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A. CONCLUSIONS **102**

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OPINION OF THE COURT

I. INTRODUCTION

A. OVERVIEW

This lawsuit was triggered by the State=s efforts in the mid-1990's to transfer ceded lands at Leali`i on Maui and La`i`opua on the Big Island to private entrepreneurs for the purpose of residential development.

In Counts I through III of their First Amended Complaint, which are the subject of this opinion,[1] Plaintiffs seek injunctive and declaratory relief prohibiting the State=s sale of ceded lands, alleging that all sales are prohibited because of the State=s trust obligations toward native Hawaiians as trustee of Public Lands Trust of the Hawaii State Constitution.[2] In their post-trial submissions, Plaintiffs alternatively seek a moratorium on any additional sales of ceded lands until the claims of the Native Hawaiian People are resolved.[3]

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[1] Counts IV and V, alleging improper valuation of the Leali`i lands, were bifurcated for later determination. *See* Section III, *infra*.

[2] *See* First Amended Complaint filed August 11, 1995.

[3] Both the OHA Plaintiffs= and Individual Plaintiffs= post trial submissions alternatively seek injunctions prohibiting sales of ceded lands until native Hawaiian claims are resolved. *See* OHA=s AProposed Opinion of the Court, Including Findings of Fact, Conclusions of Law,@ filed Dec. 19, 2001, p. 70, & AIndividual Plaintiffs= Closing Argument,@ filed Dec.17, 2001, p. 56.

This opinion addresses the Plaintiffs= original and alternative claims for relief. Sections II and III provide factual and procedural backgrounds for the present dispute. Section IV outlines legal standards governing injunctive and declaratory relief. Section V analyzes legal issues involved in Count II, Plaintiffs= request for injunctive relief prohibiting the sale of ceded lands at Leali`i on Maui. Section VI analyzes legal issues involved in determining Plaintiffs= claims for injunctive and declaratory relief in Counts I and II, *i.e.*, (1) whether the State has the legal authority to sell ceded lands (concluding that it does), and, if so, whether all sales of ceded lands constitute a breach of trust (concluding that they do not). Section VII addresses Plaintiffs= request for a moratorium on the sale of ceded lands pending resolution of native Hawaiian claims, and concludes that principles of Ajusticiability@ preclude the court from issuing such a moratorium. Finally, Section VIII contains the court=s conclusions and orders.

Pursuant to Rule 52(a) of the Hawaii Rules of Civil Procedure, this opinion includes the court=s findings of fact and conclusions of law. All factual findings included within this opinion were established by a preponderance of the evidence.

B. PARTIES

1. Plaintiffs

There are two sets of Plaintiffs. The first includes the OFFICE OF HAWAIIAN AFFAIRS (AOHA@) and the individual Members of the Board of Trustees of OHA, in their official capacities[4] (collectively the AOHA Plaintiffs@). The second are persons who have filed suit in their individual capacities, namely, PIA THOMAS ALULI, JONATHAN KAMAKAWIWO=OLE OSORIO, CHARLES KA=AI=AI, and KEOKI MAKA KAMAKA KI=ILI (the AIndividual Plaintiffs@).

As explained in more detail below,[5] pursuant to Article XII, Section 4 of the Constitution of the State of Hawaii (AHawaii State Constitution@), the State of Hawaii holds ceded lands Aas a public trust for native Hawaiians and the general public.@ Hawaii Revised Statutes (AH.R.S.@) Section 10-2 defines Anative Hawaiian@ as:

> any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes

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[4] Pursuant to Rule 25(d) of the Hawaii Rules of Civil Procedure:

> **(d) Public Officers; Death or Separation from Office.**
>
> (1) When a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution. .

The Trustees of OHA have changed since the filing of this lawsuit, but pursuant to this Rule, the current Trustees are automatically substituted as Plaintiffs.

[5] *See* Section II(A)(3), *infra*.

> Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

The same statute defines "Hawaiian" as:

> any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

According to the OHA Plaintiffs, they bring this case on behalf of the "Native Hawaiian People," whom they define as including any individual who is (A) a citizen of the United States and (B) a descendant of the aboriginal people, who, prior to 1778, occupied and exercised sovereignty in the area that currently constitutes the State of Hawaii, as evidenced by (i) genealogical records, (ii) verification by kupuna (elders) or kama`aina (long-term community residents); or (iii) birth records of the State of Hawaii. The OHA Plaintiffs cite to Section 801(a) of the Hawaiian Homelands Ownership Act of 2000[6] for this definition of "native Hawaiian."

According to the Individual Plaintiffs:

> Although the Admission Act, the Hawaii Constitution and HRS Chapter 10 distinguish between "native Hawaiians" and "Hawaiians," the Apology Resolution and Hawaiian Homelands Ownership Act of 2000, Ex. 162, do

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[6] Ex.162, Omnibus Indian Advancement Act, Title II, or the Hawaiian Homelands Ownership Act of 2000, Public Law No. 106-568, H.R. 5528 (2000) ("Hawaiian Homelands Ownership Act of 2000").

not draw this distinction and instead use the term ANative Hawaiians.@ The Hawaiian Homelands Ownership Act of 2000 defines ANative Hawaiian@ as Aa descendant of the aboriginal people, who, prior to 1778, occupied and exercised sovereignty in the area that currently constitutes the State of Hawaii.@ See & 59(B) of judicial notice order, Ex. 145. Three of the Individual Plaintiffs are Anative Hawaiians@ and all four of them are AHawaiians@ as defined in HRS ' 10-2. See Individual Plaintiffs= identity stipulation, Ex. 397. For the sake of brevity, the remainder of this memorandum uses the term AHawaiians,@ which is intended to include AHawaiians@ and Anative Hawaiians@ as defined in HRS ' 10-2.[7]

In this opinion, the term Anative Hawaiian@ or AHawaiian@ is synonymous with the definition of AHawaiian@ under H.R.S. Section 10-2. The OHA Plaintiffs= definition of ANative Hawaiian People@ is adopted for purposes of this opinion. The OHA Plaintiffs and Individual Plaintiffs are sometimes collectively referred to as Athe Plaintiffs,@ and the people they represent are sometimes referred to collectively as Athe Native Hawaiian People.@

[7] AIndividual Plaintiffs= Closing Argument,@ filed Dec. 17, 2001, p. 3, fn. 2.

2. Defendants

The named Defendants are the STATE OF HAWAII (the "State"), the HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAII ("HCDCH"), and the Executive Director and Members of the Board of Directors of HCDCH, as well as the Governor of the State of Hawaii.[8] HCDCH was known as the Housing Finance and Development Corporation ("HFDC") until June 30, 1998.[9]

The various Defendants are sometimes collectively referred to as "the Defendants."

II. FACTUAL BACKGROUND[10]

A. HISTORICAL BACKGROUND

1. Pre-Statehood

This case involves fundamental issues concerning Hawaii's ceded lands and the trust responsibilities of the State of Hawaii in relation to the Native Hawaiian People. A historical background is, therefore, appropriate to provide context. The factual findings that follow are taken

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[8] Pursuant to Rule 25(d) of the Hawaii Rules of Civil Procedure, *quoted in* fn. 4, *supra*, the current directors of the HCDCH and Governor Linda Lingle are automatically substituted as defendants.

[9] *See* Act 350 of 1997, section 18.

[10] This section contains the court's factual findings, as required by Rule 52(a) of the Hawaii Rules of Civil Procedure. Some factual findings are also contained in other sections of the opinion. To the extent these findings of fact contain conclusions of law, they are to be so construed, except that Section II(B) is intended to constitute findings of fact. To the extent any other sections of this opinion contain findings of fact, they are to be so construed.

primarily from federal and state legislative enactments. In addition, this court has taken judicial notice of many of these adjudicative facts.[11]

Before the arrival of the first Europeans in 1778, the Native Hawaiian People lived in a highly organized, self-sufficient subsistence social system based on communal land tenure with a sophisticated language, culture, and religion.[12] Native Hawaiians continue at present to comprise a distinct and unique indigenous people with historical continuity to the original inhabitants of the Hawaiian archipelago, whose society was organized as a nation prior to the arrival of the first non-indigenous people in 1778.[13]

Unified monarchial government of the Hawaiian Islands was established in 1810 under Kamehameha I, the first King of Hawaii.[14] From 1826 until 1893, the United States recognized the independence of and extended full and complete diplomatic recognition to the Kingdom of Hawaii, and entered into treaties and conventions to govern commerce and navigation with Hawaii in 1826, 1842,

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[11] *See* AOrder Granting OHA Plaintiffs= Motion For Judicial Notice Filed 8/9/99,@ filed on Sept. 6, 2000. Pursuant to Rule 201 of the Hawaii Rules of Evidence, the court can take judicial notice of certain adjudicative facts, which are then accepted as conclusively proven.

[12] Ex.1, The Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103-150, 107 Stat. 1510 (1993) (A1993 Apology Resolution@), whereas para. 1; Ex. 72, The Native Hawaiian Education Act of 1994, 20 U.S.C. secs. 7902-12 (West Supp. 1998) (A1994 Education Act@), Findings, para. 2; Ex. 75, The Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. secs. 11701-14 (1992) (A1992 Health Care Act@), Findings, para. 4; Ex. 6, An Act Relating to Hawaiian Sovereignty, Act 359, 1993 Haw. Sess. Laws (AAct 359 of 1993"), Findings, para. 2.

[13] *See* Ex. 75, 1992 Health Care Act, *supra* note 12, Findings, para. 1; Ex. 72, 1994 Education Act, *supra* note 12 para. 1; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 1.

[14] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 2; Ex. 72, 1994 Education Act, *supra* note 12, Findings, para. 3; Ex. 75, 1992 Health Care Act, *supra* note 12, Findings, para. 5; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 3.

1849, 1875, and 1887.[15]

By most accounts, the Hawaiian Kingdom had achieved nation status by the mid-1800s and maintained that status up until the 1893 overthrow. The Permanent Court of Arbitration at the Hague in *Larsen v. Hawaiian Kingdom* noted that: AA perusal of the material discloses that in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties.@[16] The Hawaiian Kingdom, especially during the term of King Kamehameha III, adopted European legal and political systems, such as the mahele process, a private land ownership system, as well as civil and criminal laws.[17] The Hawaiian Kingdom also entered into treaties with many additional nations, including:

Belgium in 1862;
Bremen in 1851;
Denmark in 1846;
France 1846 and 1857;
Germany in 1879;
Great Britain in 1836, 1846 and 1851;
Hamburg in 1848;
Hong Kong (Colony of Great Britain) in 1884;
Italy in 1863;
Japan in 1871 and 1886;
Netherlands in 1862;

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[15] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para 3; 1992 Health Care Act, *supra* note 12, Findings, para. 6; Ex. 72, 1994 Education Act, *supra* note 12,, Findings, para. 4; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 4; Ex. 162, Hawaiian Homelands Ownership Act of 2000, *supra* note 6, sec. 202(12).

[16] Ex. 354, Arbitral Award, *Larsen v. Hawaiian Kingdom* (Feb. 5, 2001), at ' 7.4. *See also* Transcript of Testimony of James Anaya on Nov. 27-28, 2001, at pp. 131-32.

[17] Ex. 370, 1891 Hawaiian Almanac and Annual AA Brief History of Land Title in the Hawaiian Kingdom.@

New South Wales (Colony of Great Britain) in 1874;
Portugal in 1882;
Russia in 1869;
Samoa in 1887;
Spain in 1863;
Swiss Confederation in 1864;
Sweden and Norway in 1852; and
Tahiti (Protectorate of France) in 1853.[18]

On January 14, 1893, John L. Stevens, the United States Minister assigned to this sovereign and independent Kingdom of Hawaii, conspired with a small group of non-Hawaiian residents, including citizens of the United States, to overthrow the government.[19] In pursuance of this conspiracy, Minister Stevens and the naval representative of the United States caused armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16, 1893, and to position themselves near government buildings and the Iolani Palace to intimidate Queen Lili`uokalani and her government.[20]

On the afternoon of January 17, 1893, a Committee of Safety, which represented United States and European sugar planters, descendants of missionaries, and financiers, deposed the Hawaiian monarchy and proclaimed the establishment of a Provisional Government.[21] Minister Stevens thereupon extended diplomatic recognition to the Provisional Government formed by the conspirators

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[18] Ex. 355, July 5, 2001 Hawaiian Kingdom Complaint filed with U.N. Security Council, pp. 21-39.

[19] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 5; Ex. 7, 1992 Health Care Act, *supra* note 12, Findings, para. 7; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 5.

[20] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para 6; Ex. 7, 1992 Health Care Act, *supra* note 12, Findings, para. 8; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 6.

[21] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para 7.

without the consent of the Native Hawaiian People or the lawful government of Hawaii and in violation of treaties between the two nations and international law.[22]

Soon thereafter, when informed of the risk of bloodshed that would result from resistance, Queen Lili`uokalani issued the following statement in Honolulu on January 17, 1893, yielding her authority to the United States Government rather than to the Provisional Government:

> I, Lili`uokalani, by the Grace of God and under the constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the Constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom.
>
> That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the Provisional Government.
>
> Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the Constitutional Sovereign of the Hawaiian Islands.[23]

Without the active support and intervention of the United States diplomatic and military representatives, the insurrection against the government of Queen Lili`uokalani would have failed for

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[22] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 8; Ex. 75, 1992 Health Care Act, *supra* note 12, Findings, para. 8; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 6.

[23] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para 9.

lack of popular support and insufficient arms.[24] On February 1, 1893, Minister Stevens raised the United States flag and proclaimed Hawaii to be a protectorate of the United States.[25]

The report of a Presidentially-established investigation conducted by former Representative James Blount into the events surrounding the insurrection and overthrow of January 17, 1893 concluded that United States diplomatic and military representatives had abused their authority and were responsible for the change in government.[26] As a result of this investigation, John L. Stevens, was recalled from his diplomatic post and the military commander of the United States armed forces stationed in Hawaii was disciplined and forced to resign his commission.[27]

In a message to Congress on December 18, 1893, President Grover Cleveland reported fully and accurately on the illegal acts of the conspirators, described such acts as an "act of war committed with the participation of a diplomatic representative of the United States and without authority of Congress," and acknowledged that by such acts the government of a peaceful and friendly people was overthrown.[28] President Cleveland further concluded that a "substantial wrong has thus

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[24] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 10; Ex. 71, Senate Committee on Indian Affairs Report 107-66, 107th Cong., 1st Sess., Sept. 21, 2001, *Expressing the Policy of the United States Regarding the United States Relationship with Native Hawaiians and to Provide a Process for the Recognition by the United States of the Native Hawaiian Governing Entity, and for Other Purposes* (hereafter "Committee Report 107-66"), at pp. 1-2

[25] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 11.

[26] *See id*. whereas para. 12.

[27] *See id*., whereas para. 13.

[28] *See id*., whereas para. 14; Ex. 75, 1992 Health Care Act, *supra* note 12, Findings, para. 9; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 7.

been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair" and called for the restoration of the Hawaiian monarchy.[29]

Queen Lili`uokalani and the Hawaiian Patriotic League, representing the aboriginal citizens of Hawaii, promptly petitioned the United States for redress of these wrongs and for restoration of the indigenous government of the Hawaiian Nation, but this petition was not acted upon.[30] The Provisional Government protested President Cleveland's call for the restoration of the monarchy and continued to hold state power and pursue annexation to the United States.[31] The Provisional Government successfully lobbied the Committee on Foreign Relations of the Senate to conduct a new investigation into the events surrounding the overthrow of the monarchy.[32]

The Committee and its chairman, Senator John Morgan of Alabama, conducted hearings in Washington, D.C., from December 27, 1893 through February 26, 1894, in which members of the Provisional Government justified and condoned the actions of the United States Minister and recommended annexation of Hawaii.[33] Although the Provisional Government was able to obscure the

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[29] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 15; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 7; Ex. 75, 1992 Health Care Act, *supra* note 12, Findings, para. 9.

[30] *See* Ex. 75, 1992 Health Care Act,, *supra* note 12, Findings, para. 10; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 8.

[31] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 16.

[32] *See id*., whereas para. 17.

[33] *See id*., whereas para. 18.

role of the United States in the illegal overthrow of the Hawaiian monarchy, it was unable to obtain the support of two-thirds of the Senate needed to ratify a treaty of annexation.[34]

On July 4, 1894, the Provisional Government declared itself to be the Republic of Hawaii.[35] On January 24, 1895, while imprisoned in Iolani Palace, Queen Lili`uokalani was forced by representatives of the Republic of Hawaii to abdicate her throne.[36] William McKinley won the 1896 Presidential election, and in 1897, replaced Grover Cleveland as President.[37] President McKinley negotiated an annexation treaty and presented it to the Senate, but the Senate refused to give its consent by the required two-thirds vote. Pro-annexation forces in the House of Representatives then introduced a joint resolution of annexation in 1898, which was passed (during the Spanish-American War) by a simple majority in each chamber of Congress, and signed by President McKinley on July 27, 1898.[38]

This ANewlands Resolution@ was adopted by Congress without the consent of or compensation to the indigenous people of Hawaii or their sovereign government, who were thereby denied the mechanism for expression of their inherent sovereignty through self-government, and who were also denied their right to self-determination, their lands, and their ocean resources.[39] Through the

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34 *See id.*, whereas para. 19.

35 *See id.*, whereas para. 20.

36 *See id.*, whereas para. 21.

37 *See id.*, whereas para. 22.

38 Resolution of Annexation of July 7, 1898, 30 Stat. 750 (1898).

39 *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 23; Ex. 75, 1992 Health Care Act,

Newlands Resolution, the self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States and Congress ratified the cession, annexed Hawaii as part of the United States, and vested title to the lands in Hawaii in the United States.[40]

Pursuant to the Newlands Resolution, the Republic of Hawaii thus ceded to the United States 1.75-1.8 million acres of land, which had been the Crown, Government, and Public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian People of Hawaii or their sovereign government. The Newlands Resolution stated that A[t]he existing laws of the United States relative to public lands shall not apply to such [public] land in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition@ and the revenues from the lands were to be Aused solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other purposes.@ In the Organic Act of 1900,[41] the United States Congress exempted these ceded lands from the then-existing public land laws of the United States by mandating that all revenue and proceeds from the lands be "used solely for the benefit of the inhabitants of the Hawaiian Islands for education and other public purposes," thereby establishing "a special trust relationship between the United States and the inhabitants of Hawaii.@[42]

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supra note 12 Findings, para. 11; Ex. 6, Act 359 of 1993, *supra* note 12, Findings, para. 9.

[40] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas paras. 24 and 26.

[41] Organic Act of April 30, 1900, 31 Stat. 141 (1900).

[42] *See* Ex. 1, 1993 Apology Resolution, *supra* note 12, whereas para. 25; Ex. 75, 1992 Health Care Act, *supra* note 12, Findings, para. 12; Committee Report 107-66, *supra* note 24, at p. 12 n.5; *Rice v. Cayetano*, 528 U. S. 495 (2000).

The Native Hawaiian People actively opposed the annexation of the Hawaiian Islands by the United States, as evidenced by resolutions they adopted and sent to Washington, D.C., signed by 21,269 people, representing more than fifty percent of the native Hawaiian population in Hawaii at that time.[43] The indigenous Hawaiian people never directly relinquished claims to their inherent sovereignty as a people or over their national lands to the United States, either through their government or through a plebiscite or referendum.[44]

The Organic Act of 1900 established a government for the Territory of Hawaii and defined the political structure and powers of the newly established Territorial Government and its relationship to the United States. This action was taken without any vote of the Hawaiian people or any compensation to them.[45]

In 1921, Congress enacted the Hawaiian Homes Commission Act, 1920,[46] which designated about 200,000 acres of the ceded public lands for exclusive homesteading by native Hawaiians, thereby affirming the trust relationship between the United States and the native Hawaiians,[47] positing that it was constitutionally proper for the United States government to establish special

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[43] *See* Committee Report 107-66, *supra* n. 24. at p. 12 n.4; Tom Coffman, *Nation Within: The Story of American Annexation of the Nation of Hawaii*, Ex. 30; Affidavit of Tom Coffman, Ex. 572. In 1896, the census data reported 38,504 persons of Hawaiian ancestry. Ex.528. *See also Ku`e: The Hui Aloha `Aina Anti-Annexation Petitions 1897-98*, Ex. 31.

[44] *See* 1993 Apology Resolution, *supra* note 12, Ex. 1, whereas para. 29; Committee Report 107-66 *supra* note 24, at p. 2.

[45] *See* 1993 Apology Resolution, *supra* note 12, Ex. 1, whereas para. 30.

[46] 42 Stat. 108 et seq.

[47] *See* 1992 Health Care Act, Ex. 75, *supra* note 12, Findings, para. 13; 1994 Education Act, Ex. 72,

programs for the Native Hawaiian People.[48] Under this program as it is administered today, title to the land is retained by the State of Hawaii and Native Hawaiian homesteaders have a leasehold interest.[49] Congress has enacted numerous laws that provide special programs for native Hawaiians or include native Hawaiians in programs designed for Native Americans generally.[50]

2. Statehood And The Admission Act

On August 21, 1959, Hawaii became the fiftieth state of the United States of America. As a condition of statehood, Congress required the new state to adopt the Hawaiian Homes Commission Act[51] and, pursuant to Section 5(b) of the Admission Act, transferred another 1.2 million acres of public lands to the State, but also imposed a public trust obligation on these ceded lands:[52]

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supra note 12, Findings, para. 8; Hawaiian Homelands Homeownership Act of 2000, Sec. 202(3).

[48] U.S. executive-branch officials and members of Congress explicitly recognized that native Hawaiians had the same rights as other Native Americans in the hearings that led to the passage of the Hawaiian Homes Commission Act in 1921. *See, e.g., Ahuna v. Dept. of Hawaiian Home Lands*, 640 P.2d 1161, 1167 (Hawaii 1982) (quoting Secretary of the Interior Franklin K. Lane as referring to native Hawaiians as "our wards ... for whom in a sense we are trustees"). *See also Hearings Before the House Committee on the Territories on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii*, 66th Cong. 129-30 (1920) (quoting Secretary of the Interior Franklin D. Lane as saying that the basis for granting special programs for native Hawaiians is "an extension of the same idea" that justifies granting such programs for Indians); *id.* at 169 (quoting Representative Curry, the Chair of the Committee, as saying: "And the Indians received lands to the exclusion of other citizens. That is certainly in line with this legislation, in harmony with this legislation."); *id.* at 170 (quoting Chair Curry, in response to a question from Representative Dowell about whether native Hawaiians might be different because "we have no government or tribe or organization to deal with," as saying that "We have the law of the land of Hawaii from ancient times right down to the present where the preferences were given to certain classes of people"). AIn the opinion of your committee there is no constitutional difficulty whatever involved in setting aside and developing lands of the Territory for Native Hawaiians only.@ House Rpt. No. 839, 66th Cong., 2nd Sess., at 4 (1920).

[49] Testimony of Kali Watson, former head of the Department of Hawaiian Home Lands.

[50] *See generally*, Section II(A) (4)(b)(ii), *infra*

[51] Congress expressly required the State of Hawaii to accept and adopt the Hawaiian Homes Commission Act, 1920, as a condition of granting statehood to Hawaii. *See, e.g.*, House Rpt. 109, 83rd Cong., 1st Sess.,

> Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other property, and to lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

Section 5(f) of the Admission Act explicitly provides that the lands granted to the State of Hawaii upon admission are to be held by the State as a public trust:

> The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or disposition of any such lands and the income therefrom, shall be held by said State as a public trust [1] for the support of the public schools and [2] other public educational institutions, [3] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [4] for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and [5] for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and

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App. III, at 45.

[52] Section 5(b) of the 1959 Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959).

their use for any other object shall constitute a breach of trust for which suit may be brought by the United States[.]

By this provision, the United States "reaffirmed the trust relationship which existed between the United States and the Hawaiian people by retaining the legal responsibility of the State for the betterment of the conditions of Native Hawaiians under section 5(f) of the [Admission Act].'[53] None of these transfers, either from the Republic of Hawaii to the United States, or from the United States to the State of Hawaii, involved the offer or acceptance of value for these lands, either to the Native Hawaiian People or the entities that assumed subsequent title.[54]

3. Creation Of The Public Lands Trust And OHA

The delegates to the 1978 Hawaii State Constitutional Convention (A1978 ConCon@) proposed a series of constitutional amendments that were subsequently ratified by the voters and added to the Hawaii State Constitution. One of the amendments was to redesignate Article XI concerning AHawaiian Home Lands@ to Article XII dealing with AHawaiian Affairs.@ As part of the new Article XII, a section was added to affirm that the State holds the ceded lands as a Public Land Trust, with native Hawaiians as one of the two named beneficiaries, along with the general public.

Article XII, Section 4 of the Hawaii State Constitution provides:

PUBLIC TRUST

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53 42 U.S.C. ' 11701(16); *see also* Committee Report 107-66, *supra* note 24 at p. 15.

54 *See* 1993 Apology Resolution, *supra* note 12, Ex. 1.

Section 4. The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

Furthermore, Article XII, Section 7 added constitutional protection for traditional and customary rights of native Hawaiians:

TRADITIONAL AND CUSTOMARY RIGHTS

Section 7. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua`a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

Article XVI, Section 7 was also amended to add the second sentence:

COMPLIANCE WITH TRUST

> **Section 7.** Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII.

The 1978 ConCon also created the Office of Hawaiian Affairs and required the State to allocate a pro rata share of revenues from the Public Lands Trust to OHA to be used explicitly for the

betterment of native Hawaiians. Specifically, the following provisions were added to become part of the new Article XII of the Hawaii State Constitution dealing with AHawaiian Affairs@:

OFFICE OF HAWAIIAN AFFAIRS;
ESTABLISHMENT OF BOARD OF TRUSTEES

> **Section 5.** There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law.

A board of trustees of OHA was also established:

POWER OF BOARD OF TRUSTEES

> **Section 6.** The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for

native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board.

Pursuant to the constitutional mandate creating OHA, in 1979, the Hawaii State Legislature promulgated legislation, now included in Chapter 10 of the Hawaii Revised Statutes, governing the administration of OHA. A few of the relevant provisions provide:

> **[' 10-1] Declaration of purpose.** (a) The people of the State of Hawaii and the United States of America as set forth and approved in the Admission Act, established a public trust which includes among other responsibilities, betterment of conditions for native Hawaiians. The people of the State of Hawaii reaffirmed their solemn trust obligation and responsibility to native Hawaiians and furthermore declared in the state constitution that there be an office of Hawaiian affairs to address the needs of the aboriginal class of people of Hawaii.
>
> (b) It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs.
>
> . . .
>
> **' 10-3 Purpose of the office.** [Validity of 1990 amendment and retroactivity to June 16, 1980. L 1990, c 304,'' 16, 18.] The purposes of the office of Hawaiian affairs include:
>
> (1) The betterment of conditions of native Hawaiians;
> (2) The betterment of conditions of Hawaiians;
> (3) Serving as the principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians; except that the Hawaiian

Homes Commission Act, 1920, as amended, shall be administered by the Hawaiian homes commission;

(4) Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians;

(5) Applying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services; and

(6) Serving as a receptacle for reparations.

. . .

' 10-4 Office of Hawaiian affairs; established; general powers. There shall be an office of Hawaiian affairs constituted as a body corporate which shall be a separate entity independent of the executive branch. The office, under the direction of the board of trustees, shall have the following general powers:

(1) To adopt, amend, and repeal bylaws governing the conduct of its business and the performance of the powers and duties granted to or imposed upon it by law;

(2) To acquire in any lawful manner any property, real, personal, or mixed, tangible or intangible, or any interest therein; to hold, maintain, use, and operate the same; and to sell, lease, or otherwise dispose of the same at such time, in such manner and to the extent necessary or appropriate to carry out its purpose;

(3) To determine the character of and the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid, subject to provisions of law specifically applicable to the office of Hawaiian affairs;

(4) To enter into and perform such contracts, leases, cooperative agreements, or other transactions with any agency or instrumentality of the United States, or with the State, or with any political subdivision thereof, or with any person, firm, association, or corporation, as may be necessary in the conduct of its business and on such terms as it may deem appropriate;

(5) To execute, in accordance with its bylaws, all instruments necessary or appropriate in the exercise of any of its powers;

(6) To issue revenue bonds pursuant to this chapter in such principal amounts as may be authorized from time to time by law to finance the cost of an office project as authorized by law and to provide for the security thereof as permitted by this chapter;

(7) To lend or otherwise apply the proceeds of the bonds issued for an office project either directly or through a trustee or a qualified person for use and application in the acquisition, construction, installation, or modification of an office project, or agree with the qualified person whereby any of these activities shall be undertaken or supervised by that qualified person or by a person designated by the qualified person;

(8) With or without terminating a project agreement, to exercise any and all rights provided by law for entry and re-entry upon or to take possession of an office project at any time or from time to time upon breach or default by a qualified person under a project agreement, including any action at law or in equity for the purpose of effecting its rights of entry or re-entry or obtaining possession of the project or for the payments of rentals, user taxes, or charges, or any other sum due and payable by the qualified person to the office pursuant to the project agreement; and

(9) To take such actions as may be necessary or appropriate to carry out the powers conferred upon it by law.

' **10-5 Board of trustees; powers and duties.** The board shall have the power in accordance with law to:

(1) Manage, invest, and administer the proceeds from the sale or other disposition of lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians and Hawaiians, including all moneys received by the office equivalent to that pro rata portion of the revenue derived from the public land trust referred to in section 10-2;

(2) Exercise control over real and personal property set aside to the office by the State of Hawaii, the United States of America, or any private sources, and transferred to the office for native Hawaiians and Hawaiians; provided that all of the properties acquired by the office shall be

controlled and managed for the purposes of this chapter, subject to any limitations of the trust provisions established by article XII, sections 5 and 6, of the state Constitution;

(3) Collect, receive, deposit, withdraw, and invest money and property on behalf of the office;

(4) Formulate policy relating to the affairs of native Hawaiians and Hawaiians, provided that such policy shall not diminish or limit the benefits of native Hawaiians under article XII, section 4, of the state Constitution;

(5) Otherwise act as a trustee as provided by law;

(6) Delegate to the administrator, its officers and employees such powers and duties as may be proper for the performance of the powers and duties vested in the board;

(7) Provide grants to public or private agencies for pilot projects, demonstrations, or both, where those projects or demonstrations fulfill criteria established by the board;

(8) Make available technical and financial assistance and advisory services to any agency or private organization for native Hawaiian and Hawaiian programs, and for other functions pertinent to the purposes of the office of Hawaiian affairs. Financial assistance may be rendered through contractual arrangements as may be agreed upon by the board and any such agency or organization; and

(9) Adopt and use a common seal by which all official acts shall be authenticated.

4. Post OHA Creation

a. Ceded Lands Revenue Issues

As noted, Congress had stated explicitly in Section 5(f) of the Admission Act that the revenues produced from the ceded lands were to be used for five stated purposes, including Athe betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended.@ Until the 1978 ConCon, however, the State of Hawaii interpreted Section 5(f) to

allow it to use the ceded lands revenues for any one of the five stated purposes, and, devoted the funds to public education, not specifically to native Hawaiians.[55]

After OHA was created, the Hawaii Legislature began to pass legislation in an effort to fulfill the constitutional mandate to provide OHA with a share of ceded lands revenue.[56] As explained in *Office of Hawaiian Affairs v. State:*[57]

> In 1980, the legislature amended chapter 10 by adding HRS ' 10-13.5, which provided that "[t]wenty per cent of all funds derived from the public land trust ... shall be expended by [OHA] for the purposes of this chapter." 1980 Haw. Sess. L. Act 273, at 525. However, "this too was not the final legislative word on OHA's pro rata share of funds from the trust." *Yamasaki*, 69 Haw. at 165, 737 P.2d at 453.
>
> Between 1980 and 1983, OHA became increasingly dissatisfied with the State's lack of progress in fulfilling its obligations. In 1983, because OHA "felt the State was not allocating twenty per cent of all funds derived from the public land trust to OHA[,]" OHA sued the State and various officers thereof, seeking declaratory and injunctive relief. *Id*. The defendants moved to dismiss, but the circuit court denied the motions. On interlocutory appeal, this court reversed the circuit court's ruling and remanded for entry of an order dismissing the case as involving a nonjusticiable political question. Essentially, this court held that it was unable to determine the parameters of HRS ' 10-13.5 "because the seemingly clear language of HRS ' 10-13.5 actually provide[d] no 'judicially discoverable and manageable standards' for resolving the dispute[d] [issues in the case]." *Yamasaki*, 69 Haw. at 173, 737 P.2d at 457 (citation omitted).

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[55] *Rice v. Cayetano*, 146 F.3d 1077 (1999), *rev'd on other grounds*, 528 U.S. 495 (2000); Melody K. MacKenzie, *Native Hawaiian Rights Handbook* 19 (1991).

[56] *See* Hawaii State Constitution Art. XII, Sec. 6, *quoted at* p. 18, *supra*, and H.R.S. Sec. 10-5, *quoted at* p. 20-21, *supra*.

[57] 96 Haw. at 391-92, 31 P.3d 901 (2001).

> In response, the legislature enacted Act 304. 1990 Haw. Sess. L. Act 304, at 947. Section 7 of Act 304 amended HRS ' 10-13.5 to provide: "Twenty per cent of all revenue derived from the public land trust shall be expended by [OHA] for the betterment of the conditions of native Hawaiians." 1990 Haw. 96 Hawai'i 392] Sess. L. Act 304, ' 7 at 951; HRS ' 10-13.5 (1993) (as amended) (emphasis added). The legislature then defined "revenue" in section 3 of Act 304 to include all
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> > proceeds, fees, charges, rents, or other income ... derived from any ... activity[ ] that is situated upon and results from the actual use of ... the public land trust ..., but excluding any income, proceeds, fees, charges, or other moneys derived through the exercise of sovereign functions and powers including [12 enumerated descriptions of sources of revenue that are excluded from the term "revenue" under the statute].
>
> 1990 Haw. Sess. L. at 304, ' 3 at 948; HRS ' 10-2.
>
> Section 8 of Act 304 provided a mechanism whereby the State, through the Department of Budget and Finance (B & F), and OHA were to determine the amounts owed to OHA for the period June 16, 1980 through June 30, 1991. 1990 Haw. Sess. L. Act 304, ' 8, at 951. On April 16, 1993, the legislature appropriated funds for payment of approximately 130 million dollars to OHA pursuant to Act 304. 1993 Haw. Sess. L. Act 35, at 41. In a memorandum dated April 28, 1993, OHA and the State memorialized the results of their negotiations and noted that "[the Office of State Planning (AOSP@)] and OHA recognize and agree that the amount specified in section 1 hereof does not include several matters regarding revenue which OHA has asserted is due OHA and which OSP has not accepted and agreed

to." With respect to the matters agreed upon and in satisfaction thereof, the State, on June 4, 1993, tendered two warrants to OHA totaling $129,584,488.85.

The 1993 payment was made pursuant to Act 35 of 1993, and addressed OHA=s claims with respect to its pro rata share of ceded lands revenue from June 16, 1980 through June 30, 1991. Pursuant to Act 329 of 1997, the Hawaii State Legislature set OHA=s share of ceded lands revenue at $15,100,000 for each of fiscal years 1997-98 and 1998-99.[58]

[58] *See* Section 2 of Act 329, codified as H.R.S. ' 10-13.3.

In January of 1994, ten months before institution of the present lawsuit, OHA had filed the complaint in *Office of Hawaiian Affairs v. State of Hawaii*,[59] with respect to its claim that the State had failed to pay its pro rata share of other revenues that the State had collected since June 16, 1980 from the ceded lands, including revenue from airport lands.[60] In 1996, the lower court had ruled, *inter alia*, that the State must pay OHA twenty percent of certain airport revenues.[61] On September 12, 2001, based on Congress=s intervening passage of the AForgiveness Act,@[62] the Hawaii Supreme Court reversed the lower court=s decision.[63] The Hawaii Supreme Court concluded that the lower court=s decision had been correct at the time it had been made.[64] Based, however, on Section 16 of Act 304, which provided that the entire Act would be held invalid if any section was found to be in conflict with federal law,[65] and due to Congress=s passage of the AForgiveness Act,@ the Hawaii Supreme Court held that Act 304, by its own terms, was effectively repealed.[66]

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[59] Civil No. 94-0-0205 in the Circuit Court of the First Circuit, State of Hawaii (ACivil No. 94-0-0205"). The Supreme Court=s opinion appears at 96 Haw. 388, 31 P.3d 901 (2001).

[60] 96 Haw. 388, 31 P.2d 901 (2001).

[61] *See* AOrder Granting Plaintiffs= Motions For Partial Summary Judgment,@ filed October 24, 1996, in Civil No. 94-0-0205.

[62] Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 105-66, '340, 111 Stat. 1425, 1448 (1998).

[63] 96 Haw. at 401.

[64] 96 Haw. at 395-96.

[65] *See* 96 Haw. at 397-98.

[66] *See* 96 Haw. at 401.

Based on the invalidation of Act 304 of 1990, the Supreme Court noted that it was Aplace[d] precisely where it was at the time *Yamasaki* was decided.@[67] Based on the lack of Ajudicially discoverable and manageable standards@ A[i]n the absence of the substantive definition of >revenue= provided in the now invalid Act 304,@ the Court again ruled that the unresolved issues of OHA=s pro rata share of ceded land revenue to be a nonjusticiable question.[68]

The Supreme Court of the State of Hawaii concluded its opinion *in Office of Hawaiian Affairs v. State* by commenting as follows:

> Given our disposition of this case, and the context of its complexity, we would do a disservice to all parties involved if we did not acknowledge that the State's obligation to native Hawaiians is firmly established in our constitution. *How* the State satisfies that constitutional obligation requires policy decisions that are primarily within the authority and expertise of the legislative branch. As such, it is incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust. *See* Haw. Const. art. XVI, ' 7. Although this court cannot and will not judicially legislate a means to give effect to the constitutional rights of native Hawaiians, we will not hesitate to declare unconstitutional those enactments that do not comport with the mandates of the constitution. . . .
>
> . . .

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[67] *Id*.

[68] *Id*.

> Now, more than twenty years later, as we continue to struggle with giving effect to that enactment, we trust that the legislature will re-examine the State's constitutional obligation to native Hawaiians and the purpose of HRS ' 10-13.5 and enact legislation that most effectively and responsibly meets those obligations.[69]

The court takes judicial notice that the 2002 legislative session did not result in a legislative resolution of the void created by the effective repeal of Act 304 of 1990. Therefore, since September 2001, there has been no legislation in effect to define how to calculate OHA=s portion of ceded lands revenue.

b. Congressional Actions

i. <u>The 1993 Apology Resolution</u>

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[69] *Id*.

In 1993, the same year as the tender of the $130 million to OHA in resolution of the ceded land revenue claims for 1980 to 1991, the United States Congress, on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii, adopted a joint resolution apologizing to native Hawaiians on behalf of the people of the United States. The Apology Resolution apologizes for the overthrow of the Kingdom of Hawaii on January 17, 1893, with the participation of agents and citizens of the United States, and for the deprivation of the inherent rights of native Hawaiians to self-determination and sovereignty. It also supports recognizes, and commends reconciliation efforts of the State of Hawaii with native Hawaiians.[70] Congress concluded in this enactment of the Apology Resolution, which is binding upon this court,[71] that the overthrow of the Kingdom of Hawaii was in

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[70] *See* 1993 Apology Resolution, *supra* note 12, Ex. 1, whereas para. 37 and Sec. 1: Acknowledgment and Apology, paras. 1 and 3.

[71] The 1993 Apology Resolution, *supra* note 12, Ex. 1, is a statute of the United States, and this court must take judicial notice of its findings pursuant to Section 202(b) of the Hawaii Rules of Evidence (Mandatory Judicial Notice of Law). *See also*., *State v. Lorenzo*, 77 Hawaii 219, 221, 883 P.2d 641, 643 (Haw. App. 1994) (AThe United States Government recently recognized the illegality of the overthrow of the Kingdom and the role of the United States in that event. P.L. 103-150, 107 Stat. 1510 (1993).@). The 1993 Apology Resolution was formally enacted by Congress, passing the Senate by a roll-call vote of 65 to 34, and was signed by President Clinton on November 23, 1993. A Ajoint resolution@ enacted by Congress as a public law and signed by the President is a statute of the United States and has the same effect as any other law enacted by Congress. *See, e.g., Ann Arbor R. Co. v. United States,* 281 U.S. 658, 666 (1930) (treating a joint resolution just as any other legislation enacted by Congress); Linde, Bunn, et al., *Legislative and Administrative Processes* 110 (1981) (Ex. 520) (AThe prescribed form of a proposal for a statute is generally called a bill, *although Congress also uses the form of a joint resolution to enact legislation*@ (emphasis added); Read, MacDonald, et al., *Materials on Legislation* 129 (4th ed. 1982) (quoting from R.M. Gibson, *Congressional Concurrent Resolutions: An Aid to Statutory Interpretation,* 37 A.B.A.J. 421, 422-23 (1951) (Ex. 521) (AIn recent years much major legislation has taken the form of a joint resolution; it is now rather generally conceded that *a joint resolution of Congress is just as much a law as* a bill after passage and approval@ (emphasis added)); Jack Davies, *Legislative Law and Process in a Nutshell* 66 (2d ed. 1986) (Ex. 522) (AA joint resolution originates in one house and, with the concurrence of the other house, has the force of official legislative action@); L. Harold Levinson, *Balancing Acts: Bowsher v. Synar, Gramm-Rudman-Hollings, and Beyond*, 72 Cornell L. Rev. 527, 545 (1987) (Ex. 523) (ACourts have consistently held that the legal effect of a joint resolution is identical to that of an enacted bill@); Goehlert and Martin, *Congress and Law-Making: Researching the Legislative Process* 42 (2d ed. 1989) (Ex. 524) (AIn reality there is little difference between a bill and a joint resolution, as a joint resolution goes through the same procedure as a bill and has the force of law@).

violation of treaties between the Kingdom and the United States and of international law, that it could not have been accomplished without the assistance of U.S. agents, and that the subsequent Acession@ of these lands to the United States in 1898 was Awithout the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government@:

> **Whereas**, *without the active support and intervention by the United States diplomatic and military representatives*, the [January 1893] insurrection against the Government of Queen Liliuokalani *would have failed* for lack of popular support and insufficient arms;
>
> ....
>
> **Whereas** the Republic of Hawaii also ceded *1,800,000 acres of crown, government and public lands* of the Kingdom of Hawaii, *without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government;*
>
> ....
>
> The Congress--
>
> (1) on the occasion of the 100th anniversary of *the illegal overthrow* of the Kingdom of Hawaii on January 17, 1893, acknowledges the historical significance of this event *which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people* . . . . Emphasis added.]

Congress also expressed its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian People, and urged the President of the United States to also acknowledge the ramifications and to support reconciliation efforts.[72]

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[72] *See* 1993 Apology Resolution, *supra* note 12, Ex. 1, sec. 1: Acknowledgment and Apology, paras. 4-5.

Although, by its terms, the 1993 Apology Resolution does not itself Aserve as a settlement of any claims against the United States,@[73] or Aresult in any changes in existing law,@[74] or itself create a claim, right, or cause of action,[75] it confirms the factual foundation for claims that previously had been asserted.[76]

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[73] *Id*., sec. 3.

[74] S. Rep. No. 103-126 (1993) at 35, Ex. M.

[75] *Rice v. Cayetano,* 941 F.Supp. 1529, 1546 n.24 (D. Hawaii 1996), *rev=d on other grounds,* 528 U.S. 495 (2000).

[76] *See, e.g., State v. Lorenzo,* 77 Haw. 219, 221, 883 P.2d 641, 643 (Haw. App. 1994)(citing the 1993 Apology Resolution, *supra* note 12, Ex. 1, as reported above, for the proposition that A[t]he United States Government recently recognized the illegality of the overthrow of the Kingdom and the role of the United States in that event.@). Congress had made the proclamations in the 1993 Apology Resolution earlier in the 1992 Health Care Act, *supra*, note 12. Specifically, Congress proclaimed that the United States annexed Hawaii Awithout consent or compensation@ to the indigenous people of Hawaii. Congress reaffirmed in the Health Care Act that the United States had recognized a Atrust@ relationship with native Hawaiians for many years, and in recognition of that relationship had extended benefits to them similar to those provided to American Indians various federal statutes, including the Older Americans Act of 1964, 42 U.S.C.A. ' 3001, et seq., the Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1987, the Veterans= Benefits and Services Acts of 1988, the Rehabilitation Act of 1973, 29 U.S.C.A. ' 701, et seq., the Native Hawaiian Health Care Act of 1988, the Handicapped Programs Technical

Amendments of 1988, the Indian Health Care Amendments of 1988, and the Disadvantaged Minority Health Improvements Acts of 1990.

ii. Other Congressional Actions

The United States has recognized a special responsibility for the welfare of the native peoples of the United States, including native Hawaiians.[77] The United States has recognized and reaffirmed that (A) native Hawaiians have a cultural, historic, and land-based link to the indigenous people who exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claims to sovereignty or its sovereign lands; (B) the United States Congress does not extend services to native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship; (C) the United States Congress has also delegated broad authority to administer a portion of the Federal trust responsibility to the State of Hawaii; (D) the political status of native Hawaiians is comparable to that of American Indians; and (E) the aboriginal, indigenous people of the United States have (i) a continuing right to autonomy in their internal affairs and (ii) an ongoing right of self-determination and self-governance that has never been extinguished.[78]

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[77] *See* Hawaiian Homelands Ownership Act of 2000, *supra*, note 6, Sec. 202(2).

[78] *See* Hawaiian Homelands Ownership Act of 2000, *supra* note 6, Sec. 202(13).

The political relationship between the United States and the Native Hawaiian People has been recognized and reaffirmed by the United States as evidenced[79] by the inclusion of native Hawaiians in (A) the Native American Programs Act of 1974,[80] (B) the American Indian Religious Freedom Act,[81] (C) the National Museum of the American Indian Act,[82] (D) the Native American Graves Protection and Repatriation Act,[83] (E) the National Historic Preservation Act,[84] (F) the Native

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79 *See id*., Sec. 202(14).

80 42 U.S.C. 2291 *et seq*.

81 42 U.S.C. 1996 *et seq*.

82 20 U.S.C. 80q *et seq*.

83 25 U.S.C. 3001 *et seq*.

84 16 U.S.C. 470 *et seq*.

American Languages Act of 1992,[85] (G) the American Indian, Alaska Native and Native Hawaiian Culture and Arts Development Act,[86] (H) the Job Training Partnership Act,[87] and (I) the Older Americans Act of 1965.[88]

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85 106 Stat. 3434.

86 20 U.S.C. 4401 *et seq*.

87 29 U.S.C. 1501 *et seq*.

88 42 U.S.C. 3001 *et seq*.

In the area of housing, the United States has recognized and reaffirmed the political relationship with native Hawaiian People through[89] (A) the enactment of the Hawaiian Homes Commission Act, 1920,[90] which set aside approximately 200,000 acres of public lands that became known as Hawaiian Home Lands in the Territory of Hawaii that had been ceded to the United States for homesteading by native Hawaiians in order to rehabilitate a landless and dying people; (B) the enactment of the 1959 Admission Act[91] (i) by transferring to the State of Hawaii title to the public lands formerly held by the United States, and mandating that those lands be held in public trust, for the betterment of the conditions of native Hawaiians, as that term is defined in section 201 of the Hawaiian Homes Commission Act, 1920, and (ii) by transferring the United States=s responsibility for the administration of Hawaiian Home Lands to the State of Hawaii, but retaining the authority to enforce the trust, including the exclusive right of the United States to consent to any actions affecting the lands which comprise the corpus of the trust and any amendments to the Hawaiian Homes Commission Act, 1920, enacted by the legislature of the State of Hawaii affecting the rights of beneficiaries under the Act; (C) the authorization of mortgage loans insured by the Federal Housing Administration for the purchase, construction, or refinancing of homes on Hawaiian Home Lands under the Act of June 27, 1934;[92] (D) authorizing native Hawaiian representation on the National Commission on American Indian, Alaska

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89 *See* Hawaiian Homelands Ownership Act of 2000, *supra* note 6, Sec. 202(15).

90 Hawaiian Homes Commission Act, 1920, 42 Stat. 108 *et seq*. (1921).

91 An Act to Provide for the Admission of the State of Hawaii into the Union, 73 Stat. 4 (1959).

92 National Housing Act, 42 Stat. 1246 *et seq*., chapter 847; 12 U.S.C. 1701 *et seq*.

Native, and Native Hawaiian Housing;[93] (E) the inclusion of native Hawaiians in a housing loan program for Native American veterans;[94] and (F) the enactment of the Hawaiian Home Lands Recovery Act,[95] which establishes a process for the conveyance of Federal lands to the Department of Hawaiian Homes Lands that are equivalent in value to lands acquired by the United States from the Hawaiian Home Lands inventory.

c. The Hawaiian Sovereignty Movement And The Akaka Bill

In recent years, there have been discussions and movement toward the creation of a sovereign Hawaiian government, and this movement has received both state and federal recognition.

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93 Public Law 101-235.

94 38 U.S.C. sec. 3764, applicable to subchapter V of chapter 37 of title 38, United States Code.

95 Hawaiian Home Lands Recovery Act, 109 Stat. 357; 48 U.S.C. 491, note prec.

The State of Hawaii has recognized the right of the Native Hawaiian People to reestablish an autonomous sovereign government with control over the lands and resources.[96] Act 359 of 1993 established the Hawaiian Sovereignty Advisory Commission (AHSAC@), which was amended by Act 200 to become the Hawaiian Sovereignty Elections Council (AHSEC@). The court takes judicial notice that the HSEC conducted a Native Hawaiian Vote regarding sovereignty, and that various Hawaiian groups supporting different forms of sovereignty continue to be active.

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[96] *See* Act 359 (1993), which recognized that the Native Hawaiian People were Adenied...their lands,@ Findings para. 9, and which also Arecognized the Hawaiian sovereignty movement,@ *State v. Lorenzo*, 77 Haw. at 221, 883 P.2d at 643; Act 200 (1994), through which the 1994 Hawaii State Legislature established a process designed to facilitate efforts of the Hawaiian people Ato restore a nation of their own choosing;@ Act 329 (1997), in which Hawaii=s Legislature characterized the 1993 Apology Law as an accurate recounting of Athe events of history relating to Hawaii and Native Hawaiians,@ called for a Alasting reconciliation@ and Aa comprehensive, just, and lasting resolution,@ and provided partial funding to undertake a complete inventory of the Public Lands and established a joint committee consisting of representatives of the Governor, the Legislature, and OHA to determine Awhether lands should be transferred to the office of Hawaiian affairs in partial or full satisfaction of any past or future obligations under article XII, section 6 of the Hawaii Constitution@ (Section 3); H.R.S. Sec. 6K-9, stating that the Island of Kaho`olawe and its waters shall be transferred Ato the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii.@

The Hawaii State Senate and the State House of Representatives each passed resolutions in 2000 and 2001 supporting the recognition of an official political relationship between the United States government and the Native Hawaiian People, as well as the need to develop a government-to-government relationship between a native Hawaiian government and the United States.[97]

The Hawaii Supreme Court has also recognized that native Hawaiians have the same legal status as other Native Americans and have separate and distinct legal rights under state law.[98]

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[97] *See* Committee Report 107-66 at 41 n. 91 and at 53-60 (reprinting H. Con. Res. 41 (2000), S. Res. 45 (2000), H. Con. Res. 23 (2001), and S. Res. 97 (2001)).

[98] *See Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 339, 640 P.2d 1161, 1168-69 (1982)(to determine Athe extent or nature of the trust obligations@ owed to the native Hawaiians by this Department, the Court turned to Awell-settled principles enunciated by the federal courts regarding lands set aside by Congress in trust for the benefit of other native Americans, *i.e.*, American Indians, Eskimos, and Alaska natives,@ because it recognized that Native Hawaiians have the same legal status as these other native peoples: AEssentially we are dealing with relationships between the government and aboriginal people. Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans.@); *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 79 Haw. 425, 903 P.2d 1246 (recognizing and explaining the traditional and customary rights of native Hawaiians); *Ka Pa`akai O Ka `Aina v. Land Use Commission*, 94 Haw. 31, 46, 7 P.3d 1068, 1083 (2000) (confirming that Ato the extent feasible when granting a petition for reclassification of district boundaries,@ the Land Use Commission must Aprotect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians@).

In terms of the federal government, in December of 1999, the United States Departments of Interior and Justice initiated a process of reconciliation in response to the 1993 Apology Resolution. A report was issued on October 23, 2000 entitled *From Mauka to Makai: The River of Justice Must Flow Freely*.[99] The principal recommendation of this Report is as follows:

> It is evident from the documentation, statements, and views received during the reconciliation process undertaken by Interior and Justice pursuant to Public Law 103-150 (1993), that the Native Hawaiian people continue to maintain a distinct community and certain governmental structures and they desire to increase their control over their own affairs and institutions. As matter of justice and equity, this report recommends that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes. For generations, the United States has recognized the rights and promoted the welfare of Native Hawaiians as an indigenous people within our nation through legislation, administrative action, and policy statements. To safeguard and enhance Native Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a

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[99] Ex. 71.

government-to-government relationship with a representative Native Hawaiian governing body.

The Departments of Interior and Justice accepted Senator Akaka=s definition of Areconciliation@ as a Ameans for healing,@ as well as his statement that Aa `reconciliation= requires something more than being nice or showing respect. It requires action to rectify the injustices and compensation for the harm.@[100]

The Report expressly states that the reconciliation process should be read as Amerely the next step, as the United States and Native Hawaiians move forward in further dialogue,@ and Athat the Federal Government should take action to address the needs and legitimate interests of Native Hawaiians,@ concluding that A[t]his reconciliation process should ultimately result in congressional confirmation of a political, government-to-government relationship between the Native Hawaiians and Federal Government pursuant to Congress= plenary authority over Indian Affairs.@[101] Furthermore, the Report states that ACongress should enact further legislation to clarify Native Hawaiians= political status and to create a framework for recognizing a government to government relationship with a representative Native Hawaiian governing body.[102]

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100 *Id*. at i.

101 *Id*. at ii.

102 *Id*. at 17.

The Report also acknowledges that Hawaiian Crown and Government lands were Aimpressed with a trust for the Native Hawaiian common people.@[103] One of the Report=s major recommendations is that past wrongs suffered by the Native Hawaiian people should be addressed as the United States moves forward in true reconciliation.[104]

Senate Bill 746,[105] entitled AExpressing the Policy of the United States Regarding the United States Relationship with Native Hawaiians and to Provide a Process for the Recognition by the United States of the Native Hawaiian Governing Entity, and for Other Purposes,@ was passed out of the Senate Committee on Indian Affairs on September 21, 2001, and is commonly referred to as Athe Akaka Bill.@ The Committee Report on the Akaka Bill[106] explains that its purpose Ais to authorize a process for the reorganization of a Native Hawaiian government and to provide for the recognition of the Native Hawaiian government by the United States for the purpose of carrying on a government-to-government relationship.@

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103 *Id*. at ii.

104 *Id*. at 17-20.

105 Ex. 27.

106 Committee Report 107-66, Ex. 28.

The Akaka Bill, if enacted, would constitute the legislation called for by the *Mauka to Makai* Report. Section 8 of the proposed bill provides that the federal government is authorized to negotiate with the State and the reorganized Native Hawaiian government for a transfer of land and resources to a Native Hawaiian government. The Native Hawaiian government created by Senate Bill 746 would thus have a land base and resources and a status similar to that of other native peoples in the United States. The Committee Report to Senate Bill 746 explains that Ait is the Committee=s intent that the reference to >lands, resources and assets dedicated to Native Hawaiian use= include, but not be limited to lands set aside under the Hawaiian Homes Commission Act and ceded lands.@[107]

This legislation is still pending before the United States Congress.

d. Lawsuits Challenging Hawaiian Rights

On February 23, 2000, the United States Supreme Court issued its decision in *Rice v. Cayetano,*[108] holding unconstitutional under the Fifteenth Amendment of the United States Constitution the portion of Article XII, Section 5 of the Hawaii Constitution that limited voting in OHA elections to Hawaiians. Since then, additional lawsuits have been filed challenging the constitutionality of OHA and the Department of Hawaiian Home Lands,[109] the constitutionality of Article XII, Sections 5 and 6 of the

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107 Ex. 7.

108 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000).

109 *Arakaki v. Cayetano*, in the United States District Court for the District of Hawaii.

Hawaii State Constitution,[110] as well as the constitutionality of the Article XII of the Hawaii State Constitution relating to AHawaiian Affairs, the Hawaiian Homes Commission, the Office of Hawaiian Affairs itself, as well as all benefits and entitlements based upon Hawaiian ancestry.@[111]

B. DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS LAW AND TREATMENT OF NATIVE AMERICAN CLAIMS

Plaintiffs presented evidence of the development of the law of international human rights and Native American rights in support of their claim that the course of history, as described in Section II(A) above, establish a Acloud@ on the State=s title to ceded lands, a claim analyzed in Section IV(B) below.

1. Development Of International Human Rights Law

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110 *Carroll v. State of Hawaii*, in the United States District Court for the District of Hawaii.

111 *Barrett v. State of Hawaii*, in the United States District Court for the District of Hawaii.

During trial, the court heard from Professor James Anaya, a leading expert in the area of international human rights law. As explained by Dr. Anaya, there is a developing body of international law that favors indigenous peoples= rights, including the right to traditional lands. These laws include treaties and customary international law.[112]

[112] Transcript of testimony of James Anaya on Nov. 27-28, 2001, at pp. 6-13.

Treaties to which the United States is a party include the International Covenant on Civil and Political Rights[113] and the International Convention on the Elimination of All Forms of Racial Discrimination.[114] Customary international laws consist of norms that are generally accepted by the international community and can include treaties accepted by other countries but not ratified by the United States, including International Labor Organization (AILOA) Convention No. 169.[115]

For example, the Western Shoshone Indians relied on the International Convention on the Elimination of All Forms of Racial Discrimination to stop the United States from using their ancestral lands for mining and nuclear waste storage pending resolution of their claims to the lands.[116]

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[113] International Covenant on Civil and Political Rights, Ex. 153 includes Article I, Section 2, which states:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

[114] International Convention on the Elimination of All Forms of Racial Discrimination, Ex. 154, includes General Recommendation XXIII (51), which states:

> The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should be far as possible take the form of lands and territories.

[115] ILO Convention No. 169, Ex. 50, includes Article 14, which provides:

> 1. The rights of ownership and possession of the peoples concerned over the lands a\which they traditionally occupy shall be recognized, In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
> 2. Governments shall take steps as necessary to identify the land which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
> 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

[116] Transcript of Testimony of James Anaya on Nov. 27-28, 2001, at p. 123.

Dr. Anaya represented the Awas Tingni tribe against The Republic of Nicaragua before the Inter-American Court of Human Rights.[117] The August 31, 2001 judgment held, in part, as follows:

[117] Transcript of Testimony of James Anaya on Nov. 27-28, 2001, at p. 60.

> The Court deems that . . . the members of the Awas Tingni Community have a communal property right over the lands they currently inhabit, without prejudice to the rights of the neighboring indigenous communities. However, the Court emphasizes that the limits of the territory over which that property right exists have not been effectively delimited and demarcated by the State . . . In this context, the Court considers that the members of the Awas Tingni Community have the right that the State, a) delimit, demarcate, and title the territory of the Community=s property; and b) refrain, until this official delimitation, demarcation and titling is performed, from acts which could cause agents of the State or third parties acting with its acquiescence or tolerance, to affect the existence, value, use, or enjoyment of the resources located in the geographic area in which the Community members live and carry out their activities.[118]

Dr. Anaya opined that any sale of ceded lands prior to resolution of the Hawaiians= claim to those lands would violate international law including: (1) International Covenant on Civil and Political Rights, Article I, Section 2; (2) International Convention on the Elimination of All Forms of Racial Discrimination, General Recommendation XXIII (51); and (3) the customary international law norm of Aan obligation made explicit for the government to take steps to make effective

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[118] Ex. 519, Aug. 31, 2001 Judgment in *Awas Tingni v. Republic of Nicaragua*.

those rights (›indigenous peoples' property interests‹) and to make effective those rights and enjoyment of those rights and to remedy the violation of those rights.@[119]

[119] Transcript of Testimony of James Anaya on Nov. 27-28, 2001, at pp. 120-23.

The *Mabo v. Queensland*[120] case is an example of how domestic courts have used international human rights laws to protect the aboriginal property rights.[121] Prior Australian appellate decisions had held that the discovery of Australia by England in the mid-1800s permitted England to acquire the sovereignty and territory of Australia by characterizing the area as *terra nullius.* In *Mabo,* the High Court of Australia held that for purposes of determining property ownership of land (as opposed to sovereignty and ownership of country) domestic property law based on local custom and traditional native title as it existed prior to discovery governed, not English or international law.[122] The Court held that employing English law to nullify all property rights of the aborigines would Aoffend the values of justice and human rights,@[123] and instead used customary international norms to influence the common law of Australia.[124] The *Mabo* Court granted the aborigines title similar to that accorded American Indians under the Marshall trilogy described in the section below.[125]

2. Treatment Of Native American Claims

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120 *Mabo v. Queensland*, Ex. 569.

121 Transcript of Testimony of James Anaya on Nov. 27-28, 2001, at pp. 94-98.

122 *Mabo v. Queensland*, Ex. 569 at 36, 47.

123 *Id.* at 25.

124 *Id.* at 34-35.

125 *Id.* at 59-60.

The court also heard from David Getches, a renowned expert in the law of area of Native American rights.[126] Since most American Indian tribes could not invoke the Law of Nations to recover lands they once possessed, they have used domestic law. American Indians have often convinced the United States to honor aboriginal use rights to land that they enjoyed under prior sovereignty.[127]

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[126] Professor Getches' curriculum vitae is Ex. 35.

[127] Getches, *Alternative Approaches to Land Claims: Alaska and Hawaii* (1986), Ex. 39, at 330.

As explained by Professor Getches, three United States Supreme Court decisions written by then Chief Justice John Marshall defined the basic components of American Indian rights.[128] These decisions set forth that tribes were not nation states under the Law of Nations and thus lost their territories based on discovery.[129] However, they also recognized Indian title based on aboriginal possession of ancestral lands[130] and also recognized that the United States had a guardian-

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[128] Transcript of Testimony of David Getches on Nov. 27, 2001, at pp. 81-82; *Johnson v. M=Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832).

[129] Transcript of Testimony of David Getches on Nov. 27, 2001, at pp. 85-86. *Cherokee Nation v. Georgia*, 30 U.S. 1, 22 (1831) (AThere are great difficulties hanging over the question, whether they can be considered as states under the judiciary article of the constitution. They never have been recognized as holding sovereignty over the territory they occupy. It is in vain now to inquire into the sufficiency of the principle, that discovery gave the right of dominion over the country discovered.@)

[130] *Johnson v. M=Intosh*, 21 U.S. 543, 603 (1823) (AIt has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right.@); *Worcester v. Georgia*, 31 U.S. 515, 544 (1832) (AIt regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.@)

ward relationship with Indians.[131] A subsequent United States Supreme Court case held that the claim of an Indian tribe to particular lands need not be based upon a treaty, statute, or other formal government action.[132]

[131] *Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831) (AThey may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.@)

[132] *United States v. Santa Fe Pac. R..Co.*, 314 U.S. 339, 347 (1941) (ANor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action.@).

Although courts have held that the determination and extinguishment of Indian title based on aboriginal possession raise political and non-justiciable issues, courts have enjoined sale of said lands prior to the determination of Indian title.[133] An example is an injunction issued the United States District Court for the District of Columbia in favor of the Native Village of Allakaket in *Native Village of Allakaket v. Hickel*.[134] In that case, the Village had pending claims for lands in Alaska before the United States Bureau of Land Management when the Secretary of the Interior attempted to transfer a right-of-way to oil companies to install a pipeline over said lands. The court, however, enjoined the issuance of a right-of-way for a pipeline through the area of the village without the consent of village officials.[135]

Indian occupancy necessary to establish aboriginal possession requires that the lands in question be the ancestral home of the tribe, as definable territory occupied exclusively by the tribe.[136]

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[133] *Id*. (Suit by the United States of America, as guardian of the Indians of the Tribe of Hualpai in the State of Arizona, against the Santa Fe Pacific Railroad Company, to enjoin the defendant from interfering with the possession and occupancy by the Indians of certain land in northwestern Arizona.); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919) (Enjoining the Secretary of the Interior and the Commissioner of the General Land Office from offering, listing, or disposing of certain lands in southern Arizona as public lands of the United States pending resolution of pueblo=s claim to title to those lands. ACertainly it would not justify the defendants in treating the lands of these Indians--to which, according to the bill, they have a complete and perfect title--as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation. Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership.@); and *Native Village of Allakaket v. Hickel*, Civil Action No. 706-70 (1970).

[134] Civil Action No. 706-70 (D. D.C. 1970); Transcript of Testimony of David Getches on Nov. 27, 2001, at pp. 80-81.

[135] Professor Getches represented the Village in *Native Village of Allakaket v. Hickel*. Transcript of Testimony of David Getches on Nov. 27, 2001, at pp. 81.

[136] *United States v. Santa Fe Pac. R..Co*., 314 U.S. 339, 345 (1941).

Finally, as explained by Professor Getches, Congress often uses its plenary power under the Indian Commerce Clause of the Constitution to recognize Indian tribes as nations within a nation, and to also provide federally recognized and unrecognized tribes with lands and economic benefits.[137]

C. THE CEDED LANDS

[137] *Rice v. Cayetano*, 528 U.S. 495, 519, 529-30 (2000)

To summarize,[138] the lands that are now characterized as Aceded lands@ and belonging to the Public Lands Trust, are those lands that were viewed as Crown, Government and Public Lands during the Kingdom of Hawaii, were then taken over by the Republic of Hawaii from 1893 to 1898 and then Aceded@ to the United States in 1898. The acreage of these lands in 1898 was 1.75-1.8 million. In 1921, some 188,000 of these acres were allocated to the Department of Hawaiian Home Lands (and another 16,518 acres were transferred to the Department as settlement for past abuses in 1994[139]). In 1959, these lands were transferred to the new State of Hawaii, with the federal government retaining about 350,000 acres. In 1998, the Island of Kaho`olawe, consisting of 28,766 acres, was returned to the State, to be held in trust until the creation of a native Hawaiian nation.[140]

Thousands of acres of ceded lands have been sold by the State of Hawaii

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138 *See* Section II(A)(1), *supra*.

139 In late 1994, the Board of Land & Natural Resources voted to return these lands and the Governor John Waihee, III signed an Executive Order.

140 Public Law 103-109, Title X (1993). *See also* H.R.S. Sec. 6K-9, stating that the Island of Kaho`olawe and its waters shall be transferred Ato the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii.@

since statehood.[141] Although it is estimated that the ceded lands now comprise around 1.2 million acres, the actual acreage and metes and bounds of the Public Lands Trust is unclear.[142] Through Act 329 of 1997, the Hawaii Legislature ordered that a comprehensive inventory be conducted of all lands comprising the public lands trust by the end of 1998. Extensions of this deadline have been granted, but this inventory has yet to be completed.[143]

No evidence was presented of any proposed future sales of ceded lands other than the lands at Leali`i. Even after issuance of Attorney General Opinion 95-3 on July 17, 1995,[144] upon which the State relied as legal authority for the sale of ceded lands,[145] the Administrator for the Lands Division of the DLNR wrote to the then Chair of DLNR, stating that Aa moratorium@ on the sale of ceded lands was in effect, and that Athe current moratorium is based on the concern that the sale of ceded lands diminishes the corpus of the public lands and thereby diminishes the potential return to OHA.@[146]

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[141] Testimony of Gilbert Coloma-Agoran; Ex. 175, Numerical Record of Land Patent Grants Issued by the Office of Commissioner of Public Lands.

[142] Testimony of Gilbert Coloma-Agoran.

[143] *Id*. & judicial notice.

[144] *See* Section VI(C), *infra*.

[145] *See* Ex. 404, Stipulation Re; Attorney General Opinion.

[146] Dec. 1, 1995 letter from Dean Uchida to Michael Wilson, Ex. 16.

In addition, after then Governor Benjamin Cayetano received Attorney General Opinion 95-3, he stated a policy of proceeding cautiously, and on a case-by-case basis.[147] With respect to Leali`i and La`i`opua, Governor Cayetano asked HFDC to proceed because Athe State has already invested substantial assets in these projects, and ... some of these sales in fact would benefit Native Hawaiians as well.@ He asked that Aany further and new development or disposition of ceded lands shall be reviewed and approved only on a case by case basis.@[148]

No evidence was presented of any pending proposals for the sale of ceded lands other than the lands at Leali`i.

D. IMPORTANCE OF LAND TO NATIVE HAWAIIANS

147 *See* Ex.15, Aug, 15, 1995 letter from Governor Benjamin Cayetano to Clarence Mills, HFDC Chair.

148 *Id*. (emph. added).

The Native Hawaiian People continue to be a unique and distinct people with their own language, social system, ancestral and national lands, customs, practices, and institutions.[149]

[149] Testimony of Davianna McGregor; *See, in general,* "*Kupa`a i Ka `Aina: Persistence on the Land,*" Dissertation of Davianna Pomaika`i McGregor, A Dissertation Submitted to the Graduate Division of the University of Hawaii in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy in History, December 1989, Ex. 19 ("McGregor Dissertation").

AThe health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land.@[150] `Aina, or land, is of crucial importance to the Native Hawaiian People **C** to their culture, their religion, their economic self-sufficiency, and their sense of personal and community well-being.[151] `Aina is a living and vital part of the Native Hawaiian cosmology, and is irreplaceable.[152] The natural elements **B** land, air, water, ocean **B** are interconnected and interdependent.[153] To Native Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians.[154] The `aina is part of their `ohana, and they care for it as they do for other members of their families.[155] For them, the land and the natural environment is alive, respected, treasured, praised, and even worshiped.[156]

As a member of the Hawaiian Sovereign Advisory Committee (AHSAC@), which was created by Act 359 of 1993, Professor Davianna McGregor, an expert in the areas of Hawaiian history, culture, and practices, attended over a dozen meetings in Hawaiian communities.[157]

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150 Apology Resolution, *supra* note 13, Ex. 1, whereas para. 32.

151 Testimony of Davianna McGregor.

152 *Id*.

153 *Id*.

154 *Id*.

155 *Id*.

156 *See id*.; *see also*, testimonies and inferences from testimonies of Davianna McGregor, Hannah Springer, and Pua Kanahele; *see generally also*, Lilikala Kame`eleihiwa, *Native Land and Foreign Desires: Pehea La Pono Ai*? (1992) (Ex. 46). Professor McGregor=s curriculum vitae is Ex. 18; Professor Kanahele=s curriculum vitae is Ex. 44.

157 McGregor testimony on 11/20/01.

One of the main purposes of the meetings was to determine the will of the Hawaiian people with respect to sovereignty. Professor McGregor pointed to HSAC=s final report, which stated:

> The Hawaiian community on each island has almost unanimously called for a measure to ensure that Hawaiian national trust lands, the Hawaiian Homelands and the ceded public trust lands, will not be decreased or misused. The community does not want to get involved with a lengthy process to restore formal recognition of a Hawaiian sovereign nation and end up without a land base.[158]

[158] Ex. 10, Feb. 18, 1994 Hawaiian Sovereignty Advisory Commission Final Report, at p.26.

The importance of land to the Native Hawaiian People is comparable to the importance of land to indigenous peoples throughout the world. As noted by Professor McGregor in her Dissertation, AKupa`a i Ka `Aina: Persistence on the Land,@[159] the United Nations Commission on Human Rights= Sub-Commission on Prevention of Discrimination and Protection of Minorities Working on Indigenous Populations conducted a study on the indigenous peoples of thirty-seven different countries, and concluded in part:[160]

> It must be understood that, for indigenous peoples, land does not represent simply a possession or means of production. It is not a commodity that can be appropriated, but a physical element that must be enjoyed freely. It is also essential to understand the special and profoundly spiritual profound sense of deprivation experienced by indigenous populations when the land to which they, as peoples, have been bound for thousands of years is taken away from them. No one should be permitted to destroy that bond.[161]

Professor David Getches, Plaintiffs= expert on Native American rights, also pointed out that despite differing value systems, native peoples throughout the United States have in common a sense of importance of land to their culture and well-being.[162] Examples were provided in which the government offered native tribes monetary compensation for lost lands, but was refused, with

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159 McGregor Dissertation, *supra* note 149, Ex. 19.

160 *Id*., p. 11.

161 *Id*., *citing to*, United Nations, Subcommission on Prevention for Discrimination and Protection of Minorities Working Group on Indigenous Populations. Cobo, Jose R. Martinez, Study of the Problem of Discrimination Against Indigenous Populations. Volumes I-V (New York: United Nations, 1987) p.39.

162 Testimony of David Getches on Nov. 27, 2001, at pp. 77-78.

the tribes insisting on the return of lands..[163] Once native lands are alienated, compensation is problematic because the tribes must often use money damages to repurchase lands from private parties, and lands are often not available for repurchase. [164] From the perspective of Native Americans, it is preferable that any sale of ancestral lands be suspended until claims for the lands are resolved.[165]

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[163] Testimony of David Getches on Nov. 27, 2001, at pp. 56-61.

[164] Testimony of David Getches on Nov. 27, 2001, at pp. 61-63.

[165] Testimony of David Getches on Nov. 27, 2001, at p. 63.

Economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastating to the population and to the health and well-being of the Native Hawaiian People.[166] The Native Hawaiian People have exhibited determination, however, to preserve, develop and transmit to future generations their ancestral territory,[167] and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions.[168]

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[166] *See* M. Look & K. Braun, *A Mortality Study of the Hawaiian People 1910-1990*, (The Queen=s Health Systems 1995), Ex. 22; K. Braun, M. Look, & J. Tsark, *High Mortality Rates in Native Hawaiians*, 54-9 Haw. Med. J. 723 (Sept. 1995), Ex. 23; and K. Braun, H. Yang, M. Look, A. Onaka, & B. Horiuchi, *Age-Specific Native Hawaiian Mortality: A Comparison of Full, Part, and Non-Hawaiians*, 4-4 Asian Am. & Pac. Islander J. of Health 353 (Autumn 1996), Ex. 24; *See also*, Apology Resolution *supra* note 12, Ex. 1, whereas para. 33. Dr. Braun=s curriculum vitae is Exhibit 21.

[167] With respect to the preservation of territory, the court also takes judicial notice that Native Hawaiian People have also been consistent in their opposition to various leasehold conversion measures, on the grounds that such conversions result in the further alienation of lands held by native Hawaiians or on behalf of native Hawaiians. Examples are the strong opposition to the state=s original leasehold conversion law as well as more recent opposition to the City & County of Honolulu=s leasehold conversion ordinance.

[168] *See* 1993 Apology Resolution, *supra* note 12 , Ex. 1, whereas para. 34; 1994 Education Act, *supra*

E. PROPOSED SALE OF CEDED LANDS AT LEALI`I

In 1987, the HFDC began planning master residential communities on each island.[169] Based on a determination that there was a critical shortage of housing in West Maui, HFDC selected and proposed the Leali`i site, and for similar reasons, selected the La`i`opua site in North Kona.

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note 12 , Ex. 72, Findings, para. 20.

[169] *See* Ex. X, Nov. 20, 1987 HFDC Request for Right of Entry to State Land at Honokawai and Wahikuli, Lahaina and Wakiu and Kawaipapa, Hana, Maui

In December 1989, HFDC filed a petition with the Land Use Commission (ALUC@) to reclassify the Leali`i lands from agricultural to urban use.[170] On or about January 24, 1990, HFDC wrote to Richard Paglinawan, then OHA Administrator, regarding the HFDC=s intent to petition the LUC for an urban district boundary amendment for the Lahaina Parcel, and asked for OHA=s testimony before the LUC.[171] Public hearings on the LUC Application for Leali`i were held before the LUC on April 10, 11 and 12, 1990.[172]

On April 10, 1990, OHA, through Linda DeLaney, its Land and Natural Resources Officer, gave oral testimony before the LUC with respect to the Leali`i project.[173] Her testimony on behalf of OHA recommended approval of the petition, conditioned upon the participation of OHA and DHHL in negotiations between HFDC and the BLNR for the exchange of the property,

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170 *See* Ex. EE.

171 *See* Ex. FF.

172 *See* Ex. OO.

173 *Id*.

and additional conditions and consultation with OHA for protection of burial sites and other cultural resources.[174] HFDC=s petition was granted in May 1990.[175] OHA did not request a contested case hearing.[176] Thereafter, OHA, DHHL, and HFDC negotiated for a Amarket value@ for the property, from which OHA and DHHL would receive a proportion.

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[174] *Id*.

[175] *See* Ex.OO, May 18, 1990 Findings of Fact, Conclusions of Law, Decision and Order in *In the Matter of the Petition of HFDC*.

[176] *Id*.

In 1992, the Legislature enacted Act 318, which established a formula to determine OHA=s portion of revenues from the conveyances of land at Leali`i and La`i`opua. OHA presented testimony before the House Committee on Water, Land Use, and Hawaiian Affairs on March 17, 1992, relating to S.B. 2485, the bill that became Act 318.[177]

OHA=s testimony before the House Committee focused on the difference between the provisions of Act 318, which entitle native Hawaiians to twenty percent of the value of raw, undeveloped lands for master planned communities, as opposed to the provisions of Act 304, which entitled OHA to twenty percent of Agross revenues.@[178] OHA=s request that the bill be set aside was based on its desire to have ANative Hawaiians be fully compensated as provided for by Act 304.@[179] OHA did not express concern that the State would be in breach of trust duties by the sale of Public Trust Lands to HFDC for residential development. OHA did not challenge the State=s power to convey ceded lands for public purposes, actually stating, AOHA has no policy making powers relating to ceded land activities. The BLNR has exclusive power.@[180]

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177 *See* Ex. MMMMMM.

178 *Id.*

179 *Id.*

180 *Id.*

In August 1992, William Paty, then BLNR Chair, sent a memorandum to Clayton Hee, then OHA Board Chair, relating to Leali`i and La`i`opua.[181] In that memorandum, Mr. Paty informed Mr. Hee that on August 28, 1992, the BLNR would render a decision on a Memorandum of Understanding (AMOU@) for the conveyance of ceded lands to HFDC at La`i`opua and Leali`i pursuant to Acts 317 and 318.[182] Mr. Paty included with the memorandum a copy of the BLNR submission in which BLNR=s Land Management Administrator recommended that the BLNR adopt the MOU, which included specific statutory entitlements to OHA.[183]

On November 20, 1992, Joseph Conant, then Executive Director of HFDC, wrote to Robert Vernon, an appraiser with John Child & Co., Inc., containing instructions and assumptions to consider in establishing a market value for Leiali` and La`i`opua.[184] Mr. Conant sent a copy of that letter to OHA and its appraisers, the Hallstrom Group.[185] OHA responded with objections as to assumptions, but never questioned HFDC=s ability to obtain good title to the land or to sell good title to individual homeowners.[186]

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[181] *See* Ex.UU. Evidence at trial revealed that residential lots at La`i`opua lands were subsequently transferred to the Department of Hawaiian Home Lands, and have been distributed to native Hawaiian beneficiaries. Testimony of Kali Watson. In this lawsuit, Plaintiffs are not seeking to set aside any sales of La`i`opua lands.

[182] *Id.*

[183] *Id.*

[184] *See* Ex.VV.

[185] *Id.*; OHA and DHHL jointly hired the Hallstrom Appraisal Group to conduct an appraisal of the market value of Leali`i and La`i`opua. *See* Ex. AAAAAAA through DDDDDDD.

[186] *See* Ex.WW, Jul. 19, 1993 letter to Joseph Conant of HFDC.

On or about July 27, 1993, OHA received written notice from the Keith Ahue, then BLNR Chair, that the ceded lands at Leali`i would be sold by DLNR out of the Public Lands Trust to HFDC pursuant to Acts 317 and 318.[187] The memorandum indicated that the conveyance date of January 25, 1993 was moved to November 15, 1993.[188] OHA did not suggest at that time that the State could not or should not sell ceded lands in fee to HFDC for subsequent sale to private individuals.

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[187] *See* Ex.Y, Jul 27, 1993 Memo to Clayton Hee, Chair of OHA, and Ho`aliku Drake, HHC, from Keith Ahue, BLNR Chair.

[188] *Id*.

On November 19, 1993, Ho`aliku Drake for DHHL and Clayton Hee for OHA jointly wrote a letter to Mr. Conant for HFDC confirming matters they had discussed at a meeting on August 9, 1993.[189] The letter suggested further cooperation between the parties with respect to the appraisals, and suggested another meeting after all appraisals were complete.[190]

After adoption of the 1993 Apology Resolution in November 1993,[191] OHA did not immediately suggest that the State could not sell ceded lands. In fact, in December 1993, OHA retained the Hallstrom Group to perform Aa limited scope market value appraisal of the fee simple interest in 583.202 acres ...@ in Leali`i.[192] The purpose was to Aestimate market value@ in Afee simple,@ in order to calculate the DHHL and OHA entitlements.[193] In the letter confirming their engagement, the Hallstrom Group defined fee simple ownership as Aabsolute ownership unencumbered by any other interest or estate; subject only to the limitations of eminent domain, escheat, police power and taxation.@[194] In arriving at the estimated market value, the Hallstrom Group Aassumed that the subject property is free and clear of all encumbrances other than those referred to herein,@ and assumed that

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189 *See* Ex. ZZ.

190 *Id*.

191 *See* Ex. OOOO.

192 *See* Ex.AAA, Dec. 13, 1993 letter to Ho`aliku Drake, HHC Chair, and Clayton Hee, OHA Chair, from John E. Hallstrom; Ex. 99, Dec. 15, 1993 Appraisal.

193 *Id*.

194 Ex. 99, Dec. 15, 1993 Appraisal, at p. 11.

title is Agood and marketable.@[195] At no time in negotiating for a Amarket value@ for Leali`i did OHA suggest that house lots at Leali`i could not be sold in fee, or that there would be a cloud on title if the sale took place.

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195 *Id*. at p. 11-12.

Representatives of DLNR, HFDC, DHHL, and OHA met on July 11, 1994.[196] In a memorandum dated July 18, 1994, OHA Chair Hee confirmed that OHA would consider accepting the Afair market value@ of 575.322 acres of land at Leali`i to be conveyed as being $27,868,022, and that DHHL and OHA would accept compensation as a percentage of that amount.[197] OHA maintained that Aacceptance of the sums [was] in no way a waiver of the right to receive compensation from any and all lands conveyed to HFDC,@ but did not suggested that sale of the land would in and of itself constitute a breach of trust.[198]

In September 1994, OHA first objected to the sale of ceded lands for the Leali`i project because attorney William Meheula[199] informed the OHA Board that acceptance of twenty percent of the fair market value might compromise Hawaiians= claim to ownership of the ceded

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196 *See* Plaintiffs= Ex. 132, Memorandum to AAll Participants@ from Clayton Hee, Chair of OHA.

197 *Id*.

198 *Id*.

199 Attorney for the Individual Plaintiffs in this case.

lands.[200] On September 15, 1994, the OHA Board accepted Mr. Meheula=s recommendation to include a disclaimer as part of any acceptance of funds.[201] The OHA Board understood that Mr. Meheula=s clients would sue the Board if OHA proceeded with the transaction without the appropriate disclaimer language.[202]

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[200] Oct. 25, 1994 HFDC Board Workshop memo, Ex. 143

[201] Sept. 15, 1994 OHA Board minutes, Ex. 78.

[202] Testimony of Clayton Hee on Dec. 3, 2001; Sept. 23, 1994 Clayton Hee letter to Robert Marks, Ex. 555.

At OHA=s request, on September 23, 1994, the Attorney General=s Office suggested disclaimer language that the OHA Trustees Aact solely for the purpose of implementing the provisions of Act 318, SLH 1992, and only on behalf of the Office of Hawaiian Affairs, and in no manner do they waive or otherwise act in furtherance or diminution of any claim the Hawaiian people may have in the land comprising the site of the Villages of Leali`i project.@[203] On September 27, 1994, the OHA Board voted to accept this disclaimer language and requested that it be included in the proposed HFDC agreements.[204]

In October 1994, however, HFDC decided that it could not include the disclaimer in the HFDC agreements, because to do so would place a cloud on title, rendering title insurance unavailable to buyers in the Leali`i project.[205] OHA did not sign the HFDC agreements, but on November 4, 1994, DLNR transferred about 500 acres of ceded lands to HFDC for Leali`i.[206] On

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[203] Sept. 23, 1994 Charleen Aina letter to William Meheula, Ex. 5; Sept. 23, 1994 Robert Marks letter to Clayton Hee, Ex. 4.

[204] Sept. 27, 1994 OHA Board minutes, Ex. 79; Sept. 30, 1994 Clayton Hee letter to Joseph Conant, Ex. 139.

[205] Oct. 13, 1994 Joseph Conant letter to Clayton Hee, Ex. 140; Oct. 25, 1994 HFDC Board Workshop memo, Ex. 143.

[206] Nov. 4, 1994 Joseph Conant memo to Clayton Hee enclosing check and Land Patent, Ex. 145.

November 4, 1994, Mr. Conant of HFDC transmitted to Chair Hee of OHA a check in the amount of $5,573,604.40 as OHA=s entitlement in accordance with Act 318.[207] OHA refused to accept the check.

[207] *See* Ex. FFF.

DHHL accepted $8,360,406 from HFDC as its portion of revenue from sale of lands at Leali`i.[208] OHA continued to negotiate, however, for what it considered to be a fair appraisal of market value.[209] By that time, there were 103 lots graded with utilities available, ready for home construction at Leali`i. The total cost to HFDC for Leali`i at that time was over $31,000,000.[210]

After institution of this lawsuit in November 1994, due to the costs of defending title, title insurance companies refused to insure title to the lands at Leali`i.[211] Therefore, the development of Leali`i has been on hold because of this lawsuit.

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[208] *See* Defendants= Ex. GGG, (Nov. 4, 1994, Transmittal to Ho`aliku Drake from Joseph Conant, attached check for $8,360,406; Nov. 4, 1994 Memo to Joseph Conant from Ho`aliku Drake returning check, in partial satisfaction of DHHL=s purchase of a portion of other property from HFDC. According to Kali Watson, then Director of DHHL, DHHL used the funds to pay for another Native Hawaiian residential project. Testimony of Kali Watson on Nov. 30, 2001.

[209] Testimony of Clayton Hee on Nov. 30, 2001.

[210] Between 1991 and 1992, HFDC developed infrastructure and underlying utilities at La`i`opua for the project. Testimony of Michael McElroy, Project Manager for La`i`opua until 1997, on Nov. 30, 2001.

[211] *See* Transcript of Testimony of John Jubinsky on Nov. 27, 2001. *See also,* Ex. UUUUU, Mar. 16, 1999 from John Jubinsky, Title Guaranty, to Dawn N. S. Chang.

III. PROCEDURAL BACKGROUND

A. PROCEDURAL HISTORY

OHA filed the Complaint in this case on November 4, 1994.[212] On November 9, 1994, the Individual Plaintiffs filed a separate complaint in the Second Circuit Court for the State of Hawaii. The original complaint in this case was amended on August 11, 1995 to consolidate it with the one filed by the Individual Plaintiffs in the Second Circuit.

On December 15, 1995, Defendants filed a Motion for Partial Summary Judgment, on the grounds that this case raised a nonjusticiable political question, which was denied on July 23, 1996 by Judge Daniel Heely.

On February 17, 1998, the OHA Plaintiffs filed Motions to (1) Bifurcate Trial and (2) Continue Trial, seeking to bifurcate alternative Counts IV and V of the First Amended Complaint concerning the proper method of valuation of the lands, including the question of whether the lands should be valued in their improved or unimproved state. These motions were granted on April 6, 1998 by Judge Virginia Lea Crandall. The issues related to valuation of the ceded lands were thus bifurcated for a trial, to take place at a later time. Consequently, this opinion does not address the allegations of Counts IV and V .

On March 12, 1998, the Defendants filed a Motion To Dismiss Certain Counts and for Partial Summary Judgment, arguing that Counts I through III should be dismissed because of sovereign immunity and the political question doctrine. This motion was denied on August 27, 1998 by

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[212] Nov. 4, 1994, OHA Board minutes, Ex. 81.

Judge Kevin Chang.

On August 28, 1998, Defendants filed Motions (a) To Dismiss First Amended Complaint Based On The Statutes Of Limitations And The Doctrine Of Laches, (b) To Dismiss Plaintiffs= First Amended Complaint For Failure To Join The U.S.A. As An Indispensable Party, and (c) To Amend their Answer to Plaintiffs First Amended Complaint To Include The Defense of the Statute of Limitations. On September 3, 1998 the Defendants filed a Motion for Leave To File Interlocutory Appeal from Order Denying Defendants= Motion to Dismiss Certain Counts and for Partial Summary Judgment. These motions were also denied by Judge Kevin Chang.[213]

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[213] A[T]he denial of a motion for summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing - - that the case should go to trial.@ *Switzerland Cheese Ass=n Inc. v. E. Horne=s Market, Inc.*, 385 U.S. 23, 25 (1966); *See also, Lind v. United Parcel Service,* 254 F.3d 1281, 1284, fn. 4 (11th Cir. 2001) (AAn order *denying* a motion for partial summary judgment ... is merely a judge=s determination that genuine issues of material fact exist. It is not a judgment, and does not foreclose trial on the issues on which summary judgment was sought.@); *See generally,* Hawaii Rules of Civil Procedure Rule 56 (standard on summary judgment).

On August 9, 1999, the OHA Plaintiffs filed a Motion for Judicial Notice requesting that this court take judicial notice of five state and federal statutes and the facts recited therein. This motion was granted on September 6, 2000.[214] On December 4, 2001, this court granted OHA Plaintiffs= oral motion to supplement this September 6, 2000 order with the additional factual

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[214] The court ruled:

> that some of the numbered paragraphs in Exhibit F attached to Plaintiffs= Motion are facts and some are law, and the court is taking judicial notice of each and every paragraph, either as a matter of law or as fact. These facts are not subject to reasonable dispute in that they are either (1) generally known within the territorial jurisdiction of the trial court and (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

See Ex. 345.

findings in the Hawaiian Homelands Ownership Act of 2000.[215]

Trial without a jury began before this court on November 20, 2001, and proceeded through December 4, 2001. The OHA Plaintiffs were represented by Sherry P. Broder, Esq., and *pro hac vice* counsel Karen Sprecher Keating, Esq. The four individually-named plaintiffs were represented by William Meheula, Esq., and Hayden Aluli, Esq. The defendants were represented by John Komeiji, Esq., Patsy Kirio, Esq., Deputy Attorney General William Wynhoff, Esq., and Deputy Attorney General Linda Chow, Esq.

At the conclusion of the trial, the court required the submission of proposed findings and conclusions from all parties, and took the case under submission.

B. RELIEF SOUGHT BY PLAINTIFFS

Plaintiffs= First Amended Complaint of August 11, 1995 asserts five causes of action.

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[215] Hawaiian Homelands Ownership Act of 2000, , *supra* note 6, Ex. 162. The supplemental annotation of Exhibit F attached to OHA Plaintiffs= Motion for Judicial Notice filed August 9, 1999 was admitted as Ex. 345.

Count I requests an injunction on all sales of ceded lands, alleging that trust obligations under Article XII, Section 4 of the State Constitution prohibit the sale of fee title to ceded lands.[216] On the same basis, in Count II, Plaintiffs request that the court Astop the sale of ceded lands@ at Leali`i to third persons.[217] In Count III , Plaintiffs ask the court for a declaratory ruling Athat (a) any conveyance to a third party violates the Hawaii State Constitution and the Admissions Act, (b) and/or any sale of Ceded Lands does not directly or indirectly release or limit claims of Native Hawaiians to those lands.@[218]

Counts IV and V of the First Amended Complaint are Plaintiffs= challenges to the process by which the HFDC valued the Amarket value@ of ceded lands at Leali`i for purposes of compensating OHA.[219] Again, by Order Denying in Part and Granting in Part the [Aluli] Plaintiffs= Motion to Bifurcate Trial, or ... to Continue Trial, entered September 22, 1997, these counts were bifurcated for later determination and not at issue in this trial.

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216 *See* First Amended Complaint, filed August 11, 1995, at para. 27-33.

217 *Id. at* para. 39.

218 *Id*. at para. 10.

219 *See id.* at para. 44-46.

In their post-trial submissions, both the OHA Plaintiffs and Individual Plaintiffs alternatively seek injunctions prohibiting all sales of ceded lands until native Hawaiian claims are resolved.[220] By Aresolution of native Hawaiian claims,@ Plaintiffs appear to mean a complete resolution of native Hawaiian claims to ceded lands, through transfer of a portion of the ceded lands to a sovereign Hawaiian government to be formed, or perhaps, to OHA.[221]

In this opinion, the court addresses both the Plaintiffs= original and amended claims for relief.

IV. STANDARDS GOVERNING REQUESTS FOR INJUNCTIVE AND DECLARATORY RELIEF

A. STANDARDS GOVERNING INJUNCTIVE RELIEF

Plaintiffs= post-trial alternative claim seeking a moratorium on the sale of ceded lands is tantamount to a request for preliminary injunctive relief. Plaintiffs= original claims request permanent injunctive relief, prohibiting any sale of ceded lands in perpetuity.

Hawaii=s leading cases on preliminary injunctive relief are *Penn v. Transportation Lease Hawaii, Ltd.*,[222] and *Life of the Land v. Ariyoshi*,[223] which articulate the following standards for the granting of such relief:

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220 *See* OHA=s AProposed Opinion of the Court, Including Findings of Fact, Conclusions of Law,@ filed Dec. 19, 2001, p. 70, & AIndividual Plaintiffs= Closing Argument,@ filed Dec.17, 2001, p. 56.

221 *Id.*

222 2 Haw. App. 272, 630 P.2d 646 (1981).

223 59 Haw. 156, 577 P.2d 1116 (1978).

> The modern test for interlocutory relief is threefold: (1) Is the party seeking the injunction likely to prevail on the merits? (2) Does the balance of irreparable damage favor issuance of an interlocutory injunction? (3) To the extent that the public interest is involved, does it support granting the injunction?[224]

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[224] *Penn*, 2 Haw. App. at 276, 630 P. 2d at 650 *citing Ariyoshi*, *supra*, note 223.

No reported Hawaii case discusses the requirements for entry of a permanent injunction. However, it is generally held that A[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.@[225]

A person or entity seeking an injunction has the burden of proving the facts that entitle it to relief.[226] To establish irreparable injury, there must be some actual, viable, presently existing threat of serious harm--one that is not remote or speculative.[227] In addition, when government agencies

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[225] *See, Indian Motorcycle Ass=n. III Ltd. Ptp. v. Mass. Housing Fin. Agency*, 66 F.3d 1246 (1st Cir. 1995):

> Four principal factors govern the appropriateness of permanent injunctive relief: (1) whether the plaintiff has prevailed on the merits; (2) whether the plaintiff will supper irreparable injury absent injunctive relief; (3) whether the harm to the plaintiff outweighs any harm threatened by the injunction; and (4) whether the public interest will be adversely affected by the injunction.

Id. at 1249.

[226] *Modern Computer Systems, Inc. v. Modern Banking Systems, Inc.,* 871 F.2d 734, 737 (8th Cir. 1989).

[227] *United States v. W.T. Grant Co.,* 345 U.S. 629 (1953); *Tucker Anthony Realty Corp. v. Schelisinger*, 888 F.2d 969, 976 (2nd Cir. 1989).

are involved, the court should allow the government the Awidest latitude in the dispatch of its own internal affairs.@[228]

[228] *Rizzo*, 423 U.S. at 378-379; *See also*, *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (A[I]t is not the role of courts, but that of political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.@)

It is important to note that injunctive relief is a remedy, not a cause of action.[229] In addition, it is an extraordinary remedy, Anot a remedy which issues as of course.@[230] It is Ato be used sparingly, and only in a clear and plain case.@[231] Even if injunctive relief is proper, it must be tailored to the specific harm to be prevented.[232]

The law also provides that A[t]he more the balance of irreparable damage favors issuance of the injunction, the less the party seeking the injunction has to show the likelihood of his success on the merits. [citations omitted.] Likewise, the greater the probability the party seeking the injunction is likely to prevail on the merits, the less he has to show that the balance of irreparable damage favors issuance of the injunction.@[233]

B. STANDARDS GOVERNING DECLARATORY RELIEF

The granting of declaratory relief is governed by Chapter 632 of the Hawaii

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[229] *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 554 at n. 12 (1987); *see, also Reuben H. Donnelly Corp. v. Mark I Marketing Corp*., 893 F. Supp. 285 (S.D.N.Y. 1985) (There is no Ainjunctive@ cause of action under New York law); *Fletcher v. Conoco Pipe Line Co*., 129 F. Supp. 2d 1255 (W.D. Mo. 2001); *Lynch v. Snepp*, 350 F. Supp. 1134 (D.C.N.C. 1972) (An injunction is not a cause of action, but Aa remedy which is ancillary to a pending suit.@) *Randle v. City of Chicago Ill*., 2000 WL 1536070 (N.D. Ill. 2000) (AInjunctive relief is a remedy, not an independent cause of action.@); *County of Del Norte v. City of Crescent City*, 84 Cal. Rptr. 2d 179 (Cal. App. 1st Dist. 1999) (AA permanent injunction is an equitable remedy, not a cause of action, and thus it is attendant to an underlying cause of action.@); *Shell Oil Co. v. Richter*, 52 Cal. App. 2d 164, 168, 125 P.2d 930 (1942) (AInjunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted.@).

[230] *Harrisonville v. W.S. Dickey Clay Mfg. Co*., 289 U.S. 334, 337-38 (1993).

[231] *Rizzo v. Goode*, 423 U.S. 362, 378 (1976).

[232] *See Cok v. Family Court*, 985 F.2d 32, 34 (1st Cir. 1993); *Hypertherm, Inc. v. Precision Prods., Inc.*, 832 F.2d 697, 700-02 (1st Cir. 1987).

[233] *Penn v. Transportation Lease Hawaii, Ltd*., 2 Haw.App. 272, 630 P.2d 646, 650 (Haw.App. 1981).

Revised Statutes. Section 632-1 provides:

> In cases of actual controversy, courts of record, within the scope of their respective jurisdictions, shall have power to make binding adju declaratory of right is prayed for; provided that declaratory relief may not be obtained in any district court, or in any controversy with respect to taxes, or in any case where a divorce or annulment of marriage is sought. Controversies exclude other instances of actual antagonistic assertion and denial of right.
>
> Relief by declaratory judgment may be granted in civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties concrete interest and that there is a challenge or denial of the asserted relation, status, right, or privilege by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied also that a declaratory judgment will remedy shall be followed; but the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, a remedy equitable in nature, or an extraordinary legal remedy, whether such remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment in any case where the other essentials to such relief are present.

The court will now apply these standards governing injunctive and declaratory relief to the claims brought by the Plaintiffs.

V. ANALYSIS OF REQUEST FOR INJUNCTIVE RELIEF PROHIBITING SALE OF LANDS AT LEALI`I

A. SOVEREIGN IMMUNITY BARS PLAINTIFFS= REQUEST FOR INJUNCTIVE RELIEF WITH RESPECT TO THE LEALI`I LANDS

As noted previously, Count II of Plaintiffs= First Amended Complaint seeks a permanent injunction prohibiting the sale of the Leali`i lands to any third person. As further noted

above, title to these lands has already been transferred to the HFDC.[234]

[234] *See* Section II(E), *supra*.

In *Pele Defense Fund v. Paty*,[235] the Hawaii Supreme Court recognized a claim for breach of fiduciary duty to enjoin prospective violations of Article XII, Section 4 of the Hawaii Constitution. The Court concluded, however, that a request for injunctive relief to place a constructive trust on public lands that had already been exchanged is Aessentially equivalent= to a nullification of the exchange and the return of exchanged lands to the trust res. The effect on the State treasury would be Adirect@ rather than ancillary, as the State would have to pay for the lands returned to the trust.[236] As such, the Court held that the claim was barred by sovereign immunity.[237]

Like the Plaintiffs in *Pele Defense Fund*, the Plaintiffs in this case ask the court to Aturn back the clock and examine actions already taken by the State.@[238] The Leali`i lands are no longer within the Public Lands Trust. Although the Plaintiffs argue that the lands were merely transferred to another State entity and that sovereign immunity therefore does not apply, the facts show that the State of Hawaii received payment for the transfer of these lands to the HFDC.[239] H.R.S. Section 171-2 specifically exempts from the definition of Apublic lands@ those lands to which the HFDC holds title in its corporate capacity. To return the lands at Leali`i to the Public Lands Trust, the DLNR would have to expend moneys from the State treasury. Moreover, the HFDC has already spent millions of dollars

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235 *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992).

236 *Id*.

237 *Id*.

238 *Pele Defense Fund*, 73 Haw. at 578, 837 P.2d at 1261.

239 *See* Section II(E), *supra*.

improving those properties.[240]

Accordingly, this court cannot compel HFDC to return the lands at Leali`i to the Public Lands Trust without directly affecting the state treasury. Pursuant to *Pele Defense Fund v. Paty,* Plaintiffs= request for injunctive relief in Count II with respect to Leali`i is, therefore, barred by sovereign immunity.

B. IN THE ALTERNATIVE, PLAINTIFFS HAVE WAIVED THEIR RE(TO THE LEALI`I LANDS

[240] *Id.*

Even if sovereign immunity did not bar Plaintiffs claim for injunctive relief with respect to the Leali`i lands, Plaintiffs, by their actions and inaction during the seven years between 1987 and 1994, as underscored above,[241] have waived any right they may have had to contest the sale of lands at Leali`i to HFDC as illegal.[242]

Waiver is the Aintentional relinquishment of a known right, or such conduct as warrants an inference of such surrender, and it is not essential to its application that prejudice results to the party in whose favor the waiver operates.@[243] Waiver includes the Aintentional relinquishment of a known right,@ a Avoluntary relinquishment of some rights,@ and Athe relinquishment or refusal to use a right.@[244] A waiver Amay be expressed or implied[,]@ and Amay be established by ... agreement, or by

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241 *Id.*

242 Plaintiffs have suggested in argument that they did not raise their right to challenge the sale of land at Leali=i and La=i=opua to HFDC in fee because they relied on an opinion by Earl Anzai, as OHA=s former attorney, suggesting that there would be a Acloud@ on title even if the property were sold. Mr. Anzai subsequently became Attorney General under former Governor Cayetano. The court precluded his testimony based on relevance and Rule 403 grounds.

243 *Hewahewa v. Lalakea*, 35 Haw. 213, 219 (1939).

244 *Anderson v. Anderson*, 59 Haw. 575, 586-87, 585 P.2d 938, 945 (1978).

acts and conduct from which an intention to waive may reasonably be inferred.@[245]

[245] *Wilart Assoc. v. Kapiolani Plaza, Ltd.*, 7 Haw. App. 354, 359-60, 766 P.2d 1207, 1201-11 (1988) *citing* 28 Am. Jur. 2d *Estoppel and Waiver* ' 160 at p. 845 (1966).

The Individual Plaintiffs argue that they and their counsel relied on Congress=s 1993 Apology Resolution and the Legislature=s Act 359 of 1993 as central bases to seek an injunction in the fall of 1994 on the sale of ceded lands, pending resolution of the Hawaiians= claim to ownership of the ceded lands. Mr. Meheula=s discussions with the OHA Board did cause OHA to insist in the fall of 1994 that a disclaimer be placed in the HFDC agreements.[246]

As a practical matter, however, neither OHA nor the Individual Plaintiffs objected to the sale of the Leali`i lands until the fall of 1994. In any event, even if Plaintiffs did not consider challenging the State=s power to sell ceded lands until after the Apology Resolution was adopted in 1993, OHA=s continuing negotiation for market value after the Apology Resolution was passed is also Aconduct from which an intention to waive may reasonably be inferred.@[247] Plaintiffs= failure to object to the development plan, which included market homes, before the LUC and Legislature in testimony relating to Act 318 is Awholly inconsistent with any dissatisfaction@ with the development plan, also suggesting waiver of any right to challenge them.[248]

Moreover, HFDC and the State were prejudiced by their reliance on Plaintiffs= acquiescence in the development plan to sell land at Leali`i. As testified to by the project managers for both Leali`i and La`i`opua, there were no objections from OHA as to the State=s power to sell public trust lands for those projects until November 1994.[249] By that time, however, $31 million had already

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246 *See* Section II(E), *supra*.

247 *Wilart Assoc.*, 7 Haw. App. at 359-360, 766 P.2d at 1201-11.

248 *See generally, Goo v. Hee Fat,* 34 Haw. 123 (1937) (failure to motion to set aside default judgment for two years and acceptance of costs in motion clearly evinced a waiver of objection to them).

249 Testimony of Michael McElroy on Nov. 30, 2001.

been invested in Leali`i.[250]

Accordingly, the court concludes that, even if sovereign immunity was inapplicable, due to actions and inaction constituting waiver, Plaintiffs are barred from requesting injunctive relief with respect to the Leali`i lands.

C. IN THE ALTERNATIVE, PLAINTIFFS ARE ESTOPPED FROM OB

For the same reasons that Plaintiffs waived any challenge to the legality of sales of Leali`i lands, Plaintiffs are estopped from making that challenge.

The Hawaii Supreme Court has articulated the doctrine of equitable estoppel as follows:

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[250] *Id.;* Testimony of Neal Wu on Dec. 4, 2001.

> The rule of law is clear that where one by his words, or conduct, wilfully causes another to believe the existence of a certain state of things, and induced him to act on that belief so as to alter his previous position, the former is precluded from averring against the latter a different state of things, as existing at the same time.[251]

AA close cousin to the doctrine of equitable estoppel, quasi estoppel is grounded in the equitable principle that one should not be permitted to take a position inconsistent with a previous position if the result is to harm another ... Put in more colloquial terms, one cannot blow both hot and cold.@[252]

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[251] *Molokai Ranch, Ltd. v. Morris*, 36 Haw. 218, 223 (1942); *Anderson*, 59 Haw. at 587-88, 585 P.2d at 946.

[252] *Univ. of Haw. Prof. Assembly v. Univ. of Haw.*, 66 Haw. 214, 221, 659 P.2d 720, 725-26 (1983), *citing Godoy v. County of Hawaii*, 44 Haw. 312, 320, 354 P.2d 78, 82 (1969); *Munoz v. Ashford*, 40 Haw. 675, 688 (1955); *Yuen v. London Guar. & Accident Co.*, 40 Haw. 213, 230 (1953); *Hartmann v. Bertelmann*, 39 Haw. 619, 628 (1952).

The doctrine of equitable estoppel is well illustrated by the facts involved in the case of *Univ. of Haw. Assembly v. Univ of Haw.*, 66 Haw. 214, 659 P.2d 720 (1983). In that case, the University of Hawaii, after entering into an arbitration agreement and proceeding to arbitration on a grievance filed by a faculty member, filed a motion to vacate the award alleging that the arbitrator did not have the authority to decide the grievance. In rejecting the University=s attempt to avoid the award, the Supreme Court held that the University was equitably estopped, noting:

> We find this complaint untenable. The University could have either excluded subjects such as tenure and promotion from the ... arbitration provisions altogether, or it could have made it clear, at the outset of the arbitration proceedings, that it was not submitting to the arbitrator the power to actually grant tenure or promotion. As a result of the University=s failure to raise its objections, the grievant has been substantially disadvantaged in terms of time and money spent in the arbitration process and in litigation. Estoppel by any name is based primarily on considerations of justice and fair play, neither of which would be enhanced if the University were allowed to claim it had no idea what it was getting into when it agreed to arbitrate this grievance. We thus hold that the University is estopped from claiming the arbitrator was not empowered to grant tenure or promotion upon a finding of arbitrary or capricious conduct.

Applying equitable estoppel and quasi estoppel principles to the case at hand, during the years of negotiations and planning for Leali`i before Plaintiffs filed this lawsuit, Plaintiffs did not suggest that they would file a lawsuit challenging the right to sell the lands at Leali`i to HFDC and in turn to third parties for their homes. During these same five years, the Plaintiffs had notice of the planned development at Leali`i, but chose not to challenge it. The State spent substantial amounts of time and money developing Leali`i before November 1994 when Plaintiffs first filed suit.

By their action (or inaction with respect to the Individual Plaintiffs) and conduct, as further described in Section II(E) above, Plaintiffs caused the HFDC to believe that no one would challenge its acquisition of the Leali`i lands as long as OHA and DLNR received fair monetary compensation for the lands. Plaintiffs= acquiescence in the development of Leali`i and HFDC=s expenditure of funds for infrastructure, and OHA=s active participation in negotiations for an appraised value for the ceded lands induced the State to continue moving forward with the housing development. The State obtained necessary land use changes, entered into agreements with developers, made agreements with county officials and spent over $31 million for infrastructure at Leali`i alone. The State significantly altered its position because of the statements and conduct of OHA, as well as the inaction of the Individual Plaintiffs.[253] Plaintiffs are, therefore, also estopped from challenging the State=s sale of

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[253] *See, e.g., Maria v. Freitas*, 73 Haw. 266, 273, 832 P.2d 259, 264 (1992) (A[T]he theory of equitable estoppel requires proof that one person *wilfully* caused another person to erroneously believe a certain state of things, *and* that person *reasonably relied* on this erroneous belief to his or her detriment@) (emphasis added)); *Ravelo v. County of Hawaii*, 66 Haw. 194, 658 P.2d 883 (1983) (ruling that a claim of estoppel could proceed based on allegations that the plaintiffs had quit their jobs and moved to the Big Island because of the county=s assurance of employment); *Doherty v. Hartford Ins. Group*, 58 Haw. 570, 573, 574 P.2d 132, 134-35 (1978) (AOne invoking equitable estoppel must show that he or she has detrimentally relied on the representation or conduct of the person sought to be estopped *and* that such reliance was reasonable.@ (emphasis in original; citations omitted)).

public trust lands lands at Leali`i.

It is true, as argued by the OHA Plaintiffs, that the doctrine of equitable estoppel cannot be invoked against a governmental agency such as OHA in the absence of overt detrimental reliance and Amanifest injustice.@[254] The law recognizes that governmental bodies must be able to change their minds in some circumstances. Thus, a mere change of mind by the government does not invoke estoppel unless the other party has detrimentally relied upon the agency=s earlier position to such an extent that it would constitute a Amanifest injustice@ to fail to invoke and apply the doctrine. In this case, however, based on the facts above, the requisite showings of extensive detrimental reliance by and manifest injustice to the Defendants have been satisfied to invoke equitable estoppel against the OHA Plaintiffs.

Thus, the doctrine of estoppel prohibits both sets of Plaintiffs from seeking injunctive relief with respect to the sale of Leali`i lands.

D. IN THE ALTERNATIVE, THE SALE OF LEALI`I LANDS DOES NOT CONSTITUTE A BREACH OF TRUST

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[254] *See, e.g., State ex rel. Bronster v. Yoshina*, 84 Haw. 179, 932 P.2d 316 (1997) (rejecting an argument that the State Attorney General was barred by laches from bringing a claim designed to determine the proper interpretation of a provision of Hawaii=s Constitution). Other decisions in the eastern claims cases have focused on defenses based on laches, estoppel, adverse possession, and statutes of limitations. Typically, these defenses have been struck as inconsistent with the government trust responsibility particularly with regard to the Nonintercourse act. *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D.R.I. 1976); and *Schaghticoke Tribe v. Kent School Corp.*, 423 F. Supp. 780 (D. Conn. 1976).

Even if sovereign immunity, waiver, and estoppel were inapplicable, based on the analysis in Section VI(G) below, the sale of ceded lands at Leali`i would not constitute a breach of trust. Therefore, on this basis also, Plaintiffs fail to meet the first prong for the granting of injunctive relief with respect to the sale of Leali`i lands--that they prevail on the merits.

For all of these reasons, Plaintiffs are not entitled to an injunction prohibiting the further sale of Leali`i lands pursuant to the plan for residential development.

VI. ANALYSIS OF REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF PROHIBITING SALE OF CEDED LANDS, INCLUDING LANDS AT LEALI`I, BASED ON ALLEGED ILLEGALITY AND BREACH OF TRUST

A. THE HAWAII SUPREME COURT=S DECISION IN THE EWA MARINA CASE DOES NOT HAVE COLLATERAL ESTOPPEL EFFECT

Defendants argue that based on the Hawaii Supreme Court=s November 12, 1998 memorandum opinion in *Trustees of the Office of Hawaiian Affairs v. Board of Land & Natural Resources*,[255] Plaintiffs are collaterally estopped from even arguing that the State does not have the power to sell ceded lands.[256]

Pursuant to Rule 35(c) of the Hawaii Rules of Appellate Procedure:

> A memorandum decision . . .shall not be cited in any other action or

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[255] *See* Ex GGGGGG, Nov. 12, 1998, Mem. Op. in *Ewa Marina* (No. 95-0330-01).

[256] (Sup. Ct. No. 19774) (A*Ewa Marina*@); *See* A[Defendants Proposed] Opinion of the Court, Including [Proposed] Findings of Fact, Conclusions of Law, and Order,@ filed Dec. 19, 2001, p. 20 *et seq*.

> proceeding except when the opinion . . . establishes the law of the pending case, res judicata or collateral estoppel. . . [.]

Res judicata is a common law doctrine which prevents multiplicity of suits and provides a limit to litigation.[257] By Apreventing inconsistent decisions,@ res judicata Aencourages reliance on adjudication.@[258]

Collateral estoppel is an aspect of res judicata and precludes relitigation of a fact or issue that was previously determined in a prior suit on a different claim between the same parties or their privies. [259] A Ajudgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided.@[260]

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[257] *Kauhane v. Acutron Co, Inc.*, 71 Haw. 458, 463, 795 P.2d. 276, 278 (1990) quoted in *State of Hawaii v. Magoon*, 75 Haw. at 164, 189, 858 P.2d. 712, 724 (1993); *Bolte v. Aits, Inc.*, 60 Haw. 58, 60, 587 P.2d. 810, 812 (1978).

[258] *Kauhane*, 71 Haw. at 463, 795 P.2d. at 278.

[259] *Dorrance v. Lee*, 90 Haw. 143, 148, 976 P.2d 904, 909 (1999).

[260] *Magoon*, 75 Haw. at 190, 858 P.2d at 725; *Kauhane*, 71 Haw. at 463, 795 P.2d at 278; *Pele Defense Fund*, 73 Haw. at 599, 837 P.2d at 1261; *accord, Silver v. Queen's Hospital*, 63 Haw. 430, 435-36, 629 P.2d 1116 (1981).

Defensive collateral estoppel denies a plaintiff who lost a claim Aanother opportunity to rehash the claim ... by switching adversaries.@[261] The public must know that judicial pronouncements shall be accepted as the Aundeniable legal truth.@[262] In general, a party to litigation is therefore collaterally estopped from relitigating an issue decided against it in a subsequent suit if three elements exist: (1) the issue decided in the prior adjudication is identical with the one presented in the action at question, 2) there was a Afinal judgment on the merits@ in the prior action and 3) the Aparty against whom the plea of res judicata is asserted [was] a party or in privity with a party to the prior adjudication.@[263] More recently, the Hawaii Supreme Court in *Dorrance v. Lee*[264] stated that collateral estoppel also requires that the issue decided in the previous litigation was Aessential@ to the final judgment.

The *Ewa Marina* decision arose from an appeal to the Hawaii Supreme Court from an administrative appeal filed by OHA. On January 30, 1995, OHA filed an appeal to the Circuit Court of the First Circuit, State of Hawaii, from the Findings of Fact, Conclusions of Law, Decision and Order entered on December 29, 1994 by the BLNR that granted a Conservation District Use Application (ACDUA@) and allowed Haseko (Ewa), Inc. (AHaseko@) to dredge a 3,000 foot long entrance channel from submerged ceded lands off the Ewa coast for its planned Ewa Marina

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261 *Morneau v. Stark Enterp*, 56 Haw. 420, 424, 539 P.2d 472, 476 (1975); *Gomes v. Tyau*, 57 Haw. 163,167, 552 P.2d 640, 643 (1976).

262 *Ellis v. Crockett*. 51 Haw. 45, 56, 451 P.2d. 814, 822 (1969).

263 *Silver*, 63 Haw. at 436, 629 P.2d at 1121; *Magoon*, 75 Haw. 190-91, 858 P.2d. at 725 *quoting Morneau* 56 Haw. 424, 539 P.2d. at 475.

264 90 Haw. at 149.

Development.

OHA argued before the Circuit Court and on appeal to the Hawaii Supreme Court, among other things, that the BLNR=s issuance of the CDUA permit was a breach of the State=s fiduciary duties under section 5(f) and the Apublic trust doctrine,@ and that the issuance of the CDUA permit constituted an improper Adisposition@ of public lands.[265] OHA specifically argued that the CDUA permit was a disposition of State land that must comply with Chapter 171 of the Hawaii Revised Statutes.[266] The Hawaii Supreme Court noted that Athe actual issue in this case, therefore, is whether the issuance of the CDUA permit is a proper disposition of ceded lands.@[267]

In its memorandum opinion deciding the *Ewa Marina* case, the Hawaii Supreme Court adopted the United States Court of Appeals for the Ninth Circuit=s 1990 holding in *Price v. State of Hawaii*[268] that Athe language of section 5(f) declares that the State is to have the power to manage the property and its income in a manner that the constitution and the laws of the State provide. That confers broad authority upon the State.@[269] The Supreme Court also concluded that A[i]t would be error to read the words >public trust= [in ' 5(f)] to require that the State adopt any particular method ... of management for the ceded lands. All property held by a state is held upon a >public trust.=

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265 *See* Ex. HHHHHH.

266 *See* Ex JJJJJJ.

267 *See* Ex. GGGGGG, at p. 22.

268 921 F.2d 950, 955 (9th Cir. 1990).

269 Ex. GGGGGG, at p. 19.

Those words alone do not demand that the a state deal with its property in any particular manner.@[270]

Specifically with respect to the Adisposition@ of ceded lands under Section 5(f) of the Admissions Act and the State Constitution, the Supreme Court stated:

> --A[S]ection 5(f) does not limit the use of the ceded lands
>
> --AThe constitution and the laws of the State of Hawaii clearly contemplate the disposition of ceded lands.@[272]

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270 *Id*.

271 Ex. GGGGGG, at p. 21.

272 *Id*.

--APursuant to HRS ' 171-18 (1993), ›all proceeds and income from the sale, lease or other disposition of [ceded lands] shall be held as a public trust for [the five purposes enumerated in 5(f)].= This statutory section expressly recognizes the power of the State of Hawaii to dispose of ceded lands. Additionally, Article XII, section 6 of the Hawaii Constitution states that ›the b rata portion of the ceded lands trust.=@[273]

--AThe State ... has the power to dispose of ceded lands.@[274]

--AIn 1995, the Attorney General correctly opined that the State has the legal authority to sell or dispose of ceded lands.@[275]

--AIn relation to ceded lands, Article XII, ' 4, [of the State Constitution] ... reads: ›The [ceded lands] shall be held by the State as a public trust for native Hawaiians and the general public.= ›Article XII, ' 4 was added to the [Hawaii] Constitution to expressly recognize the trust purposes and trust beneficiaries of the '(5f) trust, clarifying that the State=s trust obligations extend beyond the Hawaiian Home Lands Trust.= This provision had no effect on the State=s power to dispose of ceded lands.@[276]

Thus, if the decision of the Hawaii Supreme Court in *Ewa Marina* has collateral

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273 *Id*.

274 *Id*.

275 *Id*. at fn. 6, *citing* A.G. Op. 95-03.

276 *Id*. at p. 24.

estoppel effect, the OHA Plaintiffs, at minimum, and the Individual Plaintiffs, if found to be in privity with OHA, would be prohibited from asserting that the State of Hawaii lacks power to sell ceded lands.

Pursuant to Rule 40 of the Hawaii Rules of Appellate Procedure, parties to an appeal may seek reconsideration of an appellate order for any Apoints of law or fact that the [] party contends the court has overlooked or misapprehended.@ Apparently due to concerns regarding the potential collateral estoppel effect of *Ewa Marina* on this case, OHA filed a motion for reconsideration on April 6, 1998.[277] In its motion for reconsideration, OHA argued that it did not have an opportunity to litigate the issue of whether the State could sell or dispose of ceded lands, and cited to the 1993 Apology Resolution, Article XII, Section 4 of the Hawaii State Constitution, and additional legal arguments raised in this litigation.[278]

In its April 15, 1998 Order Denying Motion For Reconsideration, the Hawaii Supreme Court ruled as follows:

> Upon consideration of Appellant The Trustees of the Office of Hawaiian Affairs= motion for reconsideration, it appears that the collateral estoppel effects of our opinion in the instant case are not ripe for determination at the present time and the proper forum for consideration of this issue would be the circuit court in a future case where collateral estoppel is actually raised and litigated. Therefore,
>
> IT IS HEREBY ORDERED the motion for reconsideration is denied.[279]

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277 *See* Ex.534, OHA=s Motion for Reconsideration in *Ewa Marina*.

278 *See id*. at 3-4.

279 *See* Ex. 535.

Therefore, this court must determine whether the *Ewa Marina* case has collateral estoppel effect in this action.

Defendants argue that all elements of collateral estoppel are met here. They correctly allege that there was a Afinal judgment on the merits@ in *Ewa Marina*. They also properly assert that OHA was a party to that case. Moreover, the issue of whether the State could sell or dispose of ceded lands for public purposes was actually litigated.

In addition, the court agrees that the Individual Plaintiffs are privies of OHA for purposes of the collateral estoppel effect of *Ewa Marina*. The definition of privity under Hawaii law Ahas moved from the conventional and narrowly defined meaning of mutual or successive relationship[s] to the same rights of property to merely a word used to say that the relationship between the one who is a party of record and another is close enough to include that other within the res judicata.@[280] One of the public land trust=s five purposes is Athe betterment of conditions of native Hawaiians,@ and OHA=s purposes include A[a]ssessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians.@[281] OHA can only act through its trustees.[282] As native Hawaiians, the Individual Plaintiffs are beneficiaries of OHA, and are privies of OHA for purposes of any collateral estoppel effect of the *Ewa Marina* case.

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280 *In the Matter of the Dowsett Trust*, 7 Haw. App. 640, 646, 791 P.2d 398, 402 (1990) (internal citations omitted).

281 H.R.S. Sec. 10-3.

282 H.R.S. Secs. 10-4 and 10-5.

Therefore, the general elements for collateral estoppel have been satisfied. Based on two additional factors involved in a collateral estoppel analysis, however, this court concludes that the *Ewa Marina* case does not have collateral estoppel effect.

The first is the additional requirement contained in *Dorrance v. Lee* that collateral estoppel requires that the issue decided in the previous litigation be Aessential@ to the final judgment. [283] The issue of whether the State has the power to sell ceded lands, which is a primary issue raised by the Plaintiffs in this case, was not Aessential@ to the final judgment in *Ewa Marina*, which merely decided whether the BLNR could issue a permit to dredge submerged ceded lands.

The second additional requirement for applicability of the preclusive effects of collateral estoppel is one reflected in several cases, including *Pele Defense Fund v. Paty*,[284] that the plaintiff against whom collateral estoppel is asserted have had Aa full and fair opportunity to litigate the relevant issues.@[285] Taking judicial notice of the files in the *Ewa Marina* case, which the court has reviewed, the court cannot conclude that OHA had a Afull and fair opportunity to litigate the relevant issues@ raised in this case regarding the State=s sale of ceded lands. Although arguments regarding breach of trust were raised by OHA in that case, they were not fully briefed and thoroughly argued as they were in this case. In fact, when OHA filed the appeal of the BLNR decision to allow a dredging permit of submerged ceded lands in the *Ewa Marina* case, this lawsuit was already pending, and would have been the natural vehicle to fully litigate the legal questions raised in this lawsuit.

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283 90 Haw. at 149.

284 73 Haw. 578, 837 P.2d 1247 (1992), *citing Morneau v. Stark Enters*, 56 Haw. 420, 539 P.2d 472 (1975).

285 *Pele Defense Fund*, 837 P.2d at 1261, *citing Morneau*, 539 P.2d at 474.

Therefore, the court concludes that *Ewa Marina* does not have collateral estoppel effect on this lawsuit, and that the Plaintiffs are therefore not precluded from obtaining a decision from this court regarding whether the State has the legal power to sell ceded lands, and, if so, whether exercise of such a power of sale would constitute a breach of the State=s duties to native Hawaiians as trustee of the ceded lands trust.

B. THE POLITICAL QUESTION DOCTRINE AND SOVEREIGN IMI

Having concluded that the *Ewa Marina* case does not have collateral estoppel effect, the court must now reach the merits of Plaintiffs claims. The court must first address whether the State has the power to sell ceded lands and, if so, whether such sales constitute a breach of trust.

Plaintiffs= First Amended Complaint alleges that the sale of ceded lands is illegal based on the illegality of the overthrow of the Kingdom of Hawaii.[286] Plaintiffs argue that this violation of the Law of Nations creates a cloud on the State=s current title to the ceded lands. Plaintiffs also argue that developments in the treatment of Native American claims, by analogy, create a claim in favor of native Hawaiians.

The Hawaii Supreme Court has held, however, that the issue of whether the Territory of Hawaii received good title to ceded lands is a non-justiciable political question. In

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[286] *See* First Amended Complaint, filed August 11, 1995, para. 12 through 14.

Territory v. Kapiolani Estate,[287] refusing to recognize a claim disputing the Territory=s title to ceded lands, the Supreme Court held:

[287] 18 Haw. 640 (1908); *See also Territory v. Puahi*, 18 Haw. 649 (1908).

> The validity of the declaration in the constitution of the Republic of Hawaii, under which the present title is derived, does not present a judicial question. Even assuming, but in no way admitting, that the constitutional declaration was confiscatory in nature, this court has no authority to declare it invalid. The subsequent derivation of the title by the United States is clear. The position here taken in refusing to regard the defendant=s claim that title is otherwise than is fixed by constitutional law as presenting a judicial question is well illustrated in numerous decisions of the United States Supreme Court.[288]

Thus, the Apolitical question doctrine,@ a principle of justiciability, precludes this court=s consideration of the merits of Plaintiffs claim that the sale of ceded lands is prohibited due to a cloud on the State=s title due to the illegality of the overthrow.

In addition, the doctrine of sovereign immunity also precludes this claim. In general, sovereign immunity Aprecludes any suit against the State without its express consent, which

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[288] *Id*. at 645-46. *See also, Puahi*, 18 Haw. at 651 (rejecting challenge to the Territory=s title on the basis that the question was non-justiciable); *and see, United States v. Mowat*, 582 F.2d 1194, 1206 (9th Cir. 1978), *cert. denied*, 439 U.S. 967 (1978) (rejecting challenge to the United States=s title to public lands as Afrivolous.@)

immunity likewise covers state officials acting in their official capacities.@[289]

Case law has held that sovereign immunity does not bar a suit for injunctive relief to prohibit state officials from acting in an illegal manner.[290] The State of Hawaii has not consented, however, to be sued in a lawsuit contesting the validity of its title to the ceded lands. AIt is the law in this jurisdiction that a proceeding against property in which the State of Hawaii has an interest is a suit against the State and cannot be maintained without the consent of the State,@ so that the State Aand its interest in land [are] immune from suit.@[291] AIf it be made to appear at any stage of the case that the State claims title, the court=s jurisdiction over the merits of such claim thereby is ousted under the doctrine of sovereign immunity.@[292]

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289 *Helela v. State*, 49 Haw. 365, 369, 418 P.2d 482, 485 (1966).

290 *See Pele Defense Fund v. Paty*, 73 Haw. 578 (1992).

291 *A.C. Chock, Ltd. v. Kaneshiro*, 51 Haw. 87, 88, 451 P.2d 809, 811 (1969) (dismissing mechanics lien naming the State).

292 *Marks v. Ah Nee*, 48 Haw. 92, 94, 395 P.2d 620, 622 (1964).

A claim for injunctive and declaratory relief that would have the effect of depriving the State of control over public lands under Hawaii Revised Statutes Chapters 171 and 201E is the Afunctional equivalent of a quiet title action,@ and is barred by sovereign immunity.[293] Looking beyond the pleadings to Aexamine the effect@ of the suit and Aits impact on these special sovereignty interests [of the State],@ sovereign immunity bars Plaintiffs= claims to the extent they seek relief based on an allege cloud on the State=s title to ceded lands. Where the Arequested injunctive relief would bar the State=s principal officers from exercising their governmental powers and authority over the disputed lands and waters,@ and Awould diminish, even extinguish, the State=s control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory,@ sovereign immunity applies.[294]

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[293] *See Idaho v. Couer D=Alene Tribe*, 521 U.S. 261 (1997) (suit by Couer D=Alene tribe, claiming ownership or, alternatively, a beneficial interest in submerged lands in Lake Couer D=Alene, to enjoin State control over such land was barred by the Eleventh Amendment). Even though the Couer D=Alene Tribe styled its suit as one for declaratory and injunctive relief, sovereign immunity applied because the effect of the relief they sought Ais close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe.@ *Id*. at 282.

[294] *Id*.

The Plaintiffs cite *State of Hawaii v. Zimring*[295] for the proposition that the State has only Anaked@ title to the ceded lands.[296] *Zimring* does not, however, support Plaintiffs= position regarding illegality of sales of ceded lands. In *Zimring*, the Hawaii Supreme Court held that a lava extension adjacent to private property was Apublic domain,@ title to which passed to the State from the federal government pursuant to the Admission Act.[297] In reaching its conclusion, the Supreme Court analyzed the history of public lands in Hawaii. The Court concluded that the Republic quitclaimed Aall of its property interests@ in public lands to the United States.[298] The Supreme Court found that when the United States stated in the Organic Act that the Apossession, use and control@ of ceded lands (excluding those set aside for federal uses) would remain in the territory until otherwise provided by Congress, the United States (not Hawaii) retained Ano more than naked title to the public lands.@[299]

When Hawaii became a state pursuant to the Admission Act, however, complete title and control passed to the State, subject to the reservation Athat any public lands >set aside= for federal use by act of Congress or by order of the President or the governor of Hawaii prior to Statehood or within five years from admission would remain federal property.@[300] Thus, the Anaked title@ language of *Zimring* does not apply to the title obtained by the State of Hawaii upon admission to

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295 58 Haw. 106, 566 P.2d 725 (1977).

296 *See, e.g,* OHA Plaintiffs= Trial Memo, filed Nov. 6, 2001, at p. 2.

297 *Id*. at 123.

298 *Id*.

299 *Zimring,* 58 Haw. at 124 *cited in* OHA Plaintiffs= Trial Memo, filed Nov. 6, 2001, at p. 2.

300 *Id*. at 125.

the United States.

With respect to rights of native Hawaiians based on analogies to treatment of Native American claims, the Ninth Circuit Court of Appeals has stated, A[n]or can it be said that ' 5(f) generally creates a trust which demands the exacting standards of administration that the United States has often imposed on itself when it is dealing with Native Americans.@[301] Cases dealing with recognition of Native American claims or fiduciary duties with respect to land or assets are based on federal statutes or treaties that allow such claims, or which set aside such lands or money exclusively for indigenous people pursuant to specific acts of Congress or the executive branch of the United States government.[302] In addition, it has been held that absent express statutory authority to do so, courts lack

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301 *Price,* 921 F.2d at 955 *citing Seminole Nation v. United States,* 316 U.S. 286, 296-97 (1942).

302 *See, e.g., Cramer v. United States*, 261 U.S. 219, 230 (1923) (voiding grant of lands previously occupied by Indians based on language in the initial land patent grant by the government which Aexcepted ... such lands >as shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of,@ where the specific land at issue was Areserved or otherwise disposed of@ within the language of the exception in the grant.); *United States v. Creek Nation*, 295 U.S. 103 (1935) (affirming award of money damages to the Creek Nation for the negligent taking of lands which had been excluded from its reservation, title to which Congress had conveyed to the tribe by treaty and statute); *Seminole Nation v. United States*, 316 U.S. 286 (1942) (claim for breach of fiduciary duty against the United States for payments it made to a tribal treasurer that was misappropriating funds initially dismissed for lack of jurisdiction, but allowed after Congress amended the statute allowing for breach of fiduciary claims by Indians); *Menominee Tribe v. United States*, 101 Ct. Cl. 22 (1942) (claim for mismanagement of lumber resources under a federal statute allowing Indians to bring claims against the government arising out of a treaty, statute or mismanagement of Indian property); *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973) (claim under 1930 statute requiring the government to pay interest on all funds unless otherwise authorized by law and other statutes requiring the government to invest Indian funds in higher rate instruments); *Cheyenne-Arapahoe Tribes v. United States*, 512 F. 2d 1390 (Ct. Cl. 1975) (statutory claim for breach of fiduciary duty for the Bureau of American Affairs= alleged failure to Amaximize the trust income by prudent investment@ after it took control of Indian funds); *Menominee Tribe of Indians v. United States*, 607 F.2d 1335, 1339, 121 Ct. Cl. 506 (1979), *cert. den.*, 449 U.S. 899 (1980) (vacating district court ruling that Congress violated a Afiduciary@ duty to the Menominee Tribe by passing legislation that ended federal supervision over the tribe because Court found that it had no jurisdiction to determine whether Congress breached any fiduciary duty to Indians, but remanding with directions to determine whether the Executive Branch violated any statute or treaty by its acts); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 416 (1980) (claim by the Sioux Nation for damages under a statute Congress passed in 1976 which allowed for the payment of interest on amounts that the United States had paid to the Sioux Nation for lands taken in violation of the Fort Laramie Treaty); *United States v. Mitchell,* 463 U.S. 206 (1983) (General Allotment Act of 1887, ch. 119, 24 Stat. 388, as amended, 25 U.S.C. ' 331, *et seq*. did not give

jurisdiction to adjudicate claims to Aaboriginal@ title to land brought by aborigines.[303] Thus, the recognition of Native American claims also involve political questions.

Therefore, the political question doctrine and sovereign immunity preclude this court from considering Plaintiffs= claims based on international law and Native American law that sales of ceded lands are prohibited due to the illegality of the overthrow of the Kingdom of Hawaii.

C. AS CORRECTLY ANALYZED IN ATTORNEY GENERAL OPINION 95-3, THE STATE HAS THE LEGAL AUTHORITY TO SELL CEDED LANDS

Indians a right to sue for mismanagement Indian of trust lands, but Indians could sue under the Tucker Act, 28 U.S.C. ' 1491); *Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 336 (1986) (statutory claim for alleged breach of duties in the management of tribal forest lands); *Chippewa Indians v. United States*, 301 U.S. 358, 375-76 (1937) (affirming dismissal of claim that the United States disposed of lands ceded to it for the Abenefit of plaintiffs,@ without questioning right to dispose of lands).

[303] *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 285 (1955) (holding that Athe taking by the United States of >unrecognized= or >aboriginal= Indian title is not compensable under the Fifth Amendment,@ and limiting its award under *Sioux Nation* Aonly to instances in which >Congress by treaty or other agreement has declared that thereafter Indians were to hold lands permanently.@)

On July 17, 1995, then Attorney General Margery S. Bronster responded to an inquiry from then Governor Benjamin J. Cayetano regarding Awhether the State has the legal authority to sell or dispose of ceded lands.@[304] Although not binding, opinions of the Attorney General are Ahighly instructive.@[305]

In this case, the court agrees with the following analysis of Attorney General Opinion 95-3 regarding the State=s legal authority to sell ceded lands:[306]

July 17, 1995

The Honorable Benjamin J. Cayetano
Governor of Hawaii
Executive Chambers
Hawaii State Capitol
Honolulu, Hawaii 96813

Dear Governor Cayetano:

Re: Authority to Alienate Public Trust Lands

This responds to your request for our opinion as to whether the State has the legal authority to sell or dispose of ceded lands.

For the reasons that follow, we are of the opinion that the State may

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304 *See* Ex. LLL, Attorney General Opinion No. 95-3, dated July 17, 1995, re AAuthority to Alienate Public Trust Lands.@

305 *Kepoo v. Watson,* 87 Haw. 91, at 99, fn. 9, 952 P.2d 379 (1998)

306 Ex. LLL. It should be noted, however, that page 10 of Attorney General Opinion 95-3 is missing from the exhibit received into evidence.

sell or dispose of ceded lands. We note that any proceeds of the sale or disposition must be returned to the trust and held by the State for use for one or more of the five purposes set forth in ' 5(f) of the Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959) (the "Admission Act").

In Part I of this opinion, we determine that under the Admission Act and the Constitution the State is authorized to sell ceded lands. In Part II, we conclude that the 1978 amendments to the State Constitution do not alter the State's authority.

I. The Admission Act Authorizes the Sale or Disposition of Public Trust Land.

The term "ceded land" as used in this opinion is synonymous with the phrase "public land and other public property" as defined in ' 5(g) of the Admission Act:

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

The United States granted the ceded lands to the State of Hawaii in ' 5(b) of the Admission Act. That section, in relevant part, declares:

> (b) Except as provided in subsections (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property . . . .

Section 5(f) of the Admission Act imposes a trust upon these lands and appoints the State as the trustee.[1] The section states:

> (f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such ma supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university. [Emphases added.]

The Admission Act ' 5(f) expressly acknowledges that ceded or public trust land may be alienated when it refers to "the proceeds from the sale or other disposition of any such lands."

There is further evidence that alienation of the trust land was contemplated and permitted under ' 5(f); one of the five enumerated purposes for which the public trust land may be used is, "the development of farm and home ownership on as widespread a basis as possible." (Emphasis added.)

This Admission Act language is echoed in article XI, ' 10 of the State Constitution (previously numbered article X, ' 5) which provides:

The public lands shall be used for the development of farm and home ownership on as wi

The Hawaii Supreme Court has affirmed that "[t]he language of this section refers expressly to farm and home ownership and not leaseholds." Big Island Small Ranchers Ass'n v. State, 60 Haw. 228, 235, 588 P.2d 430, 435 (1978). The history of the 1950 constitution further reflects that fee ownership was intended. Standing Committee Report No. 78, adopted by the Committee of the Whole, stated:

The Committee unanimously agreed that for the public good, fee simple homes and farms should be made available on as widespread basis as possible, however, i owners on the public domain, the more stable the economy of the State will be . . . .

1 Proceedings of the Constitutional Convention of Hawaii 1950, at 233 (1960) (emphases added).

Additionally, ' 5(f) mandated that the constitution and the law prescribe the manner in which the State was to manage and dispose of ceded lands. In adopting article XIV, ' 8 (now renumbered, and as amended, article XVI, ' 7) "the State affirmatively assume[d] the ' 5(f) trust responsibilities." Pele Defense Fund v. Paty, 73 Haw. 578, 586 n.2, 837 P.2d 1247, 1254 n.2 (1992), cert. denied, ___ U.S. _____, 113 S. Ct. 1277, 122 L. Ed. 2d 671 (1993). That section provided that:

[A]ny trust provisions which the Congress shall impose, upon the admission of this St

Thus, the State Constitution placed the responsibility for compliance with the Admission Act on the legislature.

The legislature carried out this responsibility by enacting Act 32, 1962 Haw. Sess. Laws 95. Section 1 of the act provided, in relevant part:

_ By virtue of section 15 of the Statehood Act, a serious question exists as to whether or not Hawaii has any land laws relating to the management and d

It is of immediate importance to the economy and to the people of Hawaii that we adopt a set of laws for the management and disposition of our public lands in accordance with present day needs.

Section 2 of Act 32, codified as chapter 171, Haw. Rev. Stat., contains the provisions for the management and disposition of public lands.[2] Chapter 171 applies to any and all "public lands," including ceded lands or lands the State acquired by other means.[3] Act 32 recognized the uniqueness of the ceded lands in section -18 of section 2 (codified as Haw. Rev. Stat. 171-18). It prescribed that "all proceeds and income from the sale, lease or other disposition" of ceded lands were to "be held as a public trust." Like section 5(f) of the Admission Act, Haw. Rev. Stat. ' 171-18 expressly provides that ceded or public trust land may be alienated. Both the Admission Act and Haw. Rev. Stat. ' 171-18 refer to "the proceeds and income from the sale, lease or other disposition" of ceded lands.

Dispositions of ceded lands may also include land exchanges in which the State conveys ceded lands to other parties in exchange for land from those parties. In its definition of ceded lands, the Admission Act deals expressly with land exchanges as a means of disposing of ceded lands.

As noted earlier, ' 5(g) of the Admission Act defines "public land and other public property" as:

the lands and properties that were ceded to the United States by the Republic of Hawaii

Land exchanges, like other types of dispositions, were contemplated by the Legislature when it enacted Act 32, 1962 Haw. Sess. Laws 95. Presently codified as chapter 171, Hawaii Revised Statutes, the statute provides for exchanges of public for private lands at '' 171-50 and -50.2. Because any such exchange must be made for "substantially equal value" ' 171-50(b), the value of the ceded land trust is not diminished by the exchange.

This treatment of land exchanges affecting the trust so as not to diminish the value of the trust is an analogue to Haw. Rev. Stat. ' 171-18, which provides that proceeds and income from the sale, lease or other disposition of ceded lands "be held as a public trust." Thus, whether the disposition of the ceded lands results in money or land, the proceeds are subject to the trust and must be held by the State for use for trust purposes.

The Admission Act, pursuant to which the State acquired title to ceded lands, allowed the State to sell, alienate, or otherwise dispose of those lands. The State Constitution and laws enacted thereunder also reflect the State's right to sell.

II. The 1978 Constitutional Amendments Did Not Alter the Express Authority to Alienate Public Trust Land.

No law enacted after the Admission Act has altered the alienability of ' 5(f) trust land. We appreciate, however, that the argument has been made that a change in the State Constitution in 1978 altered the law on the issue of alienability.

In 1978, Hawaii amended its constitution to include a specific reference to the public trust established in the Admission Act. Article XII, ' 4 provides:

> The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

In article XVI, ' 7, referred to by article XII, ' 4, the State affirmatively assumes the Admission Act ' 5(f) trust provisions, and consequently the trust purposes, powers, and authority. Pele Defense Fund, 73 Haw. at 586, n.2, and 601, 837 P.2d at 1254, n.2, and 1262. Article XVI, ' 7 now provides:

> