No. _____

In The
Supreme Court of the United States

EARL F. ARAKAKI, et al.,

Cross-Petitioners,

v.

LINDA LINGLE, et al.,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Cross-Petitioners have standing as beneficiaries of Hawaii's ceded lands trust: to challenge federal laws which require the present trustee (State of Hawaii) to breach its fiduciary duties (i.e., the duty of impartiality and the duty not to comply with illegal trust terms); and to sue Hawaii state officials to enjoin them from breaching the same fiduciary duties;[1]

2. Whether Cross-Petitioners have standing as state taxpayers: to challenge federal laws which require the State of Hawaii to engage in racial discrimination; and to sue to enjoin state officials from implementing the federally mandated racial discrimination; and

3. Whether Cross-Petitioners have standing as state taxpayers (in addition to the right to challenge direct appropriations of tax revenues to the Office of Hawaiian Affairs, properly upheld by the Court of Appeals) to sue to enjoin state officials from racial discrimination in other ways which increase their state tax burden, such as: by issuing general obligation bonds or by transfers characterized as "settlement" or "trust revenues" or by lease of public lands at nominal consideration.

(Cross-Petitioners allege that all the state's racial discrimination pursuant to the Hawaiian Homes Commission

[1] In the sense that Hawaii's ceded lands trust is a charitable trust, this question could be restated as follows: Whether Cross-Petitioners, as persons having a special interest in the charitable trust and its dispositions, may maintain an action requesting the court to apply *cy pres* to delete the illegal trust purpose which requires the trustee to be partial and engage in invidious discrimination. See section IIG *infra*.

QUESTIONS PRESENTED – Continued

Act and the Office of Hawaiian Affairs laws, both that which is and is not federally mandated, diminishes their trust benefits and increases their tax burdens but excludes them from equally sharing the benefits solely because they are not of the favored race.)

PARTIES TO THE PROCEEDING

Cross-Petitioners Earl F. Arakaki; Evelyn C. Arakaki; Edward U. Bugarin; Sandra Puanani Burgess; Patricia A. Carroll; Robert M. Chapman; Michael Y. Garcia; Toby M. Kravet; James I. Kuroiwa, Jr.; Frances M. Nichols; Donna Malia Scaff; Jack H. Scaff; Allen H. Teshima; Thurston Twigg-Smith (collectively "**Cross-Petitioners**") were the Plaintiffs-Appellants in the appeal proceedings below.

Cross-Respondents Linda Lingle, in her official capacity as Governor of the State of Hawaii; Georgina Kawamura, in her official capacity as Director of the Department of Budget and Finance; Russ Saito, in his official capacity as State Comptroller and Director of the Department of Accounting and General Services; Peter Young, in his official capacity as Chairman of the Board of Land and Natural Resources; Sandra Lee Kunimoto, in her official capacity as Director of the Department of Agriculture; Ted Liu, in his official capacity as Director of the Department of Business, Economic Development and Tourism; Rodney Haraga, in his official capacity as Director of the Department of Transportation (collectively "**State Respondents**") were, or their official predecessors were, the State Defendants-Appellees in the appeal proceedings below.

Cross-Respondents Haunani Apoliona, Chairperson; and Rowena Akana; Donald B. Cataluna; Linda Dela Cruz; Dante Carpenter; Colette Y.P. Machado; Boyd P. Mossman; Oswald Stender; and John D. Waihe'e, IV, in their official capacities as trustees of the Office of Hawaiian Affairs (collectively "**OHA Respondents**") were, or their official predecessors were, the OHA Defendants-Appellees in the appeal proceedings below.

PARTIES TO THE PROCEEDING – Continued

Cross-Respondents Micah Kane, Chairman; and Quenton K. Kawananakoa; Mahina Martin; Colin Kaalele; Trish Morikawa; Milton Pa; Stuart Hanchett; Billie Baclig; and Malia Kamaka, in their official capacities as members of the Hawaiian Homes Commission (collectively "**HHCA/DHHL Respondents**") were, or their official predecessors were, the HHCA/DHHL Defendants-Appellees in the appeal proceedings below.

Cross-Respondent the United States of America ("**United States**") was a Defendant-Appellee in the appeal proceedings below.

Cross-Respondents State Council of Hawaiian Homestead Associations and Anthony Sang, Sr. (collectively "**SCHHA Respondents**") were Defendants-Intervenors-Appellees in the appeal proceedings below.

Cross-Respondents Hui Kako'o'aina Ho'opulapula; Blossom Feiteira; and Dutch Saffery (collectively "**HUI Respondents**") were Defendants-Intervenors-Appellees in the appeal proceedings below.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

If this Court grants the petition for writ of certiorari filed by the Defendant-Appellee Governor of the State of Hawaii ("**Governor**"), then it should also issue a writ of certiorari to review the questions presented in this conditional cross-petition.

OPINIONS AND ORDERS BELOW

Cross-Petitioners incorporate by reference the "Opinions and Orders Below" section in the Governor's Petition for Writ of Certiorari.

JURISDICTION

The opinion of the court of appeals was entered on August 31, 2005, is reported as *Arakaki v. Lingle*, 423 F.3d 954 (9th Cir. 2005), and is reproduced in the appendix to the Governor's petition at App. 1. Cross-Petitioners filed a timely petition for panel or *en banc* rehearing on October 3, 2005 which the court of appeals denied on November 4, 2005. (App. 169.) The Governor filed a petition for writ of certiorari which was docketed by the Clerk of this Court on February 7, 2006 as Docket Number 05-988. The jurisdiction of this Court over this conditional cross-petition is invoked under 28 U.S.C. §1254(1) and Rules 12.5 and 13.4 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

To supplement the provisions set forth in the appendix filed by the Governor, relevant provisions of the 1898 Annexation Act; the 1900 Hawaii Organic Act; §§5(g) and 7(b) of the 1959 Admission Act; and other materials essential to understand this conditional cross-petition, are listed in the index and set forth in the appendix, *infra* pursuant to this Court's Rule 14.1(h)(vi).

STATEMENT OF THE CASE

Introduction. Cross-Petitioners are fourteen individual citizens of Hawaii and the United States of America, five women and nine men, all either born and raised in the state or long-time residents. All are taxpayers of the State of Hawaii and beneficiaries of Hawaii's ceded lands trust (sometimes referred to as the "public land trust" or the "§5(f) trust"). Included among them are persons of Japanese, English, Filipino, Hawaiian, Irish, Chinese, Scottish, Polish, Jewish, German, Spanish, Okinawan, Dutch, French and other ancestries. (Complaint ¶¶7, 8 & 9, Cross Pet. App. 82, *infra.*)

Hawaii's ceded lands trust. The "ceded lands" are the approximately 1.8 million acres of public lands of the Republic of Hawaii ceded to the United States in 1898 on the condition that, except for those used for civil, military or naval purposes of the U.S. or assigned for the use of local government, **all revenue or proceeds of the lands "shall be used solely for the benefit of the Inhabitants of the Hawaiian Islands for educational and other public purposes."** Annexation Act, known as the

"Newlands Resolution", 30 Stat. 750 (1898) (Cross Pet. App. 1, *infra*). (Emphasis added.)

In 1898 about 31% of the inhabitants of the Hawaiian Islands were of Hawaiian ancestry; that is, at least one ancestor lived in the Hawaiian Islands before 1778 when the islands were discovered by English explorer Captain James Cook. Robert C. Schmitt, *Demographic Statistics of Hawaii, 1778-1965* (Honolulu, 1968) (extrapolating between 1896 and 1900 census). (Cross Pet. App. 7, *infra.*)

The trust relationship established by the Annexation Act was recognized by the Attorney General of the United States in Op. Atty. Gen. 574 (1899). (Cross Pet. App. 102, *infra.*)

> Page 576. "The effect of this clause is to subject the public lands in Hawaii to a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the Hawaiian Islands for educational or other public purposes."

The Organic Act in 1900 reiterated that "All funds arising from the sale or lease or other disposal of public land shall be applied to such uses and purposes **for the benefit of the inhabitants of the Territory of Hawaii** as are consistent with the Joint Resolution of Annexation approved July 7, 1898." Organic Act §73(e). (Cross Pet. App. 11, *infra.*) (Emphasis added.)

"Section 5 [Admission Act] essentially continues the trust which was first established by the Newlands Resolution in 1898, and continued by the Organic Act in 1900." (Opinion by Margery Bronster, Attorney General State of Hawaii July 17, 1995 to Governor Benjamin J. Cayetano, footnote 1.) (Cross Pet. App. 15, *infra.*)

> "The federal government has always recognized the people of Hawaii as the equitable owners

> of all public lands; and while Hawaii was a territory, the federal government held such lands in 'special trust' for the benefit of the people of Hawaii." *State v. Zimring*, 58 Hawaii 106, 124, 566 P.2d 725 (1977).
>
> "Excepting lands set aside for federal purposes, the equitable ownership of the subject parcel and other public land in Hawaii has always been in its people. Upon admission, trusteeship to such lands was transferred to the State, and the subject land has remained in the public trust since that time." *Id.* at 125.

The insistence of the Republic of Hawaii in 1898 that the United States hold the ceded lands solely for the benefit of the inhabitants of Hawaii was based on historic precedent and had significant, long-reaching consequences for the future State of Hawaii. The United States had held a similar trust obligation as to the lands ceded to it by the original thirteen colonies. Once those new states were established, the United State's authority over the lands would cease. Other future states, Nevada for example, did not have such an arrangement. As the Ninth Circuit held in *U.S. v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997), citing *Light v. United States*, 220 U.S. 523, 536, 31 S.Ct. 485, 488, 55 L.Ed. 570 (1911), the United States still owns about 80% of the lands in Nevada and may sell or withhold them from sale or administer them any way it chooses.

Rice v. Cayetano. The instant case is the logical extension of the landmark *Rice v. Cayetano*, 528 U.S. 495, 516 & 517, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000) in which the United States Supreme Court, on February 23, 2000, held that the definitions of "Hawaiian" and "native Hawaiian," as used in the Office of Hawaiian Affairs

("OHA") laws and the Hawaiian Homes Commission Act ("HHCA"), are racial classifications. In *Rice*, the Court struck down, under the Fifteenth Amendment, the state's use of these classifications to restrict voting for OHA trustees.

Here, Cross-Petitioners, on behalf of themselves and others similarly situated,[2] assert that the continued use of those same invidious classifications by the State of Hawaii and its officials and agencies not only harms Cross-Petitioners by visiting upon their state and nation the evils of governmental racial discrimination but also injures them in two ways that affect their pocketbooks:

- It reduces the benefits and equitable ownership of each of them in the ceded lands trust to less than one-third the share of each of the favored beneficiaries; and
- It increases the Hawaii State tax burden of each of them but excludes them from the benefits of the increase.

Their goal in this lawsuit is to invalidate the OHA laws and the HHCA; and enjoin the further use of those racial classifications by officials of the State of Hawaii; thereby remedying the harm to their pocketbooks and reaffirming the promise of democracy that the law protects all persons equally, not just members of a particular race.

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[2] This suit is on behalf of Cross-Petitioners and "others similarly situated." See Complaint for Declaratory Judgment and for an Injunction (Cross Pet. App. 71, 96 and 103, *infra*, at ¶¶54, heading, 58 & 62). A judgment declaring the HHC/DHHL and OHA laws invalid and permanently enjoining their implementation, will automatically benefit all others similarly situated. As this Court teaches in *Warth v. Seldin*, 422 U.S. 490, 501 (1975), the plaintiff must allege a distinct and palpable injury even if it is shared by a large class of other possible litigants, but so long as this requirement is satisfied, may have standing to seek relief on the basis of the legal rights and interests of others and, indeed, may invoke the public interest in support of their claim.

Background. Hawaii is justly admired as an integrated, intermarried, racially blended society. Its people share qualities of open friendliness and respect for others, without regard to race or origin or station in life. This Aloha spirit fits perfectly with the American ideal of equality under the law without regard to race or ancestry.

But Hawaii's leadership in integration and equality has unfortunately been offset by state constitutional and statutory provisions granting special privileges to some or all persons of Hawaiian ancestry. It began when Congress passed the Hawaiian Homes Commission Act ("HHCA"), Act of July 9, 1921, c. 42, 42 Stat. 108, which injected race and partiality into the previously race-neutral ceded lands trust. Then, in 1959 Congress required Hawaii to adopt the HHCA as a condition of statehood and Hawaii became the only state in the nation to give 99 year homestead leases of its public lands at $1 per year, renewable for another 100 years, exclusively to persons defined by race. In the 1978 Constitutional Convention, the Office of Hawaiian Affairs ("OHA") was established to manage the "income and proceeds from that pro rata portion of the" ceded lands trust "for native Hawaiians." (Haw. Const. Art. XII §6.). This led to the State of Hawaii making annual cash distributions of revenues (gross before expenses) from the trust exclusively for native Hawaiians.

The racial preference movement burgeoned during the years 1986-1994, when John Waihee was Governor.[3]

[3] Act 304 SLH 1990 became law and money poured from the State treasury into OHA, $136.5 million in June 1993 for prior years (1980-1991) as well as sharply increased current years' payments. (Chart of OHA's annual receipts, Cross Pet. App. 16, *infra.*) Through a December 1994 Memorandum of Understanding (Exh. 2 filed 4/13/04 in the Ninth Circuit Court, Cross Pet. App. 21, *infra*.) the state was committed to

(Continued on following page)

By the end of 1994, significant moneys from the ceded lands, instead of going for public education as they did for the first 20 years after statehood (*Hoohuli v. Ariyoshi*, 631 F.Supp. 1153, 1155 (D.Hawaii, 1990)) were being diverted to cash distributions for the exclusive benefit of one comparatively small racial group (the estimated 20,000 to 80,000 "native Hawaiians" of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778). OHA, after receiving the $136 million in 1993, sued the State for hundreds of millions more for the same period. (See *The Ceded Lands Case: Money intended for education goes to OHA*, Hawaii Bar Journal, H. William Burgess and Sandra Puanani Burgess, July 2001. Cross Pet. App. 30, *infra.*)

Some Hawaii residents became concerned. In 1996, one of those residents, Harold "Freddy" Rice, sued then-Governor Ben Cayetano challenging the Hawaiians-only restriction on voting for trustees of the Office of Hawaiian Affairs ("OHA"). On February 23, 2000, the United States Supreme Court in *Rice v. Cayetano*, 528 U.S. 495, 514-16 (2000) held that the definitions of "Hawaiian" and "native Hawaiian" are racial classifications. Because these classifications were the basis for state restrictions on voting in

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pay DHHL $30 million per year for 20 years: total $600 million. That resulted in Act 14 SLH 1995 which began appropriating the $30 million per year. In just the seven years from July 1, 1995 through June 30, 2002, HHC/DHHL depleted the State treasury, by expenditures, debts incurred and lost revenues, of over $430 million and was on track to deplete another $780 million in the following 12 years. (Cross Pet. App. 17, *infra*.) In the 12 years up to June 30, 2002, the cost of OHA to the State treasury was over $417 million and projected to cost another $1.2 billion over the next 12 years if not restrained. (Cross Pet. App. 19, *infra*.)

statewide elections for OHA trustees, the Court held they violate the Fifteenth Amendment and are invalid.

The message of *Rice* was clear: Hawaii's laws defining "Hawaiian" (one drop) and "native Hawaiian" (not less than one-half part) are racial classifications. These definitions are the foundation and only reason for the existence of OHA and HHC/DHHL.

Contemporaneous messages from the Supreme Court were equally clear. "Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993).

Regrettably, these pellucid messages were not heard or heeded in Hawaii's state government. The response of the state to *Rice*, like the response of many states in analogous circumstances after the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), ranged from denial to evasion. The state, for example, still refused to allow non-Hawaiians to *run* for OHA trustee. In July 2000 a multi-racial group of Hawaii residents (many of whom are also Plaintiffs-Appellants-Cross-Petitioners in this case) filed suit to protect the right to run for OHA trustee and to vote in OHA elections without the choice of candidates being abridged by race. In September 2000, the district court granted summary judgment in favor of plaintiffs and required the state to permit otherwise qualified non-Hawaiians to run for office and to serve, if elected, as trustees of OHA. The Ninth Circuit affirmed

this judgment. *Arakaki v. State of Hawaii*, 314 F.3d 1091 (9th Cir. 2002).

But the state and its officials still refused to dismantle the state's racially discriminatory programs. The state's two bastions of racial allocation of public resources are OHA and DHHL. Through these two programs, unjustified by any compelling interest and in no sense narrowly tailored to any legitimate purpose, the state (and to an extent, the federal government) engages in invidious racial discrimination and also breaches its fiduciary duty as trustee of the ceded lands trust.

Procedural history. Cross-Petitioners filed this suit March 4, 2002 to protect their pocketbooks as state taxpayers and the value of their benefits and equitable ownership of the lands in the ceded lands trust. In a series of "standing" orders under F.R. Civ. P. Rule 12(b)(1) lack of jurisdiction over the subject matter, and/or 12(b)(6) failure to state a claim upon which relief can be granted, between May 8, 2002 and January 15, 2004, the District Court, while forbidding Cross-Petitioners from moving for summary judgment, dismissed part after part of Cross-Petitioners' claims and finally dismissed the remaining taxpayer claims on "political question" grounds.

The United States Court of Appeals for the Ninth Circuit reversed the trial court's dismissal on "political question" grounds and upheld Cross-Petitioners' standing to challenge the appropriation of state tax revenues to OHA; but affirmed the dismissal on standing grounds of all of Cross-Petitioners' other claims and even more narrowly restricted their taxpayer standing by also dismissing their challenge to appropriation of tax moneys for HHCA/DHHL.

This leaves Cross-Petitioners with:

- No ability to challenge the federal laws which mandate that the State breach the ceded lands trust and violate the Fourteenth Amendment;
- No claims to protect their interests in the ceded lands trust;
- No claims against the United States or the HHCA/DHHL Defendants; and
- No ability to challenge the major source of funding of OHA, i.e., the transfers financed by general obligation bond issues and the transfers which State officials characterize (inaccurately, Cross-Petitioners believe) as for "settlements" or from "ceded lands" or "trust" revenues.

It also postpones far into the future the liberation of the people of Hawaii from their state government's explicit and offensive racial discrimination.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

In portions of its otherwise fine decision below, the Ninth Circuit conflates "standing" with the merits of the claims alleged; distinguishes away basic law applicable to federally created trusts; sees no redressable evil when the U.S. mandates that a state unconstitutionally discriminate on the basis of race; and can find little relief available in the federal judiciary when a state uses a racial classification to single out some of its taxpayers for exclusion from the benefits of their taxes. In these respects, the court of appeals has decided important questions of federal law in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c).

The result is to leave unchallenged most of a broad and patently offensive regime of racial discrimination and breach of fiduciary duty by the State of Hawaii and its officials. Since the dismissal of the trust claims and the claims against HHC/DHHL, the drain from the state treasury and the development of a strong and visible independence movement in Hawaii have escalated. Large separationist signs[4] are regularly posted at Iolani Palace facing King Street, one of Honolulu's busiest thoroughfares. Protesters wearing red T-shirts as symbols of their racial separateness are frequently seen. These facts are commonly known in Hawaii and appropriate for judicial notice under F.R. Evid. 201.

Arakaki Cross-Petitioners did not petition for certiorari, intending instead to first pursue, as expeditiously as possible, final judgment on the merits and then to seek review of the interlocutory orders dismissing Arakaki Cross-Petitioners' other claims.

But now the Governor has filed a petition for certiorari. This presents a welcome opportunity for the major parties to ask this Court to address their questions as to standing and perhaps put this case finally on track to a just, speedy and inexpensive determination. Piecemeal review of just the one "standing" issue raised by the Governor would have the opposite effect.

Judicial economy, the fundamental rights at stake in this case, and the ominous nature of the existing regime, call for resolution of all "standing" questions at the same time and soon.

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[4] "We are not American, We are not American", "We don't need no American Government", See http://tinyurl.com/9fzvt.

I. The Court of Appeals' opinion conflates "standing" and the merits of the claims alleged.

A. Standing focuses on the party, nature and source of the claims asserted, not the merits.

"The requirement of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.'" *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 484, 102 S.Ct. 752, 765, 70 L.Ed.2d 700 (1982), quoting from *Flast v. Cohen*, 88 S.Ct. 1942, 1952, 392 U.S. 83, 99, 20 L.Ed.2d 947 (1968).

B. Allegations establish standing, must be accepted as true and construed favorably.

The focus on the party also means that standing is not defeated by failure to prevail on the merits. An allegation of injury establishes standing to win a determination whether the law affords redress for that injury. 13 Fed. Prac. & Proc. Juris.2d §3531, 2005 pocket part, n.2.6 *Wright & Miller*.

"For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Graham v. FEMA*, 149 F.3d 997, 1001 (9th Cir. 1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)); see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (holding that "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim'").

C. Essentially the standing question is whether persons in the same position making claims of the same nature and source are given judicial relief.

> Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, * * * it often turns on the **nature and source of the claim asserted.** * * * Essentially, the standing question in such cases is **whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.**

Warth v. Seldin, 95 S.Ct. 2197, 2206, 422 U.S. 490, 500, 45 L.Ed.2d 343 (1975). (Emphasis added.)

Thus, in reviewing the motions to dismiss for want of standing, the court below should have construed the complaint favorably and limited its focus to the Cross-Petitioners and the source and nature of the claims they allege. Paraphrasing this Court's teaching in *Warth, supra* at 428 U.S. 500, the essential questions should have been to this effect:

Under the common law of trusts and 42 U.S.C. §1983, do persons in Cross-Petitioners' position (i.e., public land trust beneficiaries truthfully claiming injury traceable to breach of fiduciary duty by the former and present trustees) have a right to sue?

Under the Fifth and Fourteenth Amendments and 42 U.S.C. §1983, do persons in Cross-Petitioners' position (i.e., state taxpayers truthfully claiming a state, in implementing a program mandated by the federal government, injures them by denying them, solely because of their race, the equal benefits of their taxes) a right to judicial relief?

D. The Ninth Circuit has regularly upheld standing for trust beneficiaries and state taxpayers.

In *Price v. State of Hawai'i*, 764 F.2d 623, 628-30 (9th Cir. 1985), Dr. Nui Loa Price, "individually and in his capacity as ancestral chief of the Hou Hawaiians" and other native Hawaiians (50% or more blood quantum) claimed the State had breached the public land trust by failing to expend Admission Act §5(f) funds "for the betterment of native Hawaiians"; instead spending §5(f) funds on "the maintenance of the State of Hawaii governmental structure" a purpose not authorized by the Admission Act. The Ninth Circuit said,

> To establish standing, a plaintiff must allege personal injury that is "fairly traceable" to the defendant's conduct and "likely to be redressed by the requested relief." (Internal cites omitted.)
>
> The Hou have suffered an economic injury that can be "fairly traced" to the State's decision to fund other purposes than section 5(f)'s "the betterment of the conditions of native Hawaiians.". . . It is also clear that the Hous' economic injury would be "likely" to be redressed (internal cites omitted.) if we enjoined Governor Ariyoshi from allowing executive agencies to continue to expend trust funds in the manner alleged by the Hou. . . . We hold that the Hou have standing to seek prospective injunctive relief against Governor Ariyoshi.

Napeahi v. Paty, 921 F.2d 897, 898-99 (9th Cir. 1990) concerned a state official's shoreline certification which "resulted in including 1.75 acres within the boundary of the privately owned parcel, rather than as submerged land held by the State in trust for the people of Hawaii." The plaintiff was "a beneficiary of the ceded land trust who

contends that the State erred in its determination of the seaward boundary, thus depriving the trust of a parcel of land that should have remained subject to the terms of the trust." The Court noted at 921 F.2d 901 n.2, "Although the parties have not, in this case, raised the issue of standing to enforce the provisions of the Trust, Napeahi, as a native Hawaiian and beneficiary of this public trust, does have standing to enforce its provisions."

In a later *Price v. Akaka*, 3 F.3d 1220, 1224 (9th Cir. 1993), a §1983 action against the OHA trustees to challenge expenditure of public trust funds for a referendum to define "native Hawaiians" as all people of Hawaiian ancestry, the court held, "Price is among the class of §5(f) beneficiaries whose welfare is the object of the action at issue. Therefore, there is 'little question that the [trustees'] action or inaction has caused him injury, and that a judgment preventing or requiring action will redress it.'"

In *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984), eleven taxpayers (nine "native Hawaiians" and two of no Hawaiian ancestry) challenged under §1983 and the Fourteenth Amendment, spending tax monies from the state general fund for the benefit of the racial class "Hawaiians" (one drop of Hawaiian blood). They claimed they are burdened with more taxes to support the second class. The court held that the case fit the description of "good faith pocketbook action" in *Doremus v. Board of Educ. of Borough of Hawthorne*, 342 U.S. 429, 434, 72 S.Ct. 394, 397 (1952) and concluded that individual plaintiffs who are not Hawaiian have standing as taxpayers.

The source and nature of the claims alleged and redressability sought in the above four cases are the same as in Cross-Petitioners' claims. Since that fully satisfies the essentials, the standing inquiries should have ended there.

The next section will show that the Court of Appeals construed the complaint *un*favorably, based its standing dismissals on its conclusions as to the merits, and those conclusions are wrong.

II. The unfavorable construction and erroneous conclusions as to the merits.

A. Injecting partiality and race did not extinguish the trustee's obligations.

Any trust obligation the United States assumed in the Newlands Resolution [Annexation Act of 1898] for the lands at issue here was extinguished by Congress when it created the DHHL/HHCA and granted it control of defined "available lands." *Arakaki v. Lingle*, 423 F.3d at 964.

With all respect, that is simply not so. The United States still retained title to the 200,000 acres of "available lands" as well as the other 1.2 million acres of the ceded lands and also overall control over DHHL/HHC and the Territory of Hawaii. (Article IV, Sec. 3, U.S. Const. gives Congress the power to make all needful rules and regulations respecting the territory or other property belonging to the United States. The authority of Congress to provide for the government of Hawaii prior to statehood was derived from this section. *In re Island Airlines*, 44 Haw. 634, 361 P.2d 390 (1961)).

Moreover, Congress' power to destroy rights in lands it holds in trust is limited by the Fifth Amendment. *Babbitt v. Youpee*, 519 U.S. 234 (1997). As trustee, Congress, has a duty to act impartially amongst multiple beneficiaries. The Restatement of the Law, Trusts 3d §183 entitled "Duty to Deal Impartially With Beneficiaries": When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.

Furthermore, Congress has no power to discriminate among beneficiaries on racial grounds. See *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957) (government, acting as trustee, cannot enforce even privately created racial classification). See also, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("Accordingly, we hold today that all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny"). Cross-Petitioners assert federal constitutional rights to impartial and equal treatment that neither Congress nor the State can override.

The Restatement of Trusts 2d §166 (1959) entitled "Illegality" provides the trustee is under a duty not to comply with a term of the trust which is illegal and cites as an example of illegality a provision which would be contrary to public policy.

In 1921, when Congress enacted the HHCA, the United States as trustee violated its fiduciary duty to the people of Hawaii in two ways: It injected partiality and race into the way it treated the beneficiaries; and it set aside some 200,000 acres of the ceded lands for the exclusive benefit of native Hawaiian beneficiaries while still allowing those native Hawaiian beneficiaries to share fully in the benefits of the remaining lands.

In the sense that each trust beneficiary is the equitable or beneficial owner of a pro-rata share of the trust corpus, the HHCA gives each native Hawaiian beneficiary the equitable ownership of over three times the area of the ceded lands equitably owned by each beneficiary not of the favored race. (Based on OHA's estimate of approximately 80,000 native Hawaiians, their pro-rata beneficial ownership of the 200,000 acres of "available lands" would be 2.5 acres each. The native Hawaiians, as part of the 1.2

million total population of Hawaii, per Census 2000, would also continue to share in the beneficial ownership of the other 1.2 million acres, or 1 acre each. Therefore, each native Hawaiian would be the equitable "owner" of 3.5 acres of ceded lands, every other resident would equitably "own" 1 acre.) (Many believe the number of native Hawaiians is less than 20,000 so the magnitude of the racial favoritism may be much higher than 3 to 1.)

Enacting and implementing the HHCA thus severely violated the duty of impartiality the United States owed to each individual beneficiary lacking the favored quantum and type of blood.

B. Trustee powers are held in a fiduciary capacity.

The Circuit Court opinion, 423 F.3d at 964, provides: Assuming, *arguendo*, that the United States became a trustee, its "status as trustee was expressly subject to future revision. The Resolution specifically provides that 'the United States shall enact special laws for [the] management and disposition' of the public lands."

Trustees typically are given broad powers over the management and disposition of trust assets and those powers are held in a fiduciary capacity. See, for example, the broad powers given, except as otherwise specifically provided in the trust, to all trustees, under the Uniform Trustees' Powers Act adopted in Hawaii as Chapter 554A H.R.S. In the exercise of the trustee's powers, "a trustee has a duty to act with due regard to the trustee's obligation as a fiduciary." §554A-3 H.R.S. The Restatement of the Law, Trusts 3d §64, comment on subsection (1), unless otherwise provided by the terms of the trust, a power of

termination or modification that runs with the office of trustee is held by the trustee in a fiduciary capacity.

C. Returning ceded lands with "strings" attached did not end the U.S. role as trustee.

The Court below, *Arakaki v. Lingle*, 423 F.3d at 964: Any lingering doubt over the United States' role as trustee was eliminated entirely in the Admission Act when the United States "grant[ed] to the State of Hawaii, effective upon its admission in the Union, the United States' title to all the public lands and other public property, and to all lands defined as 'available lands' by section 203 of the Hawaiian Homes Commission Act . . . title to which is held by the United States immediately prior to its admission into the Union."

The Uniform Trust Code dated March 7, 2005 drafted by the National Conference of Commissioners on Uniform State Laws, Section 705 provides that a trustee may resign upon at least 30 days' notice to the qualified beneficiaries and all co-trustees; or with the approval of the court, and

> "(c) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation." (Cross Pet. App. 46, *infra.*)

It is true that in 1959, upon Hawaii joining the union, the United States returned title to about 1.4 million acres of the ceded lands[5] to Hawaii, including the about 200,000

[5] Admission Act §5(g), Cross Pet. App. 12, *infra*, limited the term "public lands and other public property" to "the lands and properties that were ceded to the United States by the Republic of Hawaii under

(Continued on following page)

acres of "available" lands, but the return was not without strings. If the authority of the United States over the 1.4 million acres had ceased then, that might well have ended the role of the United States as trustee. But, unlike its treatment of the original thirteen states,[6] when it returned Hawaii's ceded lands, the United States' authority over Hawaii's ceded lands did not cease. Quite to the contrary, as the court said in *Price v. Akaka*, 3 F.3d 1220, 1222, n.2 (9th Cir. 1993)

> Although the §5(b) lands include the "available lands" under the HHCA, §4 of the Admission Act "strictly limits the manner in which Hawaii may manage the homelands and the income they produce."

These powers reserved by the United States were so important to Congress that §7 of the Admission Act required the provisions "reserving rights or powers to the United States" to be "consented to fully by said state and its people" and spelled out the precise language to be put on the ballot for ratification by the electorate in the 1959 statehood election:

> "All provisions of the Act of Congress approved ..... (date of approval of this Act) ..... reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people."

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the joint resolution of annexation approved July 7, 1898 . . . , or that have been acquired in exchange for lands or properties so ceded."

[6] *U.S. v. Gardner*, 107 F.3d at 1317 and 1318 (9th Cir. 1997), quoting from the Supreme Court, "Once those new states were established, the United States' authority over the land would cease."

The United States had no authority to impose these restrictions on Hawaii's use of its public lands as a condition of statehood. That would have violated the Equal Footing Doctrine. *Coyle v. Smith*, 221 U.S. 559 (1911). Nor does the United States have such authority by virtue of being the federal government. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Art. X, U.S. Const.

The only authority of the United States in 1959 to reserve any rights or prescribe any terms or conditions over Hawaii's ceded lands derived from the 1898 Annexation Act in which the United States accepted the obligation to hold those lands solely for the benefit of the Inhabitants of the Hawaiian Islands for educational and other public purposes.

Thus in 1959, after statehood, the United States held only trust powers over the ceded lands; and trust powers may be exercised only "with due regard to the trustee's obligation as a fiduciary." Uniform Trustees' Powers Act, §554A-3 H.R.S.

The United States has never relinquished the trustee powers it so carefully reserved in 1959 although two presidents have urged it to do so.[7] Nor has the United States rescinded its mandate that the State of Hawaii, the successor trustee, adopt and continue to carry out the HHCA. That official mandate by the United States still hangs like a sword over the heads of Hawaii state officials

[7] President Ronald Reagan in 1986 and President George H.W. Bush in 1992, expressed concern that the HHCA employs an express racial classification and urged Congress to amend Section 4 of the Admission Act so that the consent of the United States is not required and also to give further consideration to the justification for the troubling racial classification. (Cross Pet. App. 58, *infra.*)

commanding them to keep violating the Fourteenth Amendment.

D. Allowing a trustee to escape liability, and immunize a successor trustee from liability for breach of trust – by breaching the trust.

The Court of Appeals concludes that the United States cannot be sued on Plaintiffs' trust beneficiary theory because §4 of the Admission Act does not designate it as a co-trustee and "the United States has only a somewhat tangential supervisory role of the Admission Act, rather than the role of trustee." *Arakaki v. Lingle*, 423 F.3d at 964. Yet, a few paragraphs later at page 965, it says because §4 of the Admission Act "expressly reserves to the United States that no changes in the qualifications of the lessees may be made without its consent" the United States is an indispensable party and, "Accordingly, the district court properly dismissed the Plaintiffs' trust beneficiary claim against the state defendants."

The Court of Appeals cites no legal precedent for this extraordinary conclusion: A trustee can select a successor trustee, mandate that the successor violate the trust and then resign, and the beneficiaries have no redress against anyone. This heads-trustees-win-tails-beneficiaries-lose construction is as unfavorable as it is possible to imagine. It violates both elementary trust law and the Equal Protection clause. Congress may not authorize the states to violate the Fourteenth Amendment. *Saenz v. Roe*, 526 U.S. 489, 508, 119 S.Ct. 1518, 1528 (1999).

E. Nor is the U.S. an indispensable party for the claim against the current trustee.

The Court of Appeals at *Arakaki v. Lingle*, 423 F.3d at 965, cites *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003) as requiring the United States to be an indispensable party here. But *Carroll v. Nakatani* did not mention "Indispensable party." Redressability was the issue there. In that case, the Plaintiff, Patrick Barrett, a non-Hawaiian, applied for a Hawaiian homestead lease, but did not sue the United States, and maintained he was not challenging the Admission Act, or any other federal law. On appeal the Ninth Circuit Court said,

> His claim, on its own, presented without the United States as a party and never challenging the constitutionality of the Admissions Act renders his claim not redressable. . . .
>
> We also affirm the district court's holding that Barrett's claim challenging the HHC homestead lease program is not redressable because he failed to join the United States or challenge the Admissions Act. *Id.* at 934.

In this case, the Cross-Petitioners do not seek award of Homestead leases, did bring suit against the federal government, and do challenge the constitutionality of both §4 of the Admission Act and the other HHCA/DHHL laws. (Complaint, Cross Pet. App. 78, 88, 89, *infra.*) The redress Cross-Petitioners seek is a declaratory judgment that the applicable federal and state laws are unconstitutional and a permanent injunction against their further implementation. This remedy is readily grantable by a federal court and fully satisfies the third prong for standing, redressability.

Neither *Carroll* nor any other decision of the Ninth Circuit or the Supreme Court, to Cross-Petitioners'

knowledge, has held that the U.S. is an indispensable party to every suit in federal court challenging the validity of an Act of Congress. The Department of Justice itself in this case said in the District Court, "To begin with, the United States is not required to be named as a party in every action involving state statutes to which it has given its imprimatur." Reply by Defendant United States to Plaintiffs' Response to the United States' Motion to Dismiss filed in the District Court August 26, 2002. Docket 201. (Cross Pet. App., *infra*, 115.)

Instead of such a burdensome requirement, Congress and federal court rules provide a notice requirement in civil suits. 28 U.S.C. §2403(a) requires that in a suit in which the United States is not a party and the constitutionality of "any Act of Congress affecting the public interest is drawn into question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality." To the same effect, see Rule 29.4(b) of this Court's rules, Fed. R. App. P. 44(a) and F.R. Civ. P. Rule 24(c).

As the Ninth Circuit said in *Green v. Dumke*, 480 F.2d 624, 628 (9th Cir. 1973), the Supreme Court has repeatedly found federal jurisdiction for challenges to the activities of state agencies administering federal programs under 42 U.S.C. §1983 combined with 28 U.S.C. §1343. It has not mattered a jurisdictional whit that the agency was enforcing federal statutes, as well as pursuing state ends. At 480 F.2d 629, the court continued, "When the violation is the joint product of the exercise of a State power and a non-State power then the test under the Fourteenth Amendment and §1983 is whether the state or its officials played a 'significant' role in the result."

F. Even third parties are liable if they participate in breach of trust.

Had the United States never been a trustee, Cross-Petitioners would still have standing to assert claims against it for mandating a breach of trust by the present trustee. See *Bogert's Trusts And Trustees*, updated by the 2004 pocket part, Chapter 43. Participation In A Breach Of Trust, §901. Right That Third Party Shall Not Knowingly Participate In A Breach Of Trust.

General Rule

> Just as every owner of a legal interest has the right that others shall not, without lawful excuse, interfere with his possession or enjoyment of the property or adversely affect its value, so the beneficiary, as equitable owner of the trust *res* has the right that third persons shall not knowingly join with the trustee in a breach of trust. One acting with a trustee in performing an act that such person knows or should know is a breach of trust becomes a participant in the breach and subject to liability for any damages that result or to restore the trust property traced to such person's possession.

G. Both the Hawaii Supreme Court and Ninth Circuit have recognized that the reasoning and law of charitable trust cases may be applied to Hawaii's ceded lands 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 ceded lands trust,

> Although the case before us involves the ceded lands trust, rather than a charitable trust, the parallels are unmistakable. 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.

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, Judge Canby, said, at 928 F.2d 826,

> In addition, allowing 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).

The comment to Section 405 of the Uniform Trust Code, **Charitable Purposes; Enforcement** (Cross Pet. App. 46, *infra*) provides that the state attorney general or persons with special interests may enforce the trust. Section 413, **Cy Pres**, provides that if a particular

charitable purpose becomes unlawful "(3) the court may apply *cy pres* to modify the trust by directing that the trust property be applied . . . in a manner consistent with the Settlor's charitable purposes." The comment provides that such actions may be maintained by the settlor, state attorney general or by a person having a special interest in the charitable disposition.

See also, Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. Hawaii L. Rev. 593 n.401 (1999) noting that observers of the charitable sector have repeatedly voiced concerns that the attorneys general do not provide adequate enforcement and that Hawaii has an appointed attorney general.

H. The Circuit Court's holding too narrowly restricts the relief available when a state uses a racial classification to single out some of its taxpayers for exclusion from the benefits of their taxes.

As with the trust beneficiary claims discussed above, decisions as to the merits of Cross-Petitioners' state taxpayer claims have no place in a standing determination. We have already shown in part I above, the Cross-Petitioners are in the same position, making claims of the same nature and source and seeking the same type of declaratory and injunctive relief as the plaintiffs in *Hoohuli, supra*, the leading Ninth Circuit case on state taxpayer standing. *Cammack*, 932 F.2d at 770 and n.9. Indeed, the trial court twice said the allegations were "nearly identical." Order dated May 8, 2002, App. 122 and 124. That should have ended the inquiry as to Cross-Petitioners' taxpayer standing.

Instead, the Court of Appeals, even more than the trial court, went deeply into the merits by parsing the taxpayer claim and ruling, without the benefit of evidence or the procedural safeguards of trial or summary judgment, on the particular challenges it would not allow and the relief it would not grant. It allowed standing to challenge appropriation of tax revenue to OHA but denied Cross-Petitioners' standing to challenge "all other spending that does not originate in tax revenue." (423 F.3d at 977.) Specifically, the Court of Appeals opinion denied Cross-Petitioners' standing to challenge the $136.5 million "settlement" paid to OHA in 1993 or the general obligation bonds issued to fund it (423 F.3d at 972); or the issuance of bonds generally (423 F.3d at 977); and, by dismissing all claims against the U.S. and HHC/DHHL, it prohibited challenges to the federal mandate and to any expenditures of tax moneys or diversions of trust revenues to HHC/DHHL regardless of the source of the state funds or the method of the diversion (423 F.3d at 967).

These restrictions are not only out of place in a standing decision, they conflict with an *en banc* and other rulings of the Ninth Circuit and with this Court's taxpayer jurisprudence.

In *Doe v. Madison School District, en banc*, 177 F.3d 789 (9th Cir. 1999), the Ninth Circuit Court *en banc* comprehensively reviewed taxpayer standing noting with approval that state taxpayers may challenge a variety of improper actions which could have a detrimental effect on the public *fisc*: at 177 F.3d 793, to prevent **a misuse of public funds**; at 793-94, "activity is supported by any separate tax or paid for from any particular appropriation **or that it adds any sum whatever to the cost of conducting the school**"; at 796, the challenged activity involves "a measurable appropriation" **or loss of revenue**.) (Emphasis added and internal citations omitted.)

See also *Cammack v. Waihee*, 932 F.2d 765, 770 (9th Cir. 1991), "municipal taxpayer standing simply requires the 'injury' of an allegedly **improper expenditure of municipal funds**, and in this way mirrors our threshold for state taxpayer standing"; municipal taxpayers may challenge city lease of airport terminal space to church where the lease agreement could have **a detrimental impact on the public fisc**; Legislative enactments are not the only government activity which the taxpayer may have standing to challenge, contrasting state taxpayer's ability to challenge executive conduct with federal taxpayer's. (Emphasis added and internal citations omitted.)

This Court's taxpayer jurisprudence. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice. *City of Richmond v. J.A. Croson & Co.*, 488 U.S. 469, 492, 109 S.Ct. 706, 721 (1989).

While federal taxpayers generally can bring Establishment Clause cases, see *Flast v. Cohen*, 392 U.S. 83 (1968), the standing rules for municipal taxpayers and state taxpayers are more liberal. See *Frothingham v. Mellon*, 262 U.S. 447, 486-87, 43 S.Ct. 597, 601 (1923) (municipal taxpayers generally have standing); *Doremus v. Bd. of Education of the Borough of Hawthorne*, 342 U.S. 429, 434, 72 S.Ct. 394, 397 (1952) (state taxpayer standing for "good-faith pocketbook action").

In *Crampton v. Zabriske*, 101 U.S. 601 (1879), Zabriskie and two other residents and taxpayers of the County of Hudson, New Jersey, brought suit in the federal Circuit Court of New Jersey to compel the county board to reconvey illegally purchased land and the seller, Crampton, to return the county bonds issued to pay for the land. The court rendered a decree in accordance with the prayer of the

bill, and also restrained Crampton from suing for the value of the lots. He thereupon appealed to the Supreme Court of the United States. This Court affirmed the decree saying, at 101 U.S. 609,

> Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question.

Today, 127 years later, there is no serious question that Cross-Petitioners, compelled to pay an illegal debt created by their state government and excluded from sharing the benefits of that debt solely because they are not of the favored race, suffer a genuine pocketbook injury.

CONCLUSION

If the Court grants any petition for writ of certiorari in this case, it should also grant this conditional cross-petition and review the issues raised herein.

Respectfully submitted,

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March 3, 2006

INDEX TO CROSS-PETITIONERS' APPENDIX

INDEX TO CROSS-PETITIONERS' APPENDIX – Continued

ANNEXATION ACT

30 Stat. 750 (1898)

JOINT RESOLUTION

To Provide for Annexing the Hawaiian Islands to the United States

Whereas the Government of the Republic of Hawaii, having in due form, signified its consent*, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands together with every right and appurtenance thereunto appertaining; Therefore

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

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* Consent, see Resolution of the Senate of Hawaii Ratifying the Treaty of Annexation of 1897 on page 15.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: Provided, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have the power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian

Islands the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars. So long, however, as the existing Government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided said Government shall continue to pay the interest on said debt.

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

§ **2.** That the commissioners hereinbefore provided for shall be appointed by the President, by and with the advice and consent of the Senate.

§ **3.** That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, and to be immediately available, to be

expended at the discretion of the President of the United States of America, for the purpose of carrying this joint resolution into effect.

Approved July 7th, 1898.

This is Resolution No. 55, known as the "Newlands Resolution," of July 7, 1898; 30 Stat. 750; 2 Supp. R. S. 895. The formal transfer took place Aug. 12, 1898, the date mentioned in §§ 1, 4, 10, 98 and 99 of the Org. Act. See also Hawaii v. Mankichi, 190 U.S. 197; but, for some purposes at least, the powers of the Hawaiian government may have ceased on July 7, 1898, the date of the joint resolution, as, for example, the power to dispose of public lands or to grant public franchises: 22 Ops. 574, 627; or to issue registers of vessels: 22 Ops. 578. Referred to in 188 U. S. 313; 33 Ops. 411.

During the period between annexation and the establishment of territorial government, June 14, 1900, the relations between Hawaii and the United States remained practically unchanged; the laws of Hawaii continued in force; and the constitution and laws of the United States in general did not extend to Hawaii except as otherwise provided by the resolution: 22 Ops. 150, and authorities infra.

Public Lands. Power of Hawaii to dispose of, ceased, though resolution continued "civil, judicial and military powers:" 22 Ops. 574; and this abrogation of power extended to sales or confirmations of title afterwards in cases of conditional sales or entries made before the passage of the resolution, and though it continued the "municipal legislation" of Hawaii: 22 Ops. 627; but the dispositions of public lands and grants of franchises made during that period were ratified by Org. Act, § 73, which

see, with §§ 75, 89, 91, 95, 97, 99, and notes, on public lands and public property in general ceded by Hawaii. Palmyra Island was part of the land ceded to the United States by Hawaii. 133 F. 2d 743.

Registry of Vessels. Hawaiian laws relating to abrogated: 22 Ops. 578. Contra: 11 H. 581; 12 H. 66. But registers that were issued during this period were in effect ratified: Org. Act § 98.

Customs Duties. Hawaiian customs laws remained in force: 12 H. 27; 13 H. 546; 105 Fed. 608; 22 Ops. 565. See Org. Act, §§ 7, 88, 93.

Tonnage Tax. Hawaiian ports, foreign, within tonnage tax law: 22 Ops. 150.

Chinese Exclusion. United States laws applicable: 22 Ops. 249; 11 H. 600; 11 H. 654; but Chinese who had previously acquired a residence in Hawaii and were temporarily absent could return, as that was not "further immigration:" 22 Ops. 353, and minority opinions in 11 H. 600; 11 H. 654, supra. Contra: 11 H. 600: 11 H. 654, supra. "Further immigration" means from other countries than the United States: 23 Ops. 487. See also Org. Act, §§ 4, 101, and notes.

Claims against Hawaii. Should be presented to State Department and by it referred to Hawaii for settlement out of its separate assets: 22 Ops. 583.

Copyright law. Not applicable to Hawaii: 22 Ops. 268.

Contract labor. Hawaiian laws relating to, continued in force: 12 H. 96. See also 8 H. 201, and 13 H. 71. These laws were repealed by Org. Act, §§ 7, 10.

Juries, grand and trial. Hawaiian laws permitting indictments without grand juries, and verdicts by nine out of twelve trial jurors in civil and criminal cases, continued in force; in continuing municipal legislation not contrary to the constitution an intention was not shown to extend to Hawaii the constitutional amendments relating to these subjects: 190 U. S. 197; 11 H. 571, and 12 H. 55; 12 H. 64; 12 H. 96; 12 H. 189; 13 H. 76; 13 H. 534; 13 H. 570; 1 U. S. D. C. Haw. 34, and minority opinion in 13 H. 32, infra. Contra: 13 H. 32; 1 U. S. D. C. Haw. 303, and minority opinions in 13 H. 76; 13 H. 534; 13 H. 570, supra. See Org. Act, § 83 and note.

Admiralty jurisdiction. Continued in circuit judges of Hawaii: 11 H. 693. See also Org. Act, §§ 10, 86, and notes.

Power of appointment. Of circuit judges, probably continued in President of Republic of Hawaii, but, if not, still appointees were de facto judges: 14 H. 229. See Org. Act, § 80.

See Org. Act, §§ 102, 103, on postal savings bank referred to in this resolution.

The commission referred to in this resolution prepared the Organic Act, post, which see, with notes thereto, for extension of Federal constitution and laws generally to Hawaii.

EXHIBIT 12

Native Hawaiian Data Book 1998: Table 1.1

Table 1.1 The Population of the Hawaiian Islands: 1778-1896.

Year	Population Estimates	Percent Change	Hawaiian		Part Hawaiian	
1778	300,000	—	—	—	—	—
1796	270,000	-10.00%	—	—	—	—
1803	266,000	-1.48%	—	—	—	—
1804	154,000	-42.11%	—	—	—	—
1805	152,000	-1.30%	—	—	—	—
1819	144,000	-5.26%	—	—	—	—
1823	134,925	-6.30%	—	—	—	—
1832	124,449	-7.76%	—	—	—	—
1836	107,954	-13.25%	—	—	—	—
1849	87,063	-19.35%	—	—	—	—
1850	84,165	-3.33%	—	—	—	—
1853	73,138	-13.10%	70,036	95.76%	983	1.34%
1860	69,800	-4.56%	65,647	94.05%	1,337	1.92%
1866	62,959	-9.80%	57,125	90.73%	1,640	2.60%
1872	56,897	-9.63%	49,044	86.20%	2,487	4.37%
1878	57,985	1.91%	44,088	73.03%	3,420	5.90%
1884	80,578	38.96%	40,014	49.66%	4,218	5.23%
1890	89,990	11.68%	34,436	38.27%	6,186	6.87%
1896	109,020	21.15%	31,019	28.45%	8,485	7.78%

Source: Robert C. Schmitt. *Demographic Statistics of Hawaii: 1778-1965*. (Honolulu, 1968). Robert c. Schmitt. *Historical Statistics of Hawaii*. (Honolulu, 1977).

One-century after European contact the Native Hawaiian population of Hawai'i declined nearly 80%. It would not be speculation to assert that Native Hawaiians bore the brunt of the population decline. While abortion and infanticide were in limited practice prior to 1778, foreign contact introduced a host of apocalyptic agents. Population decline was due in part to venereal disease-resulting in sterility, miscarriages, and death-and epidemics such as small pox, measles, whooping cough and influenza. Decline was also accelerated by a low fertility rate, high infant mortality, poor housing, inadequate medical care, inferior sanitation, hunger and malnutrition, alcohol and tobacco use. Over two centuries after European contact many of these situations still exist.

Table 1.2 The Population of the Territory and State of Hawai'i: 1900-1990.

Census Year	Total Population[a]	Percent Change	Hawaiian[b]		Part Hawaiian[b]		Non Hawaiian	
1900	154,001	——	29,799	19.35%	9,857	6.40%	114,345	74.25%
1910	191,909	24.62%	26,041	13.57%	12,506	6.52%	153,362	79.91%
1920	255,912	33.35%	23,723	9.27%	18,027	7.04%	214,162	83.69%
1930	368,336	43.93%	22,636	6.15%	28,224	7.66%	317,476	86.19%
1940	423,330	14.93%	14,375	3.40%	49,935	11.80%	359,020	84.81%
1950	499,769	18.06%	12,245	2.45%	73,845	14.78%	413,679	82.77%
1960	632,772	26.61%	11,294	1.78%	91,109	14.40%	530,369	83.82%
1970	768,559	21.46%	71,274		9.27%		697,285	90.73%
1980	964,691	25.52%	115,500		11.97%		849,191	88.03%
1990	1,108,229	14.88%	138,742		12.52%		969,487	87.48%

[a] Includes all races. Note: some numbers have been revised from earlier reports by the Census Bureau, moreover, the Bureau's definition of Hawaiian/Part-Hawaiian has changed over the decades.
[b] Hawaiian as defined by the U.S. Bureau of the Census.

Source: United States. Bureau of the Census. Robert C. Schmitt. *Historical Statistics of Hawaii.* (Honolulu, 1977).

A seven-fold increase in the overall population occurred in a 90-year period. Peak annual growth rates occurred from 1910 through 1930. The increase was not due to a rejuvenated Native Hawaiian population. Rather, the heavy labor demands of an expanding plantation economy and the limited availability of local labor resulted in a flood of more than 250,000 foreign laborers during the three decades following Annexation (1898). Most of the laborers who arrived during the early 1900s were Japanese and Filipino. Laborers from Portugal, Puerto Rico, Spain, and Korea were also brought in, but in smaller numbers. While many of these laborers returned home, many choose to remain in the islands. Importation of foreign laborers ended during the early 1930s resulting in a reduced growth rate.

Opinion of Attorney General of the U.S.,
22 Op.Atty.Gen. 574 (1899)

Page 576. “The effect of this clause is to subject the public lands in Hawai’i to a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the Hawaiian Islands for educational or other public purposes.”

Hawaii Organic Act of April 30, 1900
C339, 31 Stat. 141 § 73(e)

(e) All funds arising from the sale or lease or other disposal of public land shall be appropriated by the laws of the government of the Territory of Hawaii and applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation, approved July 7, 1898.

Sec. 5 THE ADMISSION ACT

(g) As used in this Act, the term "lands and other properties" includes public lands and other public property, and the term "public lands and other public property" means, and is limited to the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded.

Sec. 7 THE ADMISSION ACT

(b) At an election designated by proclamation of the Governor of Hawaii, which may be either the primary or the general election held pursuant to subsection (a) of this section, or a territorial general election, or a special election, there shall be submitted to the electors qualified to vote in said election, for adoption or rejection, the following propositions:

"(1) Shall Hawaii immediately be admitted into the Union as a State?

"(2) The boundaries of the State of Hawaii shall be as prescribed in the Act of Congress approved.....
(Date of approval of this Act)
and all claims of this State to any areas of land or sea outside the boundaries so prescribed are hereby irrevocably relinquished to the United States.

"(3) All provisions of the Act of Congress approved .....
(Date of approval of this Act)
reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people."

In the event the foregoing propositions are adopted at said election by a majority of the legal votes cast on said submission, the proposed constitution of the proposed State of Hawaii, ratified by the people at the election held on November 7, 1950, shall be deemed amended as follows: Section 1 of article XIII of said proposed constitution shall

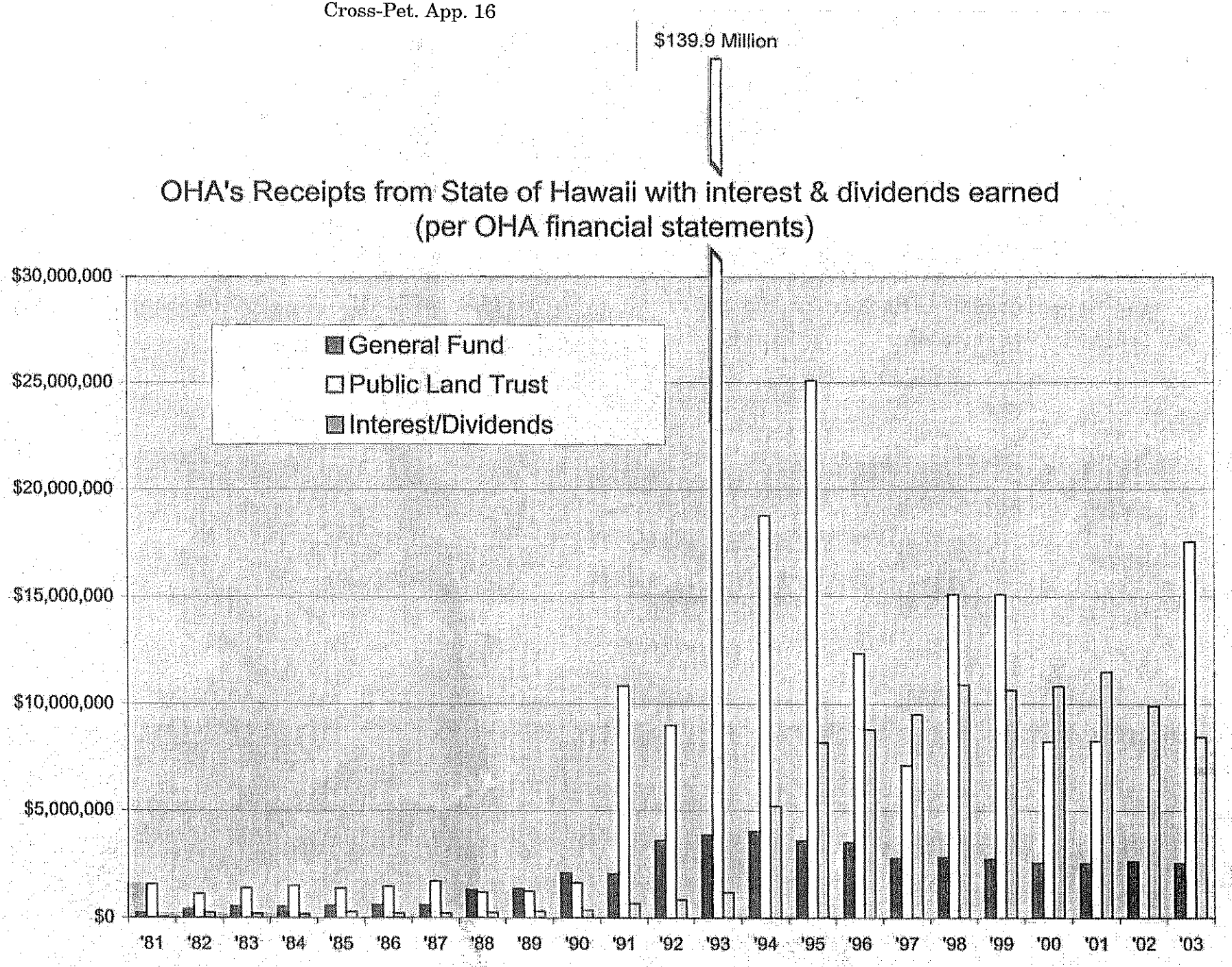
be deemed amended so as to contain the language of section 2 of this Act in lieu of any other language; article XI shall be deemed to include the provisions of section 4 of this Act; and section 8 of article XIV shall be deemed amended so as to contain the language of the third proposition above stated in lieu of any other language, and section 10 of article XVI shall be deemed amended by inserting the words "at which officers for all state elective offices provided for by this constitution and two Senators and one Representative in Congress shall be nominated and elected" in lieu of the words "at which officers for all state elective offices provided for by this constitution shall be nominated and elected; but the officers so to be elected shall in any event include two Senators and two Representatives to the Congress, and unless and until otherwise required by law, said Representatives shall be elected at large".

In the event the foregoing propositions are not adopted at said election by a majority of the legal votes cast on said submission, the provisions of this Act shall cease to be effective.

The Governor of Hawaii is hereby authorized and directed to take such action as may be necessary or appropriate to insure the submission of said propositions to the people. The return of the votes cast on said propositions shall be made by the election officers directly to the Secretary of Hawaii, who shall certify the results of the submission to the Governor. The Governor shall certify the results of said submission, as so ascertained, to the President of the United States.

Op. Hawaii Atty. Gen. July 17, 1995, footnote 1

[1]Section 5 essentially continues the trust which was first established by the Newlands Resolution in 1898, and continued by the Organic Act in 1900. Under the Newlands Resolution, Congress served as trustee; under the Organic Act, the Territory of Hawaii served as trustee.


$139.9 Million
OHA's Receipts from State of Hawaii with interest & dividends earned
(per OHA financial statements)
$30,000,000
$25,000,000
$20,000,000
$15,000,000
$10,000,000
$5,000,000
$0
General Fund
Public Land Trust
Interest/Dividends
'81
'82
'83
'84
'85
'86
'87
'88
'89
'90
'91
'92
'93
'94
'95
'96
'97
'98
'99
'00
'01
'02
'03

Cost of HHC/DHHL to State Treasury Seven Years - 7/1/95 - 6/30/2002
(Including expenditures, debts incurred and loss of revenues)

Description	Amount	MOF	Reference
Appropriations from General fund			
FY 1995-96 "out of general revenues of State of HI"	2,348,558		Act 14 SpSLH 1995 S.9
" "	2,390,000		" S.10
" "	1,539,000		" S.11
"	2,128,851	A	Act 287 SLH 1996 - Supp Appr Act
FY 1996-97	1,569,838	A	"
FY 1997-98	1,493,016	A	Act 116 SLH 1998
FY 1998-99	1,347,684	A	"
FY 1999-00	1,298,554	A	Act 281 SLH 2000 - Supp Appr Act
FY 2000-01	1,298,554	A	"
FY 2001-02	1,359,546	A	Act 259 SLH 2001 - Gen Appr Act
Debt service paid from General Fund for HHLTF from FY1997-98 - April 1, 2002	35,148,475		Attachment 9, DHHL Answers to interrog dtd 4/11/2002
Total paid from General Fund 7/1/95 - 6/30/2002	$51,922,076		
Liability Imposed on General Fund same period			
Balance of $15 million for HHLTF paid 6/30/02 from General Obligation Bond fund.	15,000,000	C	Decl Neal Miyahira, Dir Finance filed 3/7/02 - Act 259
Outstanding Principal G.O Bonds 4/1/2002	126,277,235		Attachment 9, DHHL Ans interrog
Total Paid from General Fund 7/1/95 - 6/30/02 and still owed by General Fund as of 6/30/2002	$193,199,310		
Additional Payments & Transfers for HHLTF			
Appr fr moneys on dep in homes revolving fund FY 1995-96 for HHLTF	30,000,000		Act 14 SpSL 1995 S.8(a)
Land in lieu of cash for FY 1996-97 and FY1997-98 for HHLTF. (Discount for early pay't. Amt?)	60,000,000		Decl Neal Miyahira, Dir Finance filed 3/7/02
Total Paid from & still owed by General Fund plus Additional Payments & Transfers for HHLTF 7/1/95 - 6/30/2002	$283,199,310		
Loss of revenues - General leases, licenses, permits			
FY 1995-96 - General leases	5,297,775		DHHL Ann Rept FY 1995-96
Licenses & permits	4,442,849		"
FY 1996-97 - General leases	6,347,106		DHHL Ann Rept FY 1996-97
Licenses & permits	1,224,542		"
FY 1997-98 - General Leases	6,637,660		DHHL Ann Rept FY 1997-98
Licenses & permits	1,087,529		
FY 1998-99 - General Leases	7,138,142		DHHL Ann Rept FY 1998-99
Licenses & permits	1,516,431		

FY 1999-00 - General leases	6,892,252		DHHL Ann Rept FY 1999-00
Licenses & permits	1,219,079		"
FY 2000-01 - General leases	6,150,520		DHHL Ann Rept FY 2000-01
Licenses & permits	984,598		"
FY 2001-02	6,013,558	B	Act 259 SLH 2001 - Gen Appr Act
Balance still owed 6/30/02 on Revenue Bonds - $100M appr FY 1997-98 & $25M appr FY 2000-01?	15,000,000		Act 116, SLH 1998; Act 281 SLH 2000 - Balance estimate
Loss of fair rental value of homestead leases - FY 1995-96 through FY 2001-02	35,000,000		Estimate 5,000 leases @ $1,000/yr for 7 years
Loss of interest/investment income			
FY 1995-96	5,297,775		DHHL Ann Rept FY 1995-96
FY 1996-97	6,028,545		DHHL Ann Rept FY 1996-97
FY 1997-98	5,975,173		DHHL Ann Rept FY 1997-98
FY 1998-99	5,572,311		DHHL Ann Rept FY 1998-99
FY 1999-00	6,675,682		DHHL Ann Rept FY 1999-00
FY 2000-01	6,898,757		DHHL Ann Rept FY 2000-01
FY 2001-02	6,000,000		Estimate based on prior years
Approximate total Injury to Taxpayers' Pocketbooks Caused by HHC/DHHL 7/1/95 - 6/30/2002, Including Expenditures, Debts Incurred and Loss of Revenues	**$430,599,594**		

Threatened Future Cost to State Fisc as of 6/30 2002
(Including expenditures, debts to be incurred and loss of revenues)

Threatened Injury to Taxpayers' Pocketbooks during FY 2002-03			
Appropriations FY 2002-03 MOF A (General Fund)	1,291,569	A	Act 177 Supplemental Appropriations Act of 2002
Appropriations FY 2002-03 MOF B (Special Funds)	6,034,216	B	Act 177 Supplemental Appropriations Act of 2002
Appropriations FY 2002-03 MOF C (G.O. Bond Fund)	30,000,000	C	Act 177 Supplemental Appropriations Act of 2002
Estimated Loss of Interest/Investment Income	6,000,000		Estimate based on prior year
Estimated fair rental value, 7,000 Homestead leases @ $1,000 per year	7,000,000		
General Fund Debt service for HHLTF Est. for FY 2003	10,283,310		Estimate based on prior year
	60,609,095		
Projected future injury during next 12 years after FY 2002-03 if Hawaiian Homes is not invalidated and Act 14 SpSLH 1995 is not enjoined - 12 more years at about $60M per year	$720,000,000		
Probable future injury to taxpayers' Pocketbooks if Hawaiian Homes allowed to continue.	**$780,609,095**		

Cost of OHA to State Treasury, Twelve Years - 7/1/90 - 6/30/2002
(Including expenditures, debts incurred and loss of revenues)

Description	Amount	MOF	Reference
Appropriations from General Fund for OHA			
FY 1990-91 "appropriated out of general revenues of State"	7,200,000		Act 304 SLH 1990 S. 11
" "	500,000		" S.12
"	1,971,836	A	Act 113 SLH 1990
FY 1991-02	3,491,703	A	Act 301 SLH 1991
FY 1992-93 "of general fund appropriation for statewide planning"	5,000,000		Act 300 SLH 1992 S5
"	3,423,222	A	Act 301 SLH 1991
FY 1993-94	3,580,204	A	Act 253 SLH 1994
FY 1994-95	3,438,125	A	"
FY 1995-96	3,496,698	A	Act 176 SLH 1996
FY 1996-97	2,772,596	A	"
FY 1997-98	2,772,596	A	Stipulated Facts 7/08/2002
" "There is appropriated out of the general revenues"	15,100,000		Act 329 SLH 1997
FY 1998-99	2,710,897	A	Stipulated Facts 7/08/2002
" "There is appropriated out of the general revenues"	15,100,000		Act 329 SLH 1997
FY 1999-00	2,550,922	A	Stipulated Facts 7/08/2002
FY 2000-01	2,519,663	A	"
FY 2001-02	2,619,663	A	"
Debt service paid from General Fund on Bonds for OHA, from FY 1994 - April 1, 2002	91,533,356		Attachment 7, State Answers to interrog dtd 4/11/2002
Total paid for OHA from General Fund 7/1/90-6/30/02	169,781,481		
Still owed by General Fund for same period			
Outstanding Principal G.O Bonds 4/1/2002	95,854,080		Attachment 7, State Ans interrog
Total Paid from General Fund 7/1/90 - 6/30/02 and still owed by General Fund as of 6/30/2002	$265,635,561		
Transfer of Public Land Revenues to OHA			
FY 1990-91	1,971,833	B	Act 113 SLH 1990
FY 1991-92	3,491,700	B	Act 301 SLH 1991
FY 1992-93	3,423,221	B	"
FY 1993-94	3,952,886	B	Act 253 SLH1994
FY 1994-95	3,898,247	B	"
FY 1995-96	3,956,823	B	Act 176 SLH 1996
FY 1996-97	4,762,093	T	"
FY 1997-98	5,009,441	T	Act 240 SLH 1997
FY 1998-99	4,842,041	T	"
FY 1999-00	4,048,124	T	Act 147 SLH 1999
FY 2000-01	4,016,866	T	"
FY 2001-02	4,446,029	T	Act 2 Sp SLH 2001
Balance still owed 6/30/02 on Revenue Bonds - $100M appr FY 1997-98 & $25M appr FY 2000-01?	15,000,000		Act 116, SLH 1998; Act 281 SLH 2000 - Balance estimate
Loss of dividend and interest income			
FY 1990-91	671,492		OHA Ann Rept FY 1990-91
FY 1991-92	842,856		OHA Ann Rept FY 1991-92

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FY 1992-93	1,181,983		OHA Ann Rept FY 1992-93
FY 1993-94	5,216,977		OHA Ann Rept FY 1993-94
FY 1994-95	8,199,984		OHA Ann Rept FY 1994-95
FY 1995-96	8,802,574		OHA Ann Rept FY 1995-96
FY 1996-97	9,513,999		OHA Ann Rept FY 1996-97
FY 1997-98	10,857,620		OHA Ann Rept FY 1997-98
FY 1998-99	10,626,578		OHA Ann Rept FY 1998-99
FY 1999-00	10,798,857		OHA Ann Rept FY 2000-01
FY 2000-01	11,465,433		OHA Ann Rept FY 2000-01
FY 2001-02	11,000,000		Estimate based on prior years
Approximate total injury to Taxpayers' Pocketbooks Caused by OHA 7/1/90 - 6/30/2002, Including Expenditures, Debts Incurred and Loss of Revenues	**$417,633,218**		

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Threatened Future Cost of OHA to State Fisc
(Including expenditures, debts to be incurred and loss of revenues)

Threatened injury caused by OHA to Taxpayers' Pocketbooks during FY 2002-03			
FY 2002-03 (General Fund)	2,532,663	A	Stipulated Facts 7/08/2002
Appropriations FY 2002-03 MOF T (Trust Funds) (Note: Payable only if legislature enacts new law to replace Act 304)	4,029,866	T	Act 2 SpSLH 2001
Estimated Loss of Dividend/Interest Income	11,000,000		Estimate based on prior year
General Fund Debt service to be paid for OHA Bonds	5,000,000		Estimate based on prior year
Total threatened injury FY 2002-03	$ 22,562,529		
Projected future injury during next 12 years (after FY 2002-03) if OHA is not invalidated and legislature enacts new law to replace Act 304 - 12 more years at about $22M per year	$264,000,000		
Threatened injury if legislature enacts new law to replace Act 304 retroactive to fiscal years 1980 - 1991	$ 1,000,000,000		Estimated amount based on offer made by Governor to pay OHA another $251 million plus 360,000 acres of ceded lands, as stated by former OHA Chair.
Probable Total future injury to taxpayers' Pocketbooks if OHA allowed to continue.	**$ 1,286,562,529**		

MEMORANDUM OF UNDERSTANDING

I. PURPOSE OF MEMORANDUM

The purpose of this Memorandum is to document the results of the efforts undertaken by the Task Force on Department of Hawaiian Home Lands Land Title and Related Claims ("task force").

II. FINDINGS

A. When the United States Congress passed the Hawaiian Homes Commission Act of 1920 ("Act") and set aside approximately 203,500 acres of public lands as Hawaiian home lands for the rehabilitation of native Hawaiians, the United States reaffirmed the trust responsibility it had assumed towards the Hawaiian people.

B. The State of Hawaii has a trust responsibility under Hawaii's Admission Act to carry out the mandates of the Act.

C. In contravention of the Act, many thousands of acres were wrongfully used or withdrawn from the trust by territorial or state executive actions. In recognition of these wrongful actions, the legislature acted in 1988 to establish Chapter 673, Hawaii Revised Statutes (HRS), the Native Hawaiian Trusts Judicial Relief Act which provided a waiver of sovereign immunity for breaches of the Hawaiian home lands trust from July 1, 1988, forward. Chapter 673 also required the governor to present a proposal to the legislature prior to the convening of the 1991 regular legislative session, to resolve controversies which arose between August 21, 1959 and July 1, 1988. The

Governor's *Action Plan to Address Controversies under the Hawaiian Home Lands Trust and the Public Land Trust* was accepted by the legislature in its passage of SCR 185, 1991.

D. The governor's action plan, among other actions, proposed convening a task force of representatives from the department of Hawaiian home lands, the department of land and natural resources, the office of state planning and the department of the attorney general to accelerate the review and decision-making process concerning Hawaiian home lands' land title and compensation claims. The actions of the task force were to include verifying title claims, determining if improper uses were still in existence and should be canceled or continued if authorized by the Hawaiian Homes Commission ("commission"), conducting appraisals and appropriate compensation for past and continued use of Hawaiian home lands, and to pursue all avenues for return of lands and compensation from the federal government for wrongful actions during the territorial period.

E. In 1992, the legislature approved settlement of the first package of claims covering gubernatorial executive orders and proclamations which had set aside 29,633 acres of land for public uses such as forest reserves, schools and parks. Act 316, Session Laws of Hawaii 1992, provided $12,000,000 to pay compensation, in the form of fair market rent and interest on the amount past due, for the public use of all verified claims.

F. In 1993 the legislature approved further means to resolve verified claims. Act 352, SLH 1993, extended the period within which to pay compensation, continued the authorization to the state to

pursue claims against the United States for the federal government's wrongful actions, authorized land exchanges to resolve alienations of Hawaiian home lands and provided for the appointment of an independent representative to act on behalf of native Hawaiians in the claims resolution process.

G. The state has: (1) canceled all wrongful set asides of Hawaiian home lands that remain in the control of the state;

(2) paid compensation for most wrongful uncompensated use of Hawaiian home lands from August 21, 1959 through October 28, 1992;

(3) paid fair market rent as set by the Hawaiian Homes Commission for continuing uses from October 28, 1992, through June 30, 1995;

(4) paid fair market rent for the use of lands under Nanaikapono Elementary School through April 4, 1996;

(5) initiated land exchanges for Hawaiian home lands held by the federal government under lease for nominal rents of $1 for sixty-five years at Pohakuloa and Kekaha; and,

(6) initiated actions against the federal government through claims filed with the US. Department of Interior.

H. In 1994, the task force continued to verify and value those claims which remain unresolved, including claims for lands in Lualualei and Waimanalo on Oahu; Keaukaha, Panaewa, Kawaihae and Puukapu on Hawaii; Kula on Maui; Kalaupapa on Molokai; and Waimea, Moloaa, Anahola, and Kamalomalo on Kauai; and compensation for

periods of public use of trust lands not already verified and paid.

I. The Hawaiian Homes Commission's claims to approximately 39,000 acres of land were rigorously investigated and discussed, and remain disputed due to different interpretations of the meaning of the language of the Act in describing the lands to be made available for use under the Act. Due to the difficulty of determining the intent of Congress in 1921, it is untenable to administratively prove or disprove the validity of these claims.

J. Due to the difficulty, time, uncertainty, disruption of public purposes, impact on the public land trust, and expense of judicial resolution of remaining disputed claims, the task force determined that another approach which results in the repair of the Hawaiian home lands trust, and the final resolution of claims against the state, is necessary and in the best interests of the state and the beneficiaries of the trust.

K. A separate administrative initiative on October 28, 1994 resulted in the transfer of sixteen thousand five hundred eighteen acres of additional, useable lands to the department of Hawaiian home lands.

L. In order to properly utilize the home lands, there is a need for a substantial, consistent, and predictable funding mechanism for the department to allow for the appropriate planning and development of these lands to occur. The establishment of a Hawaiian home lands settlement trust fund by the legislature would result in such a funding mechanism.

M. The court-appointed independent representative of the beneficiaries of the Hawaiian home lands trust, who is deemed the sole representative of the beneficiary class, has participated in the non-judicial proceedings of the task force as required by Act 352, SLH 1993, and has satisfied the provisions of the Stipulation for Partial Dismissal dated November 16, 1992 and the Settlement Agreement dated June 10, 1993 in *Ka'ai'ai v. Drake*, First Circuit Civil No. 92-3642.

III. AGREEMENT OF TERMS

The members of the task force and the independent representative of the beneficiaries, having duly considered and deliberated the land claims before the task force, agree to the following terms of action:

A. The state will settle all disputes in the Waimanalo, Anahola, Kamalomalo, and Moloaa areas by transfer of lands and mutual withdrawal of claims.

B. The task force will seek legislative appropriation to pay compensation for all remaining confirmed uncompensated public uses of Hawaiian home lands, as follows: (1) $2,348,558 for the purpose of paying in advance, all rent due for department of Hawaiian home lands license agreement no. 308 for the continued state use of Hawaiian home lands under Nanaikapono elementary school, for the period of April 4, 1996, through October 27, 2002; and

(2) $2,390,000 or so much thereof as may be determined in the final appraisal report for the purpose of paying compensation for the state's uncompensated use of various parcels of

Hawaiian home lands, which constitute the remaining verified claims.

C. The task force will initiate a land exchange to remedy uncompensated use of Hawaiian home lands for state roads and highways.

D. As a portion of the remedy for disputes of Waimanalo claims, upon the return to the state of any ceded lands comprising all, or a portion of, Bellows air force station (TMK: 4-1-15), the commission shall have the first selection of up to 200 acres of land.

E. While not admitting the validity of any claims, the task force will seek the satisfaction of all remaining claims filed with the administrative task force on department of Hawaiian home lands land title and related claims through the establishment of the Hawaiian home lands settlement trust fund and the annual payment of $30,000,000, until a total of $600,000,000, over a period not to exceed twenty years, is paid into the settlement trust fund. Such remaining claims comprise approximately 39,000 acres of lands which determination of title hinges on interpretation of the intent of congress in 1921 for certain definitions of the Act. The payment of funds into the settlement trust fund would include the appropriate interest, as determined by Section 478-2, HRS, which shall accrue on the balance of any funds due and not appropriated by the end of each respective fiscal year. The fund is intended to be non-lapsing, and to include any interest or other earnings arising out of investments from this fund.

F. Payments into the Hawaiian home lands settlement trust fund are not intended to replace or

result in a diminishing of funds that the department is entitled to under Article XII, Section 1 of the state constitution. A provision to that effect should be written into the legislation implementing this agreement.

G. The task force shall seek the protection from suit by any party on any decision related to the resolution of these claims against the state, including the members of the board of land and natural resources, the members of the commission, and the independent representative, who are acting in the best interests of the Hawaiian home lands trust and its beneficiaries. Such protection should not extend to actions necessary to enforce performance of a legislatively-ratified agreement referred to in this memorandum.

H. The task force shall seek a provision in the legislation implementing this agreement which would authorize the commission and others to take actions necessary to enforce performance of this memorandum and its implementing legislation.

I. The task force recommends and will seek continuation of the state's efforts to continue the pursuit of Hawaiian home lands trust claims against the federal government. The legislation sought by the task force is not intended to replace or affect the claims of native Hawaiians or Hawaiians with regard to reparations against the federal government. Nothing in this agreement or legislation pertaining to this agreement is intended to affect any claims arising out of the 1893 overthrow, or 1898 annexation, or claims under the public land trust.

J. A provision should be written into legislation implementing this agreement which would release

the State from future actions resulting from the claims that are identified in this agreement.

IV. CONCLUSION

This Memorandum reflects the results of the task force's efforts to investigate, deliberate, and resolve land claims of the Hawaiian home lands. It is the intent of the task force and the independent representative that its provisions be implemented through appropriate and timely administrative actions, and the passage of appropriate and timely legislation. The agreement of the parties to this memorandum, including the Independent Representative, is conditioned upon enactment of such legislation into law.

CONCUR:
DEPARTMENT OF HAWAIIAN HOME LANDS

By: /s/ Hoaliku L. Drake

Dated: December 1, 1994.

CONCUR:
DEPARTMENT OF LAND AND NATURAL RESOURCES

By: /s/ Keith W. Ahue

Dated: Dec. 1, 1994

CONCUR:
OFFICE OF THE ATTORNEY GENERAL

By: /s/ [Illegible]

Dated: 12/1/94

CONCUR:
OFFICE OR STATE PLANNING

By: /s/ Norma Wong

Dated: Dec. 1, 1994

CONCUR:
INDEPENDENT REPRESENTATIVE OF THE BENEFICIARIES

By: /s/ Edward C. King

Dated: Dec. 2, 1994

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THE Ceded Lands CASE:

by H. William Burgess and
Sandra Puanani Burgess

From its inception in 1898, the primary goal of Hawaii's public land trust was public education. The Annexation Act of 1898 required that the United States hold all revenues or proceeds of the ceded lands, with certain exceptions, "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

However, twenty-three years ago, through the Constitutional Convention of 1978 and subsequent legislation, the State of Hawaii shifted this priority. It ordered the diversion of a "pro rata share" of ceded lands revenues and proceeds to "the betterment of native Hawaiians" through a newly created state agency, the Office of Hawaiian Affairs ("OHA"). One consequence was to take all of the net income from the ceded lands and divert it from public education to OHA. Another consequence was to convert what had been a race-neutral public trust to one that treated beneficiaries differently based on their ancestry.

The resulting tensions in public priorities provoked a number of lawsuits in state and federal courts. The most significant of these, at least in terms of public dollar amounts at stake, is *OHA v. State*,[1] now pending in the Hawaii Supreme Court. This case graphically illustrates

[1] S.Ct. No. 20281.

OHA's profound economic and other consequences for the State of Hawaii, its public schools, and its citizens.

THE HISTORICAL BACKGROUND.

The "ceded lands" are the 1.8 million acres of public lands owned by the government of Hawaii that, upon annexation in 1898, were "ceded" to the United States with the requirement that all revenues or proceeds of the lands, except for those used for civil, military or naval purposes of the United States or assigned for the use of local government, "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."[2]

In 1898, about thirty percent of the inhabitants of Hawaii were of Hawaiian ancestry, and the remaining seventy percent were of other ancestry.[3]

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[2] Annexation Act (sometimes referred to as the Newlands Resolution), 30 Stat. 750 (1898). Such a special trust was recognized: in 1899, by the Attorney General of the United States in 22 Op. Atty. Gen. 574 (1899); by the Hawaii Supreme Court: "Excepting lands set aside for federal purposes, the equitable ownership of the subject parcel and other public land in Hawaii has always been in its people. Upon admission, trusteeship to such lands was transferred to the State, and the subject land has remained in the public trust since that time." *State v. Zimring*, 58 Hawaii 106, 124, 125 (1977); and by the State Attorney General, Opinion July 7, 1995 to Governor Benjamin J. Cayetano from Margery S. Bronster, Attorney General: "Section 5 [Admission Act] essentially continues the trust which was first established by the Newlands Resolution in 1898, and continued by the Organic Act in 1900."

[3] *See* Robert C. Schmitt, *Demographic Statistics of Hawaii: 1778-1965*. (Honolulu, 1968).

Nothing in the Annexation Act gave native Hawaiians or any other racial group any special interest in the ceded lands or any special right to the income or proceeds, beyond that which was given to all other inhabitants of Hawaii as beneficiaries of the public land trust.

Nor did native Hawaiians, merely by virtue of their ancestry, have any special entitlement to the income or proceeds of the public lands of the Kingdom of Hawaii. Everyone born in the Kingdom (except children of foreign diplomats) was a native-born subject of the Kingdom. The government of the Kingdom of Hawaii actively encouraged immigration and offered immigrants easy naturalization and full political rights. For example, the Civil Code of 1858[4] provided that "[e]very foreigner so naturalized shall be deemed to all intents and purposes a native of the Hawaiian Islands . . . and . . . shall be entitled to all the rights, privileges and immunities of an Hawaiian subject."[5]

RETURN OF CEDED LANDS.

In 1959, when Hawaii became a State, the United States transferred title to these lands, less those parts retained by the United States for national parks, military bases and other public purposes, to Hawaii, with the requirement in the Admission Act that the State hold them "as a public trust" for "one or more" of five purposes: "for the support of public schools and other public educational institutions"; "for the betterment of the conditions of

[4] Civil Code of 1858, §432.

[5] *See also* Hanifin, *To Dwell on Earth in Unity; Rice, Arakaki, and the growth of citizenship and voting rights in Hawaii*, http://www.angelfire.com/hi2/hawaiiansovereignty/HanifinCitizen.

native Hawaiians as defined in the Hawaiian Homes Commission Act," i.e., fifty percent or more blood quantum; "for the development of farm and home ownership"; "for the making of public improvements"; and "for the provision of lands for public use."

Some claim that the Admission Act created a "special trust relationship," gave "native Hawaiians" (i.e., those of fifty percent or more blood quantum) some special rights to the ceded lands, or "guaranteed" that they receive some share of the income or proceeds separate from or greater than the share of other citizens of Hawaii.

However, the Admission Act does not require that any part of the ceded lands, or income or proceeds be used in any one year, or ever, for native Hawaiians or for any particular one of the other permitted purposes.

Indeed, if the United States Congress, when it enacted the Admissions Act, had tried to give preference to one group of beneficiaries of the public land trust, the attempt would have been invalid. The United States had the right to use or occupy parts of the lands for civil, military or naval purposes and to assign parts of the lands for the use of local government. It held the rest as trustee "solely for the benefit of the inhabitants of the Hawaiian islands for educational and other public purposes."[6] Nothing "compelled" the federal government, in transferring those lands back to Hawaii in 1959, to require the State to give preference to native Hawaiians. The opposite is true. The United States' fiduciary duty compelled it to administer the trust

[6] Att'y. Gen. Op. July 17, 1995, fn. 1, *supra*.

impartially.[7] Permanently favoring one small racial group among the beneficiaries is not impartiality.

Furthermore, if Section 5(f) of the Admission Act were construed to require Hawaii to change its public trust to a racial one, such a construction would violate the equal footing doctrine and would be invalid.

All States, old and new, stand on an equal footing; that is, they have equality of constitutional right and power, each competent to exercise the sovereignty not delegated to the United States by the Constitution itself.[8]

A State's equality of constitutional right and power may not be hampered by any Congressional enactment even if accepted upon admission.[9] In *Coyle v. Smith*,[10] the Supreme Court invalidated a restriction on the change of location of the State capital, a condition that Congress had imposed as a condition for the admission of Oklahoma.

> As to matters strictly of State cognizance the legislative power of the State is complete, unhampered by any congressional enactments even if accepted upon the admission of the State, for each State is admitted on an "equal footing" with the others.[11]

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[7] Restatement of Trusts, (Second), §183; *Pele Defense Fund v. Paty*, 837 P.2d 1247, 1263 fn 18 (1992).

[8] *Escanaba Co. v. Chicago*, 107 U.S. 678, 689 (1883); *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987), *accord* Amici Curiae Brief by attorneys general including Corinne K.A. Watanabe, then Attorney General of Hawaii.

[9] Pollard's *Lessee v. Hagen*, 44 U.S. (3 How.) 212 (1845).

[10] 221 U.S. 559 (1911)

[11] *In re Island Airlines*, 44 Haw. 634, 642, 361 P.2d 390 (1961).

The first sentence of the Hawaii Admission Act includes the statement that "the State of Hawaii is declared admitted into the Union on an equal footing with the other States in all respects whatever." However, construing section 5(f) to require Hawaii to favor a particular group to the detriment of the other beneficiaries would restrict the State's power to determine for itself, like other States can, the best use of its own public lands and the best allocation of the income and proceeds from its public lands. The Constitution does not delegate that power to the federal government. These are matters strictly of State cognizance so that Hawaii is "unhampered by any congressional enactments even if accepted upon the admission of the State."[12]

CEDED LANDS INCOME GOES TO DEPARTMENT OF EDUCATION

From 1959 to 1978, the State of Hawaii channeled most of the ceded lands income to the Department of Education.[13]

That use of the income from the ceded lands complied with the Hawaii Admission Act, because the support of the public schools is one of the five permitted purposes. It also complied with the United States Constitution and the Hawaii Bill of Rights, because it benefited all of the children of Hawaii who attended public schools without regard to their race or ancestry.

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[12] *In re: Island Airlines, supra*.

[13] Final Report of the Public Land Trust, Legislative Auditor Dec. 1986; *see also* 808 Haw. Att'y Gen. Op., 1980 WL 26216 (July 8, 1980).

OHA CREATED.

In 1978, Hawaii's Constitution was amended to create OHA. Payments of the income from the ceded lands to the Department of Education ceased.

TWENTY PERCENT TO OHA.

In 1980, the Hawaii Legislature, by Act 273, provided that twenty percent of all funds derived from the public land trust would be expended by OHA.

The rationale for twenty percent was apparently that the 1959 Admission Act had specified five permissible purposes, one of which was for the betterment of the condition of native Hawaiians. Therefore, OHA should receive one fifth or twenty percent of the income.

Apparently, the Legislature did not consider it important that OHA is required to use this ceded lands income solely for "native Hawaiians" (fifty percent or more Hawaiian blood count) who make up only about five percent of Hawaii's population.

Thus, in 1980, the Legislature changed the terms of the public land trust so as to permanently give twenty percent of the funds derived from the public lands trust to a group selected only on the basis of their race or ancestry and who make up only about five percent of the public.

By this act, the State, as trustee of the public lands trust, committed itself to violate its fiduciary duty to ninety-five percent of the public, that is the about 1.1 million citizens of Hawaii who have less than fifty percent or no Hawaiian blood.

LEGISLATURE DEFINES "REVENUES."

In 1990, Act 304 defined "revenue" from which OHA is to share as "all proceeds, fees, charges, rents or other income . . . derived from any . . . use or activity, that is situated upon and results from the actual use of lands comprising the public land trust." This act that apparently has been interpreted to calculate OHA's "pro rata share" on the gross revenues rather than on the net after expenses further compounded the breach of the State's fiduciary duty to ninety-five percent of Hawaii's citizens.[14]

Act 304 also mandated that OHA and the State Department of Budget and Finance negotiate the amounts payable to OHA for the years 1980 through 1991.

1993 SETTLEMENT.

In 1993, after extensive discussions, the Legislature considered a proposal for payment of about $130 million, including interest, for the years 1980 through 1991, supported by both OHA and the State. State officials, including the Director of the Department of Budget and Finance, testified that such amount would "settle" or constitute "paying the full amount" of OHA's claims to revenues from the ceded lands for 1980-1991.[15]

OHA did nothing to dispel this understanding but rather confirmed it. The Legislature, by Act 35, then

[14] OHA recognizes the windfall it receives from Act 304. OHA's financial statements for years ending June 30, 1996 and 1997 show on page 35 that, on November 4, 1996, $1 million was allocated to an advertising campaign to "Protect 304."

[15] *See* Appellant's (the State's) Amended Opening Brief filed May 6, 1997 in *OHA v. State*, S. Ct. No. 20281, pages 30-33.

authorized and appropriated the amount in general obligation bond funds to be paid to OHA for this purpose.[16]

In April 1993, after Act 35 was enacted, OHA and an official from the Office of State Planning ("OSP") signed a Memorandum, stating in part that "OSP and OHA recognize and agree that the amount specified in Section 1 hereof does not include several matters regarding revenues which OHA has asserted is due to OHA and which OSP has not accepted and agreed to."[17]

The official from the OSP who signed the memorandum had no apparent authority to change the terms of the settlement, which had been agreed to by the Department of Budget and Finance and OHA and submitted to and acted upon by the Legislature.

In June 1993, the $130 million was paid to OHA for its share of the ceded lands revenues for 1980 through 1991.

1994 OHA SUIT.

In January 1994, OHA commenced suit,[18] seeking payment of additional amounts going back to 1980, arising from receipts of the Waikiki DutyFree shop, public housing, the Hilo Hospital, and investment earnings on unpaid "revenue."

In October 1996, Circuit Court Judge Daniel G. Heely granted OHA's motion for partial summary judgment,

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[16] *Id.*

[17] *Id.*

[18] *OHA v. State*, Civil No. 94-0205-01, First Circuit Court.

ruling that OHA is entitled to a twenty percent share of each of the items in question.

The State appealed to the Hawaii Supreme Court.[19] The case was briefed. At the oral argument heard on April 20, 1998, the court urged the parties to settle. On July 28, 1998, the court stayed proceedings until December 1, 1998, while the State and OHA discussed settlement. On April 16, 1999, OHA made a final offer to accept $304.6 million in settlement of claims for past revenues. The State offered $251.3 million to settle all claims once and for all, a global settlement. On April 27, 2000, the OHA board voted to end settlement talks with the State.[20]

Media accounts have estimated that, if Judge Heely's decision is affirmed, between $300 million and $1.2 billion may be payable to OHA for the period 1980 through 1991, apparently in addition to the $130 million already paid to settle OHA's claims for that period.

These figures boggle the mind. If OHA's "pro rata share" is twenty percent, then, obviously, the "pro rata share" of the DOE, UH or other public agencies must be four times that amount (or eighty percent of the total moneys generated from the ceded lands). So, if $250 million received by the State from the ceded lands for those prior years is available to be awarded to OHA, then $1 billion must be available to go to the DOE or the UH or other public agencies for those same years. If the State's ceded lands account holds $1 billion for OHA's share for

[19] S.Ct. No. 20281.

[20] Honolulu Star-Bulletin articles, April 20, 27 & 28, 1999.

those years, then it must hold $4 billion for its other public agencies for those years.

20% OF GROSS REVENUES OR NET AFTER EXPENSES?

Calculating OHA's twenty percent share on the gross revenues rather than the net after expenses apparently arises at these staggering amounts.

Revenues from the ceded lands do not just drop like rain from the heavens, nor do they spring up naturally from the ground. The State has to spend money to generate those revenues.

For example, at Hilo Hospital, in order to earn revenues from services to patients, the State has to pay salaries to doctors and nurses and staff, buy and maintain and repair and replace x-ray machines, computers and other equipment, pay for electricity, gas, telephone and water, and other operating, overhead and administrative expenses. The State undoubtedly borrowed money, through issuance of bonds, to build and make improvements to Hilo Hospital and has to pay that money back with interest.

It is important to know the actual revenues that the State, as trustee of the public land trust, receives from the ceded lands, as well as the expenses the State incurs in connection with those lands and in generating those revenues before making or agreeing to any "pro rata" distribution to any beneficiaries. Under general trust law, beneficiaries are only entitled to receive shares of net income, not gross.

We have asked for this information.[21] But the State has declined to furnish it, saying the negotiations with OHA are confidential.[22]

THE STATE MAY FACE ECONOMIC DISASTER.

If the State is, in fact, paying OHA twenty percent of the gross revenues, OHA is probably, actually, receiving more than one hundred percent of the net income from the ceded lands. Most businesses never achieve a twenty percent profit. Government agencies operating parks, roads, public schools and universities, airports, harbors, public rental, housing and housing development programs and hospitals could probably never generate net income (i.e., gross revenues less expenses) of anywhere near twenty percent.

To illustrate the consequences of using gross revenues for the calculation, suppose a woman of Hawaiian ancestry by her will leaves a ten-acre parcel of vacant land in trust for her two young children, a boy and a girl, each being an equal beneficiary. The vacant land generates no revenues, so the trustee decides to subdivide the property into five lots and lease the lots. To do so, he must build a road. The trustee borrows $12,000 to build a road and pay the expenses of subdivision. He then leases the five lots for total rent of $10,000 per year. The trustee has to pay back the loan principal at the rate of $3,000 per year and incurs expenses of maintaining and repairing the road, landscaping, interest, insurance, accounting, attorneys fees, and trustee fees of another $3,000 per year. The gross revenues

[21] Ex. 3 to Motion to Intervene 4/29/99 in *OHA v. State, supra*.

[22] *Id.*, Ex. 4.

of the trust are therefore $10,000. The income, after expenses and debt service, is $4,000 per year.

Suppose one of the beneficiaries, the young boy, hires a lawyer to demand that the trust pay the boy $5,000 per year as his fifty percent of the pro rata share of the trust revenues. Such a demand would clearly not be right.

To pay $5,000 per year to the boy, the trustee would have to pay him the entire $4,000 net income (leaving no share for the girl) and then either borrow $1,000 or give the boy $1,000 worth of the land. If that continued for enough years, the trust would become insolvent, or the boy would finally have all the land. The girl, an equal beneficiary, would receive no benefit at all from the trust; and, if she were in the same shoes as over a million of Hawaii's citizens, she would even have to pay taxes to the trustee annually, so the Trustee could repay the money he had borrowed to pay the boy.

Funny as it sounds, that seems to be pretty much what is now happening here in the State of Hawaii. The State is apparently paying OHA for its "pro rata share," twenty percent of the gross revenues from the ceded lands. Since that figure probably exceeds the entire net income, nothing is left for public education or any other public purpose. The State borrowed over $130 million in 1993 to pay OHA; and, at least based on media reports, the State negotiators were and still might be considering giving OHA ceded lands worth hundreds of million dollars to settle the pending lawsuit.

The over-one-million citizens of Hawaii who do not happen to have fifty percent or more blood quantum are receiving no income whatsoever from the public lands trust, despite the fact that each of them has (or had up

until 1980 when the Legislature set OHA's pro rata share as twenty percent) as much right to benefit from the ceded lands as any native Hawaiian. To make matters worse, those over-one-million citizens will have to pay taxes for years into the future so that the State can repay the moneys it has borrowed to pay OHA. If the State transfers land to OHA or borrows more millions to pay OHA, and if that practice continues for long enough, the State of Hawaii will eventually become insolvent, or OHA will end up with all the ceded lands.

The economic and social consequences are already being felt.

The editorial page of the Sunday January 3, 1999 *Honolulu Advertiser* discussed the latest numbers from the United States Census Bureau that show that Hawaii from 1997 to 1998 lost the highest percentage of its residents to other states among all the fifty states. The editorial said it is clear where the movement is coming from: recent graduates in search of good jobs and mid-career working families who have become exhausted by the struggle to keep up in Hawaii. It then went on to say what, to us, is the most disturbing part:

> There are real reasons for the exodus: the relative lack of opportunity here compared with robust job and home ownership opportunities in other states. But there are also psychological reasons: a fear that Hawaii is sliding from bad to worse; a concern that the Island qualities that make the struggle worthwhile are being lost.

The illogic of giving all the net income to OHA is compounded by the fact that OHA is required to use these

funds, not for all Hawaiians, but solely for "for the betterment of Native Hawaiians," as defined in the HHCA (fifty percent or more Hawaiian blood). As discussed earlier, they are only about 5% of our population.

Now there's the *Rice* case.[23] That decision struck down a racial restriction on voting in Hawaii's statewide elections for OHA trustees. In *Rice*, the Court held that the definition of "Hawaiian" established a racial classification, and that the state law, by depriving Hawaii's other citizens of the right to vote because of their race, violated the Fifteenth Amendment to the United States Constitution. Recently, the Federal district court in Hawaii, relying on the *Rice* decision, held that a state law that permitted only "Hawaiians" to seek or hold office as OHA trustees also violated the U.S. Constitution.[24] Other suits based on *Rice* have since been filed to overturn other state law entitlement programs for persons of Hawaiian ancestry.

Given all these concerns, should public school children have been deprived of a source of funds so that a bureaucracy for less than 5% of the population can receive constitutionally questionable extra benefits? Statewide enrollment for the public schools in a recent year was 187,395.[25] In addition, the University of Hawaii system served 71,000 to 72,000 students in credit and non-credit programs during Fall 1998.

All parents of children in the public schools (including those of Hawaiian ancestry) and all those who think public

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[23] *Rice v. Cayetano*, 528 U.S. 495 (2000).

[24] *Arakaki v. State*. Haw. No. CV-00-00514 HG-BMK (September 19, 2000), appeal pending 9th Cir. No. 00-17213.

[25] Hawaii DOE, Statistical Research & Analysis Section.

education is important to Hawaii's economy should stand up and demand that this giveaway to OHA be stopped.

Such payments to OHA, whether in cash or in land, may be disastrous to the state, not only financially, but morally and socially.

What is at issue is public land and public money, your land and your money, the land and money needed to educate children, to run the state, to care for those in need, based on need rather than ancestry, and to provide the opportunity to achieve prosperity and better lives for all of Hawaii's citizens, Hawaiian and non-Hawaiian alike.

H. William Burgess practiced law in Hawaii for 35 years until he retired in 1994. His wife, Sandra Puanani Burgess, who is of part Hawaiian ancestry, was one of the plaintiffs in Arakaki v. State which invalidated the racial restriction on eligibility for the OHA.

Section 405. Charitable Purposes; Enforcement

(a) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community.

(b) If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settler's intention to the extent it can be ascertained.

(c) The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.

Comment

The required purposes of a charitable trust specified in subsection (a) restate the well-established categories of charitable purposes listed in Restatement (Third) of Trusts § 28 (Tentative Draft No. 3, 2001), and Restatement (Second) of Trusts § 368 (1959), which ultimately derive from the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601). The directive to the courts to validate purposes the achievement of which are beneficial to the community has proved to be remarkably adaptable over the centuries. The drafters concluded that it should not be disturbed.

Charitable trusts are subject to the restriction in Section 404 that a trust purpose must be legal and not contrary to public policy. This would include trusts that involve invidious discrimination. See Restatement (Third) of Trusts § 28 cmt. f (Tentative Draft No. 3, 2001).

Under subsection (b), a trust that states a general charitable purpose does not fail if the settlor neglected to specify a particular charitable purpose or organization to receive distributions. The court may instead validate the trust by specifying particular charitable purposes or recipients, or delegate to the trustee the framing of an appropriate scheme. See Restatement (Second) of Trusts § 397 cmt. d (1959). Subsection (b) of this section is a corollary to Section 413, which states the doctrine of cy pres. Under Section 413(a), a trust failing to state a general charitable purpose does not fail upon failure of the particular means specified in the terms of the trust. The court must instead apply the trust property in a manner consistent with the settler's charitable purposes to the extent they can be ascertained.

Subsection (b) does not apply to the long-established estate planning technique of delegating to the trustee the selection of the charitable purposes or recipients. In that case, judicial intervention to supply particular terms is not necessary to validate the creation of the trust. The necessary terms instead will be supplied by the trustee. See Restatement (Second) of Trusts § 396 (1959). Judicial intervention under subsection (b) will become necessary only if the trustee fails to make a selection. See Restatement (Second) of Trusts § 397 cmt. d (1959). Pursuant to Section 110(b), the charitable organizations selected by the trustee would not have the rights of qualified beneficiaries under this Code because they are not expressly designated to receive distributions under the terms of the trust.

Contrary to Restatement (Second) of Trusts § 391 (1959), subsection (c) grants a settlor standing to maintain an action to enforce a charitable trust. The grant of standing

to the settlor does not negate the right of the state attorney general or persons with special interests to enforce either the trust or their interests. For the law on the enforcement of charitable trusts, see Susan N. Gary, Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law, 21 U. Hawaii L. Rev. 593 (1999).

Section 413. Cy Pres

(a) Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful impracticable, impossible to achieve, or wasteful:

(1) the trust does not fail, in whole or in part;

(2) the trust property does not revert to the settlor or the settlor's successors in interest; and

(3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

(b) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection (a) to apply cy pres to modify or terminate the trust only if, when the provision takes effect:

(1) the trust property is to revert to the settlor and the settlor is still living; or

(2) fewer than 21 years have elapsed since the date of the trust's creation.

Comment

Subsection (a) codifies the court's inherent authority to apply cy pres. The power may be applied to modify an administrative or dispositive term. The court may order the trust terminated and distributed to other charitable entities. Partial termination may also be ordered if the trust property is more than sufficient to satisfy the trust's current purposes. Subsection (a), which is similar to Restatement (Third) of Trusts § 67 (Tentative Draft No. 3, 2001), modifies the doctrine of cy pres by presuming that the settlor had a general charitable intent when a particular charitable purpose becomes impossible or impracticable to achieve. Traditional doctrine did not supply that presumption, leaving it to the courts to determine whether the settlor had a general charitable intent. If such an intent is found, the trust property is applied to other charitable purposes. If not, the charitable trust fails. See Restatement (Second) of Trusts § 399 (1959). In the great majority of cases the settlor would prefer that the property be used for other charitable purposes. Courts are usually able to find a general charitable purpose to which to apply the property, no matter how vaguely such purpose may have been expressed by the settlor. Under subsection (a), if the particular purpose for which the trust was created becomes impracticable, unlawful, impossible to achieve, or wasteful, the trust does not fail. The court instead must either modify the terms of the trust or distribute the property of the trust in a manner consistent with the settlor's charitable purposes.

The settlor, with one exception, may mandate that the trust property pass to a noncharitable beneficiary upon failure of a particular charitable purpose. Responding to

concerns about the clogging of title and other administrative problems caused by remote default provisions upon failure of a charitable purpose, subsection (b) invalidates a gift over to a noncharitable beneficiary upon failure of a particular charitable purpose unless the trust property is to revert to a living settlor or fewer than 21 years have elapsed since the trust's creation. Subsection (b) will not apply to a charitable lead trust, under which a charity receives payments for a term certain with a remainder to a noncharity. In the case of a charitable lead trust, the settlor's particular charitable purpose does not fail upon completion of the specified trust term and distribution of the remainder to the noncharity. Upon completion of the specified trust term, the settlor's particular charitable purpose has instead been fulfilled. For a discussion of the reasons for a provision such as subsection (b), see Ronald R. Chester, Cy Pres of Gift Over: The Search for Coherence in Judicial Reform of Failed Charitable Trusts, 23 Suffolk U. L. Rev. 41 (1989).

The doctrine of cy pres is applied not only to trusts, but also to other types of charitable dispositions, including those to charitable corporations. This section does not control dispositions made in nontrust form. However, in formulating rules for such dispositions, the courts often refer to the principles governing charitable trusts, which would include this Code.

For the definition of charitable purpose, see Section 405(a). Pursuant to Sections 405(c) and 410(b), a petition requesting a court to enforce a charitable trust or to apply cy pres may be maintained by a settlor. Such actions can also be maintained by a cotrustee, the state attorney general, or by a person having a special interest in the

charitable disposition. See Restatement (Second) of Trusts § 391 (1959).

Section 705. Resignation of Trustee

(a) A trustee may resign:

(1) upon at least 30 days' notice to the qualified beneficiaries and all cotrustees; or

(2) with the approval of the court.

(b) in approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(c) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.

Comment

This section rejects the common law rule that a trustee may resign only with permission of the court, and goes further than the Restatements, which allow a trustee to resign with the consent of the beneficiaries. See Restatement (Third) of Trusts § 36 (Tentative Draft No.2, approved 1999); Restatement (Second) of Trusts § 106 (1959). Concluding that the default rule ought to approximate standard drafting practice, the Drafting Committee provided in subsection (a) that a trustee may resign by giving notice to the qualified beneficiaries and any cotrustee. A resigning trustee may also follow the traditional method and resign with approval of the court.

Restatement (Third) of Trusts § 36 cmt. d (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 106 cmt. b (1959), provide, similar to subsection (c), that a resignation does not release the resigning trustee from potential liabilities for acts or omissions while in office. The act of resignation can give rise to liability if the trustee resigns for the purpose of facilitating a breach of trust by a cotrustee. See Ream v. Frey, 107 F.3d 147 (3rd Cir. 1997).

Regarding the residual responsibilities of a resigning trustee until the trust property is delivered to a successor trustee, see Section 707.

In the case of a revocable trust, because the rights of the qualified beneficiaries are subject to the settlor's control (see Section 603), resignation of the trustee is accomplished by giving notice to the settlor instead of the beneficiaries

HAWAII REVISED STATUTES ANNOTATED
DIVISION 3. PROPERTY; FAMILY.
TITLE 30. GUARDIANS AND TRUSTEES.
CHAPTER 554A. UNIFORM TRUSTEES' POWERS ACT.

§ 554A-3 Powers of trustees conferred by this chapter.

(a) From time of creation of the trust until final distribution of the assets of the trust, a trustee has the power to perform, without court authorization, every act which a prudent person would perform for the purposes of the trust including but not limited to the powers specified in subsection (c).

(b) In the exercise of the trustee's powers including the powers granted by this chapter, a trustee has a duty to act with due regard to the trustee's obligation as a fiduciary, including a duty not to exercise any power under this chapter in such a way as to deprive the trust of an otherwise available tax exemption, deduction, or credit for tax purposes or deprive a donor of a trust asset of a tax exemption, deduction, or credit or operate to impose a tax upon a donor or other person as owner of any portion of the trust. "Tax" includes, but is not limited to, any federal, state, or local income, gift, estate, or inheritance tax.

(c) A trustee has the power, subject to subsections (a) and (b):

(1) To collect, hold, and retain trust assets received from a trustor until, in the judgment of the trustee, disposition of the assets should be made;

(2) To receive additions to the assets of the trust;

(3) To continue or participate in the operation of any business or other enterprise, and to effect incorporation,

dissolution, or other change in the form of the organization of the business or enterprise;

(4) To invest and reinvest trust assets in accordance with the provisions of the trust or as provided by law;

(5) To deposit trust funds in a bank;

(6) To acquire or dispose of an asset, for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon a trust asset or any interest therein; and to encumber, mortgage, or pledge a trust asset for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee;

(7) To make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;

(8) To subdivide, develop, or dedicate land to public use; or to make or obtain the vacation of plats and adjust boundaries; or to adjust differences in valuation on exchange or partition by giving or receiving consideration; or to dedicate easements to public use without consideration;

(9) To enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the trust;

(10) To enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(11) To grant an option involving disposition of a trust asset, or to take an option for the acquisition of any asset;

(12) To vote a security, in person or by general or limited proxy;

(13) To pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(14) To sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(15) To hold a security in the name of a nominee or in other form without disclosure of the trust, so that title to the security may pass by delivery, but the trustee is liable for any act of the nominee in connection with the stock so held;

(16) To insure the assets of the trust against damage or loss, and the trustee against liability with respect to third persons;

(17) To borrow money to be repaid from trust assets or otherwise; to advance money for the protection of the trust, and for all expenses, losses, and liabilities sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary;

(18) To pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible;

(19) To pay taxes, assessments, compensation of the trustee, and other expenses incurred in the collection, care, administration, and protection of the trust;

(20) To allocate items of income or expense to either trust income or principal, as provided by chapter 557A, the Uniform Principal and Income Act, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(21) To pay any sum distributable to a beneficiary under legal disability, without liability to the trustee, by paying the sum to the beneficiary or by paying the sum for the use of the beneficiary either to a legal representative appointed by the court, or if none, to a relative;

(22) To effect distribution of money and property (that may be made in kind on a pro rata or non-pro rata basis), in divided or undivided interests, and to adjust resulting differences in valuation;

(23) To employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in performance of the trustee's administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(24) To prosecute or defend actions, claims, or proceedings for the protection of trust assets and of the trustee in the performance of trustee duties;

(25) To execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the trustee; and

(26) To divide, sever, or separate a single trust into two or more separate trusts for administration or tax purposes, including the allocation of the generation-skipping transfer exemption; provided the terms of the new trust provide, in the aggregate, for the same succession of interests and beneficiaries as are provided in the original trust.

HAWAII REVISED STATUTES ANNOTATED
DIVISION 3. PROPERTY; FAMILY.
TITLE 30. GUARDIANS AND TRUSTEES.
CHAPTER 554A. UNIFORM TRUSTEES' POWERS ACT.

§ 554A-5 Power of court to permit deviation or to approve transactions involving conflict of interest.

* * *

(b) If the duty of the trustee and the trustee's individual interest or the trustee's interest as trustee of another trust, conflict in the exercise of a trust power, the power may be exercised only by court authorization (except as provided in *section 554A-3(c)(1), (5), (17), and (23))* upon petition of the trustee. Under this section, personal profit or advantage to an affiliated or subsidiary company or association is personal profit to any corporate trustee.

1986 U.S.C.C.A.N. 5253

P.L. 99-557

HAWAIIAN HOMES COMMISSION ACT, 1920: APPROVAL OF AMENDMENTS

STATEMENT BY PRESIDENT RONALD REAGAN UPON SIGNING H.J. Res. 17

I am signing H.J.Res. 17, a joint resolution that gives the United States' consent to a number of amendments to the Hawaiian Homes Commission Act that were adopted by the State of Hawaii between August 21, 1959, and June 30, 1985. This consent is necessary because Section 4 of the Act to Provide for the Admission of Hawaii into the Union, Public Law 86-3, 73 Stat. 4 (1959), requires that amendments to the Hawaiian Homes Commission Act be approved by the national government. I am signing this joint resolution because I believe, as the Department of the Interior testified when the resolution was pending, that the matters with which the Hawaiian Homes Commissions Act is concerned should be left entirely to the State of Hawaii. The administration of the public lands in question can be competently handled by the State government.

