognize Native Hawaiians as an indigenous tribe. It has been introduced to Congress through various forms of legislation since 2000. Recently, efforts to become federally recognized have increased drastically. Peter Boylan, spokesperson for Dan Inouye, the former Senator from Hawaii, said: “The Hawaii Congressional delegation is committed to federally recognizing Native Hawaiians in the 112th Congress, with the strong support of the Governor and Hawaii State Legislature. We will continue to pursue a variety of options to effectuate passage.”¹²¹

The “Act”¹²² provides a process for which the United States may recognize the Native Hawaiian governing entity.¹²³ The legis-

¹¹⁶ *Id.* at 101.

¹¹⁷ McGregor, *supra* note 4, at 101.

¹¹⁸ S. 1520, 26 Leg., (Haw. 2011) available at http://www.capitol.hawaii.gov/session2011/Bills/SB1520_CD1_HTM (through the Native Hawaiian Recognition Act, the State of Hawaii explicitly acknowledges that Native Hawaiians are the only indigenous, aboriginal, maoli population of Hawaii).

¹¹⁹ ESTABLISHMENT OF OHA — OFFICE OF HAWAIIAN AFFAIRS, <http://www.oaha.org/about/history>.

¹²⁰ Native Hawaiian Government Reorganization Act, S. 675, 112th Cong. (2011) available at <http://www.indian.senate.gov/issues/upload/S675.pdf>.

¹²¹ Malia Zimmerman, *Inouye, Akaka Push Federal Indian Tribe Recognition for Native Hawaiians in New Interior Bill*, HAWAII REPORTER (Oct. 24, 2011), <http://www.hawaiireporter.com/inouye-akaka-push-federal-indian-tribe-recognition-for-native-hawaiians-in-new-interior-bill/123>.

¹²² Native Hawaiian Government Reorganization Act, S. 675, 112th Cong. (2011) available at <http://www.indian.senate.gov/issues/upload/S675.pdf>.

¹²³ Native Hawaiian Government Reorganization Act, S. 675, 112th Cong. (2011) available at <http://www.govtrack.us/congress/billtext.xpd?bill=s112-675>.

lation also gives power to the Secretary of the Interior to recognize tribes¹²⁴ by allowing him to create and maintain a list of federally recognized Indian tribes.¹²⁵ In addition, on October 14, 2011, the Senate Appropriations Committee released a proposed draft of its Interior, Environment, and Related Agencies Appropriations Act, which included legislation to recognize Native Hawaiians as a federal Indian Tribe.¹²⁶

D. *Implications of Tribal Status on Mediation*

If the “Act” is passed in Congress, it will have an enormous impact on the ability of Native Hawaiians to negotiate with the federal government through mediation. More specifically, the “Act” will affect the amount of leverage Native Hawaiians will have in current land disputes with the federal government. “Once Hawaiian sovereignty will be again recognized by the United States of America, the Nation of Hawai’i will be in a position to renegotiate terms and conditions of its relationship with the United States”¹²⁷ In other words, once recognized as an autonomous government, the Native Hawaiians will be similar to the Native Americans: they will have legal and legitimate land rights, and the government will have to work with them to resolve land disputes.

IV. NATIVE HAWAIIANS HAVE A LEGITIMATE INTEREST THAT MUST BE CONSIDERED

As the original inhabitants of the Hawaiian Islands¹²⁸, the Native Hawaiians are the region’s indigenous population. Thus, they

¹²⁴ Zimmerman, *supra* note 121.

¹²⁵ An Act to Provide for the Annual Publication of a List of Federally Recognized Indian Tribes, and for Other Purposes, Pub. L. No. 103-454, 108 Stat. 4791 (1994).

¹²⁶ Interior, Environment, and Related Agencies Appropriations Act, S. 675, 112th Cong. (2011) (the Office of Hawaiian Affairs was created in 1978) *available at* <http://appropriations.senate.gov/news.cfm?method=news.view&id=3f4832f4-6adb-4be8-9c6f-eabff62cc056> (The Office of Hawaiian Affairs was created in 1978).

¹²⁷ Clark, *supra* note 112, at 44.

¹²⁸ Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 *YALE L.J.* 537, 549 (1996) (“The first settlers of the Hawaiian Islands were Polynesians who arrived more than one thousand years ago. A second wave of migrants (also Polynesians) arrived later, perhaps six to eight hundred years ago, and became the dominant group . . . The Hawaiians then lived in relative isolation until the arrival of the British Captain James Cook in 1778.”).

have legitimate interests in the land that should be respected and considered.¹²⁹ The U.N. orders that states must recognize the land rights of its indigenous people, and must implement a system that accomplishes this: “states shall give legal recognition to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”¹³⁰ Additionally, “states shall establish and implement . . . a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems Indigenous peoples shall have the right to participate in this process.”¹³¹ Significantly, many scholars also conclude that:

Indigenous or Aboriginal [people] . . . have the right to participate in both domestic and international decision-making processes. They have the right to effectively contribute to the formulation of laws and policies, to receive adequate information, and to play an important role in problem-solving mechanisms on lands, territories and natural resources. As social participants and co-equal stakeholders, they are crucial to cultural diversity and human creativity.¹³²

There are important reasons why Native Hawaiian rights must be considered and reevaluated today. “[I]ndigenous peoples have suffered from historic injustices as a result of . . . their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their rights to development in accordance with their own needs and interests.”¹³³ That is why there is an

Urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.¹³⁴

¹²⁹ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/295 at 10 (Sept. 13, 2007).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Carlos Osi, *Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution: Cultivating Culturally Appropriate Methods in Lieu of Litigation*, 10 *CARDOZO J. CONFLICT RESOL.* 163, 175-76 (2008).

¹³³ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/295 at 2 (Sept. 13, 2007).

