

# **A BROKEN TRUST**

## **The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians**

**Hawaii Advisory Committee  
to the United States  
Commission on Civil Rights**

**December 1991**

*This factfinding report of the Hawaii Advisory Committee to the United States Commission on Civil Rights was prepared for the information and consideration of the Commission. Statements and viewpoints in this report should not be attributed to the Commission, but only to the Advisory Committee.*

## **THE UNITED STATES COMMISSION ON CIVIL RIGHTS**

The United States Commission on Civil Rights, first created by the Civil Rights Act of 1957, and reestablished by the United States Commission on Civil Rights Act of 1983, is an independent, bipartisan agency of the Federal Government. By the terms of the 1983 act, the Commission is charged with the following duties pertaining to discrimination or denials of the equal protection of the laws based on race, color, religion, sex, age, handicap, or national origin, or in the administration of justice; investigation of individual discriminatory denials of the right to vote; study of legal developments with respect to discrimination or denials of the equal protection of the law; appraisal of the laws and policies of the United States with respect to discrimination or denials of equal protection of the law; maintenance of a national clearinghouse for information respecting discrimination or denials of equal protection of the law; and investigation of patterns or practices of fraud or discrimination in the conduct of Federal elections. The Commission is also required to submit reports to the President and the Congress at such times as the Commission, the Congress, or the President shall deem desirable.

## **THE STATE ADVISORY COMMITTEES**

An Advisory Committee to the United States Commission on Civil Rights has been established in each of the 50 States and the District of Columbia pursuant to section 105(c) of the Civil Rights Act of 1957 and section 6(c) of the United States Commission on Civil Rights Act of 1983. The Advisory Committees are made up of responsible persons who serve without compensation. Their functions under their mandate from the Commission are to: advise the Commission of all relevant information concerning their respective States on matters within the jurisdiction of the Commission; advise the Commission on matters of mutual concern in the preparation of reports of the Commission to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public and private organizations, and public officials upon matters pertinent to inquiries conducted by the State Advisory Committee; initiate and forward advice and recommendations to the Commission upon matters in which the Commission shall request the assistance of the State Advisory Committee; and attend, as observers, any open hearing or conference that the Commission may hold within the State.

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## Letter of Transmittal

Hawaii Advisory Committee to the  
U.S. Commission on Civil Rights

### **Members of the Commission**

Arthur A. Fletcher, *Chairman*  
Charles Pei Wang, *Vice Chairman*  
William B. Allen  
Carl A. Anderson  
Mary Frances Berry  
Esther G. Buckley  
Blandina C. Ramirez  
Russell G. Redenbaugh

Wilfredo J. Gonzalez, *Staff Director*

Attached is a factfinding report of the Hawaii Advisory Committee based on a public forum and a factfinding meeting convened by the Committee in September 1988 and August 1990, respectively. In addition, significant interviews and other research endeavors were undertaken by members of the Committee and Commission staff. The Advisory Committee initially examined this issue in its 1980 report, *Breach of Trust? Native Hawaiian Homelands*.

The purpose of this project was to determine the extent to which both the Federal Government and the State of Hawaii are meeting their trust obligations to Native Hawaiians under the Hawaiian Homes Commission Act of 1921. This law set aside approximately 200,000 acres as a land trust for homesteading by Native Hawaiians. Primary administrative responsibilities were transferred to the State of Hawaii upon admission to the Union in 1959. The Federal Government, nonetheless, retains significant oversight responsibilities, including the exclusive right to sue for breach of trust.

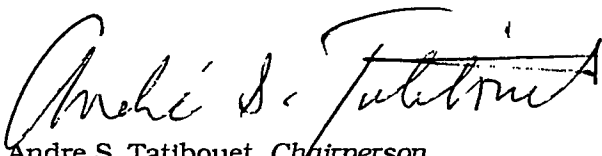
After 70 years, the Advisory Committee finds that the homesteading program has provided very few tangible benefits for beneficiaries of the trust. Only 17.5 percent of the total available lands are being homesteaded. At the same time, over 62 percent of the lands are being used by non-natives, often for minimal compensation. Especially egregious is the continued questionable use of valuable homelands by the United States Government, with virtually no compensation to the trust. These include some of the most suitable lands for development of homes. With a waiting list of over 20,000 applicants, it is unconscionable that the United States should continue to so blatantly and arrogantly defy the interests of the Native Hawaiian community, whose rights it should be aggressively defending. The Advisory Committee solicits the help of the United States Commission on Civil Rights in requiring the return of these improperly held lands, or an exchange of lands at least equally suited to homesteading.

Unlike other Native Americans, Hawaiians have never received the privileges of a political relationship with the United States. Yet, Hawaiians, whose former kingdom was a member of the international community of nations and recognized by the United States, have a compelling case for Federal recognition. This Committee hopes the Commission will support the aspirations of Native Hawaiians for greater self-determination.

The Advisory Committee is grateful for the voluntary participation of many State officials and other experts who cooperated with this effort. But most especially the Committee appreciates the overwhelming support and valuable contributions of the Native Hawaiian community. Without their encouragement, this project could not have succeeded.

By a vote of 11 to 0, the Advisory Committee approved submission of this report to the Commissioners. The Committee hopes that this document will be of value to the Commission as it continues its work to promote civil rights in this nation. We are especially hopeful that the Commission will use its good influence to help achieve the recommendations outlined herein.

Respectfully,

A handwritten signature in cursive script, reading "Andre S. Tatibouet". The signature is written in black ink and is positioned above the printed name and title.

Andre S. Tatibouet, *Chairperson*  
Hawaii Advisory Committee

## **Hawaii Advisory Committee to the U.S. Commission on Civil Rights**

Andre S. Tatibouet, *Chairperson*  
Honolulu

Charles Maxwell, Sr., *Vice Chairperson*  
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### **Acknowledgments**

The Hawaii Advisory Committee wishes to thank staff of the Commission's Western Regional Office for its help in the preparation of this factfinding report. The project was the principal assignment of John F. Dulles II. Support was provided by Grace Hernandez and Priscilla Lee-Herring. Editing assistance was provided by Thomas V. Pilla of the Western Regional Office and Gloria Hong Izumi of the Commission's headquarters office in Washington, D.C.

The Advisory Committee would also like to thank former Advisory Committee members Milton Ebesu, Julianne Puzon, and Donnis Thompson, all of Honolulu, for their participation during this study.

This factfinding report was researched and written by John F. Dulles II of the Western Regional Office. The project was carried out under the overall supervision of Philip Montez, Director, Western Regional Office.

# Contents

I. Introduction .....	1
II. Background .....	3
III. The Role of the Federal Government .....	8
IV. The Role of the State Government .....	21
V. Summary .....	41
VI. Findings and Recommendations .....	43

## Appendices

A. Arthur A. Fletcher, Chairman, United States Commission on Civil Rights, letter to Honorable Richard Thornburgh, Attorney General, U.S. Department of Justice, July 2, 1990 .....	49
B. Arthur A. Fletcher, letter to Honorable Manuel Lujan, Jr., Secretary of the Interior, U.S. Department of the Interior, July 2, 1990 .....	51
C. Myles E. Flint, Deputy Assistant General, Land and Natural Resources Division, U.S. Department of Justice, letter to Arthur A. Fletcher, August 31, 1990 .....	53
D. Timothy W. Glidden, Counselor to the Secretary and Secretary's Designated Officer, Hawaiian Homes Commission Act, U.S. Department of the Interior, letter to Honorable Arthur A. Fletcher, July 17, 1990 (with attachments) .....	55

## I. Introduction

On July 9, 1921, the United States Congress enacted the Hawaiian Homes Commission Act of 1920 (HHCA).<sup>1</sup>

The legislation established a land trust of approximately 200,000 acres for homesteading by the Native Hawaiians, defined as persons with 50 percent or more Hawaiian blood. The major purposes of the act included placing Hawaiians on the land, preventing alienation of this land trust, providing adequate amounts of water for homestead lands, and assisting Hawaiians in establishing farming operations.<sup>2</sup> Congress hoped that attainment of these objectives would enable Hawaiians to return to their lands in order to provide for their self-sufficiency, initiative, and preservation of their native culture.<sup>3</sup>

Although it is clear that there was genuine concern about the inability of the Hawaiian people to assimilate into Western society and fears that the race was disappearing, it is just as certain that other, less benevolent factors inspired the ultimate passage of HHCA.<sup>4</sup> Large sugar interests in the territory had a vested interest in protecting their holdings, which were jeopardized by provisions in the 1900 Hawaii Organic Act limiting the terms of

agricultural leases, the size of their holdings, and providing for withdrawal of agricultural leases if these lands were needed for homesteading or public purposes.<sup>5</sup> Even without the withdrawal clauses, 26,000 acres of prime agricultural land used by the sugar interests would become available upon expiration of leases. In all, leases on more than 200,000 acres of government land were due to expire between 1917 and 1921.<sup>6</sup> The sugar planters lobbied unsuccessfully for changes in the homesteading laws; however, they were aware of strong congressional support for efforts to rehabilitate the Hawaiian people by returning them to the land. They determined that their self-interest could be best achieved by supporting such a measure, at the same time insisting that their leases be extended and valuable agricultural lands exempted from the Hawaiian homelands trust. Eventually, these corporate interests prevailed and passage of the HHCA accomplished their political objectives. Unfortunately, proponents of Hawaiian rehabilitation through homesteading were forced to concede to such an extent that the original goals of the HHCA were severely compromised—the homelands trust consisted

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1 42 Stat. 108, reprinted in 1 Haw. Rev. Stat. 167-205 (1985, Supp. 1989) (hereafter cited as HHCA).

2 Federal-State Task Force Report on the Hawaiian Homes Commission Act: Report to United States Secretary of the Interior and the Governor of the State of Hawaii (Honolulu, HI, Aug. 15, 1983), p. V (hereafter cited as Federal-State Task Force Report).

3 *Id.*

4 M.M. Vause, "The Hawaiian Homes Commission Act: History and Analysis," M.A. Thesis, University of Hawaii, Manoa, 1962 (unpublished), Introduction.

5 Gavan Daws, *Shoal of Time*, Honolulu, Univ. of Hawaii Press, 1974, pp. 297-98.

6 "Native Hawaiian Rights Handbook," Native Hawaiian Legal Corporation 1990 (unpublished), chap. III, pp. 7-8 (hereafter cited as "Native Hawaiian Rights Handbook").



largely of the worst lands in the territory—remote, inaccessible, arid, and unsuitable for productive development.<sup>7</sup>

Thus, a conflict of interest governed the very creation of the Hawaiian homelands program; powerful economic forces prevailed over native interests. This theme has continued

throughout the program's history and has jeopardized its effectiveness.<sup>8</sup> In fact, the failure to return Native Hawaiians to their lands is the single most damaging conclusion that must be drawn from any careful study of the act's torturous history.

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7 Daws, p. 298.

8 "Native Hawaiian Rights Handbook," p. 14.

## II. Background

In 1979 the Hawaii Advisory Committee to the United States Commission on Civil Rights (USCCR) began receiving complaints from concerned citizens and trust beneficiaries regarding administration, management, and enforcement of the homelands trust. A public forum was convened during which the Advisory Committee received reports from experts and community advocates regarding the historical relationship of aboriginal Hawaiians to the land and to the State and Federal governments under the HHCA.<sup>1</sup> Among the allegations presented to the Committee were:

Over 20,000 acres of trust lands were unaccounted for or "lost."

Of the approximately 190,000 acres of Hawaiian homelands, Native Hawaiians were homesteading only 25,000 acres or about one-eighth of the total homeland trust.

Non-Hawaiian users of the trust included Federal, State, and county governments, as well as private parties. In 1976-77, the Federal Government paid an average rental per acre for homelands of 45 cents; the State of Hawaii paid 12 cents per acre; and the counties paid \$3.10 per acre.

The needs of the general public, as opposed to the needs of the trust beneficiar-

ies, were controlling state decisions concerning the homelands.<sup>2</sup>

In October 1980 the Hawaii Advisory Committee released its report, *Breach of Trust? Native Hawaiian Homelands*.<sup>3</sup> The document presented a summary of the information collected during the forum, and although it contained no recommendations, it served as a catalyst for focusing the attention of public officials and the public on long neglected problems affecting the administration of the HHCA.

In February 1982 the Secretary of the Interior requested that the Office of the Inspector General of the United States Department of the Interior conduct a review of Hawaiian homes programs to determine whether the Department was fulfilling its obligations under the HHCA, and whether improvements were needed. A report was issued by the inspector general in September 1982.<sup>4</sup> Among its conclusions were that the Department of Hawaiian Home Lands' accounting system was "inauditable" and that there was an "inadequate maintenance of land inventory records."<sup>5</sup>

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1 *Breach of Trust? Native Hawaiian Homelands*, Hawaii Advisory Committee to USCCR, October 1980, p. 2 (hereafter cited as *Breach of Trust*).

2 *Breach of Trust*, pp. 12, 16.

3 *Breach of Trust*.

4 Review of Hawaiian Homes Commission Programs, U.S. Dept. of the Interior, Office of Inspector General, Audit Report (September 1982).

5 *Id.*

## Federal-State Task Force

In a significant development (strongly encouraged by the Advisory Committee), the Secretary of the Interior and the Governor of Hawaii agreed to establish a Federal-State task force to review the HHCA and the programs carried out under the act. The Task Force was created in July 1982.<sup>6</sup>

Eleven members were appointed: eight from Hawaii and three from the Federal Government.<sup>7</sup> The task force began its deliberations in September 1982 and circulated its preliminary report in April 1983 for public review. Revised findings and recommendations were acted upon by the task force at its final meeting in June 1983.<sup>8</sup> A final report to the Secretary of the Interior and the Governor of Hawaii was submitted in August 1983.<sup>9</sup>

The Federal-State task force report is the most comprehensive and detailed analysis of the HHCA available to date. It represents a significant contribution to an understanding of the problems and opportunities presented by the Hawaiian Homelands program. By presenting detailed findings and recommendations directed to both Federal and State governments, it continues to serve as the primary benchmark for determining progress in the effective implementation of the HHCA.

The report includes 134 specific recommendations based on findings that are supported by a series of background and research papers. The issues addressed in-

clude: legal responsibilities, beneficiaries' right to sue, entitlements, funding, land transfers and exchanges, remedies for improper land use, traditional and cultural concerns, management and structure of the program, and alternative development models. The final recommendation calls for the Secretary of the Interior and the Governor to "convene a Federal-State Task Force to meet approximately one year from the date of submission of this report in order to assess and to report back to them upon progress in the implementation of these recommendations."<sup>10</sup> This advice was unheeded. Had a mechanism been created to review periodically progress in achieving the task force's recommendations, the Hawaii Advisory Committee believes that greater progress and enhanced accountability might have been achieved.

## Other Oversight Activities

In December 1980 a Native Hawaiians Study Commission was established by Congress to conduct a study of the culture, needs, and concerns of Native Hawaiians. The nine-member commission was appointed by President Carter, but its members were dismissed and replaced by President Ronald Reagan with his own appointees.<sup>11</sup> The commission issued its report, including findings and recommendations, in June 1983.<sup>12</sup> Although the majority of commissioners found that Hawaiians were in need of specific Fed-

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6 Federal-State Task Force Report, p. 8.

7 *Id.*

8 *Id.*, p. 10.

9 *Id.*, p. 11.

10 *Id.*, p. 68

11 Hon. Spark M. Matsunaga, Hearings before the Committee on Energy and Natural Resources, U.S. Senate, 98th Congress, 1984, part 1, p. 3.

12 Native Hawaiian Study Commission, *Report on the Culture, Needs, and Concerns of Native Hawaiians*, vol. 1, 1983.

eral assistance, they found the U.S. Government blameless in connection with the overthrow of the Hawaiian monarchy and found no legal basis for reparations. The three Hawaiian members vigorously dissented and filed their own minority report. Hearings on the report were conducted by the Senate Committee on Energy and Natural Resources in Hawaii in 1984.<sup>13</sup> Although the study commission addressed homelands issues to some extent, this was not its central focus, and deep controversy regarding the commission's conclusions greatly minimized the study's impact.

In 1981 a statewide coalition of organizations and individuals formed the Native Hawaiian Land Trust Task Force. Supported entirely by private contributions, it was intended to provide the perspectives of the Native Hawaiian community on trust issues. In its 1983 report to the President and the Congress, the group called for "immediate lawsuits against the State for breach of trust and waste of . . . land trust resources."<sup>14</sup> It also recommended that Federal funds to the State be cut off until compliance with the trust provisions in the Admission Act was achieved.<sup>15</sup>

In August 1989 the U.S. Senate Select Committee on Indian Affairs and the United States House of Representatives Committee on Interior and Insular Affairs conducted oversight hearings on the HHCA. Chaired by Senator Daniel K. Inouye, the joint committees convened hearings on each of the major islands and heard voluminous testimony from State officials, homesteaders, and community advocates. A complete transcript of these proceedings had not been made available as of this writing. However, this extensive record should provide an almost exhaustive record of existing problems and concerns relating to the HHCA.

### Recent Advisory Committee Activity

In 1988 the Hawaii Advisory Committee returned to examine issues raised in its *Breach of Trust?* report. The Committee convened a public forum in Honolulu on September 6, 1988, to solicit information on recent developments relating to the implementation, management, and enforcement of the HHCA.<sup>16</sup>

The Committee culminated its 10-year interest in the homelands program with a major factfinding meeting, also convened in Honolulu, on August 2, 1990.<sup>17</sup>

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13 Hearings before the Committee on Energy and Natural Resources, U.S. Senate, 98th Congress, Second Session on the Report of the Native Hawaiians Study Commission, Washington, DC: U.S. Government Printing Office, 1985.

Dr. Helen R. Nagtalon-Miller, then chair of the Hawaii Advisory Committee to the USCCR, testified at the proceedings, as did Charles K. Maxwell, vice chair.

14 *The Native Hawaiian: Culture, Needs, and Concerns* by Native Hawaiian Land Trust Task Force, vol. 1, 1983, p. 5.

15 *Id.*

16 Hawaiian Homes Update Forum, Hawaii Advisory Committee to USCCR, Honolulu, Sept. 6, 1988 (hereafter cited as Transcript 1988). Complete transcript of proceedings on file at Western Regional Office, United States Commission on Civil Rights, Los Angeles.

17 Fact-Finding Meeting on Hawaiian Homelands, Hawaii Advisory Committee to USCCR, Honolulu, Aug. 2, 1990 (hereafter cited as Transcript 1990). Complete transcript of proceedings on file at Western Regional Office, U.S. Commission on Civil Rights, Los Angeles. Although the Committee had intended to hold similar forums on other islands, resource limitations precluded this approach.

The Advisory Committee invited the participation of Federal and State officials, as well as legal and advocacy groups, homestead associations, community-based organizations, and concerned individuals. Approximately 40 persons addressed the Committee during the two public meetings.<sup>18</sup>

The Committee determined that its primary focus in completing its factfinding project would center on how well both the Federal and State governments were living up to their trust obligations under the HHCA. Neither the U.S. Department of Justice nor U.S. Department of the Interior sent representatives to

appear before the Committee at the August 2, 1990, factfinding meeting, despite formal letters of invitation from Arthur A. Fletcher, Chairman of the U.S. Commission on Civil Rights to Richard Thornburgh, Attorney General of the United States, and Manuel Lujan, Secretary of the Interior.<sup>19</sup> Written responses were received from both agencies.<sup>20</sup> In addition, Governor John Waihee chose not to accept the Committee's invitation to appear or send a representative to meet with the panel.<sup>21</sup> A representative of his office delivered a prepared statement to the Committee on August 2, 1990.<sup>22</sup>

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- 18 Participants appearing before the Advisory Committee at the Sept. 6, 1988, public forum were: Ilima A. Pifanala, chairperson, Hawaiian Homes Commission; Louis Hao, chairman, Office of Hawaiian Affairs; Linda Delaney, lands officer, Office of Hawaiian Affairs; Clarence Ching, trustee, Office of Hawaiian Affairs; Mahealani Kamaau, executive director, Native Hawaiian Legal Corporation; Alan Murakami, attorney, Native Hawaiian Legal Corporation; Masaru Oshiro, executive director, Alu Like, Inc.; Sonny Kaniho; Mililani B. Trask, Kia'aina, Ka Lahui Hawaii; Kawalupuna Prejean; Alice Moha Akita Zenger; and Henry E. Smith, Jr. Participants appearing before the Advisory Committee at the Aug. 2, 1990, public factfinding meeting were: Alan Murakami, director of litigation, Native Hawaiian Legal Corporation; Paul N. Lucas, staff attorney, Native Hawaiian Legal Corporation; Williamson B.C. Chang, director, Native Hawaiian Advisory Council; Mililani B. Trask, Kia 'Aina, Ka Lahui Hawaii; Colette Machado; Kamaki Kanahale, chairman, State Council of Hawaiian Homestead Associations (SCHHA); Ethel Andrade, member, Executive Board, SCHHA; Pat Brandt, Office of the Governor, State of Hawaii; Hoaliku Drake, chairman, Hawaiian Homes Commission, Department of Hawaiian Home Lands; John Rowe, deputy director, Department of Hawaiian Home Lands; Rod K. Burgess, III, vice chairman, Office of Hawaiian Affairs; Bill Tam, Office of the Attorney General, State of Hawaii; Senator Mike Crozier, chairman, Committee on Housing and Hawaiian Affairs, Hawaii State Senate; Haunani Apoliona, Alu Like, Inc.; Sonny Kaniho; Martina T. Whitehead; Lila M. Hubbard; Harold Uhane Jim; Kamuela Price; Maui Loa; Virginia Kepano; Peggy Ha'o Ross; Leona Atcherly; Joseph Nakea; Ben Hopkins; Tiny Niau; and Billie Beamer.
- 19 Correspondence to Richard Thornburg, Attorney General, U.S. Dept. of Justice, and Manuel Lujan, Secretary of the Interior, U.S. Dept. of the Interior, from Arthur A. Fletcher, Chairman, USCCR, dated July 2, 1990. Copies of the letters are included in the appendix to this report.
- 20 Responses to Chairman Fletcher from Myles E. Flint, Deputy Assistant Attorney General, Land and Natural Resources Division, U.S. Dept. of Justice, and Timothy W. Glidden, counselor to the Secretary and Secretary's designated officer, Hawaiian Homes Commission Act, U.S. Dept. of the Interior, were received on Sept. 10, 1990, and July 23, 1990, respectively. Copies of each letter, including attachments to Glidden correspondence have been incorporated in the appendix of this document.
- 21 Correspondence to the Honorable John D. Waihee, Governor of Hawaii, from Philip Montez, Regional Director, Western Regional Office, U.S. Commission on Civil Rights, July 2, 1990.
- 22 John Waihee, Governor of Hawaii, statement to Hawaii Advisory Committee, USCCR, Aug. 2, 1990 (hereafter cited as Governor's Statement). This includes the following: "In the last few years, especially in the last three, there has been almost continuous investigative and factfinding activity by State and Federal officials.