I also wish to express another concern. Because the Act employs an express racial classification in providing that certain public lands may be leased only to persons having "not less than one-half of the blood of the races inhabiting the Hawaiian Islands previous to 1778," the continued application of the Hawaiian Homes Commission Act, 1920, Haw.Rev.Stat. 201 et seq. (1976), raises serous equal protection questions. These difficulties are exacerbated by the amendment that reduces the native-blood

requirement to one-quarter, thereby casting additional doubt on the original justification for the classification.

While I am signing this resolution because it substantially defers to the State's judgment, I urge that the Congress amend Section 4 of the Act to Provide for the Admission of Hawaii into the Union so that in the future the State of Hawaii may amend the Hawaiian Homes Commission Act without the consent of the United States and give further consideration to the justification for the troubling racial classification.

SIGNING STATEMENT
P.L. 101-625

STATEMENT BY PRESIDENT OF THE UNITED STATES

STATEMENT BY PRESIDENT GEORGE BUSH UPON SIGNING S. 566

26 Weekly Compilation of Presidential Documents 1930, December 30, 1990

It is with great pleasure that I today sign S. 566, the "Cranston-Gonzalez National Affordable Housing Act." In addition to extending and reforming existing housing programs, this Act creates and expands innovative new programs proposed by this Administration. These new programs will advance opportunities for homeownership and economic self-sufficiency in our Nation's most distressed communities. This Act is an exciting bipartisan initiative to break down the walls separating low-income people from the American dream of opportunity and homeownership.

I want to note the contributions of several people to the enactment of this landmark legislation, starting with Secretary of Housing and Urban Development Jack Kemp. Secretary Kemp has brought a unique vision to his job and a commitment to empowerment as a tool to encourage individual dignity and initiative and reward productive work effort.

Many Members of Congress also made significant contributions to the bipartisan effort to produce a housing bill. A few deserve special recognition. Senators Alan Cranston and Al D'Amato have devoted the last several years to the passage of a comprehensive housing bill, and we would not be here today without their efforts. Likewise, I want to recognize the efforts of Congressmen Henry Gonzalez and Chalmers Wylie, whose spirit of cooperation throughout the legislative process helped bring us to this point.

S. 566 contains the Homeownership and Opportunity for People Everywhere – HOPE – initiative that my Administration submitted to the Congress earlier this year. HOPE represnts a dramatic and fundamental restructuring of housing policy. It recognizes that the poor and low-income tenants – not public housing authorities and developers – are our clients. HOPE will do what traditional programs have not done: empower low-income families to achieve self-sufficiency and to have a stake in their communities by promoting resident management as well as other forms of homeownership.

The cornerstone of HOPE is a program to provide grants to enable low-income families and tenants to become homeowners. HOPE homeownership grants can be used for planning activities, including the development of

resident management corporations. They can also be used for rehabilitation and post-sale subsidies to help ensure the success of homeownership. HOPE grants are eligible to be use in public housing and vacant, foreclosed, and distressed single-family and multifamily properties.

The legislation also includes my Administration's Operation Bootstrap – or Family Self-Sufficiency – proposal. In the past, public housing was seen as a long-term residence for low-income people. My Administration believes that Federal housing subsidies should serve as transitional tools to help low-income families achieve self-sufficiency, move up and into the privatehousing – market, and join the economic mainstream. The Family Self-Sufficiency Program will ensure that all new housing voucher and certificate assistance is coordinated with employment counseling, job training, child care, transportation, and other services to encourage upward mobility.

S. 566 also authorizes our HOPE for Elderly Independence proposal to combine vouchers and certificates with supportive services to assist the frail elderly. In addition, it authorizes Shelter Plus Care, which couples housing assistance and other services to homeless persons with disabilities and their families.

This Act also reflects the efforts of the Administration and the Congress to enact needed reforms to the Federal Housing Administration's (FHA) single-family mortgage insurance program. These reforms will ensure that FHA is actuarially safe and financially sound. The Act's provisions meet the four principal objectives of my Administration's original FHA reform proposals: the achievement of adequate minimum capital standards by the earliest possible date; insurance premiums that reflect the risk of default;

minimum equity contributions by borrowers to protect them and the insurance fund from default risk; and maintaining the emphasis of FHA on low- and moderate-income homebuyers. With these reforms, we will be ensuring the availablity of FHA for future generations of families seeking to achieve homeownership.

I am pleased that this Act contains a solution to the preservation and prepayment question that reflects the Administrtion's basic principles. These include protecting project residents from becoming homeless as a result of a mortgage prepayment; emphasizing alternative prepayment strategies that provide opportunities for homeownership; and honoring the contracts between project owners and the Federal Government.

One important preservation strategy is to provide project owners with economic incentives to maintain their properties for low-income use. I am concerned, however, that the incentives in S. 566 are more generous than are necessary, providing excessive benefits over the long term that will be paid by all taxpayers. Nonetheless, I recognize that this preservation proposal is a compromise and that it represents a good-faith effort by the Congress to meet the Administration's concern that limited Federal funds be provided to those who need assistance.

This legislation provides a new block grant, HOME Investment Partnerships, to promote partnerships among the Federal Government, States, localities, nonprofit organizations, and private industry. These partnerships will seek to utilize effectively all available resources and a wide variety of approaches to meet housing needs.

My Administration has been concerned that the HOME program not become a vehicle for the production of

new, federally subsidized rental housing at the expense of other, more efficient and better targeted subsidies, such as rental assistance to poor tenants.

I believe this legislation addresses our concerns, because it provides for a wide variety of uses for HOME funds, including tenant-based assistance. It also imposes higher State and local matching requirements for new construction than for tenant-based assistance or minor rehabilitation. In addition, it requires that 90 percent of HOME funds be targeted to families with incomes at 60 percent or below the area median income.

Unfortuantely, this Act also sets aside up to 15 percent of total HOME funds in FY 1992 to be used solely for a rental housing production progam. I do not believe that the earmarking of funds for new construction is consistent with the goal of providing States and localities with maximum flexibility to meet their specific affordable housing needs.

I am further concerned that this legialtion, in several instances, would relax longstanding provisions of current law that provide a preference for housing assistance for those families who are most in need. Although the Federal Government currently serves about 4.3 million low-income families, there are about 4 million additional families, most of them very low income, whose housing needs have not been met. We should not divert assistance from those who need it most.

Several additional provisions warrant careful construction to avoid constitutional concerns. For example, section 302(b)(7) of the Act calls on the President to appoint one member of the Board of Directors of the Naitonal Homeownership Trust to represent consumer

interests. In light of the President's power under article II, section 2 of the Constitution, I sign this bill with the understanding that the individual appointed by the President to serve on the Board represents the United States as an officer of the United States. The requirement that this individual represent consumer interests does not constrain the President's constitutional authority to appoint officers of the United States, subject only to the advice and consent of the Senate.

Section 943(e)(8)(A) provides that the National Commission on Manufactured Housing "may secure directly from any department or agency of the United States such data and information as the Commission may require." I sign the bill with the understanding that this provision does not limit the constitutional ability of the President to withhold information, the disclosure of which might significantly impair the conduct of foreign relations, the national security, or the deliberative processes of the executive branch or the performance of its constitutional duties.

Finally, it is the Federal Government's responsibility to ensure that the benefits of Federal programs are offered to indivdiuals in a way consistent with the equal protection guarantee of the Constitution. In that regard, I am concerned about section 958(a) of the Act, which provides a preference to native Hawaiians for housing assistance programs for housing located in the Hawaiian homelands, section 958(d)(1), which defines "native Hawaiian" in a race-based fashion; and section 911, which would exempt this preference from the provisions of the Housing and Community Development Act of 1974 relating to nondiscrimiantion on the basis of race. This race-based classification cannot be derived from the constitutional authority

granted to the Congress and the executive branch to benefit native Americans as members of tribes. I direct the Attorney General and the Secretary of Housing and Urban Development to prepare remedial legislation for submission to the Congress during its next session, so that this Act, and similar provisions in other Acts, can be brought into compliance with the Constitution's requirements.

I am pleased that, in crafting this legislation, the Congress also has modified a number of the rural housing programs administered by the Department of Agriculture's Farmers Home Administration. As a result, these programs will be more responsive to the needs of low-income residents of small towns and rural areas. A significant change is a new program of guaranteed loans for homeownership by low- and moderate-income residents in rural areas. This housing reform will provide assistance to these individuals and families more effectively and efficiently.

In conclusion, this legislation represents true bipartisanship, considerable give-and-take, and good-faith negotiation between the Congress and the Administration. It reforms and reauthorizes existing programs to provide for community development, to operate and modernize public housing, and to asist in meeting the needs of low-income families, the elderly, and the handicapped. In addition, through HOPE, it provides the potential for the redirection of housing policy back toward the poor.

The signing of the "Cranston-Gonzalez National Affodable Housing Act" presents us with an opportunity to renew our commitment to the goals we all share: decent, safe, and affordable housing for all Americans.

GEORGE BUSH

The White House,
November 28, 1990.

P.L. 102-398, HAWAIIAN HOMES COMMISSION AMENDMENTS

STATEMENT BY PRESIDENT GEORGE BUSH UPON SIGNING S.J.Res. 23

I am signing into law S.J.Res. 23, consenting to certain amendments to the Hawaiian Homes Commission Act, notwithstanding reservations I have concerning the Act itself. This joint resolution gives the United States consent to a number of amendments to the Hawaiian Homes Commission Act that were adopted by the State of Hawaii. This consent is necessary because section 4 of the "Act to provide for the admission of the State of Hawaii into the Union," Public Law 86-3, 73 Stat. 4 (1959), requires that amendments to the Hawaiian Homes Commission Act be approved by the National Government. I am signing this bill because it gives effect to the desires of the government of the State of Hawaii. But I wish to note my concern over the process by which the National Government must give its consent to matters that are solely within the competence of the State of Hawaii. Such a procedure is at tension with fe[der]alism principles that lie at the heart of our system of government. There is no question that the administration of the public lands in question here can be competently handled by the State government.

I also wish to express another concern. Because the Act employs an express racial classification in providing that certain public lands may be leased only to persons

having a certain percentage of blood "of the races inhabiting the Hawaiian Islands prior to 1778," the continued application of the Act raises serious equal protection questions. Moreover, the Congress has not conducted the type of examination of the reasons for and the need to use[ ] this classification that the Supreme court has stated is necessary to legitmate such classifications as an exercise of the Congress' Fourteenth Amendment enforcement powers.

Thus, while I am signing this resolution because it substantially defers to the State's judgment, I urge that the Congress amend the "Act to provide for the admission of the State of Hawaii into the Union," Public Law 86-3, so that in the future the State of Hawaii may amend the Hawaiian Homes Commission Act without the consent of the United States, and note that the racial classifica[ti]ons contained in the Act have not been given the type of careful consideration by the Federal Government that would shield them from ordinary equal protection scrutiny.

GEORGE BUSH

The White House,
October 6, 1992.
1992 U.S.C.C.A.N. 1337

SIGNING STATEMENT
P.L. 102-524

STATEMENT BY PRESIDENT OF THE UNITED STATES

STATEMENT BY PRESIDENT GEORGE BUSH UPON SIGNING S. 2044

28 Weekly Compilation of Presidential Documents 2133, November 2, 1992

Today I am signing into law S. 2044, the "Native American Languages Act of 1992," a bill to establish a program to help preserve Native American languages. Traditional languages are an important part of this Nation's culture and history and can help provide Native Americans with a sense of identity and pride in their heritage.

I am concerned, however, about provisions in this bill that provide benefits to "Native Hawaiians" as defined in a race-based fashion. This race-based classification cannot be supported as an exercise of the constitutional authority granted to the Congress to benefit Native Americans as members of tribes. In addition, the terms "Native American Pacific Islanders" and "Indian organizations in urban or rural nonreservation areas" are not defined with sufficient clarity to determine whether they are based on racial classifications. Therefore, I direct the affected Cabinet Secretaries to consult with the Attorney General in order to resolve these issues in a constitutional manner.

GEORGE BUSH

The White House,
October 26, 1992.

SIGNING STATEMENT
P.L. 102-547

STATEMENT BY PRESIDENT OF THE UNITED STATES

STATEMENT BY PRESIDENT GEORGE BUSH UPON SIGNING H.R. 939

28 Weekly Compilation of Presidential Documents 2182,
November 2, 1992

Today I am signing into law H.R. 939, the "Veterans Home Loan Program Amendments of 1992." On balance, the bill improves the Veterans Home Loan Program by authorizing new programs and expanding or extending existing programs.

I am, however, concerned that certain provisions of this bill raise serious constitutional concerns. For example, the race-based classification of "native Hawaiian" cannot be supported as an exercise of the constitutional authority granted to the Congress to benefit. Native Americans as members of tribes, Therefore, this classification would be subject to the most exacting equal protection standards. I direct the affected Cabinet Secretaries to consult with the Attorney General in order to ensure that the program is implemented in a constitutional manner.

In addition, the bill purports to require the Secretary of Veterans Affairs to recommend future legislation regarding a pilot program for housing loans to Native American veterans. the constitution grants exclusively to the President the power to recommend to the Congress such measures as he judges necessary and expedient. The Congress may not by law command judges necessary and expedient. the Congress may not by law command the President or his subordinates to exercise the power that

the Constitution commits to his judgment. Therefore, I will treat this requirement as advisory rather than mandatory.

GEORGE BUSH

The White House,
October 26, 1992.

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EARL F. ARAKAKI, EVELYN C. ARAKAKI, EDWARD U. BUGARIN, SANDRA PUANANI BURGESS, PATRICIA A. CARROLL, ROBERT M. CHAPMAN, BRIAN L. CLARKE, MICHAEL Y. GARCIA, ROGER GRANTHAM, TOBY M. KRAVET, JAMES I. KUROIWA, JR., FRANCES M. NICHOLS, DONNA MALIA SCAFF, JACK H. SCAFF, ALLEN H. TESHIMA, THURSTON TWIGG-SMITH, Plaintiffs, v. BENJAMIN J. CAYETANO in his official capacity as GOVERNOR OF THE STATE OF	CIVIL NO. CV02 00139 SOM KSC COMPLAINT FOR DECLARATORY JUDGMENT (RE: CONSTITUTIONALITY OF OFFICE OF HAWAIIAN AFFAIRS, HAWAIIAN HOMES COMMISSION AND RELATED LAWS) AND FOR AN INJUNCTION; SUMMONS (Filed MAR. 04, 2002)

HAWAI'I, NEAL MIYAHIRA in his official capacity as DIRECTOR OF THE DEPARTMENT OF BUDGET AND FINANCE, GLENN OKIMOTO in his official capacity as STATE COMPTROLLER, and DIRECTOR OF THE DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES, GILBERT COLOMA-AGARAN in his official capacity as CHAIRMAN OF THE BOARD OF LAND AND NATURAL RESOURCES, JAMES J. NAKATANI, in his official capacity as DIRECTOR OF THE DEPARTMENT OF AGRICULTURE, SEIJI F. NAYA, in his official capacity as DIRECTOR OF THE DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM, BRIAN MINAAI in his official capacity as DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION,

State Defendants,

HAUNANI APOLIONA, Chairman, and ROWENA AKANA, DONALD B. CATALUNA, LINDA DELA CRUZ, CLAYTON HEE, COLETTE Y.P. MACHADO, CHARLES OTA, OSWALD STENDER, and JOHN D. WAIHE'E, IV in their official capacities as trustees of the

Office of Hawaiian Affairs,

OHA Defendants,

RAYNARD C. SOON, Chairman and WONDA MAE AGPALSA, HENRY CHO, THOMAS P. CONTRADES, ROCKNE C. FREITAS, HERRING K. KALUA, MILTON PA, and JOHN A.H. TOMOSO, in their official capacities as members of the Hawaiian Homes Commission,

HHCA/DHHL Defendants,

THE UNITED STATES OF AMERICA, and JOHN DOES 1 through 10,

Defendants.

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COMPLAINT FOR DECLARATORY JUDGMENT (RE: CONSTITUTIONALITY OF OFFICE OF HAWAIIAN AFFAIRS, HAWAIIAN HOMES COMMISSION AND RELATED LAWS) AND FOR AN INJUNCTION

COMPLAINT FOR DECLARATORY JUDGMENT (RE: CONSTITUTIONALITY OF OFFICE OF HAWAIIAN AFFAIRS, HAWAIIAN HOMES COMMISSION AND RELATED LAWS) AND FOR AN INJUNCTION

INTRODUCTION

1. *The Office of Hawaiian Affairs.* This suit challenges the validity under the Constitution of the United States of:

a. Article XII, §4 of the Hawaii State Constitution, which, among other things, requires that the lands granted to the State of Hawaii by the Admission Act shall be held as a public trust for native Hawaiians and the general public. (This provision is challenged only to the extent that it gives or is construed or implemented to give native Hawaiians any protection, entitlements, rights, privileges or immunities not given equally to other beneficiaries of the public land trust.).

b. Article XII, §5 of the Hawaii State Constitution, which, among other things, establishes the Office of Hawaiian Affairs ("OHA"), and requires that OHA hold property in trust for native Hawaiians and Hawaiians.

c. Article XII, §6 of the Hawaii State Constitution, which, among other things, requires the OHA board to manage, administer and control income and proceeds from a pro rata share of the public land trust for native Hawaiians and other property for Hawaiians.

d. Chapter 10 of the Hawaii Revised Statutes ("H.R.S.") entitled "Office of Hawaiian Affairs" which governs OHA and, among other provisions, defines "Hawaiian" by ancestry and "native Hawaiian" explicitly by

race, i.e., "descendants of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778" (§10-2), requires that OHA act for the betterment of Hawaiians and native Hawaiians (§§10-3 through 10-6) and requires, or may require, that 20% of revenues from the public land trust be expended for the betterment of native Hawaiians (§10-13.5).

e. Chapter 13D H.R.S. entitled "Board of Trustees, Office of Hawaiian Affairs" which governs the OHA board.

f. §§11-1, 15 and 17 H.R.S. to the extent that they define "Hawaiian" and govern OHA elections.

g. §171-18 H.R.S. which requires that the lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation in 1898 and returned to the State of Hawaii by the Admission Act in 1959 shall be held as a public trust for the support of public schools and other public educational institutions and for other purposes including "the betterment of native Hawaiians". (This provision is challenged only to the extent that it gives or is construed or implemented to give native Hawaiians any protection, entitlements, rights, privileges or immunities not given equally to other beneficiaries of the public land trust.)

h. All other provisions of the constitutional law, statutes, regulations, case law and all actions, customs and usages of the state of Hawaii which create, establish, authorize, implement, fund, give public lands or public moneys to, or otherwise aid, assist or benefit OHA. (The foregoing constitutional provisions, statutes and other laws and actions, customs and usages are sometimes hereinafter referred to collectively as "the OHA laws".)

2. *The Hawaiian Homes Commission.* This suit also challenges the validity under the Constitution of the United States of:

a. Article XII, §§1, 2 and 3 of the Hawaii State Constitution, which adopt the Hawaiian Homes Commission Act, 1920 ("HHCA") enacted by Congress, accept the compact imposed by the United States as a condition of admission, prohibit the amendment or repeal of HHCA without the consent of the United States, and mandate that the Hawaii legislature fund the programs, administration and operation of the Department of Hawaiian Home Lands.

b. §4 of the Admission Act of March 18, 1959, Pub L 86-3, 73 Stat 4 (the "Admission Act") which requires, as a compact with the United States, that the HHCA shall be adopted as a provision of the Constitution of the State of Hawaii and, among other things, prohibits the amendment or repeal of the HHCA without the consent of the United States;

c. The Hawaiian Homes Commission Act, 1920, Act of July 9, 1921, c 42, 42 Stat 108, as amended, (HHCA) which, among other things, sets aside approximately 200,000 acres of the public lands of Hawaii for the benefit of persons defined explicitly by race, i.e., "descendants of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."

d. Act 14 of the Special Session Laws of Hawaii 1995 which, among other things, established the Hawaiian home lands trust fund and required that the State make twenty annual deposits of $30 million or their discounted value equivalent, into the trust fund. Also HHCA §213.6 which is the codification of Section 7 of said Act 14.

e. Continuation of existing Homestead leases under terms that require or permit future governmental action based on the racial classification in the HHCA or deny to Plaintiffs in the future the equal protection of the laws and the benefit of the lands covered by the leases.

f. All other provisions of the constitutional law, statutes, regulations, case law and all actions, customs and usages of the State of Hawaii which create, establish, authorize, implement, fund, or otherwise carry out the HHCA or give public lands or public moneys to or otherwise aid, assist or benefit the Hawaiian Homes Commission or the department of Hawaiian home lands. (The foregoing constitutional provisions, statutes and other laws and actions, customs and usages are sometimes hereinafter referred to collectively as "the HHCA laws".)

3. **Note: Equitable accommodation between the public need and the needs of existing Homesteaders.** Plaintiffs recognize the practical reality that the HHCA laws have been in effect for 81 years; many persons of native Hawaiian ancestry have reasonably relied on them and have become Homesteaders (7,281 Homestead leases were outstanding as of 1/31/02); in reliance on the HHCA laws, many of the Homesteaders have built homes and improvements and made other commitments with respect to their Homestead lots; and invalidating the Hawaiian homes program may have serious financial consequences for those existing Homesteaders. Plaintiffs therefore seek an equitable decree to accommodate both the public need (to end this racial discrimination by the State government) and the private needs of the existing Homesteaders (to avoid inequitable financial consequences to them merely because they acted on the basis of laws they thought were valid). *Lemon v.*

Kurtzman 411 U.S. 192 (1973). (An unconstitutional statute is not absolutely void, but is a practical reality upon which people rely. Courts recognize that reality. Pp. 197-199. A trial court has wide latitude in shaping an equitable decree and reaching an accommodation between public and private needs. Pp. 200-201. A State and those with whom it deals are not to be subjected to harsh, retrospective relief merely because they act on the basis of presumptively valid legislation, in the absence of contrary judicial direction. Pp. 208-209.)

Specifically Plaintiffs ask the Court, as part of its judgment invalidating the HHCA laws to order the State Defendants and HHC/DHHL Defendants to negotiate with the existing Homesteaders for the State's exercise of its right to withdraw the lands demised in a way that is fair to the Homesteaders but does not further violate the rights of Plaintiffs and others similarly situated. Such negotiations could result in a global settlement under which the fee simple interest is conveyed to the Homesteader in exchange for no or a reduced payment and a complete release of all claims by the Homesteader and his or her heirs and assigns against all parties, including all claims against the State of Hawaii and the United States arising out of or related to the Homestead leases, the HHCA laws, the OHA laws and any other claims for Hawaiian entitlements.