¹³⁴ *Id.*

This pressing need to address Native Hawaiian indigenous rights in particular is further supported by various bodies of law. There have been some efforts, albeit minimal, on the part of the federal government to establish that Native Hawaiians have a valid interest in the land of Hawai'i. In 1920, for example, the Hawaiian Homes Commission Act¹³⁵ was enacted by the United States Congress to set aside over 200,000 acres of ceded lands for exclusive homesteading by Native Hawaiians.¹³⁶ The Act expressly granted the Department of Hawaiian Home Lands (DHHL) the power to lease tracts of Hawaiian homelands to Native Hawaiians that would "provide residences, farms, and pastoral lots."¹³⁷ The Hawaiian Homes Commission Act¹³⁸ also stipulated conditions for these leases,¹³⁹ including eligibility based on a person having fifty percent or more Native Hawaiian ancestry.¹⁴⁰ Similarly, through the Kalapana Extension Act of 1938,¹⁴¹ Congress created a provision to lease lands within the extension to Native Hawaiians and to permit fishing in the area "only by native Hawaiian residents of said area or of adjacent villages and by visitors under their guidance."¹⁴²

Perhaps indicating the federal government's changing attitude, "[t]he last decade of the twentieth century has witnessed the resurgence of addressing the illegitimacy of Hawaii's annexation."¹⁴³ In 1993, Congress adopted a Joint Resolution, the "Apology Resolution"¹⁴⁴, which:

Acknowledges that the overthrow of the Kingdom of Hawaii occurred with the active participation of agents and citizens of the United States and further acknowledges that the Native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as a people over their na-

¹³⁵ Hawaiian Homes Commission Act, H.R. Res. 839, 66th Cong. (1920). *See also* HI CONST. art. XI, § 2 (1959).

¹³⁶ Hawaiian Homes Commission Act, H.R. Res. 839, 66th Cong. (1920). *See also* HI CONST. art. XI, § 2 (1959) at §§ 207, 208.

¹³⁷ Van Dyke & Mackenzie, *supra* note 5, at 64.

¹³⁸ Hawaiian Homes Commission Act, H.R. Res. 839, 66th Cong. (1920). *See also* HI CONST. art. XI, § 2 (1959).

¹³⁹ *Id.*

¹⁴⁰ Van Dyke & Mackenzie, *supra* note 5, at 64.

¹⁴¹ 16 U.S.C.A. § 396a (West 1938).

¹⁴² *Id.*

¹⁴³ Clark, *supra* note 112, at 44.

¹⁴⁴ Apology Resolution Act of 1993, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

tional lands, either through the Kingdom of Hawaii or through a plebiscite or referendum.¹⁴⁵

In other words, the Act establishes that: (1) Native Hawaiians never directly relinquished their property rights to the United States; and (2) Native Hawaiians remain determined to preserve, develop and transmit to future generations their ancestral territory. This Act has become the basis for Hawaiians to pursue renewed recognition as a sovereign nation, and to establish a nation-to-nation relationship with the United States.¹⁴⁶

In addition, on September 13, 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).¹⁴⁷ Although the declaration is non-binding, it indicates a global and legitimate concern for indigenous peoples. UNDRIP seeks to protect human and land rights of indigenous peoples all over the world, acknowledges indigenous peoples' right to self-determination, and sets forth standards for their survival.¹⁴⁸ The declaration states: "indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."¹⁴⁹

There is also some case law that suggests that Hawaiians have an interest in land disputes. In *Ahuna v. Dep't of Hawaiian Home Lands*,¹⁵⁰ the Department of Hawaiian Home Lands was found to have breached its fiduciary duties by basing a land use decision on the interest of the state and the citizens in general, rather than on the interests of Native Hawaiians.¹⁵¹ The court held that the Department was required to provide a lease to the Native Hawaiians because it had a high fiduciary duty to native Hawaiians based on the Hawaiian Homes Commission Act.¹⁵²

¹⁴⁵ *Id.*

¹⁴⁶ Clark, *supra* note 112, at 44.

¹⁴⁷ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. GA, 61st Sess., U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 5.

¹⁵⁰ 64 Haw. 327, 327 (1982).

¹⁵¹ *Id.*

¹⁵² *Id.* at 329 (citing Hawaiian Homes Commission Act, 1920; Act of July 9, 1921, ch. 42, 42 Stat. 108 (1920)).

V. SUCCESSFUL MEDIATION USED BY FEDERALLY RECOGNIZED INDIGENOUS TRIBES OF THE UNITED STATES

A. *Mediation over other forms of ADR*

Though other forms of ADR may be helpful to resolve the Native Hawaiian land dispute problem, mediation is the most suitable. As mentioned earlier in this note, many indigenous tribes favor mediation as opposed to other forms of ADR.¹⁵³ Even still, some scholars believe that mediation may not be the best solution when there is an imbalance of power between the two parties,¹⁵⁴ as is the case between many state governments and indigenous peoples.¹⁵⁵ However, even when there is a power imbalance, mediation can still be appropriate.¹⁵⁶ Indigenous tribes and governments “need not avoid mediation to settle their disputes.”¹⁵⁷

Mediation works especially well for indigenous tribes because of its ability to preserve lasting relationships. Mediation makes it “more likely to maintain amicable relations in the aftermath of the dispute, due to the presence of a neutral third-party mediator who assists the parties in communicating effectively.”¹⁵⁸ This may be because mediation “allows the state to simultaneously promote industry interests and maintain a politically neutral and legitimate public image in the face of popular opposition and criticism.”¹⁵⁹ In fact, “mediation as a process is perhaps at its best where the people involved must continue to deal with one another after the dispute is resolved.”¹⁶⁰ Being one of the state of the United States ensures that Hawaii will have an ongoing relationship with the Federal Government.

¹⁵³ Johnson, *supra* note 13, at 39-40.

