NO. 04-15306

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARL F. ARAKAKI, et al., Plaintiffs – Appellants, v. LINDA LINGLE et al., State Defendants – Appellees, HAUNANI APOLIONA, et al., OHA Defendants – Appellees, MICAH KANE, et al., HHCA/DHHL Defendants – Appellees, THE UNITED STATES OF AMERICA, and JOHN DOES 1 through 10, Defendants – Appellees, STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS, and ANTHONY SANG, SR., SCHHA Defendants/Intervenors – Appellees, HUI KAKO'O 'AINA HO'OPULAPULA, BLOSSOM FEITEIRA and DUTCH SAFFERY, HUI Defendants/Intervenors – Appellees.	D.C. No. CV-02-00139 SOM/KSC District of Hawaii, Honolulu PLAINTIFFS'-APPELLANTS' REPLY IN SUPPORT OF INJUNCTION TO PRESERVE STATUS QUO PENDING APPEAL; DECLARATION IN SUPPORT, EXHIBITS 1 – 5; CERTIFICATE OF SERVICE H. WILLIAM BURGESS #833 2299-C Round Top Drive Honolulu, Hawai'I 96822 Telephone: (808) 947-3234 Facsimile: (808) 947-5822 Email: hwburgess@hawaii.rr.com Attorney for Plaintiffs-Appellants

PLAINTIFFS-APPELLANTS' REPLY
IN SUPPORT OF INJUNCTION TO PRESERVE STATUS QUO
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In this reply, Plaintiffs-Appellants (sometimes referred to herein as "Taxpayers/Trust Beneficiaries") will focus on the arguments by the Defendants-Appellees in their oppositions dated April 23, 2004.

The State argues case "should have been thrown out" because of *ASARCO*. But *ASARCO* did not overrule *Hoohuli* which remains the leading Ninth Circuit precedent on taxpayer standing.

The State and HHCA/DHHL Defendants-Appellees (collectively "State"), at pages 16 through 18 of their opposition dated April 23, 2004, cite Justice Kennedy's opinion in *Asarco Inc. v. Kadish*, 490 U.S. 605, 612-617 (1989), as if it were the opinion of the Supreme Court. They argue at 18, "Accordingly, plaintiffs' entire lawsuit should have been thrown out as it was based on a theory of state taxpayer standing that no longer exists."

As this Court noted in *Cammack v. Waihee*, 932 F.2d 765, 770 fn.9 (9th Cir. 1991), in that "portion of the opinion, which was otherwise written for an unanimous eight-justice Court, Justice Kennedy was able to garner only four votes; the other four justices expressly disavowed Justice Kennedy's discussion of the injury aspect of state taxpayer standing." The Ninth Circuit in *Cammack* characterized Justice Kennedy's views as taking "a dimmer view of the breadth of state taxpayer standing than this court" and

adhered to its own decision in *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984), which is "the leading case" and "controlling Circuit precedent" on state taxpayer standing. *Cammack*, 932 F.2d at 770 and fn. 9.

Hoohuli upheld state taxpayer standing to challenge "disbursement of funds to a particular class of native inhabitants" through OHA. *Doe v. Madison School District No. 321*, 177 F.3d 789, 794 (9th Cir. en banc 1999). As the District Court here noted several times in the Order dated May 8, 2002, (Docket 117 at pages 14 and 16; *Arakaki v. Cayetano*, 299 F.Supp. 1090, 1098, 1099 (D. Hawaii 2002)), *Hoohuli* involved allegations nearly identical to those in this case.

The State also cites the Ninth Circuit's decision in *Bell v. City of Kellogg*, 922 F.2d 1418 (9th Cir. 1991), as undercutting *Hoohuli* and going with Justice Kennedy's approach in *ASARCO*. State's opposition at 18. However, in *Cammack*, the Ninth Circuit said that although in *Bell* "we implied some sympathy towards Justice Kennedy's view," nonetheless "we also made clear that *Hoohuli* remained the controlling circuit precedent. . . . *Bell* should not be interpreted as altering the law of this circuit on state taxpayer standing." *Cammack*, 932 F.2d at 770, n.9. The Ninth Circuit continues to adhere to its own *Hoohuli* decision. 932 F.2d at 770.

Moreover, as the trial court here said in the Order dated May 8, 2002,

(Docket 117 at 12, fn 8) "In any event, *Bell* could not alter the holding in *Hoohuli* without an intervening Supreme Court decision or a decision *en banc*. See *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) (The first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals"; when "a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting *en banc*, or by the Supreme Court"); *Roundy v. Commissioner of Internal Revenue*, 122 F.3d 835, 837 (9th Cir. 1997) ("A three-judge panel is bound by a prior judgment of this court unless the case is taken *en banc* and the prior decision is overruled")."

The result of *ASARCO* supports state taxpayers' standing to challenge violation by state officials of a federally created land trust which results in unnecessarily higher taxes. It is also consistent with trust beneficiary standing.

In *Asarco v. Kadish*, 490 U.S. 605 (1989) taxpayers filed suit in the Arizona court challenging Arizona's leasing of minerals and school trust lands without complying with the bidding and appraisal requirements of the State's enabling act.