This report will provide an overview of the key issues brought before the Committee at its two public forums. In addition, the Committee and Commission staff received substantial additional documentation and written statements. It should be noted that the Advisory Committee's purpose was not to produce an exhaustive analysis or evaluation of the

homelands program. Nonetheless, based on a careful review of the already existing record, combined with the transcripts of its own two meetings, the Advisory Committee felt that it was in a position to arrive at certain conclusions and to offer selected recommendations. These are included in chapter VI of this document.

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Several valuable records have been established by virtue of these oversight functions. It may be more productive for any additional oversight to occur after corrective measures are underway, particularly in light of the requirement the Governor has to present a proposal in 1991 to 'resolve controversies.' Factfinding activities that occur now are tracking a moving target." (p. 3).

### III. The Role of the Federal Government

The HHCA was enacted by the United States Congress in 1921. The act is therefore a creature of the Federal Government, and many of its current deficiencies must be blamed on the failure of the Congress to protect the interests of Native Hawaiians in its passage. The act was administered by the territorial government through the Hawaiian Homes Commission until Hawaii became a State in 1959. During that period no adequate funding mechanism was provided, and the program was financially troubled.<sup>1</sup> One expert has noted that “some of the most egregious trust breaches—trust lands set aside for nontrust purposes, unconscionable leases—occurred during this period, under the Federal Government’s trusteeship.”<sup>2</sup> Although territorial governors were not authorized to transfer control and possession of Hawaiian homelands to other public agencies by executive orders, 29 such executive order withdrawals, covering 13,578 acres of land, were issued by the governors.<sup>3</sup>

At the time of Hawaii’s admission into the Union in 1959, the State established the Department of Hawaiian Home Lands, and most of the responsibilities for implementing the

HHCA were assumed by this agency. Section 4 of the Hawaii Admission Act provided that the new State “as a compact with the United States” would adopt the HHCA as a part of the State constitution.<sup>4</sup> Nonetheless, the Federal Government retained some significant oversight responsibility. This responsibility includes a requirement that the Secretary of the Interior approve any land exchanges involving Hawaiian homelands.<sup>5</sup> Congress also retains the power to alter, amend, or repeal any provision of the HHCA.<sup>6</sup> Also, any amendments to the law enacted by the State legislature that might alter the qualifications of or diminish the benefits of the program to its beneficiaries must be approved by the United States.<sup>7</sup> Most significantly, under section 5(f) of the Hawaiian Admissions Act, the United States may bring suit if the State breaches its responsibilities to Native Hawaiians.<sup>8</sup> The United States has never exercised its right to enforce the trust provisions of the HHCA in behalf of its beneficiaries, even though the Federal courts have determined that it alone has this right to sue for breach of trust under the Admission Act.<sup>9</sup>

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1 Melody MacKenzie, senior staff attorney, Native Hawaiian Legal Corporation, testimony before the United States Senate Select Committee on Indian Affairs and the House Committee on Interior and Insular Affairs, Aug. 8, 1989, p. 2 (hereafter cited as MacKenzie Testimony).

2 *Id.*

3 Federal-State Task Force Report, p. 40.

4 Admission Act of Mar. 18, 1959, Pub. L. No. 86-3 §4, 73 Stat. 4 (1959) (hereafter cited as Admission Act).

5 HHCA §204(3).

6 HHCA §223.

7 Admission Act §4.

8 Admission Act §5(f).

The Federal Government has demonstrated less than an enthusiastic affirmation of its responsibilities. In fact, there is clear evidence that the Department of the Interior has retreated from an earlier more proactive role. In a 1979 letter to the Director of the United States Commission on Civil Rights' Western Regional Division, the Deputy Solicitor of the U.S. Department of the Interior wrote that. . .

it is the department's position that the role of the United States under section 5(f) [of the Admission Act] is essentially that of a trustee. . . Although the United States transferred the lands and the responsibility for administering the act to the state under the Admission Act, the Secretary of the Interior retained certain responsibilities. . . which should be considered to be more than merely ministerial or non-discretionary. The United States further provided that no substantive changes in the act, and thus in the terms of the trust itself, may be made without the consent of Congress and also retained authority to prosecute breaches of the trust. Taken together, the responsibilities of the Federal Government are more than merely supervisory and the United States can be said to have retained its role as trustee under the act while making the state its instrument for carrying out the trust.<sup>10</sup>

This correspondence resulted from the Hawaii Advisory Committee's inquiry of August 1, 1979, and was published in *Breach of Trust?*

Also, in 1979 the Assistant Attorney General, Land and Natural Resources Division, United States Department of Justice, wrote to the Commission's Regional Director: "The Department of Justice would have the exclusive litigation authority if suit were brought by the United States to enforce the trust. . . . It is our view, however, that individual beneficiaries of the trust may also file suit if they believe the trust to have been violated."<sup>11</sup>

In a response to Commission Chairman Arthur Fletcher's invitation to participate in the August 2, 1990, factfinding meeting, Timothy Glidden, counselor to the Secretary of the Interior and the Secretary's designated officer for the HHCA, stated that "this department [has] disclaimed any trusteeship role in the administration of the Act."<sup>12</sup> He further cited an October 17, 1989, letter to Senator Daniel Inouye, chairman, Senate Select Committee on Indian Affairs wherein he had stated that the position taken by the Department in the 1979 correspondence to the United States Commission on Civil Rights was in error: "We do not believe that to be a correct statement (by the Deputy Solicitor) and we do not want you to infer otherwise from our silence."<sup>13</sup>

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- 9 Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 588 F. 2d 1216 (9th Cir. 1978), cert. denied, 444 U.S. 826 (1979).
- 10 Frederick N. Ferguson, Deputy Solicitor, U.S. Department of Interior, letter to Philip Montez, Regional Director, U.S. Commission on Civil Rights, Aug. 27, 1979, published in *Breach of Trust*.
- 11 James W. Moorman, Assistant Attorney General, Land and Natural Resources Division, U.S. Dept. of Justice, letter to Philip Montez, Regional Director, U.S. Commission on Civil Rights, Aug. 13, 1979, published in *Breach of Trust*. (A petition for certiorari to the Supreme Court to review *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F. 2d 1216 (9th Cir. 1979) was pending at the time (See note 46).
- 12 Timothy Glidden, counselor to the Secretary and Secretary's designated officer, HHCA, letter to Arthur A. Fletcher, Chairman, U.S. Commission on Civil Rights, July 17, 1990. Reprinted in appendix to this report.



In response to a similar letter to the U.S. Attorney General from Chairman Fletcher, Myles Flint, Deputy Assistant Attorney General, Land and Natural Resources Division, responded: "The State of Hawaii is trustee of the Hawaiian Homelands. . . . The Justice Department does not oversee the trust."<sup>14</sup>

Therefore, it is apparent that the position of the Federal executive branch has shifted dramatically between 1979 and 1990, as evidenced by formal responses to the U.S. Commission on Civil Rights by officials of the Department of the Interior. The role of the Department of Justice has, meanwhile been consistently passive, most frequently deferring to the Department of the Interior. This, despite the fact that the Department of Justice may bring independent enforcement action and the Attorney General must make the ultimate decision on whether to bring a breach of trust action against the State.<sup>15</sup> Both the Glidden and Flynt responses refer to

a decision in the U.S. Court of Appeals for the Ninth Circuit, *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*,<sup>16</sup> which states in a footnote that "the United States has only a somewhat tangential supervisory role under the admission act, rather than the role of trustee."<sup>17</sup> The 1979 responses from the Federal Government to the United States Commission on Civil Rights were prepared after the ninth circuit's ruling, and yet the executive branch strongly maintained that the Federal trusteeship role under section 5(f) of the Admissions Act was intact.<sup>18</sup>

The diminished role of the Federal Government during the 1980s was also made apparent by remarks of former President Ronald Reagan, who in the process of approving legislative amendments made to the HHCA between 1959 and 1986, attempted to disavow Federal responsibility for the HHCA by declaring:

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13 Timothy Glidden, counselor to the Secretary and Secretary's designated officer, HHCA, U.S. Dept. of the Interior, letter to Hon. Daniel K. Inouye, chairman, Senate Select Committee on Indian Affairs, Oct. 17, 1989. Reprinted in appendix to this report.

14 Myles E. Flint, Deputy Assistant Attorney General, Land and Natural Resources Division, U.S. Dept. of Justice, letter to Arthur A. Fletcher, Chairman, U.S. Commission on Civil Rights, Aug. 31, 1990. Reprinted in appendix to this report. It is significant that Warren Price III, Hawaii's attorney general told the congressional oversight committees in 1989 that: ". . . it is clear that the lack of a formal mechanism, within the Department of Justice, for the presentation of requests for enforcement action by persons of Hawaiian ancestry has led Hawaiians to mistrust the one form of process Congress required as a condition of our admission as a State: a suit by the United States. This is a substantial problem and one that merits the Committees' most careful consideration." Warren Price III, testimony before the U.S. Senate Select Committee on Indian Affairs and the U.S. House of Representatives Committee on Interior and Insular Affairs, Aug. 10, 1989, (Prepared Statement, p. 12).

15 See note 14.

16 588 F.2d 1216 (9th Cir. 1978), cert. denied, 444 U.S. 826 (1979).

17 *Id.* at 1224 n. 7. This footnote is also referenced in *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985).

18 For a more detailed analysis concerning Federal trust obligations, see Federal-State Task Force Report, "Background Paper—Federal Responsibilities," app. 6, p. 192. Also, MacKenzie Testimony (See chap. III, note 1.) For a specific response to the revised position of the U.S. Department of Interior, see testimony of Paul N. Lucas, staff attorney, Native Hawaiian Legal Corporation, before Hawaii Advisory Committee, Transcript 1990, pp. 42-48. See also Milalani Trask, *Kia'aina, Ka Lahui, Hawaii*, Transcript 1990, p. 93.

I am signing this joint resolution because I believe. . . that the matters with which the Hawaiian Homes Commission 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.<sup>19</sup>

In a letter referring for approval amendments to the HHCA by the State of Hawaii to the President of the U.S. Senate, J. Danforth Quayle, Ralph Tarr, Solicitor, U.S. Department of the Interior declared: "We believe it may no longer be appropriate to require the consent of the United States for amendments by the State of Hawaii to the Homes Commission Act. Accordingly, we will submit draft legislation to repeal this requirement as soon as possible."<sup>20</sup>

The Federal-State Task Force concluded that regardless of the differing interpretations of the Federal Government's trust role, section 5(f) requires that the United States: "be aware of the manner in which the State manages or disposes of the lands. . . (satisfies) itself from time to time that the State is not abusing its responsibility as trustee; and should it conclude that the State is failing properly to discharge its responsibility under Section 5(f), then to institute proceedings against it for breach of trust."<sup>21</sup> While the

task force also called for the Interior Department "to formally assess progress made in correcting problems identified in the [report] within two years of its release,"<sup>22</sup> there is no indication that such a process was undertaken.

In his written statement to the Advisory Committee on August 2, 1990, Governor John Waihee expressed his view of the Federal role:

The State holds that the Federal Government shares with the State the role and burdens of trust responsibilities to the Hawaiian Home Lands beneficiaries in fulfilling the purposes of the Act. This is not a view that is held by the legal and fiscal agents of the United States, who are even now constructing arguments to the contrary. Any federal assistance for Hawaiian Home Lands has occurred only with the persistence of Congress. . . Nevertheless part of the State's responsibility is to continue to press claims against federal agencies for past inequities, and to lobby for present and future resources.<sup>23</sup>

The chief justice of the Hawaii Supreme Court also stated in a significant 1982 ruling that "the legislative history of the Homes Commission Act 'strongly suggests that the Federal Government stood in a trusteeship capacity to the aboriginal people."<sup>24</sup> Alan

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19 Presidential Statement on signing H.J.R. Res. 17, Pub. L. No. 99-557 into law (Oct. 27, 1986).

20 Ralph W. Tarr, Solicitor, U.S. Dept. of the Interior, letter to J. Danforth Quayle, President of the Senate, May 31, 1989. Reprinted in appendix to this report.

21 Federal-State Task Force Report, p. 196.

22 *Id.*, p. 20.

23 Governor's Statement, p. 4.

24 *Ahuna v. Dept. of Hawaiian Homelands*, 64 Haw. 327, 640 p.2d 1161 (1982).

While this portion of the opinion refers to the period before statehood, the Supreme Court decision emphasizes that the creation of the homelands program and trust obligation were Federal initiatives. As noted earlier in the report, the Federal Government continues to exercise significant authority over the HHCA, including requirements that all land exchanges be approved by the Secretary of the Interior and amendments

Murakami, litigation director for the Native Hawaiian Legal Corporation (NHLC), stated that the Federal Government is breaching its "trust duties to Native Hawaiians by refusing to establish a procedure for reviewing instances of trust breaches pursuant to section 5(f) of the Hawaii Admission Act, and refusing to acknowledge its cotrustee role for the benefit of Native Hawaiians."<sup>25</sup> He further called on the Committee to "clarify the ambiguous position of the Federal Government and determine whether, how, and when it intends to specifically participate in regular and systematic oversight of the administration of the HHCA."<sup>26</sup> As noted previously, the refusal by both the Departments of Justice and Interior to send representatives to meet with the Committee precluded an indepth exploration of these issues.<sup>27</sup>

Many experts have noted that Native Hawaiians are Native Americans, but they do not enjoy the same status as American Indians. Mililani Trask, *Kia'aina, Ka Lahui Hawai'i*, reminded the Advisory Committee that "unlike other native Americans, [Native Hawaiians] are not allowed to be self-governing or to control their lands and natural resources or the revenues from their trusts. Hawaiian Natives are excluded from the Fed-

eral policies which allow other classes of Native Americans to attain self-determination. There [is a] Federal acknowledgement of Native Indian tribes, but Hawaiians are excluded. Hawaiians are denied the right to seek federal court review to protect their trust entitlements. In short, Hawaiians do not exist as a Native people in America."<sup>28</sup> Mr. Murakami noted that the transfer of administrative responsibilities for the HHCA occurred during a period known by Native Americans as the "termination era." This was the period in which "U.S. policy toward Indians was to terminate its trust relationship with Indian tribes in an effort to assimilate Indian people into mainstream America, even at the cost of denying them their sovereign rights. . . .The Hawaii Admission Act was consistent with this policy, transferring administration of the HHCA to the state."<sup>29</sup> Because of the absence of recognition, Mr. Murakami added, Native Hawaiians "were not afforded the protective umbrella of Federal tribal recognition, they could not turn to the Federal Government to seek special consideration because of the possible risk of violating equal protection standards. . . .Ironically, Hawaiians, whose former kingdom was among the international community of nations and recognized formally by

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to the act approved by the Congress.

25 Alan Murakami, litigation director, Native Hawaiian Legal Corporation, statement before Hawaii Advisory Committee, Aug. 2, 1990, p. 1 (hereafter cited as Murakami 1990 Testimony). See also *Ahia v. Dept. of Transportation*: "Since the Hawaiian Homes Commission Act remains a federal statute, its proper construction is a matter of federal law, upon which we, of course, do not have the last word." 69 Haw. 538, 555 (1988) (Padjett, J., Dissenting).

26 Murakami 1990 Testimony, p. 1.

27 See chap. II, p. 6.

28 Mililani Trask, testimony before Hawaii Advisory Committee, USCCR, Aug. 2, 1990. (Prepared Statement, pp. 8-9) (Hereafter cited as Trask Testimony). Also, Transcript 1990, pp. 111-12.

29 Murakami Testimony 1990, p. 2. Also, "Native Hawaiian Rights Handbook," p. 18.

the U.S., have a much more compelling case for Federal recognition than do many already recognized tribes."<sup>30</sup>

Professor Williamson B.C. Chang said that "the United States will not even dare to explore its true relationship with the Hawaiian people because it raises issues that undermine the fundamental concepts on which this nation was based, namely that . . . the annexation of Hawaii was the annexation of the political rights and independence of a complete nation against its will."<sup>31</sup>

Despite the unambiguous reluctance of the Federal executive branch to assert a role in protecting the trust interests of Native Hawaiians under the HHCA, congressional interest in the plight of the beneficiaries has clearly increased. This is especially evidenced by the extensive public hearings conducted by the Senate Select Committee on Indian Affairs and the House Committee on Interior and Insular Affairs in August 1989. Testimony on trust responsibilities, housing, land issues, water rights, economic development, agricultural programs, the waiting list, leasing procedures, and many other facets of the HHCA was offered. The committees held hearings on each island and over 2,000 pages of testi-

mony and exhibits were accumulated.<sup>32</sup> Throughout the hearings, Senator Daniel Inouye, Chairman of the Senate Select Committee acknowledged the trust duty of the United States.

Soon after the hearings, Senator Inouye proposed legislation to amend the HHCA. The amendments would provide a "purpose clause" to the HHCA and would establish: (1) a policy of self-determination for beneficiaries; (2) a congressional intent to create a permanent homeland for Native Hawaiians under the HHCA; and (3) the explicit trust duties of the Federal and State governments for administering and supporting the program with funds.<sup>33</sup> Although some Native Hawaiians opposed the bill, alleging it was unnecessary and nonspecific, others argued that this bill, if approved by Congress, would "unequivocally clarify the role of the United States in dealing with Native Hawaiians" and would establish a relationship "akin to that of the Federal Government to Native Americans. Once this political relationship is established, Federal benefits otherwise unavailable to Native Hawaiians could be sought without violating constitutional principles."<sup>34</sup> This conforms with the view expressed by Senator Inouye

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30 Murakami 1990 Testimony, pp. 2-3.

31 Transcript 1990, pp. 71-72.

32 Hearings conducted Aug. 7-11, 1989, on Oahu, Kauai, Molokai, Maui, Hawaii, by U.S. Senate Select Committee on Indian Affairs and U.S. House of Representatives Committee on Interior and Insular Affairs. The Office of the Governor provided Commission staff with prepared testimony of State officials.

33 "Native Hawaiian Rights Handbook," p. 20. Hearings on the proposed legislation were conducted in Honolulu on May 31, 1990, by the Senate Select Committee on Indian Affairs.

34 Alan Murakami, letter to John Dulles, staff, USCCR, Aug. 13, 1990. The proposed amendments to the HHCA have been the subject of considerable controversy within the Native Hawaiian community. Known as the "Purpose Bill" or Senate Bill 3236, it was enacted by the 1990 Hawaii legislature after much debate. It requires congressional approval to become law. The proposed legislation has been supported by the trustees of the Office of Hawaiian Affairs (OHA), the State Council of Hawaiian Homestead Associations (SCHHA), and the Native Hawaiian Legal Corporation, among others. Vigorous opposition to its enactment was led by a petition group whose leaders included Mililani Trask, Ka Lahui Hawai'i and Billy Beamer, for-

after the congressional hearings that “the testimony expresses a clear consensus that the Federal policy of self-determination that is afforded the indigenous and native peoples of the United States and U.S. territories should be clarified to include within its scope the native people of the State of Hawaii. . . .”<sup>35</sup>

The proposed legislation would affirm the “fiduciary duty” of both the State and Federal Governments to administer the HHCA and thus might serve to enhance dramatically the level of Federal financial support for the program. The Federal-State Task Force recommended that the State and Federal governments should “each make matching contributions of \$25 million per year” for a period of 5 years to accelerate implementation of the program.<sup>36</sup> Although the State did eventually appropriate some funds, the United States never responded.

The lack of Federal assistance in helping the State accomplish the goals of the HHCA was a constant theme heard by the Advisory Committee throughout the course of both of its public forums. Hoaliku Drake, chairman of the Hawaiian Homes Commission, stated that “direct Federal financial support for Hawaiian home lands historically has been non-existent. Even during the territorial period when the Federal Government had sole responsibility, the program was expected to be self-supporting. The lack of meaningful Federal assistance during the 70-year history, the position of the Federal executive branch that it has no trust or financial obligation, and the expectation that the State of Hawaii is alone responsible, have been a source of frustration and [an] impediment to progress.”<sup>37</sup> State Senator Michael Crozier, Chairman of the Senate Committee on Housing and Hawaiian Affairs, said that “the State has re-

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mer Hawaiian Homes Commission chair. Numerous petitions were mailed to congressional leaders and to the Western Regional Office of the USCCR, requesting that any amendments to the HHCA “be deferred until the Federal and State Governments have fulfilled their promise to settle native Hawaiians on their ancestral lands awarded in 1921 for their exclusive use.” (Petitions submitted to Western Regional Office, April-May 1990) Ms. Trask said, “We do not need a ‘purpose clause’ saying that there is a Federal trust obligation unless we can have. . . some way to enforce that obligation; some clear definition as to what the Federal obligation to our people really is, and. . . the financing to achieve that goal” (Transcript 1990, p. 101). OHA trustees, on the other hand, unanimously favored the bill because it would reaffirm the trust duties of the Federal Government and provide funds for “water, electricity, sewers, and other infrastructure so Native Hawaiians can build homes.” (*Ka Wai Ola O Oha*, March 1990, p. 7).

Timothy Glidden, U.S. Dept. of the Interior, advised Commission staff that enactment of the “Purpose Bill” would significantly increase the Federal Government’s role in matters relating to the HHCA. While denying any existing trust responsibility for the act, he said that passage of the proposed amendments “will change that—we will have much more to do.” Telephone interview with John Dulles, Commission staff, June 25, 1990.

35 Hon. Daniel K. Inouye, letter to Kamuela Price, Sept. 16, 1989. This correspondence explains the reasons why Senator Inouye believes that HHCA amendments of clarification are necessary.

36 Federal-State Task Force Report, p. 32.

37 Hoaliku Drake, testimony before Hawaii Advisory Committee, USCCR, Aug. 2, 1990, prepared statement, p. 7 (hereafter cited as Drake Testimony).

peatedly asked for specific assistance from the Federal Government, in its role as trustee to the Native Hawaiian people, but responses have been slow in coming."<sup>38</sup> According to Ms. Drake, "over the 70-year history of the program, it was only in the past 2 years that the Federal Government authorized \$2.4 million for infrastructure improvements on Hawaiian homelands."<sup>39</sup> In his letter of response to the United States Commission on Civil Rights, Timothy Glidden noted that "the Department of the Interior has sought no

Federal funds for the Hawaiian Homes Program."<sup>40</sup>

In *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, the United States Court of Appeals ruled that Native Hawaiians had no right to bring a lawsuit in Federal court against the Hawaiian Homes Commission for breach of trust.<sup>41</sup> The court ruled that under the Hawaii Admission Act, only the United States could bring suit for breach of trust. It refused to interpret the act to authorize private parties to do the same.<sup>42</sup>

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38 Transcript 1990, p. 202.