¹⁵⁴ Sarah S. Matari, *Mediation to resolve the Bedouin-Israeli Government Dispute for the Negev Desert*, 34 *FORDHAM INT'L L.J.* 1089, 1107 (2011) (“Traditional conceptions of mediation involve parties that have voluntarily agreed to pursue mediation and are equal in bargaining power. Today in the United States, this traditional approach to mediation is being challenged by court mandated mediation sessions, as parties with a bargaining-power disparity may be improperly instructed to mediate their dispute.”).

¹⁵⁵ *Id.* at 1091 (“When conflict arises between a state government and an indigenous population, the government party is able to exert control over the indigenous party and dominate the processes that adjudicate indigenous persons’ rights.”).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1105.

¹⁵⁹ Garret, *supra* note 41, at 32.

¹⁶⁰ *Id.*; Johnson, *supra* note 13, at 42.

Mediation can consider the cultural elements of the Native Hawaiian community. One of the key aspects of mediation is the impartiality of the mediator. This is essential for an indigenous party because the mediator can “help [the indigenous party] communicate in culturally sensitive ways and in a manner that would resonate best with the opposing party.”¹⁶¹ A method of ADR that will facilitate culturally sensitive discussions and improve, not deteriorate, the relationship between Native Hawaiians and the Federal Government is ideal. Today, “various combinations of traditional and contemporary mediation are being used to resolve problems in Native American communities throughout the U.S.”¹⁶² Some of these will be discussed below.

B. *Why traditional forms of mediation are inappropriate*

Two traditional forms of mediation are prevalent in the United States: community based mediation and court-annexed mediation programs.¹⁶³ Community based mediation addresses conflict on a community level by focusing on “facilitative” goals¹⁶⁴ that seek to “maximize interest satisfaction for both sides.”¹⁶⁵ This type of mediation differs from an adversarial system¹⁶⁶ in that it encourages parties to evaluate the conflict broadly¹⁶⁷ while “exploring their needs or interests, rather than focus[ing] on their stated positions and legal rights.”¹⁶⁸ On the other hand, some types of court-annexed mediation involve an evaluative mediator,¹⁶⁹ emphasizing strengths and weaknesses of the parties’ positions.¹⁷⁰ Thus, in court-annexed mediation, parties are often represented by lawyers who file briefs with the mediator outlining their legal arguments.¹⁷¹ Court annexed mediation began to be implemented through the support of “federal and state courts, agencies, and legislatures”¹⁷²

¹⁶¹ Matari, *supra* note 151, at 1106.

¹⁶² Garrett, *supra* note 41, at 43

¹⁶³ Gold, *supra* note 14, at 310.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 311.

¹⁶⁸ *Id.*

¹⁶⁹ Gold, *supra* note 14, at 310.

¹⁷⁰ *Id.* at 316.

¹⁷¹ *Id.*

¹⁷² *Id.* at 315.

in America starting in the early 1990s.¹⁷³ Notably, Congress passed the Alternative Dispute Resolution Act in 1998, which requires all federal courts to establish an ADR program.¹⁷⁴

Both the community based and the court-annexed mediation programs may be helpful in resolving Native Hawaiian land disputes, but this note will focus on mediation programs which have already been used by other federally recognized indigenous tribes. There are many examples of successfully implemented mediation in indigenous tribes. The important issue becomes identifying a mediation system that will be successful in the specific context of Native Hawaiian land disputes. It is important to consider that “as our society continues to become increasingly diverse and our interactions with the world at large increase, it is incumbent on those working within and designing dispute resolution systems to craft processes that are culturally congruent with the goals and values of the participants.”¹⁷⁵ Analyzing successful mediation methods that have already been found to be “congruent”¹⁷⁶ with the goals of other indigenous tribes makes it more likely that a successful mediation method for the Native Hawaiians can be identified as well. In fact, “[m]ediation should be like a good pair of shoes, it’s important to find just the right fit.”¹⁷⁷ The following sections of this Note represent a non-exhaustive spectrum of potentially successful mediation models that may be used as a template for Native Hawaiian land disputes. Unlike traditional models of mediation, these are more tailored towards indigenous tribal conflicts and have been successfully utilized by existing federally recognized tribes.

¹⁷³ *Id.*

¹⁷⁴ *Id.* (citing 28 U.S.C § 651(b) (2000)).

¹⁷⁵ Gold, *supra* note 14, at 310.

¹⁷⁶ *Id.*

¹⁷⁷ Tracey S. Wiltgen, *Different Models of Mediation: Finding the Right Fit*, 8 HAW. B.J. 35 (2004).

C. *Mediation in the Native American context –
The Peacemaking Approach*

Many Native American tribes utilize the Peacemaking¹⁷⁸ approach in various forms¹⁷⁹ to resolve their conflicts.¹⁸⁰ The traditional Tribal Peacemaking method is very similar to mediation¹⁸¹ and is described as “any system of dispute resolution used within a Native American community which utilizes non-adversarial strategies . . . [and] incorporates some traditional or customary approaches . . . the aim of which is conciliation and the restoration of peace and harmony.”¹⁸² In order to achieve its expectation of a better community¹⁸³ within a tribe, the method

publicly and ceremonially deploys spiritual, non-legal norms and collected tribal wisdom; invokes the connectedness of all things; listens deeply to the widest possible circle of people; speaks compassionately to their hearts to remind them of their relational and cooperational obligations to be unselfish to another; and seeks to heal hurts and wounds old and new. At the same time [Tribal Peacemaking] seeks to balance the intellectual, emotional, and physical dimensions of not simply the disputants but the entire tribe which it guides on a journey to restoration.¹⁸⁴

What makes the Peacemaking approach so advantageous is its “horizontal”¹⁸⁵ reach. In other words, this is a “mediation process [which works] toward[s] solutions which are as broad or as narrow as they need to be to address the root problem.”¹⁸⁶

¹⁷⁸ See ROBERT YAZZIE, *NAVAJO PEACEMAKING AND INTERCULTURAL DISPUTE RESOLUTION*, in *INTERCULTURAL DISPUTE RESOLUTION IN ABORIGINAL CONTEXTS* 108 (CATHERINE BELL & DAVID KAHANE EDS., 2004). See also Andrew W. Baldwin, *Peacemaker Court*, 28 WYO. LAW. 27 (December 2005).