Pursuant to the 1910 Enabling Act for Arizona, the United States granted four sections of land in each township to Arizona. Almost ten

million acres were granted. The land could be used *only* for the support of the common schools of the state (school trust lands) and for internal improvements to the state. The enabling act required that before leasing such lands, they be advertised and appraised. *Kadish v. Asarco*, 155 Ariz. 484, 486 747 P.2d 1183, 1185 (1987)

The Arizona statute, subsequently enacted, required every such lease to provide for the payment by the lessee of a royalty of 5% of the net value of the minerals produced but it did not require the lands to be advertised or appraised before the lease and did not require the lands to be leased at their full appraised value. 490 U.S. at 627.

The plaintiffs were three individual taxpayers, Frank and Lorain Kadish and Marion L. Pickens, and the Arizona Education Association, a non-profit corporation. The original Defendants were the Arizona State Land Department, the State Land Commissioner in his official capacity and Cyprus Pima Mining Company, a mineral lessee. ASARCO Incorporated, a New Jersey corporation, and other mineral lessees intervened. The trial court eventually certified the case as a defendant class action. The class consisted of all present and future mineral lessees of state lands.

The plaintiffs' complaint, ¶ III, alleged that the Arizona statute governing mineral leases has "deprived the school trust funds of millions of

dollars thereby resulting in unnecessarily higher taxes." The association and its members contended that the state law "imposes an adverse economic impact" on them. Complaint ¶ IV.

The trial court entered summary judgment for Defendants. Plaintiffs appealed. The Arizona Supreme Court reversed and remanded. The intervening Defendants sought and were granted certiorari. The U.S. Supreme Court held that the Arizona statute governing mineral leases of state lands was void and affirmed the judgment of the Arizona Supreme Court.

Four of the Justices expressed the view that the suit would have been dismissed at the outset if federal standing-to-sue rules applied (reasoning that state taxpayer suits should be barred by the same rules as federal taxpayer suits). Four other justices disagreed with that view. The ninth justice, Justice O'Connor, took no part in the consideration or decision. The result of the Supreme Court's decision was to uphold the judgment in favor of the plaintiffs, Arizona taxpayers and a teachers association, whose only complained-of injury was the leasing of mineral deposits in school trust lands at below fair market rentals in violation of the Arizona enabling act.

If the Supreme Court in *Asarco* had restricted state taxpayers to challenging only direct expenditures of tax dollars (as the trial court here

ordered), it would have either reversed the Arizona Supreme Court (because the below-market mineral lease did not involve "a dime of direct state taxpayer monies", State opp. at 7) or it would have dismissed the petition for certiorari for lack of Article III jurisdiction (because the taxpayers did not allege any direct injury caused by expenditure of taxpayer funds).

The result of *Asarco* is consistent with trust beneficiary standing as well. If state taxpayers can challenge the leasing of school trust lands at below-market rents which result in unnecessarily higher taxes, surely public land trust beneficiaries, who suffer an even more direct impact because they are excluded completely from 200,000 acres of the federally created trust corpus and from any cash distribution of income from the remaining trust corpus, can have their challenge heard in federal court.

Other inapposite citation by the State claiming "no possibility of irreparable harm."

Under the heading, "Plaintiffs can show no possibility of irreparable harm.", the State, in its opposition, cites several other inapposite cases.

For example, at page 6, the State argues: "In any event, such monetary harm [impact on taxpayers' pocketbooks] is plainly <u>not irreparable</u> <u>See Hugh[e]s v. United States,</u> 953 F.2d 531, 536 (9th Cir. 1992) (mere financial hardship or monetary harm is not sufficient to constitute <u>irreparable</u>

harm)" (Underlining in State's opposition.)

In the *Hughes* case, Richard and Joan Hughes, in an effort to forestall any further tax collection activities against them, brought suit against the United States and the Commissioner of Internal Revenue seeking declaratory and injunctive relief and damages. The Hugheses argued that their request for injunctive relief falls within the judicial exception to the Anti-Injunction Act, 26 U.S.C. § 7421(a). To avail themselves of this exception, the Hugheses bear the burden of demonstrating that "(1) under no circumstances can the government ultimately prevail on the merits; and (2) the taxpayer will suffer irreparable injury without injunctive relief." The district court dismissed the counts seeking declaratory and injunctive relief on the ground that the court lacked subject matter jurisdiction, and granted summary judgment in favor of the government and the Commissioner on the damage claims. The Ninth Circuit affirmed.

Here, the Anti-Injunction Act has no application. Taxpayers/Trust Beneficiaries seek no injunction against assessment or collection of any taxes. They seek no tax refund. They complain about misuse of public funds and lands in violation of the Constitution and federal trust law. The District Court and this Court have 'federal question" subject matter jurisdiction. Taxpayers/Trust Beneficiaries seek declaratory and injunctive

relief against Defendants in their official capacities only. They do not seek compensatory damages. They are prohibited from doing so by the Eleventh Amendment. (The *Ex Parte Young* exception to the Eleventh Amendment is only applicable where prospective relief is sought. *Hoohuli, supra*, 741 F.2d at 1174.)

The harm to Plaintiffs' taxpayers' and trust beneficiaries' pocketbooks that has occurred over the last two years, since March 4, 2002 when this case started, is therefore irreparable. The better quality of public schools, and roads and parks and life they, and other Hawaii citizens similarly situated, would have had, if the over $47 million per year of public moneys had not been diverted for racially discriminatory purposes, is gone forever.