39 Drake Testimony, p. 7. Also Transcript 1990, p. 180.

40 Timothy Glidden, letter to Arthur Fletcher, July 17, 1990, p. 2 (reprinted in appendix to this report).

Further evidence of recent Federal reluctance to assist in implementing the HHCA is revealed in public statements made by Presidents Ronald Reagan and George Bush. President Reagan questioned the legality of the program on equal protection grounds and expressed concerns about the HHCA because of its "troubling racial classification." Presidential Statement on signing Pub. L. No. 99-557 (Oct. 27, 1986).

The 1990 Cranston-Gonzalez National Affordable Housing Act (Pub. L. 101-625) provided a preference for Native Hawaiians on Hawaiian Homelands under HUD Programs (Sec. 958) and a waiver of antidiscrimination provisions in the Housing and Community Development Act of 1974 (42 U.S.C. 5309) in order to allow for the provision of assistance to the Hawaiian Homelands (Sec. 911). President Bush objected to these preferences for Native Hawaiians stating that "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." He instructed the Attorney General and the Secretary of Housing and Urban Development to prepare "remedial legislation" in order that these provisions could be "brought into compliance with the Constitution's requirements." Presidential Statement on signing Pub. L. No. 101-625 (Nov. 28, 1990).

41 See note 39.

42 In a 1984 sequel to this case, *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission* 739 F.2d 1467 (9th Cir. 1984) ("Keaukaha II") this same court held that although a private litigant did not have a private cause of action under the Hawaii Admission Act, a private litigant could bring suit under 42 U.S.C. Section 1983, which allows suits against State officials who, acting under color of State law, deprive individuals of Federal rights. However, this right of action is limited to seeking declaratory and injunctive relief. Such actions cannot include requests for damages or monetary relief, absent an explicit waiver of sovereign immunity. "Native Hawaiian Rights Handbook," p. 54. Hawaii has only conditionally waived its immunity (see p. 34 of this report). Furthermore, since the availability of 42 U.S.C. §1983 applies only to actions against State officials, no direct action can be brought against the United States for its improper use of Hawaiian homelands. Indeed, a most significant barrier to complete relief in Federal court is "the absence of a waiver of sovereign immunity by the United States for damage actions against the Federal Government for breaches of trust involving the HHCA" (Alan Murakami, letter to John Dulles, staff, USCCR, Aug. 6, 1991). The Attorney General of the State has testified that "Congress should allow claims to be heard in federal court because of the trust breaches which occurred during territorial days," when the United States administered the HHCA (*An Action Plan to Address Controversies Under the Hawaiian Home*

As noted by the Federal-State Task Force, since “only the United States may act to enforce the trust provisions of section 5(f) of the Hawaii Admission Act in federal court. . .if the beneficiaries wish to enforce the Admission Act trust, they must persuade the United States to act for them.”<sup>43</sup> However, the United States has never exercised its right to enforce the trust provisions, although Native Hawaiians have repeatedly made efforts in both State and Federal courts to attempt to secure enforcement. As noted by the Federal-State Task Force, “beneficiaries. . .have proven to be the parties most actively concerned with proper administration of the trust. . .and despite the lack of an express right to sue, they have resorted to court action to enforce various provisions of the trust. . .with significant results.”<sup>44</sup> The Task Force recommended that Congress should enact legislation granting beneficiaries the right to sue for breach of trust in Federal Court.<sup>45</sup> As of this date, Congress has yet to consider leg-

islation affording Native Hawaiians such a right. In a March 16, 1988, letter to Mililani Trask, Senator Inouye advised that “the Governor of Hawaii has requested that I not pursue this issue [right to sue legislation] on a federal level.”<sup>46</sup> Nonetheless, most Native Hawaiian advocates insist that such a remedy is imperative. Kamaki Kanahale, on behalf of the State Council of Hawaiian Homestead Associations (SCHHA), recommended that “the implementation of our right to sue in Federal court be considered a priority.”<sup>47</sup> Rod Kealimahia Burgess, vice chair of the board of trustees of the Office of Hawaiian Affairs (OHA), noting that little progress has been made at the national level to restore the homelands trust, also called on the Committee to “encourage a Federal ‘right to sue’ with retroactive application to 1921.”<sup>48</sup> And in a memorandum to the Senate Select Committee on Indian Affairs and the House Committee on Interior and Insular Affairs, Mililani Trask concluded:

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Lands Trust and the Public Law Trust, Office of the Governor, January 1991). Also extensive procedural barriers have been created by the State to limit the scope of §1983 actions, including the use of the Eleventh Amendment sovereign immunity (See Murakami letter above. Also, *Ulaleo v. Paty* 902 F.2d 1395 (9th Cir. 1990), restricting the availability of remedies). According to the Governor’s 1991 *Action Plan*, “despite having no clear standing, beneficiaries have resorted to court action to enforce various provisions of the HHCA. However, most of these claims have not been heard on their merits because they have been dismissed on jurisdictional grounds.” As Congress has not considered legislation providing expanded rights in federal court for Native Hawaiians beyond §1983, “only the U.S. has the *explicit* right to sue for breaches of trust under section 5(f) of the Hawaii Admission Act” (“Native Hawaiian Rights Handbook,” p. 56).

43 Federal-State Task Force Report, p. 230.

44 *Id.*, p. 232.

45 *Id.*, p. 24.

46 Daniel K. Inouye, letter to Mililani Trask, Mar. 16, 1988. This correspondence also states “. . .the Governor has created a task force made up of his staff and OHA trustees. . . [It] is endeavoring to resolve the ceded lands question which hopefully will. . .preclude the need for a ‘right to sue’ bill.”

47 Kamaki Kanahale, chairman, State Council of Hawaiian Homestead Associations, testimony before Hawaii Advisory Committee, USSCR, Aug. 2, 1990, prepared statement, p. 8 (hereafter cited as Kanahale Testimony).

48 Rod Kealimahia Burgess, vice chair, OHA, testimony before Hawaii Advisory Committee, USSCR, Aug. 2, 1990, prepared statement p. 5 (hereafter cited as OHA 1990 Testimony). Also Transcript 1990, p. 265.

Native Hawaiians are Americans who are denied the basic Constitutional right of impartial judicial review. There is extensive and well-documented evidence of mismanagement, comingling, and breach of trust on the part of the U.S. and the State of Hawaii. It is evident that the State and its predecessor in interests, the U.S., have a substantial conflict of interest in overseeing the management of native trust lands. . . given the situation, the only alternative is <sup>49</sup>judicial review in the Federal district court.

Paul Nahoa Lucas, staff attorney with the Native Hawaiian Legal Corporation, noted that "given the United States' apathy and lack of accountability, Native Hawaiian beneficiaries need a mechanism to enforce their rights against the Federal Government. Native American groups such as American Indians, Eskimos, and Aleuts have a statutory right to sue the United States. . . Special legislation should be drafted and enacted allowing Native Hawaiians such a right. . . [they] should have nothing less."<sup>50</sup>

In addressing compensation for past misuses of Hawaiian homelands, the Federal-State Task Force noted that "the vast majority of the misuses occurred while Hawaii was a territory and the Hawaiian homes program was a federal law."<sup>51</sup> These violations "appear to constitute breaches of trust

for which compensation is due and owing. . .," the report concluded.<sup>52</sup> While virtually no compensation (monetary or land exchanges) has been forthcoming from the United States in consideration for these abuses, a more egregious injustice by the Federal Government continues to this day. There is no more compelling evidence of the Federal Government's callous disregard for the rights of Native Hawaiians than the continuing occupation by the United States of valuable homelands, especially the use by the Navy of some 1,356 acres of land at Lualualei on Oahu. These lands were set aside by the territorial Governor in 1930 and 1933 for use by the United States Navy for an ammunition depot and a radio transmission station. The territorial Governor did not have the authority to take such actions, and the executive orders were illegal.<sup>53</sup> The State Department of Hawaiian Home Lands demanded the return of these lands in 1983; the Navy responded by asserting that they belonged to the United States as a result of executive orders. The State eventually filed a lawsuit in Federal district court seeking to regain the lands; however, the U.S. District Court ruled that the lawsuit was barred by the 12-year statute of limitations contained in the Federal Quiet Title Act.<sup>54</sup> The decision was appealed to the

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49 Mililani Trask, testimony before Senate Select Committee on Indian Affairs and House Committee on Interior and Insular Affairs, "Re: Standing to Sue," Aug. 3, 1989, prepared statement, p. 7.

50 Paul N. Lucas, testimony before Hawaii Advisory Committee, USCCR, Aug. 2, 1990, p. 9. Also Transcript 1990, p. 51.

51 Federal-State Task Force Report, p. 310.

52 *Id.*

53 MacKenzie Testimony, p. 11. A Federal District Court concluded that the Governor had no authority to convey Hawaiian Home Lands under these types of orders (*Aki v. Beamer*), Civil No. 76-1044 (D. Haw. 1978).

54 *Hawaii v. United States*, 676 F. Supp. 1024 (D. Haw. 1988), *aff'd*, 866 F.2nd. 313 (9th Cir. 1989).

For a more complete description of the Lualualei controversy see also article by Livia Wang, staff attorney,



Ninth Circuit Court of Appeals, which affirmed the lower court's ruling.<sup>55</sup>

The Lualualei homestead lands comprise one-fifth of all the homestead lands on Oahu, where the waiting list exceeds 5,000 in number.<sup>56</sup> The Federal-State Task Force noted that "the Lualualei lands appear to be very well suited either to homestead use or general leasing. . . these lands could. . . substantially advance the homesteading program."<sup>57</sup> Alan Murakami said:

We have a Hawaiian population that is perhaps the most dispossessed of any in these islands. You can look over the statistics anywhere. The Hawaiians are poor, they are least educated, they are in prison in the greatest numbers and the greatest proportions, they are in the poorest health, and primarily they are housing-short—they are in overcrowded housing or they are homeless—and they are over-represented in these groups. And yet you have the U.S. Navy now controlling 1,300 acres of prime potential residential land on this island, the island with the greatest demand for residential homestead lots,

the island with the greatest population. . . Now, I term this illegal. . . and immoral. . . I believe that if the [U.S. Commission on Civil Rights] focuses on that issue alone, it would accomplish a lot, and probably more than any other body has in recent years if it can overcome the hurdles to the return of Lualualei.<sup>58</sup>

In addition to Lualualei, the Federal Government has breached its duty as a trustee by allowing other lands in the homestead inventory to be leased to the military and other Federal agencies. For example, the U.S. Army is currently occupying 295 acres of trust land at Pohakuloa, Hawaii, under a general lease that was executed in 1964 for 65 years at \$1 for the entire term. The U.S. Navy is using 25 acres of trust land at Kekaha, Hawaii, as a military storage area, also under a lease for 65 years at \$1 for the entire term.<sup>59</sup> The Federal Aviation Administration utilizes 54 acres of trust land at Keaukaha, Hilo, Hawaii, for a radar and communications facility set aside by executive orders of the Governor of the

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Native Hawaii Legal Corporation in *Ka Wai Ola O Oha*, vol. 6, no. 4, April 1989, p. 19.

The State of Hawaii initiated court action against the Federal Government in 1986 for recovery of the Lualualei lands. The U.S. District Court granted the U.S. Navy's motion for summary judgment. This decision was subsequently upheld by the Ninth Circuit Court of Appeals. (*State of Hawaii v. United States of America*, 676 F. Supp. 1024 (D. Haw. 1988) *aff'd*, 866 F.2d 313 (9th Cir. 1989).

Attorney General Price, in his congressional testimony, noted that "our efforts to obtain. . . relief from the United States as to the Lualualei lands was met with technical arguments that the Government has immunity, and will give the lands back to the State of Hawaii when they are good and ready." Testimony before U.S. Senate Select Committee on Indian Affairs and U.S. House of Representatives Committee on Interior and Insular Affairs, Aug. 8, 1989, prepared statement, pp. 9-10.

55 *Hawaii v. United States*, 866 F.2d. 313 (9th Cir. 1989).

56 Department of Hawaiian Home Lands, Annual Report 1989, pp. 12, 16, 28 (hereafter cited as DHHL 1989 Annual Report).

57 Federal-State Task Force Report, p. 304.

58 Transcript 1990, pp. 35-36.

59 DHHL 1989 Annual Report, p. 38.

Territory of Hawaii in 1948<sup>60</sup> that have previously been declared illegal.<sup>61</sup>

Rod Burgess said that "the most galling [cause for denial of homestead leases] is the historical practice of the Federal Government in illegally setting aside trust lands for military purposes. Enough land has been taken from the trust corpus by the Federal Government to satisfy the needs of all of those beneficiaries currently on the waiting list."<sup>62</sup>

Hoaliku Drake stated that "due to the Department [of Hawaiian Home Lands] limited land base on Oahu relative to other islands. . . large number(s) of families. . . will need to make a decision on migrating from Oahu to other islands."<sup>63</sup> Yet Ms. Drake also advised the Committee that even if the United States insists on retaining Lualualei, the Federal Government "should come to the table, pay us for past compensation at fair market value. . . and enter into a fair exchange of lands."<sup>64</sup> She suggested that it might be appropriate to exchange Lualualei for other

suitable Federal land, including Barber's Point and Bellow's Field, which are currently used as military housing and recreational facilities.<sup>65</sup>

On June 27, 1990, the Native Hawaiian Legal Corporation wrote letters to Attorney General Richard Thornburgh and Secretary of the Interior Manuel Lujan, requesting their assistance in securing the return of the lands set aside in trust for the benefit of Native Hawaiians under the HHCA and currently being used improperly by the Federal Government.<sup>66</sup> The Advisory Committee noted, however, that a 1980 request for an investigation of alleged violations by the State of Hawaii of the rights of Native Hawaiians transmitted to the United States Department of Justice by Mitsuo Uyehara, attorney for Ho'Ala Kanawai, Inc., received the following reply (in part): "You will be pleased to know that the Federal Government is presently investigating. . . . Once the investigation has been completed, the United States will initiate appropriate ac-

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60 Timothy Glidden, letter to Alan Murakami, Oct. 19, 1990.

61 *Aki v. Beamer*, No. 76-1044 (D. Haw, Feb. 21, 1978). *Department of Hawaiian Home Lands v. Aloha Airlines, Inc.*, Civil No. 6122 (3rd Cir. Ct. of Hawaii, Sept. 24, 1980).

62 OHA 1990 Testimony, p. 4.

63 Drake Testimony, p. 4.

64 Transcript 1990, pp. 188-89.

65 *Id.*

66 A. Murakami, letters to Richard Thornburgh and Manuel Lujan, Jr. June 27, 1990.

In its response dated October 19, 1990, the U.S. Department of the Interior noted that it had sought information from the Hawaiian Homes Commission on the subject of the letter and was informed by the commission that "it is not now engaged in discussions with the pertinent Federal agencies with respect to the four tracts in questions." Recounting the previous failure of the State to recover Lualualei through discussions with the U.S. Navy or litigation, the letter of response states that "in light of the decision, the Homes Commission has not lately pursued the Lualualei question further, nor has it approached the agencies with respect to the other tracts identified above. We are told that the Commission has instead concentrated on resolving issues pertaining to the use of home lands by State agencies and counties, and by private parties. In light of the Lualualei decisions at both the District Court and Court of Appeals levels, we do not quarrel with these priorities," Timothy Glidden, letter to Alan Murakami, Oct. 19, 1990).

tion, if any such action is warranted.<sup>67</sup> The Advisory Committee was told in August 1990,

more than a decade later, that no additional response was ever received.<sup>68</sup>

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67 Rembert A. Gaddy, Acting Chief, Indian Resources Section, U.S. Dept. of Justice, letter to Mitsuo Uyehara Esquire, Ho'Ala Kanawai, Inc., Feb. 20, 1980.

68 Transcript 1988, p. 136.

## IV. The Role of State Government

The extent of frustration and despair felt by Native Hawaiians about the homelands program is well evidenced by the following statement presented to the Advisory Committee at its September 1988 forum:

The Hawaiian Homes Commission Act, passed almost 30 years after the U.S. takeover [of Hawaii] held out a promise of land repatriation to mitigate the injustice done to our people. You and I are here today because the Hawaiian homes program, with its 67-year history of neglect, has failed in its mission. If Hawaiians show any vitality as a people today, it is in spite of this program, not because of it.

The long history of abuse, mismanagement, and uninspired leadership have brought our people to the point where we are no longer willing to put up with more of the same in the future. We now believe to take control of our own affairs, to eventually remove this program from State control, is the only answer.<sup>1</sup>

The trust responsibilities of the State on behalf of Native Hawaiians under the HHCA have been strictly interpreted by the courts

and judged according to the same strict standards as those imposed for a trustee of a private trust.<sup>2</sup> In a landmark decision, *Ahuna v. Department of Hawaiian Home Lands*,<sup>3</sup> the Hawaii Supreme Court ruled that the trust duties are the same as those owed by the Federal Government in administering trusts on behalf of American Indian tribes.<sup>4</sup> In *Ahuna*, the court ruled that the Hawaiian Homes Commission must adhere to the "most exacting fiduciary standards," must "administer the trust solely in the interest[s] of the beneficiary," and must use "reasonable skill to make the trust property productive."<sup>5</sup> In another significant case, a U.S. district court ruled that the Hawaiian Homes Commission had breached its trust responsibilities by allowing the needs of the general public to influence its decisions.<sup>6</sup> The court determined that the Commission must adhere to the terms of the trust and act exclusively in the interests of the beneficiaries.<sup>7</sup> Thus, the Federal-State Task Force concluded: "The Hawaiian Homes Commission must follow the terms of the trust as embodied in the HHCA even if it believes that a different course

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1 Mahaelani Kamaau, testimony before Hawaii Advisory Committee to USCCR, Sept. 6, 1988, prepared statement, p. 2) (hereafter cited as Kamaau Testimony). Also Transcript 1988, p. 68.

2 "Native Hawaiian Rights Handbook," p. 16. See also note 10

3 64 Haw. 327, 640 P. 2d 1161 (1982).

4 *Id.* at 339.

5 *Id.* at 339, 340.

6 *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, Civ. No. 75-0260 (D. Haw., Sept. 1, 1976). The *Keaukaha* case was later reversed on jurisdictional grounds by the Ninth Circuit Court of Appeals. However, the merits of the conclusions reached by the Court are undisputed. See MacKenzie Testimony, p. 7.

7 *Id.*

might prove more beneficial. If the Commission wishes to deviate from the terms of the HHCA, then the act must be amended."<sup>8</sup> Both the State and Federal courts were acting in situations where the Commission has permitted other influences and interests to interfere with its decisions affecting beneficiaries under the homelands trust.<sup>9</sup>

In 1979 the late chairman of the Hawaiian Homes Commission, Georgianna Padeken, told the Hawaii Advisory Committee that of the original 200,000 acres set aside for the program under the HHCA, only 12.5 percent (approximately 25,000 acres) of the inventory had been leased to 2,997 eligible beneficiaries.<sup>10</sup> In contrast, 61 percent of the lands (122,000 acres) were then being used by non-beneficiaries.<sup>11</sup> At that time, there were 6,310 beneficiaries on the waiting list for homestead leases.<sup>12</sup> In its 1989 annual report, the Department of Hawaiian Home Lands (DHHL) reveals that it had awarded 5,778 leases as of June 30, 1989, nearly 79 percent for residential purposes.<sup>13</sup> However, the report notes that 2,500 homestead leases were awarded during the 1984-87 accelerated program. Most of these leases were for raw, undeveloped parcels of land that lack

the necessary infrastructure for the building of homes. Most of these unimproved lots have yet to be developed, due to the extraordinary costs involved in meeting county building requirements.<sup>14</sup> Therefore, in almost a decade, only a few hundred more Native Hawaiians had actually been placed in homesteads. Meanwhile, the waiting lists were expanding rapidly (at a rate of over 100 new applicants per month) and the total list was approaching 19,000.<sup>15</sup> Alan Murakami, director of litigation for the Native Hawaiian Legal Corporation, reported that "in .69 years, the program has actually settled fewer than 3,700 Native Hawaiian families on [residential, farm, ranch, and aquacultural] homesteads on only a little more than 32,000 acres, or 17.5 percent of the total available lands [now reduced to 187,413 acres due to accounting discrepancies]. In contrast, the DHHL is currently allowing over 62 percent of the lands to be used by a variety of lessees. . .and others who are not Native Hawaiian."<sup>16</sup>

Based on data provided by the DHHL (as of June 30, 1989), only 541 of 28,995 total acres in the homelands inventory on Maui are being used for homesteading.<sup>17</sup> Over 20,000 acres are in general leases, including one of

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8 Federal-State Task Force Report, p. 208.

9 For a more complete description of judicial decisions affecting State trust obligations under the HHCA, see Federal-State Task Force Report, app. 7, background paper, "State Trust Responsibilities," pp. 203-12. See also MacKenzie Testimony.

10 *Breach of Trust*, p. 10.

11 A. Murakami testimony before Hawaii Advisory Committee, USCCR, Sept. 6, 1988, p. 2 (hereafter cited as Murakami 1988 Testimony).

12 *Breach of Trust*, p. 10.

13 DHHL 1989 Annual Report, p. 12.

14 *Id.*

15 *Id.*

16 Murakami 1990 Testimony, p. 4.

17 DHHL 1989 Annual Report, p. 16.

15,620 acres to a private non-Hawaiian company (Maui Factors). On Kauai, only 831 acres of a total of 18,569 are homesteaded.<sup>18</sup> On the Big Island (Hawaii), less than 21,000 acres are homesteaded of a total acreage of 107,883.<sup>19</sup> Yet, the Parker Ranch alone uses 32,845 acres under DHHL general leases, licenses, and permits. On Oahu, the most populous island with the greatest demand for homes, only 921 acres are homesteaded by Native Hawaiians.<sup>20</sup> The remaining 5,609 acres are used for other purposes, including nearly 1,400 acres by the U.S. Navy. Although more than one-third of Molokai's homelands are homesteaded (9,477 acres of a total of 25,366),<sup>21</sup> this island also has almost no employment opportunities. Furthermore, native economic development ventures have been stymied by lack of infrastructure, inadequate technical assistance, and difficulty of accessing available water.