Plaintiffs seek no retroactive application of the Court's declaratory judgment or retrospective relief of any kind.

4. *The Admission Act, §5(f).* This suit also challenges the validity under the Constitution of the United States of:

a. §5(f) of the Admission Act, which requires that the lands granted to the State of Hawaii shall be held as a public trust for one or more of five purposes, including "for the betterment of the conditions of native Hawaiians as defined in the Hawaiian Homes Commission Act". (This provision, §5(f), is challenged only to the extent that it gives or is construed or implemented to require or authorize the State of Hawaii to give native Hawaiians any right, title or interest in the "ceded lands" or public lands of Hawaii, or the proceeds or income therefrom, not given equally to other beneficiaries of the public land trust.)

b. All other provisions of the statutes, regulations, case law and all actions, customs and usages of the United States which enforce, implement or carry out §5(f) of the Admission Act so as to require or authorize the State of Hawaii to give, native Hawaiians any protection, right, title or interest in the "ceded lands" or public lands of Hawaii, or the proceeds or income therefrom, not given equally to other beneficiaries of the public land trust.

JURISDICTION AND VENUE

5. Jurisdiction is invoked pursuant to 28 U.S.C. § 1331 (federal question), 1343(3) and 1343(4) (civil rights) and 2201 and 2202 (declaratory judgment).

6. Venue is in this judicial district pursuant to 28 U.S.C. §1391(b) because the acts giving rise to this action occurred in this district and the property that is the subject of this action is situated in this district.

PARTIES

Plaintiffs

7. All 16 Plaintiffs are residents and citizens of the State of Hawaii and of the United States.

8. Included among Plaintiffs are persons of Japanese, English, Filipino, Portuguese, Hawaiian, Irish, Chinese, Scottish, Polish, Jewish, German, Spanish, Okinawan, Dutch, French and other ancestries.

9. Each and every Plaintiff has a material financial interest in the subject matter of this action as a taxpaying citizen of the State of Hawaii and the United States and as a beneficiary of the public land trust created in 1898 when the public lands of the government of Hawaii were ceded to the United States with the requirement that all revenues or proceeds, with certain exceptions, "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes".

State Defendants

10. Defendant Benjamin J. Cayetano is a resident and Governor of the State of Hawaii.

11. Defendant Neal Miyahira is a resident of the State of Hawaii and the Director of the State of Hawaii Department of Budget and Finance. In that capacity, he is charged with the responsibility of allocating, remitting and/or transferring revenue to the Trustees of OHA to be used by OHA as provided in Art. XII, §§ 5 and 6 and HRS Chapter 10, including the racially discriminatory provisions of HRS § 10-2; and allocating, remitting and/or transferring revenues to the Defendant Hawaiian Homes Commissioners.

12. Defendant Glenn Okimoto is a resident of the State of Hawaii and the State Comptroller, and the Director of the Department of Accounting and General Services. In those capacities he is charged with the responsibility of allocating, remitting and/or transferring revenue to the Trustees of OHA to be used by OHA as provided in Art. XII, §§ 5 and 6 and HRS Chapter 10, including the racially discriminatory provisions of HRS § 10-2; and allocating, remitting and/or transferring revenues to the Defendant Hawaiian Homes Commissioners.

13. Defendant Gilbert Coloma-Agaran is a resident of the State of Hawaii and the Chair of the Board of Land and Natural Resources and the Director of the State of Hawaii Department of Land and Natural Resources. In that capacity, he is charged with the responsibility of allocating, remitting and or transferring revenue to the Trustees of OHA to be used by OHA as provided in Art. XII, §§ 5 and 6 and HRS Chapter 10, including the racially discriminatory provisions of HRS § 10-2.

14. Defendant James J. Nakatani is a resident of the State of Hawaii and the Director of the State of Hawaii Department of Agriculture. In that capacity, he is charged with the responsibility of allocating, remitting and or transferring revenue to the Trustees of OHA to be used by OHA as provided in Art. XII, §§ 5 and 6 and HRS Chapter 10, including the racially discriminatory provisions of HRS § 10-2.

15. Defendant Seiji Naya is a resident of the State of Hawaii and the Director of the State of Hawaii Department of Business, Economic Development and Tourism. In that capacity, he is charged with the responsibility of allocating, remitting and or transferring revenue to the

Trustees of OHA to be used by OHA as provided in Art. XII, §§ 5 and 6 and HRS Chapter 10, including the racially discriminatory provisions of HRS § 10-2.

16. Defendant Brian Minaai is a resident of the State of Hawaii and the Director of the State of Hawaii Department of Transportation. In that capacity, he is charged with the responsibility of allocating, remitting and or transferring revenue to the Trustees of OHA to be used by OHA as provided in Art. XII, §§ 5 and 6 and HRS Chapter 10, including the racially discriminatory provisions of HRS § 10-2

OHA Defendants

17. Defendants Huanani Apoliona, Chairperson and Rowena Akana, Donald B. Cataluna, Linda Dela Cruz, Clayton Hee, Collette Y.P. Machado, Charles Ota, Oswald Stender, and John D. Waihe'e IV are residents of the State of Hawaii and are the Trustees of the Office of Hawaiian Affairs ("OHA"), an agency of the State of Hawaii, and are officials of the State of Hawaii.

HHC/DHHL Defendants

18. Defendants Raynard C. Soon, Chairman, and Wonda Mae Agpalsa, Henry Cho, Thomas Contrades, Rockne Freitas, Herring Kalua, Milton Pa, and John Tomoso are residents of the State of Hawaii and are the commissioners of the Hawaiian Homes Commission, an agency of the State of Hawaii, and are officials of the State of Hawaii.

Other Defendants

The United States of America is named as a party because the constitutionality of two acts of Congress affecting the public interest (The HHCA and §§4 and 5(f) of the Admission Act) are drawn in question. 28 U.S.C. §2403. HHCA was originally a federal statute but is now a State law incorporated into the State Constitution by reference, Art. XII, §§ 1, 2 & 3. See also page 12 of this Court's order of July 12, 2001 in *Barrett v. State of Hawaii,* CV. No. 00-00645 DAE KSC. (Plaintiff challenged HHCA but did not name United States as party. Court granted summary judgment against Plaintiff. "In the absence of the United States as a party to this action, this court is unable to redress Plaintiffs injury in any meaningful way.") Plaintiffs do not believe that their claims are adverse to the interests of the United States in upholding the Constitution of the United States. Two presidents have expressed doubts as to the constitutionality of the express racial classification of "native Hawaiian" as used by HHCA and certain other bills. (Statement by President Ronald Reagan upon signing N.J. Res 17 in 1986 (HHCA "employs an express racial classification" . . . "raises serious equal protection questions"; and Statement by President George H.W. Bush upon signing S. 566 on November 28, 1990 (Affordable Housing Act defines "native Hawaiian" in a "race-based fashion" . . . "cannot be derived from the constitutional authority granted to the Congress and the executive branch to benefit native Americans as members of tribes."; then President Bush expressed similar convictions in S.J. Res. 23 on October 6, 1992; S. 2044 on October 26, 1992; and H.R. 939 on October 28, 1992). Plaintiffs therefore believe it is possible that the U.S. may cho[o]se not to defend or support the constitutionality of the HHCA

laws or the OHA laws or the challenged interpretation of a portion of §5(f) of the Admission Act.

19. The "Doe Defendants" are persons whose identities are unknown to Plaintiffs but who are believed to be residents of the State of Hawaii and to be agents, employees or officials of the State of Hawaii and are and will be engaged in the performance of their duties as agents, employees or officials of the State of Hawaii and further will be acting pursuant to directives, instructions, or orders from or with the permission of the Defendants, or those acting in concert with them or at their direction or under their control.

20. Each individual Defendant is sued only in his or her official capacity. Relief is sought against each Defendant as well as his or her or its agents, assistants, successors, employees, attorneys, and all persons acting in concert or cooperation with them or at their direction or under their control.

LEGAL HISTORY

(With notations showing applicability to Plaintiffs' claims in this action.)

1898 – The public land trust established for inhabitants of the Hawaiian Islands

21. In 1898, the Republic of Hawaii ceded its public lands (about 1.8 million acres formerly called the Crown lands and Government lands) to the United States with the requirement that all revenue from or proceeds of these lands except for those used for civil, military or naval purposes of the U.S. or assigned for the use of local government "shall be used solely for the benefit of the inhabitants of the

Hawaiian Islands for educational and other public purposes". *Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, Resolution No. 55, known as the "Newlands Resolution", approved July 7, 1898*; Annexation Act, 30 Stat. 750 (1898) (reprinted in 1 Rev. L. Haw. 1955 at 13-15).

22. The Newlands Resolution established the public land trust. Such a special trust was recognized by the Attorney General of the United States in Op. Atty. Gen. 574 (1899); *State v. Zimring* 58 Haw. 106, 124, 566 P.2d 725 (1977) and *Yamasaki* 69 Haw. 154. 159, 737 P.2d 446, 449 (1987); see also Hawaii Attorney General Opinion July 7, 1995 (A.G. Op. 95-03) to Governor Benjamin J. Cayetano from Margery S. Bronster, Attorney General, "Section 5 [Admission Act] essentially continues the trust which was first established by the Newlands Resolution in 1898, and continued by the Organic Act in 1900. Under the Newlands Resolution, Congress served as trustee; under the Organic Act, the Territory of Hawaii served as Trustee."

23. In 1898, about 31% of the inhabitants of Hawaii were of Hawaiian ancestry and the remaining 69% were of other ancestry. Robert C. Schmitt, *Demographic Statistics of Hawaii, 1778-1965* (Honolulu, 1968).

24. In 1900, the Organic Act, 31 Stat. 141 (1900), §73(e) reiterated that "All funds arising from the sale or lease or other disposal of public land shall be . . . applied to such uses and purposes for the benefit of the *inhabitants* of the Territory of Hawaii as are consistent with the joint resolution of annexation approved July 7, 1898." (Emphasis added.)

25. **Note:** The public land trust, from its inception in 1898, required the ceded lands and proceeds and revenues derived from them, to be held "solely for the benefit of the *inhabitants* of the Hawaiian lslands", not just for those of Hawaiian ancestry. (Emphasis added.)

26. **Note:** Nor did persons of Hawaiian ancestry, merely by virtue of their ancestry, have any special entitlement to the use, income or proceeds of the public lands of the Kingdom of Hawaii. The King conducted his government for the common good and not for the private interest of any one man, family or class of men among his subjects. Constitution of 1852, Article 14. Every adult male subject, whether native of naturalized, was entitled to vote. Id, Section 78. Everyone born in the Kingdom (except children of foreign diplomats) was a native-born subject of the Kingdom. In the last half of the 19th century, the government of the Kingdom actively encouraged immigration and offered immigrants easy naturalization and full political rights. For example, the Civil Code of 1858 provided that "[e]very foreigner so naturalized shall be deemed to all intents and purposes a native of the Hawaiian islands . . . and . . . shall be entitled to all the rights, privileges and immunities of an Hawaiian subject."

1921 – The Hawaiian Homes Commission Act

27. In 1921, Congress enacted the Hawaiian Homes Commission Act, 42 Stat. 108 (1921) ("HHCA") which set aside about 200,000 acres of the ceded lands and provided for long term leases of Homestead lots (at one dollar per year) to "native Hawaiian" persons, defined in §201(7) as "any descendant of not less than one-half part of the blood

of the races inhabiting the Hawaiian Islands previous to 1778."

28. Congress, by enacting the HHCA and limiting its benefits to a group selected on the basis of race or ancestry, caused the United States to violate the equal protection requirement implicit in the Fifth Amendment to the U.S. Constitution and also to violate its fiduciary duty as trustee of the public land trust to all the citizens of Hawaii who had none or less than "one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."

1959 – The Admission Act

29. In 1959, when Hawaii became a state, the United States transferred title to the ceded lands (less those parts retained by the U.S. for national parks, military bases and other public purposes) back to Hawaii with the requirement in the Admission Act §4 that the State adopt the HHCA and in §5(f) that the State hold the ceded lands "as a public trust" for "one or more" of five purposes ("for the support of public schools and other public educational institutions", "for the betterment of the conditions of native Hawaiians as defined in the Hawaiian Homes Commission Act" (i.e., "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778"), "for the development of farm and home ownership", "for the making of public improvements" and "for the provision of lands for public use."

30. Congress, by requiring as a condition of statehood, that the HHCA be adopted and that a race-based component, ("for the betterment of the conditions of "native Hawaiians" as defined in the HHCA, i.e., "any

descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.") be added to the purposes of the public land trust:

a. violated the equal protection implicit in the Fifth Amendment to the U.S. Constitution;

b. also violated the "equal footing doctrine" which prohibits Congress from imposing, as a condition of statehood, any restriction on a state's constitutional powers not required of other states;

c. also caused the United States to violate its fiduciary duty as trustee of the public land trust to all the citizens of Hawaii who had none or less than "one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."

1978 – Hawaii Constitution purportedly amended, creates OHA, further breach of public land trust and violation of U.S. Constitution

31. In 1978, Hawaii's Constitution was purportedly amended to establish an Office of Hawaiian Affairs ("OHA"). Amended Article XII, Section 6 provides that the board of trustees of OHA "shall exercise power as provided by law; to manage and administer the proceeds from the sale . . . and income . . . including all income and proceeds from that pro rata portion of the trust referred to in Section 4 of this article for native Hawaiians." Section 4 does not specify any pro rata portion.

32. **Note: 1978 votes not tallied legally. 18,833 voters disenfranchised. Doubtful that majority ratified OHA Amendments.** The ballots for the 1978 ratification election were not tallied as requested by the

Constitutional Convention or in compliance with the common law rule that a ballot must be counted if the voter's intent can be reasonably ascertained from the ballot. As a result of the illegal manner of tallying, 18,833 voters who attempted to vote on the proposed amendments were disenfranchised. These rejected, uncounted 18,833 ballots (6.4% of the total votes cast) were more than enough to change the outcome on the amendments that established OHA and DHHL, the two least popular of all the thirty-four proposed amendments. Furthermore, only about 18% of the voters specifically marked their ballots "Yes." A plurality of about 45% was recorded in favor of the OHA and DHHL amendments by counting ballots that did not mark "Yes" or "No" regarding the amendments as affirmative votes. The Hawaii Constitution in effect at the time of the Nov. 7, 1978 general election provided in the relevant part that proposed constitutional "amendments shall be effective only if approved at a general election by a majority of all the votes tallied upon the question . . . " Hawaii Constitution January 1969 Article XV, Section 2. Since 18,833 ballots, enough to change the outcome, were wrongfully rejected from the tally, it was impossible to accurately determine that the amendments were approved by the necessary majority.

33. In 1980, the Hawaii Legislature enacted Section 10-13.5 H.R.S. "Twenty per cent of all funds derived from the public land trust, described in Section 10-3, shall be expended by the office [OHA], as defined in section 10-2, for the purposes of this chapter."

34. By changing the terms of the public land trust so as to permanently give 20% of the funds generated by the

trust to a group selected only on the basis of their race or ancestry and who make up less than 5% of the trust beneficiaries, the Hawaii Legislature in 1980:

a. Required the State to violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution; and

b. Required the State, as trustee of the public and trust, to violate its fiduciary duty to Plaintiffs and to over 95% of the beneficiaries, i.e., the about 1.1 million citizens of Hawaii who have less than 50% or no Hawaiian blood;

1990 – Legislature defines "revenues" retroactively, mandates Budget & Finance and OHA to negotiate.

35. In 1990 the Hawaii Legislature in Act 304 defined "revenue" from which OHA is to share, retroactive to 1980, as "all proceeds, fees, charges, rents or other income . . . derived from any . . . use or activity, that is situated upon and results from the actual use of lands comprising the public land trust".

36. Act 304, which was interpreted to calculate OHA's "pro rata share" on the gross revenues, (rather than on "income" as provided in the Hawaii Constitution or on net income after expenses as required under trust law), further compounded the breach of the State's fiduciary duty to 95% of Hawaii's citizens, including Plaintiffs.

37. Act 304 also mandated that OHA and the State Department of Budget and Finance ("B&F") negotiate the amounts payable to OHA for the years 1980 through 1991.

38. In 1993, after extensive discussions, a proposal for payment of about $130 million, including interest, for the years 1980 through 1991, supported by both OHA and the State, was submitted to the Legislature. State officials, including the then Director of the Department of Budget and Finance, testified that such amount would "settle" or constitute "paying the full amount" of OHA's claims to revenues from the ceded lands for 1980-1991. OHA did nothing to dispel this understanding but rather confirmed it. The Legislature, by Act 35, then authorized and appropriated the amount in general obligation bond funds to be paid to OHA for this purpose.

39. In April 1993, after Act 35 was enacted, OHA and an official from the Office of State Planning ("OSP") signed a Memorandum which stated in part "OSP and OHA recognize and agree that the amount specified in Section 1 hereof does not include several matters regarding revenues which OHA has asserted is due to OHA and which OSP has not accepted and agreed to."

40. In June 1993 the approximately $130 million was paid to OHA for its share of the ceded lands revenues for 1980 through 1991.

1994 – OHA sues for more for same period, 1980-1991

41. In January 1994, OHA commenced a lawsuit, *OHA v. State of Hawaii*, seeking payment of additional amounts going back to 1980 arising from receipts of the Waikiki duty-free shop, public housing, the Hilo Hospital and investment earnings on unpaid "revenue."

42. In October 1996, Circuit Court Judge Daniel G. Heely granted OHA's motion for partial summary judgment,

ruling that OHA is entitled to a 20% share of each of the items in question. The State appealed and the Hawaii Supreme Court until 1999 deferred ruling while the State and OHA discussed settlement.

43. Media accounts estimated that, if Judge Heely's decision was affirmed, between $300 million and $1.2 billion may be payable to OHA for the period 1980 through 1991 in addition to the $130 million already paid to settle OHA's claims for that period.

1999 – Some of Plaintiffs here file amicus brief in *OHA v. State*

44. On May 29, 1999, some of Plaintiffs here filed in the Hawaii Supreme Court an amicus curiae brief in *OHA v. State* arguing on behalf of the Defendant State of Hawaii that the OHA laws are based on racial classifications and therefore presumptively invalid and subject to strict scrutiny. Also, Hawaiians have no "special" or "political" relationship, comparable to that of Indian tribes, which would exempt the OHA laws from strict scrutiny analysis.

February 23, 2000 – *Rice v. Cayetano* decided by high court

45. On February 23, 2000, the Supreme Court of the United States in *Rice v. Cayetano,* 528 U.S. 495, struck down OHA's Hawaiians-only voting restriction. In applying the Fifteenth Amendment, the Court rejected the arguments to the contrary by OHA and the State and held that the definitions of "Hawaiian" and "native Hawaiian" are racial classifications.

46. Those definitions, which the highest court in the land has now determined to be racial classifications, are the foundation and the only reason for the existence of OHA and HHCA.

March 2000 – Some of Plaintiffs here sought to intervene in *OHA v. State*

47. On March 28, 2000, a diverse, multi-ethnic group of 23 Hawaii men and women, some of whom are Plaintiffs in this case, moved to intervene in the Hawaii Supreme Court in *OHA v. State* arguing, among other things, that the *Rice* decision together with the Supreme Court's other decisions holding all racial classifications presumptively invalid, if applied in a case challenging OHA itself, will require that OHA be invalidated and its claims be dismissed.

48. On May 8, 2000, the Hawaii Supreme Court denied the motion to intervene in *OHA v. State.* No reason was stated.

September 2001 – Hawaii Supreme Court dismisses *OHA v. State*

49. On September 12, 2001, the Hawaii Supreme Court in OHA v. State, reversed the 1996 Heely decision and dismissed the case for lack of justiciability. The Court said that, because it conflicts with federal legislation, "Act 304 – by its own terms – is effectively repealed."

50. The Hawaii Supreme Court did not rule on or mention the federal constitutional question raised in the amicus brief and in the motion to intervene. It nevertheless did say, "the State's obligation to native Hawaiians is

firmly established in our constitution" and "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." *OHA v. State,* Appeal Nos. 20281 & 20216 Decision, September 12, 2001.

51. Following the Hawaii Supreme Court's decision, OHA trustee Clayton Hee was quoted in the media that OHA had cut its own throat by walking away from a settlement offer by the State of $251 million and 360 acres of ceded lands.

52. New bills are presently pending before the current Legislature of the State of Hawaii that would "reinstate Act 304-style funding" or, as an interim measure, appropriate $17 million to OHA. Some legislative leaders have said that interim funding in some amount would probably be favorably considered in the current session.

STATEMENT OF CLAIMS

Exhaustion of administrative remedies

53. Plaintiffs have no administrative remedy for challenging the constitutionality of the OHA laws or the HHCA laws or for enforcing their rights as beneficiaries of the public land trust.

Need for equitable relief

54. Plaintiffs have no adequate remedy at law and will continue to have their rights as beneficiaries of the public land trust and as taxpayers and their constitutional and civil rights violated as a result of the OHA laws and the HHCA laws and the ongoing acts of Defendants in

implementing and enforcing them unless immediate and permanent injunctive relief is rendered.

Harm to Plaintiffs and others similarly situated

55. From July 7, 1898, when the public lands of Hawaii were ceded to the United States until enactment of the Hawaiian Homes Commission Act in 1921 the United States held title and the Territory of Hawaii remained in the possession, use and control of the public lands of Hawaii (except for those used for civil, military or naval purposes of the U.S.), hereinafter called the "ceded lands", and their revenues and proceeds, for the benefit of the inhabitants of Hawaii. This was in compliance with the public land trust and the Constitution of the United States.

56. From 1921, when Congress enacted the Hawaiian Homes Commission Act ("HHCA") and set aside about 200,000 acres of the public lands of Hawaii for the exclusive benefit of "native Hawaiians," to the present, some of Plaintiffs' ancestors and, ultimately, all of Plaintiffs have been deprived of the equal opportunity to use and benefit from those about 200,000 acres as well as thirty percent of the state receipts derived from the leasing of cultivated sugarcane lands and from water licenses and from the proceeds from other dispositions of those sugarcane lands, solely because they (Plaintiffs) are not of the favored race, i.e., because they are not "descendants of not less that one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."