The per capita status quo in Hawaii is worse today than it was two years ago. The State of Hawaii, with the third highest debt burden per capita among U.S. states (Exhibit 4), is deeper in debt by approximately $90 million more, attributable to the kind of laws the Supreme Court has termed "odious to a free people." If this Court does not issue an injunction promptly, the outflow from the State treasury, and therefore from the pocketbooks of Taxpayers/Trust Beneficiaries, and others similarly situated, and the diminishment of the quality of life for all of them, will continue unabated. Two or three or more years from now, when Plaintiffs finally

prevail, as they ultimately will, no judgment can possibly bring back today's status quo, erase the additional $90 to $130 million State debt that will have been incurred, or wash out the other monetary and social pain that will inevitably happen in those years.

The State inaptly cites *ASARCO* again, this time to argue claim of irreparable harm "borders on frivolous." But this Court, two years after *ASARCO*, held both Hawaii taxpayers and Hawaii public land trust beneficiaries have standing even if their tax burden might not be lightened and trust income might be spent for other purposes.

On page 8, the State again cites *ASARCO*, *supra*, as if it were the opinion of the Supreme Court, quoting from 490 U.S. 614, "it is pure speculation whether the lawsuit would result in any actual tax relief for [plaintiffs]'. Thus plaintiffs' claim of irreparable harm borders on the frivolous." The quote is from part II-B-1 of the *ASARCO* opinion in which, as we have previously seen, only three other justices joined with Justice Kennedy. Four other justices expressly disavowed this part of the decision and Justice O'Connor took no part in the consideration or decision. See 490 U.S. 609. In *Cammack, supra*, in 1991, two years after the *Asarco* decision, the Ninth Circuit said at 932 F.2d 769,

> However, *Hoohuli,* the leading case on this issue in the circuit, does not require that the taxpayer prove that her tax burden will be

lightened by elimination of the questioned expenditure.

Also in the same year, 1991, the Ninth Circuit in *Price v. Akaka*, 928 F.2d 824 (9th Cir. 1991) considered a closely related issue in a §1983 action alleging that the OHA trustees managed the income of the trust for native Hawaiians in a manner that violates §5(f) of the Hawaii Admission Act by co-mingling OHA's share of the public land trust income with other OHA funds and spent none of it for native Hawaiians. The district court found that Price has not stated a claim and dismissed the complaint.

On appeal, his Court, in a decision by Judge Canby said, "Having accepted the Complaint's allegations as true, and having construed the Complaint in the light most favorable to Price, we hold that Price has stated a claim and that the district court has jurisdiction to hear it. We conclude therefore that the court's dismissal was erroneous." (Internal cites omitted.)

> The fact that the trustees may, consistently with § 5(f), spend the income for purposes other than to benefit native Hawaiians does not deprive Price of standing to bring his claim. We recently considered this very question, and determined that allegations such as those Price has made are sufficient to show an "injury in fact". *See Price,* 764 F.2d at 630. [FN2] In addition, allowing ***827** Price to enforce § 5(f) is consistent with the common law of trusts, in which one whose status as a beneficiary depends upon the discretion of the trustee nevertheless may sue to compel the trustee to abide by the terms of the trust. *See* Restatement 2d of the Law of Trusts, § 214(1), comment a; *see also id.* at § 391 (stating that plaintiff with "special interest," beyond that of ordinary citizen, may sue to enforce public charitable trust). *Id.* 859 F.2d at 826, 827.

The *Mancari* argument has already been adjudicated.

The State argues at pages 23-30 of its opposition that plaintiffs have not shown probable success on their equal protection claims because they have "failed to demonstrate the inapplicability of the Mancari doctrine." (page 25.) The State and OHA made the *Mancari* argument in *Rice*[1] and *Arakaki I* and lost. They are precluded from re-litigating it.

Issue preclusion (also known as "collateral estoppel") bars the Defendants from re-litigating issues already adjudicated against them. The Ninth Circuit has explained that to

> foreclose relitigation of an issue under collateral estoppel: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action.

Clark v. Bear Stearns & Co., 966 F.2d 1318, 1320 (9th Cir. 1992). *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992). In addition, the party that is foreclosed from relitigating the issue must have been a party or in privity with a party in the prior litigation. *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 167-68 (1999); *Pena*, 976 F.2d at 472.

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[1] Finally, the state submits, its classification survives rational basis review (which is the appropriate standard) under *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), because the federal government and the state of Hawaii have the same special relationship with and owe the same unique obligation to native Hawaiians as the federal government does to Indian tribes. *Rice v. Cayetano,* 146 F.3d 1075, 1079 (9th Cir. 1998).

Most of the key issues in this case, particularly those relating to *Mancari*, have already been adjudicated in *Rice v. Cayetano* and in *Arakaki v. State*, Civil No. 00-00514 in the U.S. District Court for Hawaii (See *Arakaki I Summary Judgment Order*, i.e., Second Amended Order Granting in Part and Denying in Part Plaintiffs' Cross Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment dated August 22, 2003, (Exhibit 5) following this Court's mandate in *Arakaki v. State*, 314 F.3d 1091 (9th Cir. 2002).

- The definitions of "native Hawaiian" and "Hawaiian" in HRS §10-2 are racial classifications. *Rice*, 528 U.S. at 516-517; *Arakaki I Summary Judgment Order* at 28; *Arakaki v. State,* 314 F.3d 1091, 1095 (9th Cir. 2002) (the Hawaiian ancestry requirement is "race-based."); *Rice v. Cayetano,* 146 F.3d 1075, 1079 (9th Cir. 1998) (Rice is, of course, quite right that the Hawaii Constitution and Haw.Rev.Stat. §13D-3 contain a racial classification on their face.)