Senator Michael Crozier, chairman of the State Senate Committee on Housing and Hawaii Affairs, stated: "the condition of the waiting list needs immediate attention. . .at present, there are over 18,000 applications pending for residential, agricultural, and pastoral lands, and 28 percent of the applicants, over 5,000 people, have been on the list for over 10 years. Some have been on the list for

over 30 to 40 years. Both the length of the list and length of the wait make the vast majority of Native Hawaiian people despair of ever receiving an award of land."<sup>22</sup> The legislator noted that the main problem "in putting people on the land is a lack of infrastructure."<sup>23</sup> He estimated that it costs between \$30,000 to \$45,000 to prepare a residential lot for building (not including the cost of the actual home).<sup>24</sup> Hoaliku Drake, chair of the Hawaiian Homes Commission, said that "securing adequate financing has always been an obstacle to Native Hawaiian homesteading."<sup>25</sup> The deputy director of the DHHL, John Rowe, stated that the department estimates a cost of approximately \$80,000 to \$90,000 per unit for infrastructure and a home.<sup>26</sup> Ms. Drake said that her department's goal for the next 10 years "is to deliver more than 14,000 lots and homes at an estimated cost of \$2.4 billion."<sup>27</sup> Despite these enormous costs, the program has, until very recently, received no appropriations of any kind, and the DHHL was forced to rely exclusively on revenues generated by leasing Hawaiian homelands to nonbeneficiaries. Throughout the territorial period and during statehood until 1987, neither the Federal nor State government allocated resources to administer or implement the program. In that year, the State legisla-

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18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 Hon. Michael Crozier, Senator, State of Hawaii, testimony before Hawaii Advisory Committee, USCCR, Aug. 2, 1990, prepared statement, p. 2. Also, Transcript 1990, p. 262.

23 *Id.*

24 *Id.*

25 Drake Testimony, p. 3. Also Transcript 1990, pp. 180-81.

26 Transcript 1990, p. 225.

27 Drake Testimony, p. 3. Also Transcript 1990, pp. 181-82.

ture finally appropriated State general revenues of \$1.2 million to fund one-half of the department's administrative staffing budget.<sup>28</sup> This action came fully 9 years after the Hawaii constitution was amended to require legislative funding not only for administration, but also program implementation of the HHCA. In 1978 delegates to the Hawaii Constitutional Convention adopted Article XII, section 1, which mandates that "the legislature shall make sufficient sums available for . . . [the] development of home, agriculture, farm and ranch lots. . . home, agriculture, aquaculture, farm and ranch loans. . . rehabilitation projects. . . [and] the administration and operating budget of the department of Hawaiian home lands. . ." <sup>29</sup> The clear intent of this provision was to relieve the DHHL of the burden of financing its own operations. Yet, in spite of a substantial increase in funding for the 1989-91 biennium (\$3.8 million),<sup>30</sup> the DHHL still is dependent on revenues generated by general leases.<sup>31</sup> This reliance includes the funding for more than half of all staff positions, in apparent violation of the constitutional amendment.<sup>32</sup>

In addition to this enhanced funding, the legislature also provided \$22.7 million for capital expenditures in 1988-89 and added an additional \$50.7 million for the 1989-91 biennium.<sup>33</sup> However, 92 percent of this additional capital improvements funding is in the form of revenue bond financing.<sup>34</sup> This authorizes the DHHL to issue bonds that must then be repaid with its own funds. This again would appear to contravene the intent of Article XII, section 1, of the Hawaiian Constitution. Mr. Rowe advised the Committee that the DHHL had decided to float only \$25 million in revenue bonds.<sup>35</sup> Issuing the total amount of bonding would, he added, require using "all of our general lease revenues, including some of the revenues from large landholdings that are in pastoral or farm general leases."<sup>36</sup> Mr. Murakami noted that the DHHL is responsible for homestead land which makes up 15 percent of all public lands in Hawaii, yet receives State funding equivalent to one-tenth of 1 percent of the more than \$3.2 billion in the current State operating budget.<sup>37</sup> And, he continued: ". . . it is responsible for complex programs involving land management, loan processing and serv-

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28 "Native Hawaiian Rights Handbook," p. 33.

29 Hawaii Constitution, Article XII, Sec. 1.

30 "Native Hawaiian Rights Handbook," p. 33.

31 For a more complete description of current resource limitations, see "Native Hawaiian Rights Handbook," pp. 31-37.

32 Ka Nuhou, DHHL Newsletter, vol. 16, no. 2, February 1990, p. 5. Also, Ilima Piianaia, Responses to U.S. Senate Select Committee on Indian Affairs and U.S. House Committee on Interior and Insular Affairs, Sept. 21, 1989, p. 24 (hereafter cited as Piianaia Responses). For a discussion on this issue, refer to A. Murakami, letter to John Dulles, staff, USCCR. Re: Hawaii Advisory Committee Hearings, Aug. 13, 1990, p. 2.

33 MacKenzie Testimony, p. 8, "Native Hawaiian Rights Handbook," p. 33.

34 MacKenzie Testimony, p. 9.

35 Transcript 1990, pp. 234-35.

36 *Id.*

37 Murakami 1990 Testimony, p. 4.

ing, technical assistance to farmers and ranchers, general lease administration, and a host of other beneficiary programs. . . Its duties are greater and more varied than those of several other departments. Nevertheless, the DHHL receives less general revenue funding than any other executive department."<sup>38</sup> Although the DHHL has struggled with inadequate resources, the State enjoyed a cash surplus of approximately \$750 million as of June 30, 1989.<sup>39</sup>

One potential source of funding for the homelands program consists of funds generated by the State for "ceded" lands that were returned by the Federal Government to Hawaii in 1959. Section 5(f) of the Admission Act provided that these lands be "held by the state as a public trust for several purposes, including the betterment of the conditions of Native Hawaiians as defined in the HHCA."<sup>40</sup> Although nearly 200,000 acres of this trust are set aside for the homelands program, the general ceded lands trust consists of nearly 1.4 million acres and "includes lands com-

prising well over 90 percent of Hawaii's public lands, and over a third of the land in the Hawaiian islands."<sup>41</sup> Prior to 1978, public education was the primary beneficiary of the trust.<sup>42</sup> However, in that year the constitution was amended to establish the Office of Hawaiian Affairs (OHA).<sup>43</sup> Its purpose is "to promote the betterment of conditions of Native Hawaiians," and its funding is primarily based on the 1980 State law that mandates that 20 percent of all funds derived from the public land trust shall be expended by OHA.<sup>44</sup> Until 1990, the State was providing OHA with \$1.3 million a year as its 20 percent share of the trust. As part of an agreement between Governor John Waihee and OHA, that amount will increase to more than \$8.5 million per year.<sup>45</sup>

In addition, almost \$100 million has been committed to repay OHA for past compensation in lost ceded lands revenues. Because the beneficiaries under this trust are one and the same with those of the HHCA, these re-

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38 *Id.*

39 Y. Takemoto, director of State Department of Budget and Finance, testimony before House Committee on Finance (Hawaii Legislature), January 1990.

40 Federal-State Task Force Report, p. 203.

41 Warren Price III, testimony before U.S. Senate Select Committee on Indian Affairs and U.S. House of Representatives Committee on Interior and Insular Affairs, Aug. 8, 1989, p. 8.

42 *Id.*

43 Hawaii Constitution, Article XII §5.

44 Hawaii Revised Statutes sec. 10-13.5 (1985). OHA was established to "promote the betterment of conditions of Hawaiians." It also serves as the principal public agency (except for the homestead program) for all programs relating to the Hawaiian people. It assesses the policies and practices of other agencies that affect the Hawaiian community; receives and distributes grants for Hawaiian programs; and serves as a receptacle for possible reparations from the Federal Government. Hawaii Rev. Stat. §10-3. OHA is governed by a board of trustees elected statewide by Native Hawaiians. Trustees serve staggered 4-year terms.

45 Honolulu *Advertiser*, Feb. 9, 1990, p. 1. Also, see *Ka Wai Ola O OHA*, vol. 7, no. 6, June 1990, p. 1, for details relating to the agreement that was signed into law by Governor John Waihee on July 3, 1990. The legislation allows OHA trustees to opt for a combination of money and/or land as a part of its compensation for past due entitlements. A plan for this process was submitted by the Governor to the 1991 legislature. (See note 119.)



sources might be used to further the goals of the HHCA.

The Federal-State Task Force recommended, in its final report, that the Governor appoint an "Advisory Committee on Funding Sources" to devise strategies for accelerating lease awards.<sup>46</sup> This recommendation was never implemented. Ilima Pianaia, former chair of the Hawaiian Homes Commission, stated at the Advisory Committee's September 1988 meeting that "the department has not had a financial plan or a financial strategy."<sup>47</sup>

The task force further recommended that the State of Hawaii and the United States "should each make matching contributions of \$25 million per year in appropriations. . .for 5 years."<sup>48</sup> This recommendation also went unheeded, although the State dramatically increased its appropriations to the DHHL during the administration of incumbent Governor Waihee. With the exception of a recent grant from the Department of Housing and Urban Development and the availability of home loans to eligible beneficiaries under the Federal Housing Administration, the Federal Government has failed to respond. Hoaliku Drake said that a Federal commitment of resources is necessary.<sup>49</sup> Governor Waihee wrote the Committee that "part of the State's responsibility is to continue to press claims against Federal agencies for past inequities,

and to lobby for present and future resources."<sup>50</sup>

Although it is clear that the promise of the trust benefits will not be secured with financial resources alone, it is certain that the task will not be accomplished without substantially increased budgetary resources. Despite the mandate in Article XII, section 1, of the Hawaii State Constitution, the DHHL has never requested full funding for its program from the legislature.<sup>51</sup> The deputy director of the DHHL said that a request for full funding is "a possibility. . .within the reality of what the State funding resources can provide to us."<sup>52</sup>

The goal of the DHHL is to deliver more than 14,000 lots and homes in the next 10 years. The waiting list, always expanding, is now close to 21,000. As long as the State is devoting less than 0.2 percent of its operating budget to the Hawaiian homes program, and the Federal Government is refusing to acknowledge a fiduciary responsibility, it appears unlikely that these ambitious goals can be met.

Despite the increased State funding for the DHHL, the income generated by leases of Hawaiian homelands to nonbeneficiaries is a vital source of income to the department. Ms. Drake reported that the department now "generates about \$3.5 million annually by

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46 Federal-State Task Force Report, p. 29.

47 Transcript 1988, p. 39.

48 Federal-State Task Force Report, p. 32.

49 Drake Testimony, p. 12. Also, Transcript 1990, p. 180.

50 Governor's Statement, p. 4.

51 Alan Murakami noted that part of the problem may be due to the power of the State Department of Budget and Finance to reduce funding requests of individual agencies in the formulation of an executive budget to be submitted by the Governor to each legislature, Murakami 1990 Testimony, p. 9.

52 Transcript 1990, pp. 231-32.

leasing its lands for business purposes.”<sup>53</sup> She added that “the department must increase its leasing income dramatically to support its goal.”<sup>54</sup> Former Hawaiian Homes Commission chair Ilima Piianaia also advised the Committee in 1988 that “unless there is a drastic change that I cannot foresee in the near future, we have to generate income.”<sup>55</sup> In a formal response to inquiries presented during the congressional oversight hearings in August 1989, Ms. Piianaia also stated that “the history of funds provided to the department from its inception demonstrates the problem of a lack of funds and fluctuations in funds from year to year. The income stream provided by general leases is a fairly steady and reliable source of revenues. . .for its homestead projects.”<sup>56</sup> The Federal-State Task Force noted that, in spite of the 1978 constitutional amendment (Article XII, section 1), the DHHL “has continued to lease lands to nonbeneficiaries to generate revenues to administer the program and meet its operational expenses.”<sup>57</sup> Long-time Native Hawaiian advocate Sonny Kaniho, who challenged the DHHL policy of leasing to non-beneficiaries, told the Advisory Committee:

The HHCA does not authorize the Hawaiian Homes Commission to lease lands for

revenue generation. However, the commission continues to deny beneficiaries the right to occupy and use trust lands simply because it conflicts with its ability to generate income to pay for the administrative costs of the program, or because of the interests of its general leases. . .Even after the legislature provided partial funding for the DHHL, the Hawaiian Homes Commission continues to place higher priority on generating income from lands within the DHHL inventory than it does on awarding lands to Native Hawaiian beneficiaries.<sup>58</sup>

Kamaki Kanahale noted that “in order to survive, [the Hawaiian Homes] Commission is forced to come up with ‘creative financing’ in order to generate its own income to operate, build homes, and at the same time try and ‘lele’<sup>59</sup> its way through politics and its pressures. The end results are more lands being leased out to non-Hawaiians, shorter inventories to disperse to its beneficiaries and finally the impossibility of ever being able to bring more Native Hawaiians to the land.”<sup>60</sup> Colette Machado, a community leader from Molokai (and former Hawaiian homes commissioner) and Mahealani Kamaau, executive director of the Native Hawaiian Legal Corporation, both told the joint congressional committees that general leases do not benefit the DHHL be-

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53 Drake Testimony, p. 7.

54 *Id.*, p. 8.

55 Transcript 1988, p. 34.

56 Piianaia Responses, p. 25.

57 Federal-State Task Force Report, p. 210.

58 Testimony of Sonny Kaniho and Aged Hawaiians before Hawaii Advisory Committee, USCCR, Sept. 6, 1988, prepared statement, p. 6 (hereafter cited as Kaniho Testimony). See also, Federal-State Task Force Report, p. 211, for description of Kaniho v. Padeken lawsuit, challenging the leasing of Hawaiian homelands to nonbeneficiaries.

59 “lele” is a Native Hawaiian word meaning to “move or travel.”

60 Kanahale Testimony, pp. 4-5.

cause they do not result in more leases to Native Hawaiians.<sup>61</sup> Ms. Kamauu concluded that "making money in this manner [leasing to nonbeneficiaries] is a fundamental cause of the department's programmatic failure."<sup>62</sup> Mr. Murakami said that a "basic conflict of interest" is created by the DHHL's being in the business of leasing lands to generate revenue while at the same time having to balance this against the need to issue lands to Hawaiians.<sup>63</sup> While acknowledging that the practice would likely continue, the Federal-State Task Force, nonetheless, concluded that "such leases to non-beneficiaries appear to be contrary to the intent of Congress and in breach of trust responsibilities assumed by the State of Hawaii upon admission into the Union."<sup>64</sup>

The HHCA provides statutory authority for the withdrawal of general leases before their expiration date upon "notice. . . that the lands are required."<sup>65</sup> Ms. Piianaia noted that "lands not immediately needed for homesteading purposes cannot be left idle and nonproductive."<sup>66</sup> However, she continued, "as lands are needed for homesteading pur-

poses, lands can be withdrawn from the operation of the general lease since each contains a reservation clause authorizing the Hawaiian Homes Commission to withdraw lands for homesteading purposes."<sup>67</sup> While the commission has exercised this right in certain cases,<sup>68</sup> Hawaiian advocates have expressed dismay that several significant general leases having severe adverse impacts upon beneficiaries have continued to enjoy the privileges and profits reaped from their existing terms. For example, the Kekaha Sugar Company leases 14,558 acres of Hawaiian homestead lands on Kauai. This lease was executed in 1969 for 25 years at a rate of only \$4.30 per acre per year plus 6 percent of gross proceeds from sugar sales.<sup>69</sup> In addition, the company obtained a water license from the State that allows it to use all surface waters flowing from the Waimea River as well as all water from existing wells.<sup>70</sup> The lease provided no explicit reservation for water for Hawaiian homesteaders in the area, despite a long history of inadequate water resources to support their pastoral and ranching enterprises.<sup>71</sup> Kekaha Sugar's insistence on monopolizing

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61 Colette Y. Machado, Na Pu'uwai, Native Hawaiian Community, testimony before U.S. Senate Select Committee on Indian Affairs and U.S. House of Representatives Committee on Interior and Insular Affairs, Aug. 9, 1989, p.2.

Mahealani Kamauu, testimony before U.S. Senate Select Committee on Indian Affairs and U.S. House of Representatives Committee on Interior and Insular Affairs, Aug. 9, 1989, p. 3 (hereafter cited as Kamauu, Aug. 9, 1989 Testimony). Also See Piianaia Responses, p. 24.

62 Kamauu Aug. 9, 1989, Testimony, p. 3.

63 Transcript 1988, p. 83.

64 Federal-State Task Force Report, p. 279.

65 HHCA §212.

66 Piianaia Responses, p. 25.

67 *Id.*

68 *Id.*, p. 26.

69 DHHL Annual Report, p. 28.

70 Kamauu Aug. 9, 1989, Testimony, p. 9.

71 Alan Murakami, testimony before Senate Select Committee on Indian Affairs and House Committee on Interior and Insular Affairs, Aug. 9, 1989, pp. 10-11 (hereafter cited as Murakami Water Rights Testimony).

all available water has resulted in four of the five original homesteaders abandoning their leases. Two current beneficiaries have struggled to continue ranching operations with what little water can be secured. In response to litigation on behalf of the beneficiaries, the company opposed any irrigation of their pastures, the awarding of any new leases, and even opposed allowing homesteaders to reside on their ranches throughout the year because of the shortage of water during the drier periods.<sup>72</sup> Alice Zenger, one of the Kekaha homesteaders, addressed the Advisory Committee at its September 1988 meeting:

Breach of trust? This voice calls out, yes, yes, yes. . . .And why? Because the powers to be in the Department of Hawaiian Home Lands are not acting exclusively for the beneficiaries. There is a definite conflict of interest. When Kekaha Sugar Company can dictate what happens to all that water that comes down by the ditch [for which] they only pay \$55,208 a year; when the act of 1920 [HHCA] specifically spells out that, as a lessee, I am entitled to surplus water, and I do not have adequate water to even flush my toilet; I do not have adequate water for my troughs for my animals. . . .And I go to the DHHL, and I write to [two] Governors, with copies to my legislators, and I talk with the powers that be in the DHHL. . . .And all this time, through two generations, 33 years and 8 months, and their track record in helping us is zero. . . .I plead with you,

please come to Kauai and hear the many voices who cry out and get no help.<sup>73</sup>

Mehealani Kamaau, of the Native Hawaiian Legal Corporation, concluded that "it would be hard for Kekaha Sugar to argue it had no surplus water if a portion or all of its leases were withdrawn to benefit Native Hawaiian homesteaders."<sup>74</sup>

Another egregious example of the failure of the DHHL to withdraw general leases injurious to Native Hawaiians is the continued use by the Parker Ranch of vast pastoral acreage on the Big Island of Hawaii. Although these leases (and licenses) of nearly 33,000 acres have netted a return of less than \$4.00 per acre per year,<sup>75</sup> they have also deprived beneficiaries of the right to pursue economic self-sufficiency, one explicit objective of the original HHCA.

Sonny Kaniho provided extensive testimony concerning the plight of the Aged Hawaiians, an organization of ranchers who have been waiting for more than 38 years to be awarded pastoral homestead leases. After years of pressure and petitions, the Hawaiian Homes Commission finally opened up land for homesteading in Waimea on the big island of Hawaii in 1952. A waiting list was established to determine who would receive pastoral and farm lots. Of 187 individuals on the original list, 48 did receive awards. However, following these initial awards, the commission canceled the waiting list, without apparent authority

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This testimony entitled "Water Rights—The Hawaiian Home Lands Trust" provides an overview of water rights issues. A more detailed description is also found in the "Native Hawaiian Rights Handbook," pp. 37-53.

72 A. Murakami, testimony before Senate Select Committee on Indian Affairs and House Committee on Interior and Insular Affairs, Aug. 9, 1989, p. 12.

73 Transcript 1988, pp. 153-55.

74 Kamaau Aug. 9, 1989, testimony, p. 10.

75 DHHL 1989 Annual Report, p. 32.

and without notifying those on the original list. Until Mr. Kaniho found evidence to this effect in the State archives 18 years later, the commission denied the existence of the waiting list. Following the 1982 investigation by the Office of the Inspector General of the U.S. Department of the Interior, the DHHL conducted an investigation of the suppression of the 1952 waiting list and, on March 30, 1984, the commission agreed to reinstate the 1952 Waimea waiting list.<sup>76</sup>

Since that time, however, large portions of the area in question have remained in the possession and control of the Parker Ranch under revocable permits.<sup>77</sup> The permission of the DHHL for continued use by the Parker Ranch of this acreage is a matter of serious concern to the Aged Hawaiians, who were recently notified that future pastoral homestead lots will consist of 5-20 acres each, sufficient to support not more than five head of cattle.<sup>78</sup> These lots are not designed to promote economic self-sufficiency and are therefore unacceptable to those Aged Hawaiians still waiting. However, as one observer noted, "to wait is to die."<sup>79</sup> Many on the original list have died. The oldest on the list up until 1990 was Henry Ah Sam, who died on January 26, 1990, at the age of 92.<sup>80</sup>

Edward Kalama, an Aged Hawaiian testifying before the 1989 congressional oversight committees, spoke on behalf of a fellow rancher:

By refusing to allow beneficiaries the opportunity to obtain leaseholds of sufficient size to promote the self-sufficiency of beneficiaries, the Hawaiian Homes Commission is defeating the purpose of the HHCA. The future prospect of successfully ranching on 10-20 acre unirrigated lots in Waimea in a successful manner is dim. The commission has created the situation where a serious rancher like Mr. [James] Akiona, Sr., has no opportunity to pursue his goal of economic self-sufficiency. This policy contradicts the legislative intent and purpose of the HHCA, and should be stopped.<sup>81</sup> [Mr. Akiona, Sr. is presently number two on the 1952 waiting list].

Ethel Andrade, a member of the SCHHA executive board and a Waimea rancher, stated that she was one of the fortunate original applicants who received 300 acres in 1952. She reminded the Committee that the Federal-State Task Force had called for the implementation of the 1952 waiting list prior to any other land awards. "But the waiting list still exists," she added, "and is ignored, while other land awards continue. This is a 38-year old breach of trust!"<sup>82</sup> On July 28, 1990,

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76 Kaniho Statement, pp. 2-4.

77 Transcript 1988, p. 109.

78 "Native Hawaiian Rights Handbook," p. 36.

On July 31, 1990, the DHHL revised this proposal to offer 166 pastoral lots of 10-20 acres each, 8 lots of 100 acres each and 8 lots of 200 acres each. It also offered another 22 lots in Humu'u la (100 acres each) and Kama'oa-Pueo (25 acres each) on the Big Island. Minutes of Hawaiian Homes Commission meeting, July 31, 1990.

79 Mahealani Kamauu, testimony before Senate Select Committee on Housing and Hawaiian Programs (Hawaii legislature), Feb. 16, 1990.

80 *Id.*

81 Edward Kalama, testimony of Aged Hawaiians, before the U.S. Senate Select Committee on Indian Affairs and House Committee on Interior and Insular Affairs, Aug. 11, 1989, p. 4.

Sonny Kaniho was arrested for trespassing in a protest against the DHHL's failure to provide ranch lots to the Aged Hawaiians. He was joined by others on the waiting list and by a State legislator.<sup>83</sup> However, only Kaniho was arrested for trespassing on Hawaiian homelands leased to the Parker Ranch. He noted that he has been arrested five times for trespassing since he began protesting DHHL policies. The State legislator who joined him also recalled that Governor John Waihee's father was on the Waimea waiting list and died before receiving his award.<sup>84</sup>

Another significant issue addressed by the Federal-State Task Force concerns the use of Hawaiian homelands by public agencies, both State and Federal. The report noted that some 30,000 acres of homestead lands were being used for the benefit of the public rather than the beneficiaries.<sup>85</sup> Much of this land was withdrawn from the trust through illegal executive orders issued by territorial and State Governors. The Task Force called for immediate revocation of these executive orders.<sup>86</sup> In December 1984, then Governor George Ariyoshi canceled 27 executive orders and proclamations, returning almost 28,000 acres to the control of the DHHL.<sup>87</sup> Although some lands formerly under executive order

have been exchanged for lands of equal value, others have continued to be used in the same manner as before under a variety of conveyances issued by the DHHL.<sup>88</sup> The department has issued 5-year licenses to the city and county of Honolulu for beach parks at Nanakuli, Waimanalo, Kaiona, Kaupo, and Makapuu for a total return of \$1.00.<sup>89</sup> These parks, although used by Native Hawaiians, are also open to the general public. The beach at Makapuu, it has been noted, is not in the vicinity of a homestead community; instead, it is located near a popular tourist attraction and serves primarily visitors and the general public.<sup>90</sup> Former chairman of the Office of Hawaiian Affairs and Molokai trustee, Louis Hao, told the Advisory Committee that "the response to illegal set-asides was imperfectly implemented by the DHHL. Almost immediately after the lands were returned to the control of the department, revocable leases were approved to continue most of these lands under the administration of county parks. . . . We continue to question whether such an arrangement is consistent with the fiduciary responsibilities of the State."<sup>91</sup> Indeed, the Hawaii Supreme Court has ruled that the Hawaiian Homes Commission is obligated to administer the trust solely in the in-

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82 Ethel Andrade, letter to John Dulles, July 9, 1990, p. 1.

83 Hawaii Tribune-Herald, July 30, 1990, p. 1.

84 *Id.*

85 Federal-State Task Force Report, p. 39.

86 *Id.*, pp. 39-41.

87 "Native Hawaiian Rights Handbook," p. 28.

88 Drake Testimony, p. 29. Also, "Native Hawaiian Rights Handbook," p. 29.

89 DHHL 1989 Annual Report, p. 47.

90 MacKenzie Testimony, p. 10.

91 Louis Hao, testimony before Hawaii Advisory Committee, USCCR, Sept. 6, 1988, p. 4.

terest of the beneficiary and "use reasonable skill and care to make the trust property productive."<sup>92</sup>

As discussed in the Federal issues section of this report, the Federal Government continues to use illegally significant parcels of Hawaiian homestead land. Although the State did file legal action to secure the return of the valuable Laulaulei property, the Federal courts ruled that the State did not act in a timely manner.<sup>93</sup> The Federal Government uses Hawaiian homelands in three other locations, and no formal actions have been taken to recover these parcels. The DHHL has stated that "resolution of these matters require federal action."<sup>94</sup> Noting "too many examples of land abuse by both the State and Federal governments," the State Council of Hawaiian Homestead Associations (SCHHA) requested the Advisory Committee's support in recommending "a full Federal audit" of all lands under the HHCA.<sup>95</sup>

Despite significant research efforts by State government, there remain unresolved questions regarding the full accounting of the Hawaiian homelands inventory. These discrepancies were noted by the Federal-State Task Force,<sup>96</sup> and former HHC chair Piania told the Advisory Committee in September

1988 that she was "not satisfied that we have resolved the land inventory."<sup>97</sup> The original act set aside 203,500 acres, more or less, but more current and precise research reflects a figure considerably smaller.<sup>98</sup> The Federal-State Task Force commissioned Deputy Attorney General George K.K. Kaeo, Jr., to record and index all 33 tracts of Hawaiian homelands, and his report (considered the most authoritative) reflects a revised total of 187,561.49 acres.<sup>99</sup> This total does not however conform to existing State tax records.<sup>100</sup>

In her testimony before the congressional oversight committees in 1989, former Hawaiian Homes Commission chair Billy Beamer recommended that "Congress should appropriate funds to conduct a final title search to define the inventory of Hawaiian Home Lands."<sup>101</sup> She observed that "since the Federal Government approved the HHCA without maps, legal descriptions, metes and bounds, it should rectify the omission."<sup>102</sup>

Kamaki Kanahale discussed the cultural rights and concerns of Native Hawaiians. Noting the importance of preserving the Native Hawaiian lifestyle, he observed that "the inability to practice our cultural rights have caused the diminishing of our race in major numbers."<sup>103</sup> The Federal-State Task Force

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92 *Ahuna v. Department of Hawaiian Homelands*, 64 Haw. 327, 340, 640 F2d 1161, 1169 (1982). See Federal-State Task Force Report, pp. 205, 206.

93 See chap. III, notes 55, 56.

94 Drake Testimony, p. 30.

95 Kanahale Testimony, p. 7.

96 Federal-State Task Force Report, p. 59.

97 Transcript 1988, pp. 32-33.

98 "Native Hawaiian Rights Handbook," p. 69.

99 Federal-State Task Force Report, p. 324.

100 Federal-State Task Force Report, pp. 330-31.

101 Billy Beamer, testimony before the U.S. Senate Select Committee on Indian Affairs and House Committee on Interior and Insular Affairs, Aug. 7, 1989, prepared statement, recommendation 1.

102 *Id.*

recommended the protection of native rights, including: rights to gather, hunt, and fish for subsistence and livelihood purposes; rights to access to the mountains and the sea and traditional trails; the right of worship and access to sacred places of worship; and rights to running water for subsistence and agricultural purposes.<sup>104</sup> The SCHHA petitioned the Advisory Committee for a review to "assure access to traditional religious or sacred places, and the ability to participate in all endeavors of traditional practices such as fishing, hunting, and gathering. . .on homestead lands and surrounding areas."<sup>105</sup> The Vice Chairman of the Hawaii Advisory Committee, Charles Maxwell, Sr., expressed concern about the lack of access to the ocean for Native Hawaiians on a large coastal area of Maui, as the result of a 15,000 acre general lease. The right of way has been closed, Mr. Maxwell stated, thus depriving Hawaiians the opportunity to "harvest the resources from the ocean."<sup>106</sup> Noting that natives could not possibly afford to lease so much acreage, he suggested that at least "we should retain our right of access to the ocean."<sup>107</sup> In direct response to the Vice Chairman's inquiry, former HHC chair Piianaia said, in September

1988, that the DHHL has not prepared a plan for this entire acreage.<sup>108</sup> She promised to follow up in detail; however, despite followup correspondence from the Committee, no response was received.<sup>109</sup> At the August 1990 factfinding meeting, Ms. Drake, the new HHC chair, was asked about this same issue. She responded by observing that "a lot of people that have been going on to private or Hawaiian homestead lands have been trashing the area. They have stolen cattle."<sup>110</sup> Ms. Drake also commented that the DHHL is working with community agencies to make sure that only Hawaiians are allowed onto the land.<sup>111</sup> She also promised to speak with Mr. Maxwell "more fully" on the matter in private at a later time.<sup>112</sup> Noting that he had been inquiring about this specific issue since the Committee's 1979 forum, he remarked that "I've been asking this question for years, and I have not gotten the answer. That's frustrating."<sup>113</sup> In its prepared testimony, the DHHL noted that it had not implemented the task force findings on traditional and cultural concerns because it "will require additional resources to ensure the access is managed properly to maintain the land asset and reduce potential liability."<sup>114</sup>

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103 Kanahale Testimony, p. 10.

104 Federal-State Task Force Report, p. 55.

105 Kanahale Testimony, p. 10.

106 Transcript 1988, p. 24.

107 *Id.*

108 Transcript 1988, p. 24.

109 On Oct. 6, 1988, a letter from John Dulles, to Chairman Piianaia, requested a response to Mr. Maxwell's inquiry. The letter noted Ms. Piianaia's commitment at the Sept. 6, 1988, forum "to followup in more detail in writing," Transcript 1988, p. 24. No response was received. A second letter from Mr. Dulles to Ms. Piianaia dated Mar. 10, 1989, also went unanswered.

110 Transcript 1990, p. 202.

111 *Id.*

112 *Id.*, p. 204.

113 *Id.*



In 1988 the Hawaii legislature enacted the Native Hawaiian Trusts Judicial Relief Act.<sup>115</sup> This law authorizes a limited "right to sue" enabling Native Hawaiians to initiate litigation in State courts to enforce the provisions of the HHCA and the ceded lands trust. The legislation is not retroactive and does not allow an unlimited right to seek past damages for official misconduct. It allows plaintiffs to challenge official decisions and to restore the trust depleted by the breach of trust; however, actual damages are limited to out-of-pocket expenses directly related to the claimed injury. It excludes punitive damages, imposes a 2-year statute of limitation, and provides for attorneys fees if a plaintiff is successful.<sup>116</sup> The statute also provides a 3-year period during which the Governor may introduce legislation for addressing claims not covered in this limited act. Should he fail to act or receive legislative support, beneficiaries could seek judicial relief in State court for damages prior to July 1, 1988.<sup>117</sup> In his statement before the Committee, the Governor stated that the "proposal is currently being developed."<sup>118</sup> In his address to the State Council of Homestead Associations on August 17, 1990, the Governor stated:

Act 395 requires that we submit a proposal to the 1991 Legislature to resolve controversies under both the Hawaiian Home Lands Trust and the Native Hawaiian Public Trust (Or "OHA" Trust).

This "requirement" provides a unique opportunity to not only repair historic obligations, but to position Hawaiian Home Lands for a far more successful future. And so we will address such issues as state and federal land disputes; available resources; management and jurisdictional issues; and revenues due to Hawaiian Home Lands from the disposition of ceded lands that are currently in sugar production.<sup>119</sup>

Colette Machado, community leader and former Hawaiian Homes commissioner from Molokai, shared her concerns regarding third-party agreements (TPAs) and protection of water rights. Third-party agreements allow nonbeneficiary agricultural interests to consolidate leases and operate large-scale farming operations. Hawaiian homesteaders receive a nominal consideration in exchange for allowing their individual leases (40 acres or less) to be used by agribusiness interests in this manner. Hawaiian homesteaders who are attempting to farm their own small individual leases cannot compete successfully

114 Drake Testimony, p. 44.

115 1988 Haw. Sess. Laws, Act 395, Haw. Rev. Stat. Ch. 673.

116 Haw. Rev. Stat. §§673-2(a), 673-4(a)(b). In her testimony, Milliani Trask noted that "the statute prevents the court from awarding plaintiffs either land or money. The statute provides that land or revenues won by plaintiffs should be paid to the State Trustee (See HRS chap. 673)," Trask Testimony, p. 3.

117 1988 Haw. Sess. Laws, Act 395 §5; Haw. Rev. Stat. Ch. 673.

118 Governor's Statement, p. 3.

119 Ka Nuhou, DHHL Newsletter, vol. 16, no. 6, September/October 1990, p. 6, quoting Hon. John Waihee, Governor of Hawaii.

In January 1991 the Governor submitted to the Hawaii legislature *An Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust* in accordance with Act 395. The plan, which contains a summary of "Controversies and Recommended Actions" was approved by the legislature through a concurrent resolution.

with the large corporate enterprises. According to Ms. Machado, this practice has allowed non-Hawaiians to control all major crops on Molokai with the exception of sweet potatoes.<sup>120</sup> Once the growers decide to abandon the land, she asserted, they leave it "fouled with pesticides. . . Nothing can be done with it for 10 years."<sup>121</sup> These agreements have been sanctioned by the DHHL, despite section 208(5) of the HHCA, which prohibits subleasing of Hawaiian homelands.<sup>122</sup> This practice came about as a result of efforts to assist the pineapple industry, but subsequently spread to accommodate many different uses.<sup>123</sup> Martin Kahae, a Molokai homesteader, told the Senate Select Committee on Indian Affairs that these agreements are causing homesteaders to suffer:

The hard-working homesteader who sweats blood is suffering. Whatever money he has he uses to work his homestead. The crop he plants he hopes to sell for profit, and to benefit his family. But, these Third-Parties are competing with this homesteader, growing the same crop and using homestead land and water that is supposed to be for Native Hawaiians.<sup>124</sup>

Water rights issues are also of paramount importance to Molokai residents. Although Native Hawaiians have by statute first prefer-

ence to two-thirds of all water in the Molokai Irrigation System,<sup>125</sup> they are in danger of losing their allocation to nonnative developers. Hawaiian homesteader water demands are very low, because as Ms. Machado said, "Hawaiians don't need the water, because they don't farm."<sup>126</sup> This underutilization by homesteaders is the result of their inability to afford costly water hookups, and the failure of DHHL to provide infrastructural improvements and to aggressively implement economic development plans for its beneficiaries.<sup>127</sup> Should Native Hawaiians succeed in creating large-scale agricultural enterprises in the future, they fear that their water supplies may have already been depleted.

According to the Native Hawaiian Legal Corporation, "one of the most critical failures of the homesteading program has been the inability to secure adequate water resources to support ranching, farming, and . . . aquacultural activities. Because of the locations of homestead areas, and the lack of financial resources to overcome the obstacles, potential beneficiaries of the HHCA have often been frustrated by the lack of adequate irrigation to support homesteading.<sup>128</sup> While section 221 of the HHCA provides certain entitlements to water, these are limited and have not been tested for a more expansive interpretation.<sup>129</sup>

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120 Transcript 1990, pp. 117-18.

121 Transcript 1990, p. 116.

122 Murakami 1988 Testimony, p. 7.

123 *Id.*

124 Martin Kahae, Molokai Hawaiian homelands homesteader, testimony before the U.S. Senate Select Committee on Indian Affairs, Aug. 29, 1988, p. 2.

125 Molokai Irrigation System, HRS §168-4. DHHL has first preference to two-thirds of the water in the Molokai irrigation system.

126 Transcript 1990, p. 120.

127 Murakami Water Rights Testimony, p. 8.

128 "Native Hawaiian Rights Handbook," p. 37.

129 *Id.*

According to the NHL, the DHHL "has largely failed or been unable to exercise its rights under section 221 because of financial and physical limits to developing the infrastructure to transport the necessary water supplies the long distances to generally remote locations of trust lands."<sup>130</sup> According to William W. Paty, chairperson of the Board of Land and Natural Resources and the Commission on Water Resource Management, "with the passage of the State Water Code in 1987, jurisdiction and authority in all matters relating to the implementation and administration of Hawaii's water resources is vested in the new Commission on Water Resource Management."<sup>131</sup> State attorney general Warren Price III told the congressional oversight committees that the new water code incorporates the existing statutory water rights for the beneficiaries of the HHCA. However, he cautioned that the "scope of these rights is not certain, and remains to be fleshed out" in litigation, administrative proceedings, and on the new water commission.<sup>132</sup> With the new State authority (resulting from litigation in Federal court), Mr. Price observed that "the State now has the flexibility to consider and protect the needs of the DHHL in a manner consistent with the rights of other public and private water users."<sup>133</sup>

With the existence of long-standing, complex, and still unresolved problems involving

water rights for HHCA beneficiaries on the islands of Kauai, Hawaii, and Molokai, it is not likely that the issues involved in these disputes (and others) will be settled anytime soon. With the emergence of a stronger role for State government in determining water use questions, and the apparent lack of interest by the Federal Government in asserting its trust duties, it would appear inevitable that the struggle to protect water resources for the homelands trust in the years ahead will present a difficult challenge.<sup>134</sup>

Section 204(3) of the HHCA provides a procedure whereby the DHHL may exchange title to its lands for land privately or publicly owned of an equal value.<sup>135</sup> According to the Federal-State Task Force, the DHHL was not actively pursuing large-scale land exchanges because it had determined that better assessment of Hawaiian homelands was needed before such lands were traded away.<sup>136</sup> Although there has been limited use of this authority, it would appear essential that land better suited to homesteading be aggressively sought out by the DHHL. Recalling that the HHCA "set aside some of the worst public land for inclusion in the homestead inventory,"<sup>137</sup> one expert concluded that "without land better suited for homesteading, current resources devoted to the program are insufficient to place Native Hawaiians reasonably soon on homesteads suitable for residences.

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130 *Id.*, p. 39.

131 William W. Paty, testimony before U.S. Senate Select Committee on Indian Affairs and U.S. House Committee on Interior and Insular Affairs, Aug. 9, 1989, p. 1.

132 Warren Price III, testimony before U.S. Senate Select Committee on Indian Affairs and U.S. House of Representatives Committee on Interior and Insular Affairs, Aug. 9, 1989, prepared statement, p. 2.

133 Warren Price III, testimony before U.S. Senate Select Committee on Indian Affairs, May 30, 1990, p. 2.

134 See footnote 72.

135 HHCA §204(3).

136 Federal-State Task Force Report, p. 307.

137 Murakami 1990 Testimony, p. 3.

.farms and ranches.”<sup>138</sup> As noted earlier, costs for infrastructure improvements necessary to prepare one homestead lot for building have been estimated between \$30,000 to \$45,000 (excluding the dwelling). One official, Rod Burgess, of the Office of Hawaiian Affairs, estimated that “amenity support to many of the lots remaining to be developed will require upwards of \$100,000 per lot for infrastructure alone.”<sup>139</sup>

Management problems have plagued the entire history of the Hawaiian homelands program. While territorial administrators were notoriously negligent in caring for the trust, the State of Hawaii has clearly taken its responsibilities more seriously. As a result of the Federal-State Task Force report, and other community-based advocacy efforts, many positive and constructive actions have been initiated to improve the program's effectiveness. These include: cancellation of illegal executive orders; substantially improved funding support; implementation of an accelerated award program, assigning raw land to eligible beneficiaries; negotiated land exchanges to replace the value of trust lands used for State airports; enactment of a limited “right to sue” law; and an extension of the term of a lease from 99 years to 199 years to assure that eligible beneficiaries can

remain on the land. Despite these, and other commendable improvements, the DHHL continues to suffer from bureaucratic inefficiencies and a mandate well beyond the capabilities of its limited staffing and financial resources.<sup>140</sup>

In a candid assessment, Ms. Pitanaia said that the Hawaiian homelands program “was set up as a highly dependent program. . .that is a very colonial way of treating Native Hawaiians.”<sup>141</sup> Noting that the Federal-State Task Force has recommended that the DHHL look into setting up an alternative authority to administer the trust, she admitted that this had not been pursued because of other priorities, especially the acceleration program. However, she concluded that “we know we have to make an organizational shift.”<sup>142</sup> She commented that the DHHL, as a State agency, must follow many administrative, personnel, and budgetary procedures that can create impediments.<sup>143</sup> Reliance on other State agencies for technical support and approvals also is frustrating to the DHHL. The Federal-State Task Force recommended that a management audit of the DHHL be undertaken to address “organizational structure, staffing patterns, and other such considerations.”<sup>144</sup> Despite the serious management concerns reflected in the report, this recom-

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138 *Id.*, p. 1.

139 OHA 1990 Testimony, p. 4.

140 For an overview of management problems affecting the DHHL, see Murakami 1988 and 1990 Testimony before the Hawaii Advisory Committee, USCCR.

141 Transcript 1988, p. 16.

142 *Id.*, pp. 43-44.

143 *Id.*, pp. 42, 44.

144 Federal-State Task Force Report, p. 65.

mentation was not followed. Instead, the DHHL "implemented an organization and operational analysis utilizing a consultant."<sup>145</sup> The department, according to Ms. Drake, is "in the process of securing the necessary approvals to implement changes in the organizational structure."<sup>146</sup> Progress was achieved in the area of financial management. The inspector general of the U.S. Department of the Interior found in 1982 that the DHHL accounting system was inauditable.<sup>147</sup> By 1985 the legislative auditor gave an unqualified opinion of the department's financial statement.<sup>148</sup> Staffing problems have consistently affected the agency. With only 98 civil service employees<sup>149</sup> and staff vacancies as high as 35 percent,<sup>150</sup> the department must rely on temporary hiring to fill many necessary positions. Because the legislature actually provides only about 42 percent of the DHHL's administrative budget, the department lacks the ability to recruit and sustain a fully qualified work force on a permanent basis.<sup>151</sup> Legislative funding is clearly inadequate to support the department's mission.

The Federal-State Task Force noted that access to information from the DHHL is difficult to obtain, especially for program beneficiaries. It suggested the appointment of ombudsmen and other innovative approaches for outreach.<sup>152</sup> And it concluded that "beneficiaries feel there are not enough opportunities for them to participate in decision-making."<sup>153</sup>

The voluminous testimony provided to congressional committees and to a lesser extent, this Advisory Committee, by program beneficiaries in recent years suggests that this continues to be a critical concern in the Native Hawaiian community. Nonetheless, the DHHL's response to the Task Force recommendations on outreach have been limited. The department responded that the task force "suggestions are noted."<sup>154</sup> The agency further commented that it was "upgrading its district office staff and expanding its community relations and public information staff and budget."<sup>155</sup> Ms. Piianaia acknowledged that the department is "not fantastic on information"<sup>156</sup> but also rejected the proposal for ombudsmen, commenting that "I don't think

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145 Drake Testimony, p. 52.

146 *Id.*, p. 53.

147 See note 12. Also, Federal-State Task Force Report, p. 63.

148 Drake Testimony, p. 46.

149 Transcript 1990, p. 211.

150 Murakami 1990, Testimony, p. 2.

151 A. Murakami, letter to John Dulles, USCCR, Aug. 13, 1990, p. 2.

152 Federal-State Task Force Report, p. 67.

153 *Id.*, p. 66.

154 Drake Testimony, p. 54.

155 *Id.*

156 Transcript 1988, p. 30.

there is a need for an advocate.”<sup>157</sup> She stated that it might represent a conflict for an internal employee to become involved in an adversarial situation.<sup>158</sup> Ms. Drake, in an interview with Commission staff, also categorically rejected this recommendation.<sup>159</sup>

Recognizing that the DHHL is a State agency and therefore is subject to many legal and regulatory constraints, the Federal-State Task Force recommended “alternative and creative solutions,” including consideration of a public authority to administer the trust.<sup>160</sup> The DHHL has not examined the public authority device.<sup>161</sup> Consequently, the administrative mechanism for achieving the purposes of the HHCA continues to be vested in a State executive agency with limited resources and powerful political influences interfering with its ability to serve exclusively the interests of its trust, as required by law. The inherent conflicts of interest diminish its effectiveness as an advocate for its beneficiaries since the department must at all times comply with the wishes of the incumbent Governor, and also subordinate itself to the legislature and to other more powerful State agencies, such as Department of Land and Natural Resources and the Office of the Attorney General. In seeking funds, it must conform to the Governor’s budget package; for purposes of legal counsel, it must depend on the State attorney general. In matters relating to land exchanges and other negotiations, it must submit to the DLNR.

Ethel Andrade, noting that all Hawaiian homes commissioners are appointed by the Governor, has recommended instead that “commissioners be elected annually from qualified homesteaders.”<sup>162</sup> She proposed that they serve full time “at salaries and perquisites comparable to legislators, rather than the present political patronage by the Governor.”<sup>163</sup>

The lack of direct accountability to beneficiaries, their almost nonexistent formal involvement in decisionmaking, and the failure of the program to deliver results over a 70-year history are the cause of great anger, despair, and disillusionment. The cries for self-determination and sovereignty increase as Native Hawaiians see their needs and aspirations neglected and ignored by larger political interests. The inflated value of all real estate on the islands makes the task of protecting the Hawaiian homelands trust that much more difficult. The Governor, a Native Hawaiian, has been supportive of the program and has helped to increase the level of financial resources for the DHHL and the Office of Hawaiian Affairs. Nonetheless, Native Hawaiian people are largely disenfranchised and suffer disproportionately from economic and environmental adversity. Recent statistics compiled by the State reflect that 34 percent of Hawaiians live in poverty. They represent almost one-fifth of the State’s population, they make up about 46 percent of adults and 66 percent of youths in correctional facilities. Of

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157 *Id.*, p. 31.

158 *Id.*

159 Hoaliku Drake, interview with John Dulles, Honolulu, HI, June 12, 1990.

160 Federal-State Task Force Report, p. 64.

161 Drake Testimony, p. 51. Also, Transcript 1988, p. 44.

162 Ethel Andrade, letter to John Dulles, USCCR, July 9, 1991, p. 2.

163 *Id.*

the State's 14,000 adults on welfare, one in three is Hawaiian. They have a death rate 34 percent higher than the average American and the highest lung cancer rate in the Nation.<sup>164</sup> A journalist recently noted that:

This sounds like a familiar story—a once self-sufficient indigenous people become disenfranchised and dependent. But

though there are many parallels between native Americans and Hawaiians, the U.S. has recognized more than 500 mainland Indian and Alaskan tribal governments in a nation-within-a-nation relationship; as bad as the conditions of many tribes, most largely control their own lands and resources and have significant protections. Critics argue that only Hawaiians have been left out.<sup>165</sup>

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164 Viveca Novak, "Hawaii's Dirty Secret," *Common Cause Magazine*, November/December 1989, p. 12.

165 *Id.*

## V. Summary

The Advisory Committee heard many recommendations from contributors and participants concerning the Hawaiian homelands program. Several persons suggested that the Federal-State Task Force should be reconvened to evaluate progress. Most critics observed that many of the most significant task force recommendations had been ignored or insufficiently addressed. They demanded full implementation. Some individuals called for the appointment of a Federal authority or master to oversee the program's operations; others called for a full investigation or evaluation by the Federal Government. Immediate litigation by the U.S. Department of Justice for trust violations was demanded by some participants. Many advocates appealed for the right of beneficiaries to bring suit in Federal court for enforcement of the trust.

Almost all contributors, including State officials, suggested that the Federal Government should provide funding resources to the program and enhanced technical assistance and support. Consistently, participants expressed the belief that the United States needs to acknowledge its misconduct and negligence in administering the program until statehood, and to compensate the trust for damages. There was a consensus that the United States must either return homestead lands it is occupying or provide alternate lands or other appropriate compensation. Some advocates believe that the State is not fully complying with its own constitution, especially provisions governing funding of the

homelands program. Several participants demanded that the State more aggressively protect the trust assets, including seeking fair compensation for current and past use of its trust resources by public and private parties. Several individuals insisted that the DHHL should not be engaged in leasing lands to nonbeneficiaries for revenue-generating purposes.

Participants differed as to possible alternative mechanisms for administering the trust. Some recommended that the Office of Hawaiian Affairs might be a more appropriate agency for this purpose, but others noted that it is a State agency and a creature of the State legislature. Several experts believed more research is required to find appropriate public authority models that might more effectively and independently administer the homelands program.

Most Native Hawaiian advocates acknowledged that immediate interim steps might be required to correct problems with the homelands program and insisted that the eventual goal must be the "creation and recognition of a sovereign entity which will control Hawaiian homes trust lands as well as certain ceded and Federal lands which should be returned to the Hawaiian people."<sup>1</sup> One community leader, in her statement to the Hawaii Advisory Committee in August 1990, affirmed this position:

The central problem revolves around control and utilization of the valuable lands, natural resources and revenues of the Ha-

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1 Kamaau Aug. 9, 1989, Testimony, p. 10.



waiian homes and ceded lands which are the trust entitlements of the Hawaiian people. These trust assets make the Native Hawaiians the wealthiest Native Americans in the United States. Despite this fact, the Native Hawaiians are the poorest, the sickest, and least educated of the State.

Neither the U.S. nor the State has ever been able to act as a responsible trustee in managing the Hawaiian homes or ceded lands. . . . Unless Native Hawaiians and Hawaiians are allowed to form self-governing entities, to be acknowledged and to control their lands and natural resources, they will continue to be denied equal protection of the laws and policies of the United States.<sup>2</sup>

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2 Trask Testimony, pp. 6, 9.

## VI. Findings and Recommendations

**Finding 1:** The Hawaii Advisory Committee concludes that the United States has failed to exercise its trust obligations to the beneficiaries of the Hawaiian Homes Commission Act, as mandated by Section 5(f) of the Hawaii Admission Act.

The statute specifically entrusts oversight responsibilities to the Federal Government and grants it exclusive authority to enforce the provisions of the act. Despite this, correspondence to the Chairman of the U.S. Commission on Civil Rights from both the U.S. Departments of Interior and Justice denies Federal trust duties. It is clear that the United States has now abandoned any interest in protecting the trust.

This retreat is unacceptable to the Advisory Committee, especially in light of overwhelming evidence that the objectives of the Hawaiian Homes Commission Act have not been achieved in 70 years of Federal and State administration. Refusal by the Federal Government to monitor compliance, investigate complaints, and take appropriate legal actions, constitute a denial of the civil rights of Native Hawaiian trust beneficiaries.

**Recommendation 1:** Congressional Action; Office of Compliance and Trust Counsel

The Congress should enact legislation establishing a clear Federal trust duty to Native Hawaiians for fulfillment of the Hawaiian Homes Commission Act. In view of the current Federal reluctance to accept trust obligations under the act, this congressional action is a fundamental prerequisite to any meaningful Federal participation in corrective actions to repair the trust and make it effective.

The Federal executive branch of government should establish an office of compliance within the U.S. Department of the Interior to evaluate systematically performance by the State in meeting its trust duties. Comprehensive compliance reviews should be conducted on a periodic basis. This office should also establish mechanisms for receiving, investigating, and promptly resolving complaints by beneficiaries of trust breaches. It should initiate appropriate actions to recover trust assets for the State of Hawaii that were lost or diminished during the period of Federal administration of the program.

To effectively carry out its enforcement functions, such a compliance unit will need the support of competent legal counsel. The Congress and the executive branch should give serious consideration to establishing an office of trust counsel with adequate legal resources and sufficient independence to aggressively seek remedies for trust violations.

**Finding 2:** Unlike other Native Americans, Hawaiians have never received the privileges of a political relationship with the United States. Yet Hawaiians, whose former kingdom was a member of the international community of nations and recognized by the United States, have a compelling case for Federal recognition.

The lack of formal recognition of Native Hawaiians by the Federal Government has resulted in their inability to secure control of lands and natural resources, develop self-governance mechanisms, enjoy eligibility for Federal programs designed to assist Native Americans and other protected groups, and the denial of valuable legal rights to sue for discrimination. This constitutes disparate

treatment and must be remedied without delay.

**Recommendation 2:** Federal Recognition of Native Hawaiians

The Congress should promptly enact legislation enabling Native Hawaiians to develop a political relationship with the Federal Government comparable to that enjoyed by other native peoples in the Nation. Such legislation would encourage the realization of sovereignty and self-determination for Native Hawaiians, a goal that this Advisory Committee strongly endorses.

The legislation should also explicitly confer eligibility to Native Hawaiian beneficiaries for participation in Federal programs designed to assist Native Americans, Alaska Natives, and other protected groups who have suffered from historical discrimination.

Native Hawaiians should receive the full protection of civil rights statutes and regulations applicable to Native Americans and other protected groups in the United States.

**Finding 3:** With questionable legal authority and negligible compensation, the Federal Government is occupying valuable Hawaiian homelands for purposes unrelated to fulfillment of the trust.

Continued control of these lands (including Lualualei, Pohakuloa, Kekaha, and Keaukaha) in defiance of trust obligations, demonstrates a callous disregard for the interests of the Native Hawaiian beneficiaries. Lualualei alone constitutes one-fifth of all homestead lands on Oahu, where over 5,000 Hawaiian applicants are waiting for leases. The United States has failed to return these valuable parcels to the trust and also refused to exchange them for other suitable Federal lands or provide fair compensation for their past and present use.

**Recommendation 3:** Return of Federal Lands; Adequate Compensation; Amend Quiet Title Act

Immediate action is required by the Federal Government to address this critical issue. The trust must be made whole, and this necessitates the Federal Government evacuating and restoring currently held homestead lands, or negotiating the exchange of other available Federal properties that are suitable for homesteading. In addition, the Federal Government must make arrangements to provide market value compensation for past and present use of Hawaiian homelands. The U.S. Department of the Interior, with legal assistance from the U.S. Department of Justice, should immediately initiate negotiations with those branches of the Federal Government using the homelands (primarily military) to effect an expeditious resolution to this problem.

To assure appropriate judicial remedies for the uncompensated use of Lualualei, the Congress should amend the Federal Quiet Title Act, which currently includes a 12-year statute of limitations. This would allow resolution of the problem through the Federal court system in the event administrative negotiations are unsuccessful.

**Finding 4:** Native Hawaiian beneficiaries are denied the explicit right to sue for enforcement of the trust in Federal court under the Hawaii Admission Act and the Hawaiian Homes Commission Act. Because of the very narrow scope of judicial remedies available in Federal and State courts, and extensive procedural and jurisdictional constraints, beneficiaries are effectively denied full access to judicial remedies for breaches of trust.

In view of the unwillingness of the Federal Government to file such actions on their behalf, beneficiaries are effectively denied the right of judicial redress. The Advisory Committee believes this represents an egregious

abridgement of the equal protection of the laws for Native Hawaiians. In addition, there are insufficient legal resources to directly assist beneficiaries in pursuing legal remedies.

**Recommendation 4:** Right to Sue; Legal Resources

The U.S. Congress should enact legislation explicitly granting beneficiaries the right to sue in Federal court for breaches of trust under the Hawaii Admission Act and the Hawaiian Homes Commission Act. Such legislation should be enacted promptly, without regard to existing "right-to-sue" laws enacted at the State level, and severely limited remedies presently available through the Federal courts. Otherwise, beneficiaries will be effectively precluded from seeking restoration for breaches of trust inflicted during the nearly 40 years of Federal administration of the Hawaiian homes program.

Increased rights for Native Hawaiian beneficiaries may be meaningless without the availability of adequate resources to pursue such claims. The complex nature of many issues involving Hawaiian homelands necessitates significant resources to fund such litigation. The Advisory Committee recommends a significant increase in Federal funding of legal services programs for Native Hawaiian beneficiaries.

**Finding 5:** The United States has failed to provide funding support or sustained technical assistance for implementation of the Hawaiian Homes Commission Act. This failure has persisted despite the fact that the legislation was enacted by the United States Congress and that most of the damage done to the trust occurred during the territorial period. With the exception of limited technical and "housekeeping" initiatives, the Federal Government has largely ignored the findings and recommendations of the Federal-State Task Force.

**Recommendation 5:** Federal Funding and Technical Support

The U.S. Congress should enact legislation establishing a fiduciary responsibility of the United States for accomplishing the purposes of the Hawaiian Homes Commission Act. Enhanced Federal financial support is critical to the success of the program.

In addition, the U.S. Department of the Interior should provide technical assistance and support to help the State of Hawaii effectively implement the program. This function should be entirely independent from the compliance unit, and should serve to assist the State in aggressively seeking Federal financial and technical assistance from all sources.

**Finding 6:** An accurate inventory of Hawaiian homelands has never been achieved, resulting in an inability to reconcile discrepancies and resolve disputes.

Despite efforts by the State to correct this problem, there still exists only an estimate of the total acreage. This problem is largely the making of the Federal Government, as the original statute was imprecise as to the lands included and a comprehensive survey was not undertaken prior to transferring title to the State of Hawaii.

**Recommendation 6:** Federal Support for Completing Land Inventory

The U.S. Department of the Interior should fund and provide technical support to assist the State of Hawaii in conducting an exhaustive research project designed to document and define the total homelands inventory. The Federal Government should also assist the State in designing and implementing a management system that is capable of continuously updating the inventory, based on new information and changes resulting from land transactions.

**Finding 7:** The Federal-State Task Force report remains the most comprehensive and

accurate assessment of the Hawaiian homes program. No formal followup or reevaluation was ever undertaken, although this was called for in the study. The extensive findings and recommendations serve as the benchmark for measuring progress. Although the State has been partially responsive, the Federal Government has virtually ignored much of the advice provided in this document.

**Recommendation 7:** Federal-State Task Force Responses; Reconvening the Task Force

The State of Hawaii should address in a more substantive manner those task force recommendations that it has failed to adopt or implement. In those instances where actions have not been taken due to higher priorities, the State should establish a proposed timetable for full implementation.

It is especially imperative that the Federal Government provide a full accounting for its almost complete disregard of many task force findings and recommendations. The U.S. Secretary of Interior should assign a high priority to a prompt and thorough response.

In its responses, both the State and Federal governments should make every effort to update systematically critical information contained in the 1983 document.

In addition, the Secretary of the Interior and the Governor of Hawaii should immediately reconvene the Federal-State Task Force to review progress in implementing recommendations in its 1983 report and to undertake new oversight and advisory functions, as necessary. The task force should meet on a periodic basis and issue reports to the Congress and the Hawaii legislature at least biennially.

**Finding 8:** The State of Hawaii amended its constitution in 1978 to provide full funding of the Hawaiian homelands program, including administration, operations, and

programs. However, the Department of Hawaiian Home Lands receives less than 0.2 percent of the State's overall budget, and is therefore still exceedingly dependent on revenues generated by leasing homestead lands to nonbeneficiaries. This creates a conflict of interest situation that adversely affects beneficiary entitlements. Although funding for the program has increased measurably, especially during the administration of Governor Waihee, it falls far short of the resource level necessary to support the ambitious mandate of the Hawaiian Homes Commission Act.

**Recommendation 8:** State Funding

The Governor's budget submissions to the legislature should incorporate the full amount of financial assistance necessary to support effective implementation of the program. At the same time, the State should continue to aggressively solicit funding assistance from the Federal Government, which has a responsibility to assist the State in fulfilling the provisions of the act.

**Finding 9:** The Department of Hawaiian Home Lands continues to suffer from a lack of continuity in leadership, inadequate staff levels, and bureaucratic inefficiencies. The department lacks critical technical expertise, and creative initiatives have been stymied by the need to accommodate many competing priorities. Many recommendations in the Federal-State Task Force report have yet to be addressed as a result of these limitations. Furthermore, the basic structure of the department has impeded its ability to perform its trust duties effectively. As a State government agency within the executive branch, it is unable to function exclusively in the interests of its beneficiaries. The department is subject to many policies and regulations relating to budgeting, personnel, and administration that can frustrate its efforts. Of greater concern, however, is the inability of the depart-

ment to compete successfully with other more powerful political influences affecting public policy. The placement of the trust obligation in a relatively small State agency largely subordinate to other greater public interests results in a conflict of interest. From the inception of the program, the ability of larger economic and political interests to prevail over Native Hawaiian trust entitlements have worked to render the program ineffectual.

**Recommendation 9:** Enhanced Technical Resources; Alternate Administrative Mechanism

The Department of Hawaiian Home Lands needs enhanced staffing in order to perform its many varied functions. Management, technical, and legal capabilities must be improved. The department should not rely on other State offices for legal and technical representation, as these entities are not acting exclusively on behalf of native beneficiaries.

The reconvened Federal-State Task Force should promptly begin the process of developing recommendations for alternative administrative mechanisms to implement the Hawaiian Homes Commission Act. The Native Hawaiian community, including homesteaders, other beneficiaries, and advocacy organizations, must be fully consulted in this endeavor. The objectives of the study should be to devise a structure that, to the extent possible, insulates the trust from inherent conflict of interest difficulties.

The task force study and recommendations on a new mechanism must be accomplished in an expedited manner. This Advisory Committee believes that it is unlikely that the Hawaiian homes program will ever succeed unless the trust functions can be managed in a more independent, aggressive, and creative manner, with increased accountability to the beneficiaries. Indeed, the new administrative

structure should be governed and primarily directed by Native Hawaiians. This recommendation is in keeping with the mandate of the Hawaii Supreme Court which specified that the trustee is obligated to administer the trust solely in the interest of the beneficiary. The current structure fails to meet this test.

**Finding 10:** Decisionmaking in the Department of Hawaiian Home Lands is formally vested in a commission appointed entirely by the Governor. There are no systematic or institutionalized mechanisms for decisionmaking influence by the beneficiaries themselves. Furthermore, Native Hawaiians have consistently expressed frustration at the difficulty in accessing information from the Department of Hawaiian Home Lands or in resolving problems in a timely and satisfactory manner.

**Recommendation 10:** Appointments to the Hawaiian Homes Commission; Appointment of Ombudsmen

Until a complete restructure of the Hawaiian Homes Commission is achieved (see recommendation 9), the Governor should consent to make appointments to the commission based on recommendations made by Native Hawaiian beneficiaries in a democratic manner. Furthermore, the Department of Hawaiian Home Lands should immediately appoint full-time ombudsmen on every major island to assist beneficiaries with problems or questions relating to their status or entitlements.

**Finding 11:** Failure of the Department of Hawaiian Home Lands to develop management plans for the productive use of large areas of trust land, combined with the willingness to lease land to nonbeneficiaries for purposes of generating revenue, effectively defeat the goal of putting beneficiaries back on the land. Many competing priorities on the limited staff and resources of the department have contributed to this situation. However,

the failure to develop plans in a timely manner and to withdraw harmful leases, is inflicting lasting damage on the beneficiaries. In some cases, they have been waiting for as long as 30 to 40 years for residential, ranching, or farming lands, with no hope of imminent awards. Some have died and many more certainly will without receiving the benefits promised in the Hawaiian Homes Commission Act.

**Recommendation 11: Limiting Revenue-Generating Leases to Nonbeneficiaries**

The Hawaiian Homes Commission should drastically curtail the practice of leasing lands to nonbeneficiaries in order to generate revenue. The practice is injurious to the interests of the beneficiaries, in too many cases depriving them of their lands. The Department of Hawaiian Home Lands should secure the necessary management and technical assistance required to develop suitable management plans in an expeditious manner. Wherever there is a conflict between a lease to nonbeneficiaries and the clear interests of eligible beneficiaries, the latter should prevail.

The Hawaiian Homes Commission should make every effort to use Hawaiian Home Lands for the original intent of the act, which is to rehabilitate the Native Hawaiian by returning him to the land.

**Finding 12:** The Advisory Committee concludes that Native Hawaiian rights to gather, hunt, and fish for subsistence purposes, and to have access to sacred places of worship on Hawaiian Home Lands have been insufficiently protected by the State of Hawaii.

**Recommendation 12: Access to Homelands**

The Hawaiian Homes Commission should adopt policies and procedures in a timely manner that will allow Native Hawaiians to exercise traditional practices of gathering, hunting, fishing, and religious worship on Hawaiian homelands. These rights should be specifically reserved for Native Hawaiians, and the Department of Hawaiian Home Lands should restrict entry by other persons. A permit system might be appropriate to assure regulated access by qualified beneficiaries to the lands.

## Appendix A



UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS

1121 Vermont Avenue, N.W.  
Washington, D.C. 20425

July 2, 1990

The Honorable Richard Thornburgh  
Attorney General  
U.S. Department of Justice  
Constitution Avenue and Tenth Street, NW  
Washington, D.C. 20530

Dear Mr. Attorney General:

This letter invites participation by the United States Department of Justice in a fact-finding meeting to be convened by the Hawaii Advisory Committee to the United States Commission on Civil Rights in Honolulu on August 2, 1990. The meeting will be held at the Ramada Renaissance Ala Moana Hotel (Garden Lanai Room), 410 Atkinson Drive, between 9:00 a.m. and 5:00 p.m. The purpose of the meeting is to obtain information and views relating to implementation of the Hawaiian Homes Commission Act. Specifically, the Committee is interested in learning the extent to which the Federal government and the State of Hawaii are meeting their obligations for fulfilling the law.

You (or your designated representative) are requested to address the following issues:

How does the Department of Justice exercise oversight responsibilities for the Hawaiian Homes trust under Section 4 and 5 of the Hawaii Admission Act of 1959?

Has it been necessary for the Department of Justice to bring any enforcement actions against the State of Hawaii for breaching its trust responsibilities to Native Hawaiians?

To what extent has the Federal government responded to the specific findings and recommendations issued by the Federal-State Task Force on the Hawaiian Homes Commission Act issued to the United States Secretary of the Interior and the Governor of the State of Hawaii (August 1983)?



- 2 -

Finally, the Advisory Committee solicits your specific recommendations for improving the performance and accountability of the Federal and State governments in fulfilling the mandate of the Hawaiian Homes Commission Act.

Participation by the United States Department of Justice in the fact-finding meeting will be scheduled between 3:00 and 4:00 p.m.

The United States Commission on Civil Rights is an independent, bipartisan, fact-finding agency first established by Congress in 1957 and reestablished in 1983. The Hawaii Advisory Committee is one of 51 such Advisory Committees appointed nationwide by the Commission. Members serve without compensation for 2-year terms. The Advisory Committee is chaired by Andre' S. Tatibouet of Honolulu.

We would appreciate your response to this invitation as promptly as possible. Also, should you have questions or need additional information, please contact our Western Regional Division in Los Angeles (213) 894-3437.

Your cooperation with the work of the Hawaii Advisory Committee and the United States Commission on Civil Rights are very much appreciated.

Sincerely,



ARTHUR A. FLETCHER  
Chairman

**Appendix B**



**UNITED STATES  
COMMISSION ON  
CIVIL RIGHTS**

1121 Vermont Avenue, N.W.  
Washington, D.C. 20425

July 2, 1990

The Honorable Manuel Lujan, Jr.  
Secretary of the Interior  
U.S. Department of the Interior  
1800 C Street, NW  
Washington, D.C. 20240

Dear Mr. Secretary:

This letter invites participation by the United States Department of the Interior in a fact-finding meeting to be convened by the Hawaii Advisory Committee to the United States Commission on Civil Rights in Honolulu on August 2, 1990. The meeting will be held at the Ramada Renaissance Ala Moana Hotel (Garden Lanai Room), 410 Atkinson Drive, between 9:00 a.m. and 5:00 p.m. The purpose of the meeting is to obtain information and views relating to implementation of the Hawaiian Homes Commission Act. Specifically, the Committee is interested in learning the extent to which the Federal government and the State of Hawaii are meeting their obligations for fulfilling the law.

You (or your designated representative) are requested to address the following issues:

How does the Department of the Interior exercise oversight responsibilities for the Hawaiian Homes trust under Section 4 and 5 of the Hawaii Admission Act of 1959?

Has it been necessary for the Department of the Interior to recommend to the United States Department of Justice bringing enforcement action against the State of Hawaii for breaching its trust?

How does the Department of the Interior carry out its responsibilities for approving State actions relating to the Hawaiian homelands and for advising the Congress on matters pertaining to the Hawaiian Homes Commission Act?

7 /  
What level of assistance has the Federal government provided to the State of Hawaii to help implement the Act (funding and technical)?

To what extent has the Federal government responded to the specific findings and recommendations issues by the Federal-State Task Force on the Hawaiian Homes Commission Act issued to the United States Secretary of the Interior and the Governor of the State of Hawaii (August 1983)?

Finally, the Advisory Committee solicit your specific recommendations for improving the performance and accountability of the Federal and State governments in fulfilling the mandate of the Hawaiian Homes Commission Act.

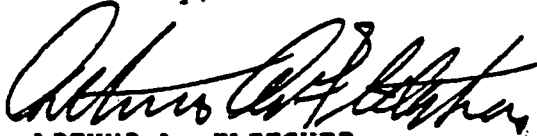
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We would appreciate your response to this invitation as promptly as possible. Also, should you have questions or need additional information, please contact our Western Regional Division in Los Angeles (213) 894-3437.

Your cooperation with the work of the Hawaii Advisory Committee and the United States Commission on Civil Rights are very much appreciated.

Sincerely,



ARTHUR A. FLETCHER  
Chairman



Appendix C

U.S. Department of Justice  
Land and Natural Resources Division

90 SEP 10 AM 10:24

E-230

Office of the Assistant Attorney General

Washington, D.C. 20530

August 31, 1990

Mr. Arthur A. Fletcher  
Chairman  
United States Commission  
on Civil Rights  
1121 Vermont Avenue, N.W.  
Washington, D.C. 20425

Dear Mr. Fletcher:

I have been asked to respond to your July 6, 1990 letter to Attorney General Thornburgh seeking Justice Department participation in an August 2, 1990 fact-finding meeting in Hawaii. The subject of the meeting, convened by the Hawaii Advisory Committee to the United States Civil Rights Commission, was implementation of the Hawaiian Homes Commission Act. As was communicated to your office by phone prior to the August 2 meeting, this Department was not able to send a representative to Hawaii. I have, however, taken this opportunity to offer a brief written response on behalf of the Department to the questions included in your July 6 letter. As you can see, the Justice Department has, at most, a peripheral role in implementation of the Hawaiian Homes Commission Act.

Turning to your specific questions:

1. How does the Department of Justice exercise oversight responsibilities for the Hawaiian Homes trust under Section 4 and 5 of the Hawaii Admission Act of 1959?

The State of Hawaii is trustee of the Hawaiian Homelands. See Keaukaha-Panaewa Community Assoc. v. Hawaiian Homes Comm'n, 588 F.2d 1216, 1224, n.7 (9th Cir. 1978). The Justice Department does not oversee the trust. To the extent that there is active federal oversight, it is exercised by the Department of the Interior, which has accepted the status of lead federal agency in connection with federal responsibilities under the Hawaiian Homes Commission Act. Justice Department involvement, if any, would be to bring a legal action to enforce the trust under Section 5(f) of the Act. Owing to Interior's status as lead federal agency and overseer, the Justice Department would

- 2 -

normally bring such an action only upon Interior's recommendation, although independent action by the Justice Department is possible. The ultimate decision of whether to bring a 5(f) action is committed to the discretion of the Attorney General.

2. Has it been necessary for the Department of Justice to bring any enforcement actions against the State of Hawaii for breaching its trust responsibilities to Native Hawaiians?

No. The Department of the Interior has not recommended that any such action be taken.

3. To what extent has the Federal government responded to the specific findings and recommendations issued by the Federal-State Task Force on the Hawaiian Homes Commission Act issued to the United States Secretary of the Interior and the Governor of the State of Hawaii (August 1983)?

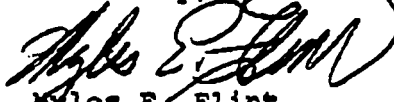
The Justice Department defers to the Department of the Interior, as lead federal agency, regarding the response to this question.

4. Finally, the Advisory Committee solicits your specific recommendations for improving the performance and accountability of the Federal and State governments in fulfilling the mandate of the Hawaiian Homes Commission Act.

The Justice Department defers to the Department of the Interior, as lead federal agency, in respect to any suggestions regarding improved implementation of the Hawaiian Homes Commission Act.

I hope that this adequately responds to the Commission's July 6 letter. Feel free to contact me if you have additional questions.

Sincerely,



Nyles E. Flint  
Deputy Assistant Attorney General

cc: David O. Simon, DOJ  
Ruth Van Cleve, DOI



Appendix D

United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240

17 JUL 1990

90 JUL 23 AM 10:59

Honorable Arthur A. Fletcher  
Chairman  
United States Commission on Civil Rights  
1121 Vermont Avenue, N.W.  
Washington, D.C. 20425

Dear Mr. Fletcher:

Thank you for your July 2, 1990 letter to Secretary Lujan inviting the Department of the Interior to participate in a fact-finding meeting of the Hawaii Advisory Committee to the United States Commission on Civil Rights in Honolulu on August 2, 1990. Because I serve as the Secretary's Designated Officer on the Hawaiian Homes Commission Act, Secretary Lujan has asked me to respond to you directly. Although I appreciate the invitation, I will be unable to attend the meeting due to unavoidable schedule conflicts. I am pleased, however, to offer the following written response to your questions. Because the federal government has only a minimal role in the administration of the Hawaiian Homes Commission Act, I trust that this response will be sufficient for the purposes of the Hawaii Advisory Committee.

Your letter states that the Committee is interested in learning the extent to which the federal government and the State of Hawaii are meeting their obligations in implementing the Hawaiian Homes Commission Act. Section 4 of the Hawaiian Statehood Act of March 18, 1959, 73 Stat. 4,5 generally placed responsibility for the administration of the Act in the State. Although the Statehood Act does not so require, the Department of the Interior has assumed the role of "lead federal agency" with respect to fulfilling the responsibilities of the federal government concerning the Hawaiian Homes program. Thus, within the executive branch, Interior has taken the lead with respect to the federal consent legislation that is required under section 4 of the Statehood Act. In addition, the Department continues to act on proposed exchanges of homelands for other lands in accordance with Section 204(3) of the Homes Commission Act.

From time to time, the claim is advanced that the federal government has broader responsibilities under the Act and that its role is essentially that of a trustee. The United States Court of Appeals for the Ninth Circuit rejected this contention in Keaukaha-Panaewa Community v. United States, 588 F.2d 1216, stating at 1224 n.7 that "[t]he United States has only a somewhat tangential supervisory role under the Admission Act, rather than the role of a trustee." In addition, this Department disclaimed any trusteeship role in the

administration of the Act in my letter of October 17, 1989 to Senator Inouye, Chairman, Select Committee on Indian Affairs, a copy of which is enclosed. With these general observations on the nature of the federal role offered as background, I now address in turn the specific questions raised in your letter.

1. How does the Department of the Interior exercise oversight responsibilities for the Hawaiian Homes trust under Section 4 and 5 of the Hawaii Admission Act of 1959?

As indicated above, Interior serves as the lead federal agency in implementing the federal government's role under the Act. We communicate on a regular basis with the Hawaiian Homes Commission. We review state enactments for purposes of securing the requisite Congressional approval, and we review and evaluate proposed land exchanges.

2. Has it been necessary for the Department of the Interior to recommend to the United States Department of Justice bringing enforcement action against the State of Hawaii for breaching its trust?

No.

3. How does the Department of the Interior carry out its responsibilities for approving State actions relating to the Hawaiian homelands and for advising the Congress on matters pertaining to the Hawaiian Homes Commission Act?

In its capacity as lead federal agency for implementing the federal role under the Act, the Department prepares reports and recommendations on proposed consent legislation. Enclosed by way of example is the Department's written report of March 31, 1989 and my prepared testimony statement of March 8, 1990 on S.J. Res. 154. I also enclose a statement presented by a Departmental witness on August 8, 1989 before Senator Inouye's Select Committee on Indian Affairs. That statement will expand upon the answer provided herein, and particularly details our processes with respect to the approval of land exchanges, which represents the only current statutory function of the Secretary of the Interior under the Hawaiian Homes Commission Act.

4. What level of assistance has the Federal government provided to the State of Hawaii to help implement the Act (funding and technical)?

The Department of the Interior has sought no Federal funds for the Hawaiian Homes program. We are informed, however, by the Homes Commission that Senator Inouye arranged in fiscal years 1989 and

1990 for the appropriation of Federal funds to the Commission. The level of funding and the statutes providing for it are subjects on which personnel of the Homes Commission could undoubtedly provide you with further information.

5. To what extent has the Federal government responded to the specific findings and recommendations issued by the Federal-State Task Force on the Hawaiian Homes Commission Act issued to the United States Secretary of the Interior and the Governor of the State of Hawaii (August 1983)?

The Task Force recommended that the Department of the Interior serve as the lead federal agency on matters of federal concern that relate to the Act. This recommendation has been implemented. The Task Force also recommended that the Secretary appoint a Designated officer within the Department as a point of contact for the Act. This recommendation too has been implemented. The Task Force also recommended that an effort be made to comply with the consent requirement of the Statehood Act. This recommendation led to the enactment of P.L. 99-557 of October 27, 1986, 100 Stat. 3143, the first consent statute, and to the currently pending S.J. Res. 154. The enclosed statement of August 8, 1989 speaks more fully to the implementation of the Task Force Report by this Department, and states that we believe we have "in very large measure" taken positive action with respect to the recommendations directed to us.

We appreciate the interest of the Hawaii Advisory Committee in this important matter.

Sincerely yours,



Timothy W. Glidden  
Counselor to the Secretary and  
Secretary's Designated Officer  
Hawaiian Homes Commission Act

Enclosures





## United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240

October 17, 1989

Honorable Daniel K. Inouye  
Chairman, Select Committee on  
Indian Affairs  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

In reflecting upon your August hearings in Hawaii concerning the Hawaiian Homes Commission Act, it seemed to me that we ought to be in further touch with you with respect to this Department's understanding of the current responsibilities of the United States Government under the Act.

As you know from Secretary Lujan's letter to you of April 17, 1989, and from our testimony during the hearings, the Department of the Interior has accepted the responsibility to act as "lead Federal agency" with respect to Federal responsibilities concerning the Hawaiian Homes program, as the 1983 Federal-State Task Force on the Homes Commission Act recommended. We believe, as did the Task Force, that in the interests of orderly government some Federal department or agency should do so, and given this Department's role with respect to the Territory of Hawaii, it has seemed logical for Interior to serve in that capacity. That has meant that we in Interior have taken initiatives with respect to the Federal consent legislation that is required under the Statehood Act. In addition, given the provision of section 204(3) of the Homes Commission Act pertaining to land exchanges, the Secretary also continues to be required to act on proposed exchanges of home lands for other lands.

The United States has a further, explicit power under section 5(f) of the Hawaii Statehood Act. Section 5(f) provides that certain lands (including Hawaiian home lands) "will be held by said State [of Hawaii] as a public trust," and that the use of such lands for other than the purposes specified in the statute "shall constitute a breach of trust for which suit may be brought by the United States." If such an action were brought, only the Department of Justice could institute it, but the Department of the Interior could appropriately offer its recommendations to the Department of Justice on the subject.

On several occasions during the hearings, you quoted from a letter signed by a former Deputy Solicitor of this Department, dated August 27, 1979, which states in pertinent part that

" . . . it is the Department's position that the role of the United States under section 5(f) is essentially that of a trustee." We do not believe that to be a correct statement, and we do not want you to infer otherwise from our silence. Accordingly, my purpose is to advise you that our position is the one expressed, quite without equivocation, by the U.S. Court of Appeals for the Ninth Circuit in Keaukaha-Panaewa Community Assoc. v. Hawaiian Homes Commission, 588 F.2d 1216 (1978):

. . . the state is the trustee . . . . The United States has only a somewhat tangential supervisory role under the Admission [Statehood] Act, rather than the role of trustee. (At 1224, n.7)

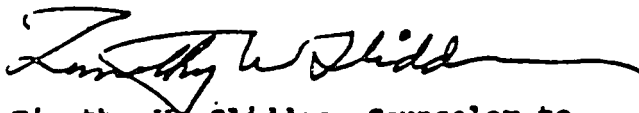
To the same effect is Price v. State of Hawaii, 764 F.2d 623 (9th Cir., 1985).

Oddly, while the Keaukaha-Panaewa decision is cited in the 1979 letter, it is there neither discussed nor distinguished, and the legal conclusion that follows in the letter is at war with the words of the court's decision. In the circumstances, we cannot stand behind the 1979 letter. We instead adopt the position of the Court of Appeals.

For your information, the 1979 letter is in error in another connection. It refers to three responsibilities of the Secretary of the Interior under the Homes Commission Act, two of which have been repealed and which had been repealed before the 1979 letter was written. Sections 204(1) and 212 were amended by the 1978 Constitutional Convention in Hawaii to eliminate references to the Secretary of the Interior, among other things, and the changes were approved by the voters in the November 1978 Hawaii election. The third section to which reference is made in the 1979 letter, section 204(4), relates to land exchanges and it continues to refer to the Secretary of the Interior, as discussed above, but it was renumbered in 1978 as section 204(3).

I have discussed these matters with the Solicitor of the Department of the Interior, Mr. Martin L. Allday, who has authorized me to state that he concurs in the legal conclusions stated herein. Our mutual hope is that this letter will assist in eliminating any misunderstanding, so that the Interior Department can most effectively and correctly contribute to the administration of the Hawaiian Homes Commission program.

Sincerely yours,



Timothy W. Glidden, Counselor to  
the Secretary and  
Secretary's Designated Officer  
Hawaiian Homes Commission Act



# United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240



MAY 31 1989

Honorable J. Danforth Quayle  
President of the Senate  
Washington, D.C. 20510

Dear Mr. President:

Enclosed herewith is a proposed joint resolution "To consent to certain amendments enacted by the legislature of the State of Hawaii to the Hawaiian Homes Commission Act, 1920."

We recommend that the proposed joint resolution be referred to the appropriate committee for consideration and that it be enacted.

The Hawaiian Homes Commission Act was enacted by the United States Congress in 1921 as a homesteading program, to place native Hawaiians -- defined as those of 50 percent or more Hawaiian blood -- on land in Hawaii designated for that purpose. Approximately 200,000 acres were defined as "available lands" under the Act. Because at that time the Department of the Interior had general responsibility for many of the territories of the United States, including Hawaii, the Secretary was given certain statutory responsibilities in the Act. One of these Secretarial responsibilities, pertaining to land exchanges, remains in the Act today, and for that reason the Department of the Interior has agreed to serve as the Federal agency generally responsible for Federal matters touching the Homes Commission Act.

The Hawaiian Statehood Act (Statehood Act) in 1959 (Public Law 86-3, 73 Stat. 4) conveyed title to the "available lands" to the new State, and it generally placed responsibility for the administration of the Hawaiian Homes Commission Act (Homes Commission Act) in the State. The Statehood Act, however, also contained additional particular provisions concerning the Homes Commission Act, and it is these that give rise to the enclosed proposed joint resolution. Section 4 of the Statehood Act provides that the Homes Commission Act is to be included in the Constitution of the new State as a "compact" with the United States, and that (with certain exceptions) the Homes Commission Act can be amended by the State "only with the consent of the United States." The exceptions are amendments relating to

*Celebrating the United States Constitution*

administration and to the powers and duties of certain State officers. Section 4 contains other restrictions as well: the qualifications of lessees cannot be changed, certain encumbrances on Homes Commission Act land cannot be increased, and the benefits to lessees cannot be diminished without United States consent; and there is an absolute bar to the impairment or reduction of certain named funds and to the use of income from "available lands" for any purpose other than carrying out the Homes Commission Act.

The enclosed proposed joint resolution is intended to provide "the consent of the United States," as section 4 requires, to amendments enacted by the Legislature of the State of Hawaii in 1986 and 1987. Public Law 99-557, approved October 17, 1986, provided the consent of the United States to all but one of the amendments enacted in Hawaii from statehood through June 30, 1985. The 1986-87 amendments are six in number, and an attachment to this letter summarizes the content of each. Only one of the six, Act 75 of 1986, falls indisputably within the section 4 consent requirement (because it permits new encumbrances on leaseholds), but there is a potential for argument as to the need for United States consent with respect to the other five. It is often difficult to be certain, given the language of section 4 of the Statehood Act, whether a particular amendment requires United States consent. Very often, for example, it can be argued that a particular change could result in at least a minor diminution of benefits to some native Hawaiians. In these circumstances, it has been our position that, if there is doubt, it should be overcome by seeking consent. Through that means, litigation on the matter can be avoided.

For your information, Act 112 of 1981, the single Hawaii enactment excluded from the consent granted by Public Law 99-557, has been repealed by Act 36 of 1987. Therefore, any uncertainty that may have existed has now been eliminated. Also, one other amendment to the Homes Commission Act enacted in Hawaii in 1987, Act 283, has not been included in the proposed joint resolution because it contains nothing of substance. Act 283 is a housekeeping bill, containing corrections of typographical and other nonsubstantive errors in many Hawaii laws, and it corrects one internal reference in the Homes Commission Act. We believe it is inarguably exempt from the consent requirement.

The Hawaii Legislature enacted no amendments to the Homes Commission Act in its 1988 regular session.

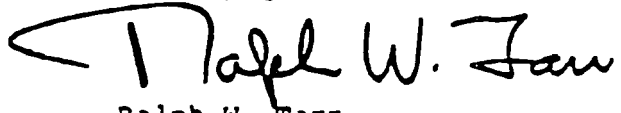
The six acts cited in the proposed joint resolution were all passed by both houses of the Hawaii Legislature without a dissenting vote. We have examined all of them, together with documents pertinent to their legislative history, and we

believe each to be free of controversy. When the proposed joint resolution is referred to the appropriate committee, we will transmit to the chairman of that committee copies of all six acts of the Hawaii Legislature, together with copies of testimony delivered at State hearings, State legislative committee reports, and other documents pertinent to the history of each bill as it moved through the State Legislature.

We believe it may no longer be appropriate to require the consent of the United States for amendments by the State of Hawaii to the Homes Commission Act. Accordingly, we will submit separate draft legislation to repeal this requirement as soon as possible. Before such a repeal could become effective, it could require the approval of the people of Hawaii.

The Office of Management and Budget has advised that there is no objection to the submission of this proposed legislation from the standpoint of the Administration's program.

Sincerely,

A handwritten signature in cursive script that reads "Ralph W. Tarr". The signature is written in dark ink and is positioned above the typed name and title.

Ralph W. Tarr  
Solicitor

Enclosure

JOINT RESOLUTION

To consent to certain amendments enacted by the legislature of the State of Hawaii to the Hawaiian Homes Commission Act, 1920.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That, as required by section 4 of the Act entitled "An Act to provide for the admission of the State of Hawaii into the Union," approved March 18, 1959 (73 Stat. 4), the United States hereby consents to the following amendments to the Hawaiian Homes Commission Act, 1920, as amended, adopted by the State of Hawaii in the manner required for State legislation: Act 16, Act 75, Act 84, Act 85, and Act 249 of the Session Laws of Hawaii, 1986; and Act 36 of the Session Laws of Hawaii, 1987.

Amendments to the Hawaiian Homes Commission Act, 1920, Enacted in Hawaii in 1986 and 1987, to which the proposed Joint Resolution would provide the consent of the United States

Act 16 of 1986: Authorizes the Department of Hawaiian Home Lands (the State agency which administers the Hawaiian home lands program) to participate in any Federal or State program that permits the establishment of enterprise zones on Hawaiian home lands. The principal purpose of such enterprise zones would be to encourage the employment of economically disadvantaged Native Hawaiians.

Act 75 of 1986: Provides an alternative means by which Hawaiian home lands may be made available to Native Hawaiians. Under existing law, Native Hawaiians may obtain 99-year leases at \$1 per year, but they cannot pledge their leasehold interest to secure private financing except for loans insured or guaranteed by a Federal agency. Private lenders are thus unable to place a mortgage lien on homestead properties. Act 75 provides an alternative method, termed a Homestead General Lease Program, under which Native Hawaiians may lease Hawaiian home lands for residential, agricultural, pastoral, or aquacultural purposes. The Department of Hawaiian Home Lands (Department) is authorized to subdivide and improve any Hawaiian home lands for the foregoing purposes and can also enter into agreements with developers for the development and construction of improvements. The resulting lots or parcels may be leased for an initial term of not more than fifty-five (55) years at fair market value. Native Hawaiians on the Department's waiting lists would receive priority for such leases, followed by other Native Hawaiians. If lots or parcels are available after all interested and qualified Native Hawaiians have received leases, the remaining lots may be disposed of at fair market rental to the general public. Homestead general lessees may encumber their leasehold interests by mortgage loans from the private sector, and may transfer their interests by subletting, bequests, or otherwise. The Department of Hawaiian Home Lands is further authorized to convert any homestead lease to a homestead general lease in accordance with procedures to be adopted by the Department. Act 75 provides for its repeal, and thus for the termination of the Homestead General Lease Program, either five years after the United States has consented to the Act, or on December 31, 1995, whichever occurs first.