¹⁷⁹ Matt Arbaugh, *Making Peace the Old Fashioned Way: Infusing Traditional Practices into Modern ADR*, 2 PEPP. DISP. RESOL. L. J. 303, 311 (2002).

¹⁸⁰ Baldwin, *supra* note 176, at 307 (“The Peacemaker Court institutes a long tradition. Tribes have used Peacemaker Courts, in a formal or an informal way, for hundreds of years.”).

¹⁸¹ Arbaugh, *supra* note 177, at 308.

¹⁸² Baldwin, *supra* note 176 (quoting Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers’ Ethics in Tribal Peacemaking*, 27 U. TOL. L. REV. 821, 835 (1996)).

¹⁸³ William C. Bradford, *Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice and Limitations of Tribal Peacemaking in Indian Dispute Resolution*, 76 N. DAK. L. REV. 551, 579 (2000).

¹⁸⁴ *Id.*

¹⁸⁵ Baldwin, *supra* note 176, at 26.

¹⁸⁶ *Id.*

There have been many instances where Peacemaking has been a successful tactic in resolving land disputes between the federal government and the Native Americans. In fact, “there are so many examples that it is hard to select a few to illustrate the importance of mediation in today’s Native American culture.”¹⁸⁷ The discussion will reflect a few out of many tribes which have successfully implemented the Peacemaking approach in resolving land disputes.

1. The Navajo Tribe

Different tribes use different permutations of the Peacemaking approach by tailoring the method to fit their unique needs.¹⁸⁸ The Navajo Peacemaking method, used by the Navajo Tribe,¹⁸⁹ was created in 1982,¹⁹⁰ making the Navajos the very first tribe to “recreate a traditional Indian justice system to work in tandem with its tribal court.”¹⁹¹ The Navajo Peacemaking method “blends traditional peacemaking with the American court system,”¹⁹² and relies on leaders who are chosen by the community to promote dispute resolution.¹⁹³ These leaders “have proven themselves to be successful in speaking, planning, and spirituality.”¹⁹⁴ The process may consist of a vast array of reconciliation options including:

prayer, to commit people to serious and respectful discussions of the dispute; recounting the facts of the dispute (actual and perceived, including opinions about the facts and the emotional impact of what happened) teachings of traditional approaches to the problem by the [leaders]; plans for future action; and finally, a consensus decision by the group.¹⁹⁵

Navajo tribe members use Peacemaking to successfully resolve many disputes, including land disputes.¹⁹⁶ Navajo Peacemaking in general is successful for various reasons: Navajos accept this method, people are efficiently utilizing this method, and people are satisfied with the decisions achieved.¹⁹⁷ Various scientific studies

¹⁸⁷ Garret, *supra* note 41, at 43.

¹⁸⁸ Arbaugh, *supra* note 179, at 311-12.

¹⁸⁹ Yazzie, *supra* note 176.

¹⁹⁰ Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875, 877 (1999).

¹⁹¹ *Id.*

¹⁹² Arbaugh, *supra* note 179, at 311-12.

¹⁹³ Yazzie, *supra* note 176.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Costello, *supra* note 188, at 895.

¹⁹⁷ Yazzie, *supra* note 176.

and surveys have validated this by reporting successful party satisfaction.¹⁹⁸

2. The Grand Traverse Band

The Navajo Tribe paved the way for other Native American Tribes to create their own Peacemaking methods. Although other tribes are unlike the Navajo Nation in that they may create authority separate from the American courts to resolve disputes,¹⁹⁹ Peacemaking is still successful for these tribes as well. One example is the Akwasasne Tribe, which is on the U.S./Canadian border.²⁰⁰ This tribe created The Sken Nen Kowa Peacemaking Center in the late 1980s.²⁰¹ Initially, the Center only started off with eight trained mediators and was the first of its kind on Native American land.²⁰² Akwasasne tribe members utilized the help of the Center to resolve various land disputes.²⁰³

3. Alaska Natives

There are over 400 Alaska Natives²⁰⁴ with tribes in Alaska, including the Inupiat, Yup'ik, Tlingit, Athabascan, Aleut, Alutiiq, and Eyak Tribes.²⁰⁵ Alaskan Native Land disputes must be viewed in the context of the Alaskan Native Claims Settlement Act of 1971 (ANCSA),²⁰⁶ which gave Alaskan Natives "44,000,000 acres of land and nearly \$1 billion for extinguishment of [the Alaskan Natives'] land rights to all of Alaska."²⁰⁷

Various forums exist in Alaska to facilitate mediation and peacemaking. The Minto Tribal Court, located in Minto, Alaska, was established in 1940 and consists of five judges who discuss values important to the community, consequences of bad actions, and praise for good role models.²⁰⁸ The judges' role is to help parties

¹⁹⁸ *Id.* at 108.

¹⁹⁹ Arbaugh, *supra* note 179, at 312.

²⁰⁰ Dorissa Bolinski, *Mediation Brings Peace to Community*, 40 DISP. RESOL. J. 46, 46 (1994).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ HISTORY – ALASKA FEDERATION OF NATIVES, <http://www.nativefederation.org/about-afn/history/>.

²⁰⁵ WORKING EFFECTIVELY WITH ALASKA NATIVE TRIBES AND ORGANIZATIONS DESK GUIDE, available at http://alaska.fws.gov/external/pdf/native_affairs_desk_guide_fws.pdf.

²⁰⁶ 43 U.S.C. § 1601 (1994).