- OHA is a state agency. *Rice*, 528 U.S. at 520.

- OHA, a state agency, is not itself a quasi-sovereign, nor does it participate in the governance of a quasi-sovereign. *Rice*, therefore, explains that *Mancari* does not apply to the State mandate that OHA trustees be Hawaiian. *Arakaki I Summary Judgment order* at 24.

• The State does not have the same unique relationship with Hawaiians and native Hawaiians as the federal government has with Indian tribes. *Arakaki I Summary Judgment Order* at 25.

• In response to arguments by the State Defendants and OHA that "Hawaiians, like native Americans, are indigenous people who have a unique trust relationship with the federal government, the District Court in *Arakaki I* said, "Defendants' and OHA's arguments fail for several reasons." *Arakaki I Summary Judgment Order* at 22.

• See Admission Act §5(f). Although Congress envisioned the need for a public trust, it did not authorize the State to restrict the administration of that trust to a particular race. *Arakaki I Summary Judgment Order* at 26.

• Assuming arguendo, native Hawaiians shared the same status as Indians in organized tribes, *Mancari* would not permit Congress to authorize a state to exclude non-Hawaiians from voting for the state's public officials. *Arakaki I Summary Judgment Order* at 23 citing *Rice* at 528 U.S. 520.

• The scope of the rule announced in *Mancari* is limited to tribal Indians. There is no other group of people favored in this manner. *Arakaki I Summary Judgment Order* at 22. *Rice*, 528 U.S. at 518.

• The preference at issue in *Mancari* only applied to the BIA. *Arakaki I Summary Judgment Order* at 22.

• The legal status of the BIA is truly sui generis. *Arakaki I Summary Judgment Order* at 22, citing *Rice* at 528 U.S.518.

• *Rice* excluded *Mancari*'s application to the OHA voting scheme precisely because OHA is an agency of the State. *Arakaki I Summary Judgment Order* at 23, citing *Rice* at 528 U.S.520-21.

Each of the above issues is also a key issue in this case. Some of the same rules of law and arguments are at issue in this case as in *Arakaki I*. See *Disimone v. Browner*, 121 F.3d 1262, 1267 (9th Cir., 1997) (factors to be considered include whether there is substantial overlap of argument and whether application of same rule of law involved in both cases). In *Arakaki I*, Defendants and Intervenor, OHA, "argue that Hawaians, like native Americans, are indigenous people who have a unique trust relationship with the federal government." *Arakaki I Summary Judgment Order* at 22. Defendants make the same arguments here that they made in *Arakaki I*, without even "a switch in the verbal formula" such as proved insufficient to distinguish earlier and later cases in *Starker v. United States*, 602 F.2d 1341, 1345 (9th Cir. 1979).

Second, these constitutional issues were actually litigated in *Arakaki I* as central issues in that case.

Third, Judge Gillmor decided those issues in *Arakaki I* after the

mandate of this Court in *Arakaki v. State*, 314 F.3d 1091 (9th Cir. 2002) and her decision as to each of those issues was "a critical and necessary part of the judgment in that action." *Clark*, 966 F.2d at 1320. As the State Defendants and OHA argued in that case, and as they reiterate here, if *Mancari* applied to state agencies using the classifications "Hawaiian" and "native Hawaiian" then the statutes at issue would be upheld. *Arakaki I Summary Judgment Order* at 22. But Judge Gillmor expressly considered and rejected the Defendants' and OHA's argument. "Defendants' and OHA's arguments fail for several reasons." *Arakaki I Summary Judgment Order* at 22. Following *Rice*, she held that the application of the statutory definition of "Hawaiian" as a qualification to be an OHA trustee discriminates based on race. The rule announced in Mancari does not save the racial restriction on who may serve as a trustee of OHA. *Id* at 21.

The Defendants in this action were Defendants in *Arakaki I* or are in privity with them. The Defendants in *Arakaki I* were the State, Governor Cayetano and Chief Elections Officer Yoshina (both sued in their official capacities). The State Defendants centered their defense on their claim that the racial classification permitting only Hawaiians to serve as trustees of OHA is akin to preferences Congress has provided to native Americans and which require only a rational basis review before the preference would be

upheld. *Id.* at 12. OHA was permitted to intervene as a Defendant in order to represent the interests of its beneficiaries, Hawaiians and native Hawaiians. *Arakaki I Summary judgment order* at 12. In practical effect, Plaintiffs sought and obtained a judgment against the State, including its agency, OHA. In the present case, Governor Cayetano was again, and his successor Linda Lingle is, sued in his and her official capacity, as are all the other state officials. OHA, through its trustees in their official capacities, is also a party. Plaintiffs name the state officials in their officials capacities in order to obtain a judgment in practical effect against the State, including its agency, OHA. Because an official capacity suit is a way to sue the government, an official sued in his official capacity is in privity with the government. *Conner v. Reinhard*, 847 F.2d 384, 394 (7th Cir. 1988); *Gregory v. Chehi*, 843 F.2d 111, 120 (3d Cir, 1988). Similarly, beneficiaries are bound by a judgment against a trustee with respect to the interest that is the subject of the fiduciary relationship. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 593-94 (1974); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1277-78 (9th Cir. 1992).