Act 84 of 1986: Authorizes the Department of Hawaiian Home Lands to enter into agreements with private developers for the development of Hawaiian home lands for either homestead purposes or for income generating purposes. The Department of Hawaiian Home Lands is authorized under existing law to

enter into such agreements; it also has authority to enter into general leases in order to derive income for use in meeting the administrative costs of the Department. Act 84 would largely perpetuate existing law, but it would exempt the Department from the requirement that its private development agreements be approved by both the Legislature and the Governor. That requirement is time-consuming. It can lead to uncertainty and it may preclude the timely response to opportunities. Act 84 would also permit the Department of Hawaiian Home Lands to negotiate contract provisions conferring particular benefits upon Native Hawaiians.

Act 85 of 1986: Expands the authority of the Department of Hawaiian Home Lands with respect to the financing of improvements on homestead lands and for infrastructure development. Many lessees have been unable to construct homes on their leaseholds due to the lack of loan financing. The lack of funds has also hampered the Department's ability to construct needed infrastructure in homestead subdivisions. Act 85 is intended to meet this problem in two ways. First, it permits the Department to obtain loans by using its loan accounts receivables (e.g., money owed by its present borrowers), as collateral for loans from financial institutions. The money borrowed would be used by the Department for making loans to homestead lessees for home construction, and for the construction of infrastructure in homestead subdivisions. Second, Act 85 enables the Department to fulfill conditions under which homestead lessees can participate in the United States Department of Housing and Urban Development (HUD) insured loan program. Terms of the agreement developed by the Department and HUD require that a cash reserve be established to cover any potential defaults on the part of the mortgagee, and allows the transfer to that reserve of available funds from certain of the Department's other loan funds.

Act 249 of 1986: Reduces from fifteen to seven the number of fiscal accounts that the Department of Hawaiian Home Lands is required by law to maintain. As a result of amendments enacted following Statehood, the Hawaiian Homes Commission Act required the maintenance of seven separate revolving funds and eight other special funds. Act 249 abolishes some such funds and merges others in order to simplify the funding structure. This action promotes more efficient and economical management.

Act 36 of 1987: Repeals Act 112 of 1981, which was excluded from the consent provide by Public Law 99-557 because it was in conflict with an amendment later enacted in Hawaii. Act 112 had provided a new method of calculating the amount due in the event of surrender or cancellation of a lease, or the death of a lessee who had no qualified heir. The effect of Act 36 is to continue substantially the earlier method of



calculating the amount due, which requires payment by the Department of Hawaiian Home Lands of the appraised value of improvements, including growing crops, on the leasehold. Act 36 also permits payment to be made by the Department from the General Loan Fund if the Home Loan Fund is inadequate for that purpose.

STATEMENT OF TIMOTHY W. GLIDDEN, COUNSELOR TO  
THE SECRETARY OF THE INTERIOR AND THE  
SECRETARY'S DESIGNATED OFFICER FOR THE  
HAWAIIAN HOMES COMMISSION ACT, ON S.J. RES.  
154, A JOINT RESOLUTION "TO CONSENT TO  
CERTAIN AMENDMENTS ENACTED BY THE LEGISLATURE  
OF THE STATE OF HAWAII TO THE HAWAIIAN HOMES  
COMMISSION ACT, 1920," BEFORE THE COMMITTEE  
ON ENERGY AND NATURAL RESOURCES, UNITED  
STATES SENATE.

The Department of the Interior welcomes this opportunity to respond to the Committee's invitation to testify on S.J. Res. 154, a Joint Resolution proposed by the Administration to provide the consent of the United States to amendments enacted by the State of Hawaii in 1986 and 1987 to the Hawaiian Homes Commission Act. I am testifying not only in my capacity as Counselor to the Secretary of the Interior, but also particularly in light of my formal appointment as the Secretary's Designated Officer for the Hawaiian Homes Commission Act.

I should like, first, to provide some background concerning the Hawaiian Homes Commission Act and the responsibilities of the Department of the Interior with respect to it. As I shall explain, we believe that the current status of the Hawaiian Homes Commission Act makes the Act unique in United States statutory law, and that the legislation before you is necessary because of a unique statutory requirement. Secondly, I will review the most recent

action of the Congress on this subject, which gave rise to Federal consent legislation in 1986. Finally, I will turn to the joint resolution now before you, on which we urge your favorable action.

By way of background, the Hawaiian Homes Commission Act was enacted by the Congress in 1921 as a homesteading program, to place native Hawaiians -- defined as those of 50 percent or more Hawaiian blood -- on land in Hawaii designated for that purpose. Approximately 200,000 acres were defined as "available land" under the Act. Because at the time the Department of the Interior had general responsibility for most of the territories of the United States, including Hawaii, the Secretary was given certain statutory responsibilities in the Act. One of these, pertaining to land exchanges, remains in the Act today.

In the Hawaii Statehood Act, enacted in 1959, the Congress required in section 4 that the Hawaiian Homes Commission Act be "adopted as a provision of the Constitution of said State" of Hawaii -- and it was so adopted -- and further, section 4 described the Homes Commission Act as "a compact with the United States." The Statehood Act further provided that following Hawaii's admission, the Homes Commission Act could be amended in Hawaii, either through usual State legislation or by means of an amendment to the State Constitution, but any such amendment is, under the terms of section 4, "subject to . . . the consent of the United States," unless it

relates to administration or to the powers and duties of State officers, or unless it increases benefits to lessees of Hawaiian home lands.

It is this "consent" provision that gives rise to the joint resolution now before the Committee.

In the early 1980's, because of widely held misgivings concerning the slow pace at which homestead leases were being awarded to native Hawaiians, the Governor of Hawaii and the Secretary of the Interior appointed a Task Force to make recommendations to both of them on ways "to better effectuate the purposes of the Hawaiian Homes Commission Act." The Task Force submitted its recommendations on August 15, 1983. Among the recommendations made was the recommendation that the Department of the Interior serve as the lead Federal agency on matters of Federal concern that relate to the Homes Commission Act, and that is our role here today. Another recommendation was that the Secretary of the Interior appoint a person within the Interior Department to serve as the Secretary's Designated Officer for purposes of the Hawaiian Homes Commission Act -- so as to have an official and known point of contact on Homes Commission matters. I have been so designated. Yet another recommendation was that an effort be made to comply with the "consent" requirement of the Statehood Act, because, at the time of the Task Force deliberations, no effort had ever been made to seek the "consent of the United States" to any State-enacted amendments to the Hawaiian Homes Commission Act.

Turning then to recent Congressional action on this subject, in 1986 Public Law 99-557 was enacted at the urging of the Interior Department. That law provided the consent of the United States to all amendments to the Homes Commission Act enacted in Hawaii from the date of Hawaii's admission to the Union, in August 1959, through June 30, 1985, save one, which I will discuss shortly. The Task Force to which I have referred took note of the fact that many amendments to the Homes Commission Act had been enacted in Hawaii from the time of Statehood onward, but that none had been forwarded to the Congress to meet the consent requirement of the Statehood Act. The Task Force recommended that as to such amendments, the consent of the United States be obtained as soon as possible -- so as to eliminate doubt as to the status of such amendments and thus as to the validity of particular provisions of the Homes Commission Act. Public Law 99-557 was the result. That legislation took the form of providing consent to all amendments (with the one exception) enacted over the period 1959 through June 30, 1985, so as to place the Act on as firm a foundation as possible as of that date.

One Hawaii amendment, which had been enacted in 1981, was excluded from the consent provided by Public Law 99-557 because it was not consistent with another later-enacted amendment. That 1981 law has since been repealed by the Hawaii Legislature, so that issue is moot.

As of June 30, 1985, therefore, the consent of the United States was provided to all amendments that required it, and the Hawaiian Homes Commission Act had achieved the firm status that the Task Force and others sought.

Turning now to S.J. Res. 154, this legislation provides the consent of the United States to six amendments to the Homes Commission Act, enacted in Hawaii in 1986 and 1987. (There were no amendments to the Act enacted in the State in 1988.)

Our letter submitting the proposed legislation to the Congress (S.J. Res. 154) provides information as to the substance of each of those six amendments. All were free of controversy in Hawaii. As our explanatory letter states, it may be that some of the six do not require the consent of the Congress, if the consent requirement of the Statehood Act is not strictly construed, but we believe a cautious approach is proper to eliminate any doubt as to the validity of any particular amendment. Our proposed legislation thus provides for consent to all amendments enacted since 1985 that might arguably require it.

The Interior Department's position as to these six amendments is, as it was with the previous consent legislation, one of deference to the lawmakers of Hawaii. We believe they are in a position to judge most wisely the merits of amendments to the Homes Commission Act. We have, however, examined the amendments and are prepared to speak to them, should you have questions about them. In addition, the

Chairman of the Hawaiian Homes Commission is present in this hearing, with others of her staff also present, and they too will speak to the substance of these amendments, should you have questions concerning them.

Because no amendments to the Hawaiian Homes Commission Act were enacted in Hawaii in 1988, enactment of S.J. Res. 154 will provide consent to all amendments as of January 1, 1989. We understand that additional amendments are now being considered by the Hawaii Legislature in its current session, so we may anticipate that legislation providing the consent of the United States to amendments enacted by the State in 1990, as well as those enacted in 1989, will be before the next session of the Congress.

Following the enactment of Public Law 99-557 in 1986, the Chairman of this Committee asked the Secretary of the Interior to focus, in submitting later consent legislation, on particular cited amendments -- as our proposed legislation, now S.J. Res. 154, does. He also asked that we provide pertinent legislative materials from Hawaii, including reports from committees of the State Legislature, on amendments for which consent from the U.S. Congress is sought. We have obtained all such legislative materials from Hawaii and have provided them to the staff of this Committee. An examination of them reveals that all six amendments were free from controversy in Hawaii. We believe they should be similarly free from controversy in the United States Congress.

Finally, I would speak to the paragraph on the last page of the Interior Department's letter of May 31, 1989, to the President of the Senate, transmitting the proposed Joint Resolution that has become S.J. Res. 154. That paragraph states that the Department expects to transmit to the Congress proposed draft legislation to repeal the consent requirement for amendments to the Hawaiian Homes Commission Act. Upon reconsideration, the Administration has concluded that it will not submit legislation on that subject.

That concludes my prepared testimony. I will be happy to respond to any questions you may have.



**TESTIMONY OF RUTH G. VAN CLEVE, LAWYER, SOLICITOR'S OFFICE,  
DEPARTMENT OF THE INTERIOR, BEFORE THE SELECT COMMITTEE ON INDIAN  
AFFAIRS, UNITED STATES SENATE, REGARDING THE ADMINISTRATION OF THE  
HAWAIIAN HOMES COMMISSION ACT**

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August 8, 1989  
Kauai, Hawaii

Mr. Chairman, I am pleased to testify before you this afternoon on matters concerning the Hawaiian Homes Commission Act and the Department of the Interior. You asked for information concerning the Interior Department's implementation of pertinent recommendations of the 1983 Federal-State Task Force Report on the Hawaiian Homes Commission Act, and also for information with respect to programs administered by Interior that could be used to support the development of Hawaiian home lands. I shall speak to each of these matters in turn. I do so as one who served as a Federal member of the Task Force. I was then and am now a lawyer in the Solicitor's Office of the Interior Department, where I devote most of my energies to matters relating to the territories of the United States, but it has been my pleasure in recent years to devote some energy as well to the Homes Commission program of a former Territory.

The Task Force Report of August 15, 1983, contained 134 recommendations, of which roughly a quarter are within the responsibility of the Interior Department. The assessment of our actions pursuant to these recommendations permits me to say that in very large measure we believe we have acted to implement them. It may be most useful to you if I elaborate on that general assessment by discussing recommendations to and actions by Interior under four

headings: (1) Interior Department internal arrangements, (2) lands restored to the Hawaiian Homes Commission, (3) Federal consent legislation, and (4) Secretarial approval of land exchanges.

(1) Internal Arrangements

The Task Force recommended that the Interior Department serve as the lead Federal agency on matters touching the Homes Commission program that are within the responsibility of the United States Government, and that there be appointed within the Department an officer or employee to serve as the point of contact on that subject. We have willingly undertaken to serve and have served in that lead agency capacity. Soon after the Report was issued the Secretary appointed the first person to serve in the position officially designated as the "Secretary's Designated Officer - Hawaiian Homes Commission Act". The first such designee was Ms. Cecil Hoffmann, also a member of the Federal-State Task Force. She was succeeded in March 1986 by Emily DeRocco, who then also served Secretary Hodel as his Director of External Affairs. Mrs. DeRocco was succeeded in April 1989 by Mr. Timothy Glidden, who has joined you for all of these hearings, and who as you know is Counselor to Secretary Lujan. To be certain that there will at all times be a person to serve as the Secretary's Designated Officer, we have had issued a Secretarial Order, No. 3111, which has been made permanent by its incorporation in the Interior Department Manual. (It is cited as 514 DM 1.1)

(2) Lands Restored

The Task Force expressed grave concern about the considerable amount of Hawaiian Home land that had been improperly made available for other than homeland purposes by means of executive orders and proclamations of many Governors of Hawaii, as well as through licenses and other means. The resolution of these improprieties and the restoration of the lands in question to the Department of Hawaiian Home Land (DHHL) lay almost entirely in Hawaii with officers of the State Government. The Task Force Report asked the Interior Department to monitor progress and, if insufficient progress were made, to ask the U.S. Department of Justice to institute a breach of trust action under section 5(f) of the Statehood Act. The Interior Department representatives on the Task Force made clear their view that litigation should be viewed as a last resort -- but that point has become academic in light of the actions lately taken in Hawaii. Most important, the action of the Governor of Hawaii in December 1984 in cancelling numerous executive orders and in withdrawing home lands from the operation of numerous proclamations, resulted in the restoration of about 28,000 acres of Hawaiian home lands to DHHL. That figure almost meets the total acreage that the Task Force identified in general terms as warranting restoration. The bulk of the difference is attributable to Lualualei, of which I will speak further. Licenses to State agencies and rights-of-entry documents have also been scrutinized by DHHL. We understand that negotiations have been held and in some cases continue, on a base-by-case basis, between the users and DHHL to

resolve conflicts on these matters. In sum, from our vantage it has appeared that the problems that concerned the Task Force with respect to the restoration to the jurisdiction of the DHHL of lands that had been improperly put to other uses, have been largely resolved. Those that remain are in the process of resolution.

A particular word may be warranted about the important acreage at Lualualei, used by the U.S. Navy for an ammunition depot and communications facilities. The Task Force was particularly anxious that action be taken to resolve the status of the Lualualei lands. Interior representatives on the Task Force expressed a willingness to pursue the question with the Navy in Washington on an informal basis. We did so, over a period of many months, but without achieving the Navy's agreement with the position of the Hawaiian Homes Commission. We were ultimately advised by DHHL that we might best abandon our efforts. Litigation, which seemed the appropriate course at that stage, followed. As you doubtless know, the Navy's position prevailed.

(3) Consent Legislation

The Task Force was troubled to learn in its deliberations that, notwithstanding the clear language of section 4 of the Statehood Act, which requires the consent of the United States to substantive amendments enacted in Hawaii to the Hawaiian Homes Commission Act, such consent had neither been sought nor granted in the years since Statehood in 1959. It seemed to most of us that in

that state of affairs, key portions of the Act were potentially vulnerable, and litigation could thus arise. Minimally, any such litigation would be disruptive and time-consuming. The Interior representatives therefore agreed to initiate legislation to implement the consent requirement of section 4 and encourage its enactment. We did not need to take the initiative, however, because Congressman Akaka acted first by introducing H. J. Res. 17 in early 1985. We were pleased thereafter to cooperate with him and his staff, and with the House Interior Committee, and we recommended that the legislation he introduced be amended so as to comprehend not just the Hawaii enactment then of special concern, and to which H.R. Res. 17 was directed -- that is, the reduction of the blood quantum for successorship purposes -- but, instead, to comprehend all amendments enacted in Hawaii from the date of Hawaii's admission through June 30, 1985. That, it seemed to us, would place the Homes Commission Act on the invulnerable basis that administrators and lessees alike would welcome. Our proposed modification was adopted, and the legislation in question became Public Law 99-557, approved by President Reagan on October 27, 1986.

We have since initiated a second consent bill, and it would provide the consent of the United States to six laws enacted by the Legislature of Hawaii in 1986 and 1987. We provided to the Chairman of this Committee a draft of the bill as a drafting service last January. Following an unusually protracted clearance process, attributable in part to the change of Administration last January and in part to the uniqueness of the Statehood Act's requirement for

Federal consent, the proposed bill was finally cleared for submission to the Congress in May of this year. The bill then went forward to both houses of the Congress as an Executive Communication. It has since been introduced in the Senate as S. J. Res. 154; and it has been referred in the House to the Committee on Interior and Insular Affairs. We very much hope for its early enactment. Because there were no State amendments to the Homes Commission Act in 1988, enactment of this latest consent bill would fortify the Act through January 1, 1989.

Relevant to our consent legislation is a second subject on which the Task Force recommended Federal legislative action: legislation to permit beneficiaries of the Hawaiian Homes Commission Act to sue for breach of trust in Federal courts. At the time of the Task Force Report, the Court of Appeals for the 9th Circuit had held that beneficiaries did not have such a right, because it was confined to the United States under section 5(f) of the Statehood Act. Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 588 F.2d 1216 (1978), cert. denied 444 U.S. 826 (1979) ("Keaukaha I"). Accordingly, we prepared appropriate Federal legislation. Before it emerged from the Executive Branch clearance process, however, the 9th Circuit, in a further decision ("Keaukaha II", 739 F.2d 1467 (1984)), held that beneficiaries did have the right to sue in Federal court under the old civil rights statute generally referred to as 42 U.S.C. 1983. Our conclusion was then that our proposed legislation was unnecessary and that the pertinent Task Force recommendation had become moot.

(4) Land Exchanges

Because section 204(3) of the Homes Commission Act permits land exchanges in certain circumstances between DHHL and others, but only with the consent of the Secretary of the Interior, it is obviously necessary that the Interior Department be prepared to deal with proposed exchanges as they arise. In furtherance of a Task Force recommendation on this subject, the Interior Department in the Secretarial Order previously cited (No. 3110, 514 DM 1.1), has provided for review of each proposed land exchange by both the Solicitor and the Assistant Secretary for Policy, Budget and Administration. The order requires that the review be conducted "as promptly as possible consistent with the careful scrutiny that is required". The Secretary must act on the proposed exchange "as expeditiously as possible". It may be unsurprising that promptness and expedition have appeared to give way to "careful scrutiny", but I can report that all land exchanges submitted to us since the Task Force's report have been approved by the Secretary.

In his audit of Homes Commission programs of September 1982, the Inspector General of the Interior Department had faulted the Department for its treatment of certain earlier proposed exchanges. There had been a total of seven proposed exchanges, with the latest approved in 1967. Being mindful of these critical comments, we were cautious in handling the three proposed exchanges that were submitted to us in recent years. These three were submitted in 1985 and 1986, and were all approved in the early months of 1987. The Solicitor's

Office reviewed the appraisal reports with great care. We obtained expert advice from an experienced, senior appraiser in the Department's Fish and Wildlife Service. We put many questions to DHHL, and obtained full answers to them all. We concluded, after protracted consideration by many lawyers in the Interior Department, that the approval action was subject to the National Environmental Policy Act. We obtained from environmental experts within the Bureau of Land Management the analysis necessary for NEPA compliance, in the form of an Environmental Assessment, it having been concluded that a full Environmental Impact Statement was unnecessary; and after that, following approval by the Solicitor and the Assistant Secretary, we sought and obtained Secretarial approval. We expect to proceed in the same careful manner whenever another proposed land exchange is submitted to us for Secretarial approval.

I now turn to the second subject in the Chairman's letter to the Secretary of July 11: a request for information concerning "programs administered by the U.S. Department of the Interior which could be used to support the development of the home lands", including "programs for which other communities in the United States would be eligible . . .".

In the usual sense of the term, the Interior Department administers very few Federal financial assistance programs. The Department's major missions concern the management of public lands and natural resources, the development of some of these resources, and two "people" programs -- in the Bureau of Indian Affairs and the



Office of Territorial and International Affairs. The functions of the Bureau of Indian Affairs include some social and education programs, but these programs are tied to a tribe's eligibility under treaties or specific Federal laws directed to them. Approximately the same situation prevails with respect to the territories. Most of the territories qualify under pertinent statutes for most Federal programs; any additional assistance to them is based on specific Federal laws authorizing it.

Accordingly, there appear to be no current "programs administered by the U.S. Department of the Interior" that could be of value to support the development of home lands.

But the Interior Department has vast expertise and many experts. If a need were to be identified that coincides with what Interior can offer, then the Department would be glad to provide assistance -- perhaps on a reimbursable basis, but perhaps not, depending on the particular service sought and its duration. For example,

-- The Geological Survey has an office in Hawaii, and its expertise in hydrology, including water supply information, is usually made available through cooperative agreement with State and local agencies. Volcanologists reside on the Island of Hawaii to monitor active volcanoes and to provide warnings to residents of hazardous conditions. A volcanic hazard assessment of the Island has been completed. The Geological Survey also has expertise in conducting mineral and energy assessments. Some land exchanges may

warrant such assessments for industrial minerals and geothermal energy resources. Additionally, the Geological Survey has expertise in investigating coastal erosion and wetlands loss that could make a positive contribution to land exchanges within Hawaii's coastal areas.

-- The National Park Service may be able to assist with the structuring of appropriate cultural, historical, and archeological surveys. Outdoor recreation planning assistance may also be available.

-- Fish and Wildlife Service experts may be able contribute to State fishery efforts. Other Fish and Wildlife initiatives address Endangered Species, migratory birds, and wetlands preservation -- all subjects that might be useful in a particular site-development project.

-- The Bureau of Reclamation has expertise in the construction and management of water resource developments. While that Bureau's major work is in the seventeen western States, not including Hawaii, its expertise could probably be made available in Hawaii on a reimbursable basis.

-- Bureau of Land Management experts on land recordation and indexing and related subjects have already provided assistance to DHHL. Two such experts visited Hawaii for about a week during the time of the Task Force work. We understand that DHHL welcomed and

profitted from their advice. (We also understand the BLM experts gave good marks to DHHL personnel in their land recordation systems and practices.) It may be that such assistance might again be of value.

The important point is to identify the need to be filled. If it is within the range of the experts within Interior's bureaus, then this Committee and the DHHL can count on our cooperation. I am confident the Secretary's Designated Officer, if a need were made known to him, would use his good offices to effect a satisfactory response.

I will be please to respond to your questions.