²⁰⁷ Marilyn J. Ward Ford and Robert Rude, *ANCSA: Sovereignty and a Just Settlement of Land Claims or and Act of Deception*, 15 Touro L. REV. 479, 479 (1999).

²⁰⁸ See Joan F. Connors, *Resolving Disputes Locally in Rural Alaska*, 376 MEDIATION Q. 10, available at <http://www.ajc.state.ak.us/Reports/rurj92exec.pdf>.

come to a resolution by offering practical solutions to problems.²⁰⁹ The Sitka Tribal Court was established in 1981 and is a part of the Sitka Tribe.²¹⁰ This Tribal Court is informal and there is only one judge who acts as more of a mediator.²¹¹ In Barrow, Alaska, there is a neutral²¹² “community conciliation organization”²¹³ called PACT.²¹⁴ This organization strives to “promote harmony in the community”²¹⁵ by “offering free conciliation for Barrow residents, education about conciliation, and promoting community responsibility for conflict prevention and resolution.”²¹⁶ There is no formal procedure as parties are instead expected to “craft their own solutions”²¹⁷ and come to a consensus about the dispute.

All of the above-discussed Alaska Native mediation forums have the support and acceptance of the Alaska State and Government. Thus, any of these options can be applied to the Native Hawaiian land dispute problem. Also, “rather surprisingly, the presence of [the] unsettled [sovereignty] issues did not interfere significantly with the tribal courts’ ability to resolve disputes productively.”²¹⁸ Perhaps these systems of mediation can be used in Hawaii even though the issue of Native Hawaiian tribal recognition has not been solved.

4. The Nisga’a Tribe

In 1998, the Canadian government created the Nisga’a Treaty²¹⁹ which “transfer[ed] ownership of Indigenous traditional lands”²²⁰ to the indigenous Nisga’a community. The mediation approach used was one of restitution, acknowledgment of wrong, harmony, cooperation, collaboration and reconciliation.²²¹

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ Connors, *supra* note 208.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ CATHERINE BELL, *INDIGENOUS DISPUTE RESOLUTION SYSTEMS WITHIN NON-INDIGENOUS FRAMEWORKS*, IN *INTERCULTURAL DISPUTE RESOLUTION IN ABORIGINAL CONTEXTS* 242 (CATHERINE BELL & DAVID KAHANE EDS., 2004).

²²⁰ DeAnna Marie Rivera, *Taino Sacred Sites: An International Comparative Analysis for a Domestic Solution*, 20 *ARIZ. J. INT’L & COMP. L.* 443, 485 (2003).

²²¹ *Id.*

The Nisga'a method may be a great solution to Native Hawaiian land disputes because the two groups are so similarly situated. Like the indigenous Nisga'a community, Native Hawaiians also hope to gain back ownership of their land from a larger government. In describing the applicability of the Nisga'a approach to other tribes, one scholar stated that the

precarious balance between [the indigenous tribe's] needs and those of the dominant society is a reality nearly every Indigenous society would have to face in the creation of such agreements. That type of balance is successfully achieved only through open, equally bargained for, negotiations, which seek to give all parties a voice.

The Nisga'a Treaty meets this open communication element and is truly a great mediation model. The Treaty has a structured process (three distinct stages to achieve resolution), but also maintains a flexible consideration of external factors important to the indigenous tribe. This method would definitely benefit Native Hawaiians in their land dispute problem.

D. *Is the Peacemaking approach appropriate for Native Hawaiians?*

Native American tribes “across the country seem to be making greater use of the Peacemaker Court system as a formal model used to implement traditional law.”²²² Some scholars go so far as to say that the Peacemaking approach is a “beacon for the future.”²²³ No matter what form of Peacemaking a tribe uses, the ultimate goal of Peacemaking is the “restoration of relationships while solving the immediate problem.”²²⁴ If the Native Hawaiians and the Federal Government implement a system similar to the Peacemaking approach in their land disputes, they may, like the Navajos and other Native American tribes, experience success and satisfaction.

It is important to note that there are some downfalls to Peacemaking. It is not often used when disputes involve non-Native American parties²²⁵ because it is so tailored to the needs of each

²²² Baldwin, *supra* note 176, at 27.

²²³ *Id.*

²²⁴ Arbaugh, *supra* note 179, at 312.

²²⁵ Baldwin, *supra* note 176, at 27.

single tribe.²²⁶ In other words, “so central to the successful functioning of [the Tribal Peacemaking method] is the commitment to a shared tribal values and responsibilities, [that] the extension of [the method] beyond the boundaries of the reservation or beyond the subject matter of disputes between tribal members is inherently problematic.”²²⁷ Thus, the method “cannot always be expected to succeed in cases where an outsider is involved in a dispute with a tribal member.”²²⁸ Additionally, the Tribal Peacemaking method is limited in its ability to accommodate large disputes since the method ideally proposes participants to sit in a circle²²⁹ to discuss the dispute. Another problem arises with the Tribal Peacemaking method because of its ban against the participation of any lawyers or judges.²³⁰ Though the process calls for a supervising “peacemaker,”²³¹ this may be insufficient. The current Native Hawaiian land dispute problem is made even more complex because of the uncertain tribal status of Native Hawaiians. Thus, the dispute may require the legal knowledge of lawyers and judges.

On the other hand, perhaps a modified version of the Tribal Peacemaking method, like the Navajo Peacemaking process, may be successfully implemented in Hawaii. In 2011, the Center for Court Innovation held a roundtable discussion sponsored by the U.S. Department of Justice’s Bureau of Justice Assistance.²³² Tribal and state court practitioners discussed whether Peacemaking could be adopted in non-Indian forums.²³³ The panelists came to the conclusion that the Peacemaking method could indeed be successful when taken out of the Native American Tribes context and applied to non-tribal disputes.²³⁴ One scholar admitted that when attempting to replace the traditional adversarial legal system with the Tribal Peacemaking method, “hybrid or *ad hoc* implementation of modified forms”²³⁵ may be needed. Additionally, parties “ought to proceed with caution, with special attention given to the form and substance of the legal system adopted by each tribe appropri-

²²⁶ Bradford, *supra* note 181, at 579.

²²⁷ *Id.* at 551, n.146.

²²⁸ *Id.*

²²⁹ *Id.* at 580

²³⁰ *Id.*

²³¹ *Id.*

²³² CAN PEACEMAKING WORK OUTSIDE OF TRIBAL COMMUNITIES? — CENTER FOR COURT INNOVATION, available at <http://www.courtinnovation.org/research/can-peacemaking-work-outside-tribal-communities>.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Bradford, *supra* note 181, at 601.

ate not only to its culture but also to its disputes.”²³⁶ If these factors are taken into account, the Tribal Peacemaking method may be the appropriate mediation model for the Native Hawaiians and their land disputes.

E. *The U.S. Institute for Environmental Conflict Resolution (USIECR)*

Native Hawaiians should also take advantage of The U.S. Institute for Environmental Conflict Resolution. The official website of the USIECR describes itself as a resource open to Native Hawaiians as well. The USIECR is an infrastructure that can support the creation of a mediation system. Currently, any federal agency may use it to assess or mediate any conflict related to the environment, public lands, or natural resources. The USIECR is also dedicated to educating Americans on preserving and protecting natural resources through Native American health and tribal policy.²³⁷ In addition, the USIECR has launched various programs to build up a network of dispute resolution practitioners who can assist with government disputes involving these tribes (The Native American and Alaskan Environmental Collaboration and Conflict Resolution Program).²³⁸ Native Hawaiians and the Federal government should seek out the USIECR to facilitate the mediation of land disputes.

The USIECR has been successful in resolving many tribal land disputes for federally recognized tribes. For example, in 2007, after the USIECR conducted an assessment and determined that a solution was feasible, the Confederated Salish and Kootenai Tribes of Montana agreed to sign an annual funding agreement for the National Bison Range within their land. They agreed to a government-to-government partnership to share management responsibilities for the land.²³⁹ From 2005-2009, USIECR convened the Couer d’Alene Tribe and the Idaho Department of Environmental Quality, which determined the feasibility of a negotiation, and se-

²³⁶ *Id.*

²³⁷ U.S. INSTITUTE FOR ENVIRONMENTAL CONFLICT RESOLUTION, <http://www.ecr.gov/>. See generally Richard Dahl, *Finding Middle Ground*, 111 ENVTL. HEALTH PERSPS. A650 (2003).

²³⁸ U.S. INSTITUTE FOR ENVIRONMENTAL CONFLICT RESOLUTION, NATIVE AMERICAN AND ALASKA NATIVE ENVIRONMENTAL COLLABORATION AND CONFLICT RESOLUTION PROGRAM, <http://www.ecr.gov/Resources/NativeAmericanTribalConsultationServices.aspx>.

²³⁹ National Bison Range Case, USIECR, available at <http://www.ecr.gov/pdf/NationalBisonRangeAssistedNegotiation.pdf>.

lected a mediator. As a result, the parties forged a new respectful collaboration that will maximize the potential for successful management of the Coeur d'Alene Lake.²⁴⁰ In 2005, USIECR helped the Tennessee Division of the Federal Highway Administration (FHWA) and the Tennessee Department of Transportation (TDOT) to develop a framework for consulting with Tennessee Tribes on the transportation projects in Tennessee. This ultimately resulted in the development of a Memorandum of Understanding, which incorporated the interests and concerns of the Native American tribes in Tennessee. Tribes have endorsed this workshop as an effective prototype for building productive working relationships between agencies and tribes.²⁴¹ It is clear that the USIECR gives federally recognized tribes the foundation and tools to implement a system of mediation in their communities. Even though Native Hawaiians are not federally recognized, the USIECR could be instrumental in implementing a mediation system for Native Hawaiian land disputes as well.

F. *Mediation in Hawaii*

Though there is no official mediation system in place for resolving Native Hawaiian land disputes, there are other examples of mediation in Hawaii. Ho'opono'ono, for example, is an effective form of reconciliation²⁴² traditionally used within Native Hawaiian communities to "seek reconciliation and forgiveness."²⁴³ The twelve-step process²⁴⁴ is essentially designed to heal²⁴⁵ and cleanse "mental problems."²⁴⁶

Like the Hawaiian Mediation Model, this type of mediation has only been used on a smaller scale. It is uncertain whether, if applied to complex land dispute cases with the federal government, Ho'opono'ono will succeed. Some critics of the method state that

²⁴⁰ *Id.*

²⁴¹ Recognized Indian Tribes' Religious and Cultural Interests in Tennessee: Facilitated Workshop, U.S. INSTITUTE FOR ENVIRONMENTAL CONFLICT RESOLUTION, available at <http://www.ecr.gov/pdf/TribalConsultationWorkshop.pdf>.

²⁴² MALCOM NAEA CHUN, HO'OPONONO: TRADITIONAL WAYS OF HEALING TO MAKE THINGS RIGHT 3 (2006).

²⁴³ *Id.* at 1.

²⁴⁴ Robert Benham & Ansley Boyd Barton, *Alternative Dispute Resolution: Ancient Models Provide Modern Inspiration*, 12 GA. ST. U. L. REV. 623, 630 (1996).

²⁴⁵ CHUN, *supra* note 242, at 6.