There is also continuity among the plaintiffs in the two cases. Among the Plaintiffs in the present case are most of the Plaintiffs in *Arakaki I*: Earl F. Arakaki, Evelyn C. Arakaki, Sandra P. Burgess, Edward U. Bugarin,

Patricia A. Carroll, Robert M. Chapman, Brian L. Clarke, Michael Y. Garcia, Toby M. Kravet, Thurston Twigg-Smith.

Thus, the requirements for issue preclusion (collateral estoppel) are satisfied. The decision in *Arakaki I* on the issues that "Hawaiian" and "native Hawaiian" are racial classifications and that Mancari does not apply to a state agency using racial classifications precludes and estops the Defendants here from relitigating these issues.

Other issues relevant to *Mancari* are not genuinely disputed. Both the State and OHA Defendants have substantially conceded that there are no federally recognized native Hawaiian or Hawaiian tribes. For example:

• "There is no currently exist ing federally recognized Native Hawaiian tribe." OHA's Supplemental Memo filed May 5, 2003 at 4 (Docket #249).

• Congress has not decided that it will deal with Native Hawaiian groups as political entities on a government-to-government basis, *e.g*. as a federally recognized tribe. Indeed, Plaintiffs [*Kahawaiolaa*] have not shown, nor could they show, that Congress has established such relations. Hawaii, either as a State or U.S. Territory, never had a reservation program. *Kahawaiolaa v. Norton*, 222 F.Supp.2d 1213, 1219, 1220, 1221, fn. 10 (D. Hawaii 2002).

• In 1920, there was no government or tribe of Hawaiians to deal with. At the hearings before the House Committee on the Territories on February 3, 1920 on proposed adoption of the Hawaiian Homes Commission Act, Representative Dowell questioned the Territory of Hawaii Attorney General about the legality of "class" legislation. Harry Irwin, the A.G. said the 14th Amendment applies only to states. Committee Chairman Curry said, Congress does enact class legislation lands to Indians. Dowell: But we have made Indians wards of Congress. Page 167. Curry: We give land to Civil War veterans. Also, Mexican War veterans. Dowell: This is an absolute exclusion of all except a certain class of citizens. Page 168. Dowell: It seems to me that the Indian proposition is hardly a parallel with the question we have before us. Curry mentions Indians being deprived of their lands. Dowell: That is true, but in principal have we not a different proposition because **we have no government or tribe or organization to deal with.** Page 171. Chairman Curry finally comments, I think it is legal but I would not stake my reputation on it. Page 174. (Emphasis added. Also, the above are short-hand summaries. For the exact wording see the committee report, Exhibit 2 to declaration filed December 15, 2003 with Plaintiffs' Counter Motion for Partial Summary Judgment, Docket 332.)

• OHA's Amicus Brief dated November 18, 1997 in the Ninth Circuit

in *Rice v. Cayetano*, Ninth Circuit No. 97-16095 at 25, "Native Hawaiians were not culturally organized into tribal units in pre-contact periods, so it would obviously be insensitive and inappropriate to impose that obligation on them now." Exhibit 3 to Declaration filed December 15, 2003 with Docket 332).

• "…no vestiges of an official 'tribe' which purports to represent all Native Hawaiians remains." "Native Hawaiians are no longer a community under one leadership, or indeed any leadership at all outside of state-created entities such as the Office of Hawaiian Affairs." Brief of Patton Boggs law firm, lobbyist for OHA in approximately July 2003. Lobbying fee to Patton Boggs: reportedly up to $450,000. *Id.*, Exhibit 4 at 4 & 6.

• Actions speak louder than words. OHA and its consultants, attorneys and political supporters have been trying for the last 3.5 years to convince Congress to pass the Akaka bill, the current version of which is S. 344/ H.R. 665 also known as the Native Hawaiian Recognition Act of 2003. One former OHA Trustee recently said OHA had spent more than $4 million in illegal lobbying for the Akaka bill. The OHA administrator, however, says OHA has spent "something less than $1 million for lobbying for the Akaka bill." (Exhibit 3 to Declaration filed herewith) If Hawaiians or Native Hawaiians were already federally recognized as a tribe, they would

not be spending so much money and effort.

The "non-justiciable political question" issue has also already been adjudicated.

OHA argues at 18 and 19 of its opposition that Taxpayers/Trust Beneficiaries have no likelihood of success since the trial court ruled that their claims present a nonjusticiable political question, citing *United States v. Sandoval*, 231 U.S. 28 (1913) "and more particularly because Congress is currently considering legislation designed to codify the relationship between the United States and Native Hawaiians in greater detail."

OHA made the same argument in *Arakaki I.* Judge Gilmor, noted,

> "The Office of Hawaiian Affairs has asked the Court to defer ruling on Plaintiffs' motion for summary judgment in light of the fact that Congress is presently considering a bill related to recognizing native Hawaiians as indigenous people. … OHA cites United States v. Sandoval, … for the proposition that the determination of whether and to what extent native people will be recognized and dealt with under the guardianship and protection of the United States is a question reserved for Congress. … Sandoval does stand for the proposition that Congress has the power to enact laws for the benefit and protection of tribal Indians. … The federal courts, however, are charged with the interpretation of the United States Constitution. … The possible passage of proposed legislation in Congress (citing in footnote 9 that Senator Akaka has proposed a bill relating to the status of native Hawaiians. See S. 2899, 106th Cong. §2 (2000) is not an event that this Court can look to as a reason not to act." *Arakaki I Summary Judgment Order* at 22.

Judge Gillmor decided the "nonjusticiable political question" issue as

part of her original Order Granting Plaintiffs' Cross Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment filed September 19, 2000. On appeal this Court affirmed that Hawaii's limitation of eligibility to be a candidate for OHA trustee is invalid under the Fifteenth Amendment and the Voting Rights Act, but that the district court should not have reached the question of whether the Equal Protection Clause of the Fourteenth Amendment precludes restriction on OHA trustee appointments. After this Court's mandate in *Arakaki v. State*, 314 F.3d 1091 (9th Cir. 2002) affirming in part and vacating and remanding in part, Judge Gillmor deleted the portions of the order and judgment dealing with trustee appointment and the Fourteenth Amendment. As to the nonjusticiable political question issue the final language quoted above remained unchanged from the original.

The pending Akaka bill referred to in Judge Gillmor's September 19, 2000 order is substantially the same as the pending bill referred to in the Order herein dated January 14, 2004 Docket 354 which is one of the subjects of this appeal.

Thus, since the federal courts are charged with the interpretation of the United States Constitution, and since this Court and the District Court have already adjudicated, in a suit with the same parties and their privies, and the same issues as to the constitutionality of the same racial

classifications, that the possible passage of substantially the same bill in Congress is not an event that this Court can look to as a reason not to act, OHA is therefore precluded from re-litigating this issue. It follows that Taxpayers/Trust Beneficiaries are likely to prevail on this issue.

A trustee has a duty to the beneficiaries not to comply with a term of a trust which is illegal. Rest. Trusts 2d, §166 Illegality. Under §214 any beneficiary can maintain a suit against the trustee to enforce the duties of the trustee to him or to enjoin … a breach of the trustee's duty to him.

OHA argues at pages 9 through 11 of its opposition that "no case has ever held that a trust beneficiary has standing to challenge a trustee from acting in accordance with the terms of the trust on the ground that such action violates the Equal Protection Clause. However, both the Hawaii Supreme Court and the Ninth Circuit have recognized that the reasoning and law of charitable trusts may be applied to Hawaii's public land trust.

In *Pele Defense Fund v. Paty,* 73 Haw. 578, 604, 837 P.2d 1247, 1263 (1992), the Hawaii Supreme Court, opinion by J. Klein, applied the reasoning of *Kapiolani Park Preservation Soc'y v. City & County of Honolulu,* 69 Haw. 569, 572, 751 P.2d 1022, 1025 (1988) in a suit to enforce the public land trust.

> Although the case before us involves the ceded lands trust, rather than a charitable trust, the parallels are unmistakable. ****1264** ***605** Here, we have a situation where the agency charged with the administration of a trust held for the benefit of native Hawaiians and members of the public has purportedly disposed of trust assets in violation of trust provisions and, if we were to adopt the position of the State, no one in the State of Hawaii would have the right to bring the matter before Hawaii's courts. As we said in *Kapiolani Park,* '[s]uch a result is contrary to all principles of equity and shocking to the conscience of the court." *Id.* at 573, 751 P.2d at 1025. Leaving aside for the moment the question of whether we can now review the State's consummated acts, we are of the firm conviction that our courts must be available to the citizens of Hawaii to avert such a purported breach of public trust.

In *Price v. Akaka,* 928 F.2d 824 (9th Cir, 1991), a §1983 action by a beneficiary alleging the trustees of OHA managed the income in a manner that contravenes §5(f), co-mingled OHA's share of the income with other OHA funds, expended none for the benefit of native Hawaiians; and used it instead for purposes other than those listed in §5(f). The court said, at 928 F.2d 826,

> In addition, allowing ***827** Price to enforce § 5(f) is consistent with the common law of trusts, in which one whose status as a beneficiary depends upon the discretion of the trustee nevertheless may sue to compel the trustee to abide by the terms of the trust. *See* Restatement 2d of the Law of Trusts, § 214(1), comment a; *see also id.* at § 391 (stating that plaintiff with 'special interest," beyond that of ordinary citizen, may sue to enforce public charitable trust).

Here, the State Attorney General, and his predecessors, are deeply conflicted in their roles as *parens patriae*. They have failed to seek

instructions of a court as to the legality of the OHA laws and the HHCA/DHHL laws. (The State, as trustee, and its A.G. and other State officials charged with the duty of carrying out the fiduciary duties of the State, have been and are required to do so under the Uniform Trustees' Powers Act, HRS §554-5(b)). They have taken no action to prevent the distribution of millions annually from the public land trust exclusively for a small group of beneficiaries, selected solely by race, without first requiring a trust accounting to tell if the public land trust produced any net income from which cash distributions could properly be made to any beneficiaries. In these and other ways, the State and its officials have abandoned their fiduciary duty to Plaintiffs and to all trust beneficiaries not of the favored race. Under those circumstances, if Plaintiffs cannot do so, no one in the State of Hawaii would have the right to bring the matter before Hawaii's courts. As the Hawaii Supreme Court said, "[s]uch a result is contrary to all principles of equity and shocking to the conscience of the court." And as Judge Canby suggested for the Ninth Circuit, a beneficiary such as Price with a "special interest," beyond that of the ordinary citizen, may sue to enforce a public charitable trust such as the OHA trust which is funded by Hawaii's public land trust. Taxpayers/Trust Beneficiaries, who are excluded from cash distributions and homesteads in the lands of the public land trust

solely because they are not of the favored ancestry, have that interest as surely as Price does in the OHA trust.

The fears about the proposed injunction are unfounded.

All four sets of Appellees claim they would suffer irreparable harm if an injunction were entered pending the appeal. For the most part, those fears seem to reflect a misunderstanding of the true narrowness of the injunction sought. Examining each item should show that the injunction will allow most current operations of OHA and HHC/DHHL to continue with little change.

Item a: Would enjoin the State from further PLT distributions except to the extent of 20% of the net income, if any. This should have no effect on any operations of OHA because the distributions from the PLT are apparently, indeed must be, held and invested and not used for operations. (This must be so because the total distributions from the PLT to OHA from the beginning through 6/30/2003 have been $301,397,820, Exhibit 11 filed with the motion dated April 12, 2004. The balance in the NHTF as of December 31, 2003 was $313,003,550. Exhibit 8. Obviously, if OHA was spending the distributions, instead of holding them for investment, they would not grow.)

This part of the injunction should have no effect on any OHA

beneficiaries because the about $313 million held in the NHTF is apparently not being distributed to any of the "native Hawaiian" beneficiar ies of the NHTF.

The State opposition at 11 says the injunction would directly cut off the salaries of OHA trustees, see HRS §10-9(1)(a). That section provides members of the board shall be paid exclusively from revenue under section 10-13.5. §10-13.5 does not mention revenues. It says, "Twenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by the office…" The injunction would not affect the salaries of the board members unless 20% of the net income from the PLT should turn out to be not enough to cover their salaries. Even then, their salaries could be paid from the earnings on the about $313 million corpus of the NHTF. The interest/dividends each year have been at least $8 million per year for the last nine years (See Exhibit 11) so there should be no real danger that the OHA trustees' salaries would not be paid.

The benefit of this part of the injunction is that the State would be required, if it chooses to make any further distributions from the PLT to OHA, pending this appeal, to actually comply with the "well -established principle of the law of trusts that beneficiaries are entitled only to the net income from the trust." articulated so vigorously by the State Attorney

General in her presentation to the Hawaii Supreme Court in *OHA v. State*. (See Exhibit G filed herein April 11, 2002 at Docket 88.) To determine the net income or loss, the State would need to account for the trust, a task routinely performed by trustees as a matter of course. That would be a boon to the public interest because at last, the public would know whether the PLT actually generates any net income. If it does, then 20% would go to OHA. If the PLT generates no net income, we would have a strong indication that the payments to OHA for the last 24 years have not been trust distributions at all but merely a sham to transfer $300 million from the State treasury to OHA.

Item b: Would enjoin OHA from further disbursing or encumbering the amount it now holds in the NHTF (apparently "Native Hawaiian Trust Fund"). Again, this item would not seem to affect operations or beneficiaries. The amount in the NHTF in recent years has seemed to fluctuate with the stock market, indicating that the corpus is held for investment rather than for distribution. If, the interest and dividends are needed for operations, that need could be easily accommodated while holding the principal intact pending this appeal. The details could be worked out perhaps with the assistance of the Circuit Mediation Office in a way to preserve the status quo with minimal inconvenience to all parties.

Item c: Would enjoin the State from further payments of the $30 million per year for the Hawaiian home lands. Ben Henderson, Deputy to the Chairman of the HHC, declares that stopping the $30 million this year would stop all planning, design, or construction for the 12 residential homestead projects authorized for development beginning July 1, 2004. This would in turn delay awards of an additional 2,159 residential homestead leases for at least a year.

The DHHL annual report for FY 2002-02 filed with the State's opposition, shows on page 24 that the DHHL had total unreserved fund balances as of June 30, 2002 of $123,962,916. The cover letter from Micah Kane, Chairman, says that at the end of FY 2002 the department had received a total of $261.85 million of the $600 million (20 payments of $30 million per year for 20 years). Of that amount, an unreserved balance of $55,534,669 remained. Another $30 million was probably paid in FY 2002-03. Another $30 million is about to be paid now.

The April 27, 2004 Honolulu Star Bulletin Business Briefs article (Exhibit 4 filed herewith) reports that Hawaii, with the third-highest debt burden per capita among U.S. states, plans to sell $225 million of bonds this week. (i.e., last week.) The funds will be used to pay part of the state's $30 million a year for 20 years to native Hawaiians. When measured as a

percentage of personal income, Hawaii has the highest debt among U.S. states. Hawaii has $3,101 of debt per resident, placing it behind Connecticutt and Massachusetts, according to Moody's.

The Sunday April 25, 2004 Honolulu Advertiser, (Exhibit 2 filed herewith) under the headline, "Most DOE prioriti es bypassed" began with the principal at Lokelani Intermediate School on Maui who 'thought this might be the year." The school, straining under Kihei's population growth, has students in about a dozen temporary and portable classrooms. Money for a new six-classroom building was 10th on the state Department of Education's school construction priority list. But Lokelani Intermediate again failed to make the cut.

It is likely that OHA and Hawaiian Homes will go into the dustbin of history when this case reaches final judgment. Balancing the hardships now forbids further increasing the already heavy per capita debt burden already being carried by Taxpayer/Trust Beneficiaries and others similarly situated. The primary purpose of the Hawaii public land trust since its inception in 1898 has been to benefit the inhabitants of the Hawaiian Islands for education and other public purposes. The public interest requires that the $30 million be stopped. The public schools need and deserve the money. DHHL does not. Its' coffers are already overflowing.

Item d: Would enjoin the HHC/DHHL from issuing further Hawaiian Homestead leases without disclosing that this suit seeks to have such leases withdrawn and requiring waivers in the event that such leases are withdrawn as a result of a judgment or settlement of this suit.

Mr. Henderson in his declaration paragraph 6, pages 4 and 5 says commercial lenders are unlikely to lend with the conditions plaintiffs want because they require the lessee to waive any claim the lessee might have against the DHHL and State, 'including the right to be reimbursed the value of the improvement if the lease is cancelled."

That is a legitimate concern and, accordingly, Taxpayers/Trust Beneficiaries do not seek such a waiver. The standard homestead lease form (Exhibit 1 filed herewith) has a withdrawal clause, paragraph 3, giving the DHHL the right to withdraw from the operation of the lease the lands demised, as in the exclusive judgment of the DHHL may be required for a public use and purpose, with the proviso that 'no compensation or damages shall be payable to the Lessee by reason of such withdrawal, save and except that the Lessee will be entitled to compensation for the fair market value, determined as of the time of withdrawal, of all improvements placed by the Lessee on said premises and affected by such withdrawal."

Accordingly, Plaintiffs now revise item d of the proposed injunction to read as follows:

d. Enjoin issuance by the HHC/DHHL Defendants-Appellees (collectively "HHC/DHHL") of any further Hawaiian Homestead leases or related agreements without: (a) first disclosing to all parties involved (including proposed lessees, developers, lenders, guarantors, contractors, investors, partners, joint venturers) that this suit seeks to have such leases withdrawn and could impair related financing and other contractual arrangements; and (b) requiring all such parties to waive any and all claims against HHC/DHHL or the State in the event such leases are withdrawn as the result of a judgment or settlement of this suit, save and except that the Lessee will be entitled to compensation for the fair market value, determined as of the time of withdrawal, of all improvements placed by the Lessee on said premises and affected by such withdrawal."

DATED: Honolulu, Hawaii, May 4, 2004.

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H. WILLIAM BURGESS
Attorney for Plaintiffs-Appellants

NO. 04-15306

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARL F. ARAKAKI, et al., Plaintiffs – Appellants, v. LINDA LINGLE et al., State Defendants – Appellees, HAUNANI APOLIONA, et al., OHA Defendants – Appellees, MICAH KANE, et al., HHCA/DHHL Defendants – Appellees, THE UNITED STATES OF AMERICA, and JOHN DOES 1 through 10, Defendants – Appellees, STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS, and ANTHONY SANG, SR., SCHHA Defendants/Intervenors – Appellees, HUI KAKO'O 'AINA HO'OPULAPULA, BLOSSOM FEITEIRA and DUTCH SAFFERY, HUI Defendants/Intervenors – Appellees.	D.C. No. CV-02-00139 SOM/KSC District of Hawaii, Honolulu DECLARATION IN SUPPORT OF PLAINTIFFS'-APPELLANTS' REPLY IN SUPPORT OF INJUNCTION TO PRESERVE STATUS QUO PENDING APPEAL; EXHIBITS 1 – 5.

DECLARATION IN SUPPORT OF PLAINTIFFS'-APPELLANTS' REPLY IN SUPPORT OF INJUNCTION TO PRESERVE STATUS QUO PENDING APPEAL

H. WILLIAM BURGESS hereby declares under penalty of perjury as follows:

1. I am an attorney licensed to practice law in the federal and state courts located in the State of Hawaii, in the Ninth Circuit and the Supreme Court and am the attorney for Plaintiffs-Appellees in this case.

2. The statements of fact in this declaration are true to the best of my knowledge and belief.

3. The attached exhibits are true copies of:

Exhibit 1. Sample form of Hawaiian Homestead Lease I received from the Department of Hawaiian Home Lands;

Exhibit 2. Article, More DOE priorities bypassed, The Honolulu Advertiser, Sunday, April 25, 2004;

Exhibit 3. Pro, con articles on Akaka bill, The Honolulu Advertiser, Sunday, May 2, 2004 (4 pages);

Exhibit 4. Article, State to sell $225M in bonds, Honolulu Star-Bulletin, Tuesday, April 27, 2004;

Exhibit 5. Second Amended Order Granting in Part and Denying in Part Plaintiffs' Cross Motion for Summary Judgment and Denying

Defendants' Motion for Summary Judgment, August 22, 2003 in Arakaki v. State, Civ. No. 00-00514 HG-BMK

4. In June 2002 Patrick Hanifin and I, with the approval of our clients, withdrew our then-pending motion for preliminary injunction. We did this despite the fact that our clients, and others similarly situated, were continuing to suffer the adverse effects of the flow of funds from the State treasury for the OHA and Hawaiian Homes programs. It had become clear from the standing orders that the Court would not permit us to even challenge the major outflows and that the preliminary injunction motion would not result in an appealable decision based on the merits. We decided to, instead, move for summary judgment in the hope that we could achieve a decision on the merits more promptly.

DATED: Honolulu, Hawaii, May 4, 2004.

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H.WILLIAM BURGESS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, the foregoing document(s) will be duly served upon the following parties via process server, facsimile, hand delivery, U.S. Mail or certified U.S. Mail, postage prepaid.

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_____
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