57. In 1995, based on a memorandum of understanding signed by the previous governor and enacted in the Special Session of 1995, Governor Cayetano signed Act 14 which established the "Hawaiian home lands trust fund"

(now provided for in HCCA §213.6.) to be used for capital improvements and other purposes in furtherance of HHCA and provided for the State to make twenty annual deposits of $30 million each into that fund. As of June 30, 2000, the State had paid DHHL $158 million and had appropriated another $15 million for these deposits.

58. As a result of the HHCA laws, and the issuance of Homestead leases pursuant to the racial classification in the HHCA laws and the ongoing acts of Defendants in implementing and enforcing the HHCA laws, Plaintiffs and over one million of Hawaii's other citizens similarly situated, have been and continue to be harmed as follows:

a. **Diversions of public land trust lands and revenues to DHHL harm Plaintiffs as trust beneficiaries.** As beneficiaries of the public land trust Plaintiffs, and others similarly situated, are entitled to impartial treatment, equal access to all programs funded by public land trust revenues, and equal opportunity to use or benefit from the public lands. But as a result of the diversion of the about 200,000 acres of public lands and thirty percent of the State receipts from the sugarcane lands and water licenses and other diversions of public lands and revenues to DHHL and the issuance of Homestead leases pursuant to the racial classification in the HHCA laws, each Plaintiff has been and continues to be deprived of the equal protection of the laws and his or her full and equal share of the use or benefits of the public land trust;

b. **Existing Homestead leases require the HHC/DHHL Defendants to continue to enforce and administer racially discriminatory provisions for over 100 more years. They inflict ongoing and continuing harm on Plaintiffs.** As of January 31, 2002

there were 7,281 Homestead leases outstanding (including 5,823 residential, 1076 agricultural and 382 pastoral) covering some 42,000 or more acres from the public land trust. Each of these Homestead leases is required to have an initial term of 99 years "unless sooner terminated as hereinafter provided", extendable by DHHL for an additional term of 100 years, at rent of $1 per year. The original lessee is required to swear under oath that the lessee is a native Hawaiian. Upon the death of a lessee the lessee's interest may vest in certain relatives who are at least one-quarter Hawaiian. The lessee is not permitted to transfer or hold the premises for any other person except a native Hawaiian or Hawaiians, and then only upon the approval of DHHL. The lessee's interest is not subject to attachment, levy or sale upon court process, except pursuant to agreement with a native Hawaiian or Hawaiians or for any indebtedness due to or assured by DHHL. The lessee may mortgage or pledge his or her interest only with the consent and approval of the HHC. In the case of residential Homestead leases, the lessee is required to occupy the lot as the lessee's home and to continue to occupy and use the lands on lessee's own behalf. The agricultural Homestead leases require the lessee to practice "good husbandry" and, should DHHL deem advisable and so require, the lessee shall adopt a farm or ranch plan prepared by the U.S. Soil Conservation Service. Also, "The primary purpose of the Act being the successful rehabilitation of native Hawaiians under the guidance and tutelage of the Lessor [DHHL], it is deemed necessary and in furtherance of said Act and the purpose thereof that the Lessor retain, and it does hereby so retain, the right to approve in advance any proposed agreement between the Lessee and another relating in any way to the use of the agricultural lot." Pastoral Homestead leases have similar

provisions for good husbandry and the rehabilitation of native Hawaiians under DHHL's guidance and tutelage. The result of each of those Homestead leases is to deprive Plaintiffs of the benefit of some part of the public lands. A prudent trustee would and could obtain fair market lease rents substantially higher than $1 per year. The HHC/DHHL Defendants, by complying with the Homestead leases and performing the duties and exercising the rights of Lessor under those leases, deprive and continue to deprive Plaintiffs, and others similarly situated, of the benefit of over 42,000 acres of lands in the public land trust, and the equal protection of the laws, solely because Plaintiffs are not of the favored race.

c. **DHHL has the right to withdraw the whole or any part of the lands demised by the Homestead leases as may be required for a public use and purpose. Compliance with the 14th Amendment and the State's fiduciary duty as trustee of the public land trust are public uses and purposes.** Under the Homestead leases, the DHHL reserves "The right to withdraw from the operation of this lease the whole or any part or portion of the lands demised hereby, and any interest therein as in the exclusive judgment of the Lessor [DHHL] may be required for a public use and purpose . . . " The HHC/DHHL Defendants and the State Defendants are all required to take an oath of office to support and defend the Constitution of the United States. (Hawaii State Constitution, Art.XVI §4; §202 HHCA; §26-34 HRS). Under the Constitution of the United States, state officials, including the HHC/DHHL Defendants and the State Defendants, are forbidden from denying to any person the equal protection of the laws on account of race. Their duty to support and defend the Constitution of the

United States is a public purpose which overrides any inconsistent duties arising under state law or federal statutes. Also, both federal and state trust laws require the HHC/DHHL Defendants and the State Defendants to comply with the State's fiduciary duty and public purpose to act impartially in administering the public land trust.

d. **Appropriations for DHHL harm Plaintiffs as taxpayers.** Part of the State of Hawaii's tax revenues (which include taxes Plaintiffs pay to the State of Hawaii) are appropriated to the Department of Hawaiian Home Lands (DHHL) and part also may go to pay principal and interest on bonds that generated funds that have been appropriated to DHHL. For instance, for Fiscal Year 2001 at least $7,154,969 was appropriated to DHHL in general and special funds paid by the Plaintiffs and other taxpayers of Hawaii. 2000 Sess. L. Act 281. The Legislature also approved $25,000,000 in revenue bonds. The Hawaiian Homes Commissioners administer DHHL's funds and decide how those funds will be spent. The HHCA laws require the Hawaiian Homes Commissioners to work solely for the benefit of the racial class of native Hawaiians and to promote the interests of people in that class, particularly the people who have qualified for Homesteads based on their racial ancestry. If the state tax revenues (including taxes Plaintiffs pay) were not diverted to DHHL, Plaintiffs' taxes could be reduced or funding for racially neutral programs that Plaintiffs could qualify for could be increased. Although each Plaintiff's tax burden is increased by the appropriations to DHHL, and by any appropriations to pay principal and interest on bonds that generated funds that have been appropriated to DHHL, every Plaintiff is denied any benefit of those appropriations solely because of his or her ancestry, i.e., he or she is

not "native Hawaiian" since none of Plaintiffs have the required one half part of the favored racial ancestry. Every Plaintiff is injured in that he or she is denied the equal protection of the laws and is forced to pay taxes for unconstitutional racially discriminatory programs.

59. From 1959 to 1978 the practice of the State of Hawaii was to channel the income of the ceded lands, except for the parts set aside under the HHCA, by and large to the Department of Education. Final Report of the Public Land Trust, Legislative Auditor, Dec. 1985.

60. This use of the income from the ceded lands, except for the parts set aside under the HHCA, complied with the public land trust because the primary purpose of the public land trust from the inception has been public education. It also complied with the Admission Act because the support of the public schools was one of the five permitted purposes. It also complied with the Constitution of the United States because it benefited all children of Hawaii who attended public schools without regard to their race or ancestry. Children of Hawaiian ancestry, who make up about 25% of the public school student body, shared fully in that benefit.

61. In 1978, through the Constitutional Convention and subsequent legislation, the State of Hawaii shifted this priority. It purportedly ordered the diversion of a pro rata share" of ceded lands revenues and proceeds "to the betterment of native Hawaiians" through a newly created agency, the Office of Hawaiian Affairs ("OHA"). One consequence of these events was to take substantially all of the net income from the ceded lands and divert it from public education to OHA. Another consequence was to convert what had been (except for the HHCA) a race-neutral

public land trust and convert it to one which treated beneficiaries differently based on their ancestry.

62. As a result of the OHA laws and the ongoing acts of Defendants in implementing and enforcing them, Plaintiffs and about one million of Hawaii's other citizens similarly situated have been and continue to be harmed as follows:

a. **Diversions of public land trust revenues to OHA harm Plaintiffs as beneficiaries of the public land trust.** At least $250 million in ceded lands revenues, or appropriations "equivalent to" such revenues, have been diverted to OHA for the exclusive benefit of the racial class defined as "native Hawaiian". OHA is legally obliged to segregate and earmark funds from the public land trust for "native Hawaiians". According to OHA's financial report of November 30, 200[1], OHA holds investments of over $304 million and total fund equity of over $337 million. Plaintiffs believe that most of those investments and funds are derived from public land trust revenues diverted to OHA. If the public land trust revenues were not diverted to OHA, funding for the racially neutral purposes of the public land trust, such as public education, could be increased; or that revenue could be spent on racially neutral programs now funded by tax revenues and Plaintiffs' taxes could be reduced; or funding for racially neutral programs that each Plaintiff could qualify for could be increased. As a beneficiary of the public land trust each Plaintiff is entitled to impartial treatment and equal access to or benefit of all programs funded by public land trust revenues. But as a result of the diversion of the public land trust assets to OHA exclusively for "native Hawaiians", each Plaintiff is and continues to be denied the equal protection of the laws and continues to be

deprived of his or her full and equal share of the benefits of the public land trust;

b. **Appropriations for OHA harm Plaintiffs as taxpayers.** Part of the State of Hawaii's tax revenues (which include taxes each Plaintiff pays to the State of Hawaii) are appropriated to the Office of Hawaiian Affairs (OHA) and part also go to pay principal and interest on bonds that generated funds that have been appropriated to OHA. The trustees of the OHA administer OHA's funds and decide how those funds will be spent. The OHA laws require the OHA trustees to work solely for the benefit of the racial classes of Hawaiians and native Hawaiians and to promote the interests of people in those racial classes. If the state tax revenues (including taxes each Plaintiff pays) were not diverted to OHA, each Plaintiff's taxes could be reduced or funding for racially neutral programs that each Plaintiff could qualify for could be increased. Although each Plaintiff's tax burden is increased by the appropriations to OHA, and the appropriations to pay principal and interest on bonds that generated funds that have been appropriated to OHA, each Plaintiff is denied any benefit of the portions set aside for "native Hawaiians" solely because of his or her ancestry, i.e., none of the Plaintiffs have the required one half part of the favored racial ancestry. All except three of the Plaintiffs are also denied any benefit of the portions set aside for "Hawaiians" because they have none of the favored ancestry. Every Plaintiff is harmed in that he or she is denied the equal protection of the laws and is forced to pay taxes for unconstitutional racially discriminatory programs.

c. **The exemption of Homestead lots from real property taxes also harms Plaintiffs as taxpayers.** The City and County of Honolulu and the County of

Maui both exempt Hawaiian Homesteads from paying real property taxes. To be awarded a Hawaiian Homestead one must be native Hawaiian or the child of a native Hawaiian Homesteader. As a result of this racially discriminatory tax exemption, taxes imposed on the owners of other property, including every Plaintiff, in order to pay the costs of the government are higher than they otherwise would be.

CLAIMS FOR RELIEF

First Claim for Relief Equal Protection Clauses of Fourteenth and Fifth Amendments

63. Plaintiffs reallege paragraphs 1 through 62 as if set forth fully.

64. The Fourteenth Amendment of the Constitution of the United States provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall and State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

65. The Supreme Court of the United States held, in *Rice v. Cayetano,* 528 U.S. 495, 514 (2000) that the definitions of "Hawaiian" and "native Hawaiian" in the OHA laws, which specifically incorporate the HHCA definition, are racial classifications. "Ancestry can be a proxy for race. It is that proxy here." "The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose." *Id.* at 515. "The State's electoral

restriction enacts a race-based voting qualification." *Id*. at 517.

66. Giving status, entitlements, privileges, preferences and benefits exclusively to people who meet those definitions are the foundation and the only reason for the existence of OHA, HHCA and DHHL.

67. The Supreme Court held in *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 222 (1995) that "equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment" and at 226, "Accordingly, we hold today that all racial classifications, imposed by whatever federal, state or local governmental actor must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."

68. The OHA laws and the HHCA laws cannot pass strict scrutiny because: (a) neither the State of Hawaii nor the United States has a compelling interest in dividing its citizens into two classes based on race and discriminating against those citizens in one class and favoring those in the other; and (b) even if some compelling interest existed, neither the OHA laws nor the HHCA laws are narrowly tailored.

69. To the extent that the Admission Act requires the State of Hawaii to adopt the HHCA and to the extent that it is construed as requiring or compelling the State to give native Hawaiians rights to the ceded lands, or revenues or proceeds thereof, not shared equally by other citizens, those parts of the Admission Act are invalid under the Fifth and Fourteenth Amendments and the Equal Footing doctrine.

70. The OHA laws, the HHCA laws, the Homestead leases issued pursuant to the racial classification in the HHCA laws, and the ongoing acts, customs and usages of the State Defendants, the HHC/DHHL Defendants and the OHA Defendants in implementing and enforcing the OHA laws and the HHCA laws deny and continue to deny to Plaintiffs the equal protection of the laws and are ongoing violations of the Fourteenth Amendment.

71. If and to the extent that the OHA laws or the HHCA laws are defended, implemented or authorized by any acts, customs or usages of the United States or its officials, they deny and continue to deny to Plaintiffs the equal protection of the laws and are ongoing violations of the Fifth Amendment.

Second Claim for Relief
Violation of the Civil Rights Act, 42[ ] U.S.C. § 1983

72. Plaintiffs reallege paragraphs 1 through 71 as if set forth fully.

73. The Civil Rights Act, 42 U.S.C. § 1983, provides,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

74. The OHA laws, the HHCA laws, the Homestead leases issued pursuant to the racial classification in the

HHCA laws and the ongoing acts, customs and usages of the State Defendants, the HHC/DHHL Defendants and the OHA Defendants under color thereof deny and continue to deny to Plaintiffs the equal protection of the laws and rights, privileges and immunities secured to them by the Constitution and laws of the United States and are ongoing violations of the Civil Rights Act, 42 U.S.C. § 1983.

Third Claim for Relief
Breach of Public Land Trust

75. Plaintiffs reallege paragraphs 1 through 74 as if set forth fully.

76. The public land trust was created by federal law: The Newlands Resolution in 1898 expressly accepting the terms offered by the Republic of Hawaii (including the requirement that, with the exceptions noted, proceeds and revenues of the ceded lands "shall be used solely for the benefit of the Inhabitants of the Hawaiian Islands for educational and other public purposes.") and the Organic Act in 1900 (reiterating that "All funds arising from the sale or lease or other disposal of public land shall be applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the Joint Resolution of Annexation approved July 7, 1898.")

77. Having accepted the duties of a trustee of the public land trust for the benefit of the people of Hawaii, the United States is (or at least through the time it returned the ceded lands to Hawaii in 1959, was) obliged to treat all of the inhabitants of Hawaii, including the Plaintiffs, with the strict equality that is required of a trustee

who is obliged to protect the interests of multiple beneficiaries.

78. The scope of the U.S. fiduciary duty in administering trust property is a question of federal law. *U.S. v. Mason,* 412 U.S. 391, 397 (1973). Congress's power to change the public land trust is limited by the Fifth Amendment, the equal footing doctrine and the fiduciary duty under federal law of the United States as trustee of the public land trust, at least through the time it returned most of the ceded lands to Hawaii in 1959. The power of the United States to act as trustee of the public land trust is, like all of its powers, limited by the Fifth Amendment. The equal protection component of the Fifth Amendment and the obligations of a public trustee require that the United States in all its actions related to the public lands trust treat all beneficiaries equally, without regard to race.

79. The United States neither had nor has any constitutional power to authorize, permit or require the State as trustee of the public land trust to discriminate for or against beneficiaries on grounds of race or ancestry.

80. The State's role and the scope of its duties as trustee is likewise limited by federal law, including the Newlands Resolution, the Admission Act, the United States Constitution, the Fourteenth Amendment and other federal laws. The State has accepted the duties of a trustee of the public lands trust and has recognized that its fiduciary obligations to the beneficiaries are governed by the same strict standards applicable to private trustees. "The State owes this same high standard to the beneficiaries of the ceded lands trust and, as stated in the text, the beneficiaries of this trust should not be left powerless to prevent the State from allegedly neglecting its obligations."

Pele Defense Fund v. Paty, 73 Haw. 578, 604, 837 P.2d 1247, 1264 (1992). The trustee must deal impartially when there is more than one beneficiary. *Ahuna v. Dept. Hawaiian Home Lands,* 64 Haw. 327, 340 (1982) citing federal authorities including *Mason,* supra.

81. As beneficiaries of the public land trust, Plaintiffs have federally created rights under the Newlands Resolution and the Admission Act and have standing to invoke 42 U.S.C. § 1983 to sue state officials who violate the terms of the federally created trust (as limited by the requirements of the United States Constitution) or who violate other federal laws in their administration of that trust.

82. The OHA laws, the HHCA laws and the ongoing acts of the State Defendants, the HHC/DHHL Defendants and the OHA Defendants in implementing and enforcing them and the Homestead leases issued only to people who satisfy the racial classification in the HHCA laws, breach the fiduciary duty those Defendants, as State officials, owe to Plaintiffs as beneficiaries of the public land trust and are ongoing violations of federal laws.

83. If and to the extent that the OHA laws or the HHCA laws are defended, supported, implemented or authorized by any acts, customs or usages of the United States or its officials, they breach the fiduciary duty the United States owes to Plaintiffs as beneficiaries of the public land trust and are ongoing violations of federal laws.

Prayer

Wherefore, Plaintiffs pray that this Court:

A. Declare:

1. The OHA laws and the HHCA laws are invalid under the Constitution of the United States, effective as of the date of the Court's Judgment;

2. All moneys, investments, lands and property of any kind, and all earnings thereon and growth thereof, held by or for OHA, HHC or DHHL, are general funds and property of the State of Hawaii;

a. All such property is free of any trust or other encumbrance which restricts its use to the benefit of any racial classification or prevents it from being used for the benefit of all of the people of Hawaii; and

b. All such property is within the care and control of the Defendant Governor to be used for such constitutional and non-discriminatory purposes as the State deems appropriate and in compliance with the public land trust for the inhabitants of the State of Hawaii; and

3. Continued management, administration and enforcement of the existing Homestead leases by HHC/DHHL Defendants would be an ongoing and continuing violation of federal law (the equal protection clause of the Fourteenth Amendment and the Civil Rights Act) and a continuing breach of the State's fiduciary duty, under federal law, as trustee of the public land trust;

B. Order the HHC/DHHL Defendants and/or the State Defendants to negotiate with the existing Homesteaders for the State's exercise of its right to withdraw the lands demised in a way that is fair to the Homesteaders but does

not further violate the rights of Plaintiffs and others similarly situated.[1]

C. Permanently enjoin the HHC/DHHL Defendants from issuing any further Homestead leases, making any further grants, loans, guarantees, transfers, contracts or expenditures or doing any further developments relating to the HHCA laws, or from otherwise further implementing, enforcing or carrying out the HHCA laws;

D. Permanently enjoin the OHA Defendants from making any further grants, loans, guarantees, transfers, contracts or expenditures relating to the OHA laws or from

[1] Such negotiations could result in a global settlement under which, for example, the fee simple interest in the demised land is conveyed to the Homesteader in exchange for no or a reduced payment and a complete release of all claims by the Homesteader and his heirs and assigns against all parties, including all claims against the State of Hawaii and the United States and anyone else arising out of or related to the Homestead leases, the HHCA laws, the OHA laws and any other claims for Hawaiian entitlements. If the fair market value of the land demised were, say, $50,000, the fee might be conveyed with no payment required. If the fair market value was $200,000 the Homesteader might be required to pay $150,000 within ten years or earlier if the Homesteader sells or mortgages the land or ceases to occupy it as the Homesteader's residence. These are just examples showing how plaintiffs believe a fair settlement might be reached. Plaintiffs do not ask the court to order such a settlement. Plaintiffs do believe that any settlement reached should be subject to this court's approval, to ensure that the interests of plaintiffs and others similarly situated are protected. If no settlement is reached by the State and Homesteaders within a reasonable time, plaintiffs believe the court should order the State Defendants and the HHC/DHHL Defendants to withdraw the lands demised by the Homestead leases. In that event, and if the Homesteaders intervene in this action, plaintiffs believe the court should adjudicate the manner in which the demised lands are withdrawn so that it is fair to the Homesteaders and does not further violate the rights of plaintiffs and others similarly situated.

otherwise further implementing, enforcing or carrying out the OHA laws;

E. Permanently enjoin the State Defendants from making or agreeing to make any further transfers of public moneys, investments, lands or property of any kind to or for OHA or to or for HHCA or DHHL and from otherwise carrying out, implementing or enforcing the OHA laws or the HHCA laws;

F. Order the OHA Defendants to transfer to the State Defendants all moneys, investments, lands and property of any kind, and all earnings thereon and growth thereof, held by or for OHA;

G. Order the HHCA/DHHL Defendants to transfer to the State Defendants all moneys, investments, lands and property of any kind, and all earnings thereon and growth thereof, held by or for HHC and DHHL;

H. Retain jurisdiction to exercise its equitable powers and issue such further orders in aid of execution of its judgment, to resolve disputes as to settlements between the State Defendants and the individual Homesteaders and to accomplish, to the greatest extent possible, either a global settlement or final adjudication of all related claims.

I. Allow Plaintiffs their costs herein, including reasonable attorney's fees, and such other and further relief as is just.

Dated: Honolulu, Hawaii this 4th day of March, 2002.

/s/ H. William Burgess
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EARL F. ARAKAKI, et al., Plaintiffs, vs. BENJAMIN J. CAYETANO in his official capacity as GOVERNOR OF THE STATE OF HAWAII, et al. Defendants,	CIVIL NO. 02-00139 SOM/KSC Reply to Plaintiffs' Response to the United States' Motion to Dismiss; Certificate of Service DATE: September 3, 2002 TIME: 9:45 a.m. HONORABLE SUSAN OKI MOLLWAY

REPLY TO PLAINTIFF'S RESPONSE
TO THE UNITED STATES' MOTION TO DISMISS

(Filed Aug. 26, 2002)

* * *

(D. Hawaii 2001). Plaintiffs reasoning is flawed. To begin with, the United States is not required to be named as a party in every action involving state statutes to which it has given its imprimatur. In *Rice v. Cayetano*, 528 U.S. 495 (2000), for example, the United States was never viewed as an indispensable party despite the Court's recognition of the role Congress played in the underlying statutory scheme. Furthermore, Plaintiffs in this case base their standing on their status as taxpayers – unlike the plaintiff in *Carroll*. As we set out in or original motion, Plaintiffs' claims against the United States are nothing more than "generalized grievances" of federal taxpayers. Such claims do not confer standing, and there is no basis for finding the United States to be an indispensable party

to an action that does not meet the requirements of Article III.

IV. Conclusion

For the foregoing reasons, the United States respectfully requests that all of Plaintiffs' claims against the

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