²⁴⁶ *Id.* at 3.

it is virtually obsolete: “the ho’oponopono remains only a fond memory The ho’oponopono is rare today and is regarded as a silly remnant of heathenism by most people and squelched at every turn.”²⁴⁷

However, proponents of the ho’oponopono method say that it is expanding. In fact, today in Hawaii ho’oponopono is used to “devise restitution plans and set penalties for repeat criminal offenders.”²⁴⁸ The fact that ho’oponopono utilizes both “the spiritual and the practical”²⁴⁹ may be ideal when considering Native Hawaiian land ownership since so much of what Native Hawaiians value in their land is its spiritual value.²⁵⁰

Notably, there is even evidence that mediation has been successful in Hawaii in contexts other than land disputes. For example, even without official tribal status, Native Hawaiians currently have cultural rights.²⁵¹ Through the Native American Graves Protection and Repatriation Act (NAGPRA), Native Hawaiians are able to dispute the return of cultural material or human remains using mediation.²⁵² If Native Hawaiians can use mediation in a cultural context to ensure their rights are respected, it seems logical to use the same method of ADR in land disputes as well. Mediation would be a reasonable and practical solution to the high conflict disputes over land in Hawaii. Thus, the Federal Government should introduce a forum in which to facilitate mediation between itself and the Native Hawaiians.

²⁴⁷ *Id.* at 3 (citing Mary Kawena Pukui, formerly a translator and consultant at the Bernice Pauahi Bishop Museum in Hawai‘i).

²⁴⁸ Benham, *supra* note 200.

²⁴⁹ *Id.*

²⁵⁰ See Shawn Malia Kana’iaupuni & Nolan Malone, *This Land is My Land: The Role and Place in Native Hawaiian Identity*, in *Race, ethnicity and place in a changing America*, 291-305 (Global Press) available at http://www.geo.cornell.edu/hawaii/AIS3400/Kanaiaupuni_article.pdf.

²⁵¹ Robert K. Patterson, *Resolving Material Culture Disputes: Human Rights, Property Rights and Crimes Against Humanity*, 14 WILLAMETTE J. INT’L L. & DISP. RESOL. 155, 165 (2006).

²⁵² Native American Graves Protection and Repatriation Act of 1990, Pub. L. No. 101-601, 104 Stat. 3048. See also Isaac Morikawa, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian “Cultural Property” Repatriation*, 20 U. HAW. L. REV. 261 (1998).

VI. APPLYING A MEDIATION MODEL TO NATIVE HAWAIIAN LAND DISPUTES

Overall, “there is a need for Indigenous peoples to rely on . . . ADR systems rather than court litigation.”²⁵³ Additionally, “[a]s our society continues to become increasingly diverse and our interactions with the world at large increase, it is incumbent on those working within and designing dispute resolution systems to craft processes that are culturally congruent with the goals and values of the participants.”²⁵⁴ Hawaii is no exception. Mediation must be made available to Native Hawaiians in order to resolve land disputes with the federal government.

If mediation has been successful with other indigenous tribal issues, like Native American land disputes,²⁵⁵ it seems likely that mediation will also be successful with Native Hawaiians land disputes. Like Native Hawaiians, Native Americans

have experienced and continue to see the ever-present efforts by non-Indians to take their land, water, religion and traditions by legal or illegal means. Thus, Native Americans have a difficult time believing that non-Indians really understand their views on issues and really mean what they say. In the mediation process a spirit of trust can be built between the parties to a dispute and through this process extremely delicate issues can be brought to a final resolution.²⁵⁶

In other words, the values and concerns that Native Hawaiians possess are very similar to those of Native Americans. Putting aside the issue of federally recognized tribal status, it is obvious that commonalities exist between Native Hawaiians, Native Americans, and Alaskan Natives. Thus, looking at the effects that mediation has had on these other tribes will likely be dispositive of how mediation will affect the Native Hawaiians.

²⁵³ Osi, *supra* note 130, at 163.

²⁵⁴ Gold, *supra* note 14, at 310.

²⁵⁵ See Garrett, *supra* note 41.

²⁵⁶ Garrett, *supra* note 41, at 45.

VII. WHAT'S NEXT IF THE NATIVE HAWAIIANS
REMAIN UNRECOGNIZED?

A. *Unlikely for Act to pass*

It seems unlikely that the Native Hawaiian Government Reorganization Act of 2011, an act that would set up a framework for a separate Native Hawaiian nation within the United States,²⁵⁷ will pass. The Act

has been floundering in Congress for more than a decade . . . The legislation passed the U.S. House three times, even with strong opposition by conservatives both in and out of the U.S. House. However, the legislation, which has taken on many forms, has never passed the U.S. Senate.²⁵⁸

Also, the Act has “been extremely controversial in the islands and in Congress. Native Hawaiians on both sides have been fighting over the language and intent.”²⁵⁹ Many Native Hawaiian sovereignty activists oppose the Act because they do not want federal authority forced upon them.²⁶⁰ In addition, conservative organizations, such as the Heritage Foundation, the Cato Institute, and several Republican Congress members, oppose the Act as well.²⁶¹

B. *Opponents of the Act*

Opponents say that the proposed Native Hawaiian Government Reorganization Act of 2011 is “more radical” than earlier versions, because the new language has “no public involvement at the state or congressional level, and contains none of the limitations that were originally negotiated in the past by former Governor Linda Lingle.”²⁶² Another position is that the Act is a race-based initiative since it is difficult to distinguish who is actually Native Hawaiian, and who is not, because much the population of Hawaii is multiethnic.²⁶³ Steven Duffield, former chief counsel to Senator Jon Kyl, R-AZ, said: “[I]t’s worth remembering that every

²⁵⁷ Zimmerman, *supra* note 121.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Wiethaus, *supra* note 109, at 45.

professional poll has shown that Hawaiian citizens are highly skeptical of this race-based scheme.”²⁶⁴ There is also a fear that Non-Hawaiians will be excluded from the benefits of Native Hawaiians, and yet will still have to support Native Hawaiians through welfare programs and other funding. “Many Non-Hawaiians can only see present poverty and welfare programs as a prediction of the future relationship between the United States and the Nation of Hawaii . . . Even deeper lies the condescending assumption that Native Hawaiians are incapable of generating national self-sufficiency.”²⁶⁵

There is also a lot of opposition to the Act from Congress. For example, the US Senate has never approved any version of the Act²⁶⁶ and several GOP Senators are likely to block any attempt to bring the bill to the floor for a vote.²⁶⁷ The Act will also have to gain passage in the US House in order to be passed. Rep Doc Hastings (R-WA), who is strongly opposed to the new version, chairs the House Natural Resources Committee.²⁶⁸ Steven Duffield, former chief counsel to Sen. Jon Kyl (R-AZ), said:

For many years, the [Act] advocates insisted that the law would just allow a process for those of ‘Native Hawaiian’ blood to decide a path forward. That was always a farce, and this new provision proves it. The appropriations language would lead to only one result: Native Hawaiians becoming an Indian tribe, with all the public expense and jurisdictional nightmares that go with that status.²⁶⁹

There has also been a lot of resistance to the Act from locals and government officials in Hawaii. Leon Siu, a native Hawaiian activist and popular Hawaiian entertainer, has opposed the Act in Congress and has even traveled to Washington DC to meet with House and Senate members about his concerns.²⁷⁰ Siu said in an earlier letter to the *Hawaii Reporter* that it was a “key tactical error”²⁷¹ when the Act was amended to its newest version to create a tribe. In other words, the newest version of the Act takes away

²⁶⁴ Zimmerman, *supra* note 121.

²⁶⁵ Wiethaus, *supra* note 109, at 45.

²⁶⁶ Andrew Walden, *Senate Indian Affairs Committee to vote on Akaka Bill*, HAWAII FREE PRESS (Apr. 6, 2011), available at <http://www.hawaii-freepress.com/main/ArticlesMain/tabid/56/articleType/ArticleView/articleId/4065/categoryId/52/Senate-Indian-Affairs-Committee-to-vote-on-Akaka-Bill-Thursday.aspx>.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ Zimmerman, *supra* note 121.

²⁷⁰ *Id.*

²⁷¹ *Id.*

state oversight, and effectively “set off a chain of events that led to the Act’s failure.”²⁷² Even former Governor Linda Lingle tried to stop the new amendments to the Act because she didn’t support them.²⁷³ In a letter she wrote to the US Senators, Governor Lingle expressed her concerns with the 2011 Act. She explained that the prior version of the Act set up “a process of recognition first, establishment of a Native Hawaiian governing entity, followed by negotiations between the entity, the United States, and the State, concerning, among other things, the powers to be exercised by the entity and the assets, including land, to be transferred to the entity”.²⁷⁴ The Governor explained to the Senators that she opposes the current Act because it vests the entity almost immediately with broad and ill-defined powers.²⁷⁵

If the Act does not pass, where will this leave Native Hawaiians in their ongoing struggle with the federal government over land rights? The answer is in the same place. No matter what the outcome, there is a need for mediation. Passing of the Native Hawaiian Government Reorganization Act of 2011 would inevitably make it easier for the Native Hawaiians to garner the kind of respect and consideration they deserve from the federal government. However, the pending Act, and all the attention and debate it has recently attracted, is only shedding light on a problem that has been ongoing for decades. It is not that the need for mediation has suddenly appeared in tandem with the proposed Act. Regardless of whether the Act passes, it remains true that Hawaii could have benefited long ago from a mediation system for land disputes. Thus, there is no better time than now to implement such a much-needed system.

VIII. CONCLUSION

Given the heated opposition to the Native Hawaiian Government Reorganization Act of 2011, Native Hawaiians are likely to remain federally unrecognized as an indigenous tribe. Because of this, it is even more important that the U.S. implement a mediation

²⁷² *Id.*

²⁷³ Andrew Walden, *2011 Akaka Bill grants Tribal officials broad immunity from Hawaii Criminal and Civil Laws*, HAWAII FREE PRESS (Mar. 31, 2011), <http://www.hawaii-freepress.com/main/ArticlesMain/tabid/56/articleType/ArticleView/articleId/4027/2011-Akaka-Bill-grants-Tribal-officials-broad-immunity-from-Hawaii-Criminal-and-Civil-Laws.aspx>.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

program. It is essential to protect the interests of the Native Hawaiians who may not have the same political clout as other indigenous tribes in the United States, but who clearly have vested interests in the land of Hawaii. These interests must be addressed and respected by the federal government in order to achieve a peaceful society within the Hawaiian Islands. Neglecting to utilize mediation in Hawaiian land disputes will only fuel hatred and animosity between Native Hawaiians and the state.

The “possibilities are unlimited for the continued and expanded use of mediation between a tribe and the ‘outside world,’ including federal and state agencies.”²⁷⁶ It may take some time to tailor a system of mediation to efficiently meet the needs of the Native Hawaiian land disputes. At least in regards to Native Americans, legal reformers suggest that “dispute resolution methods should be rediscovered and tailored to the more multi-faceted cultural processes and complex social arrangements that characterize each distinct reservation setting.”²⁷⁷ This holds true for Native Hawaiians as well. Despite its reformative contributions, traditional, culturally neutral modes of mediation may be ineffective when forced upon tribal societies²⁷⁸ like the Native Hawaiians. Instead, mediation models that consider the specific needs of the community should be implemented.

Adopting successful methods already used in Native American and Alaskan Native Tribes will be the best place to start. In addition, methods already used by Native Hawaiians on a smaller scale (in family and community disputes) may be a great foundation to build upon in order to address more complex land dispute cases with the federal government.

Ultimately, the most important thing is that a method, any method, is used. Regardless of federal indigenous tribal status, a system of mediating land disputes will be beneficial for both the Native Hawaiian community and the federal government.

²⁷⁶ Garrett, *supra* note 41, at 45-46.

²⁷⁷ Bradford, *supra* note 181, at 577-78.

²⁷⁸ *Id.*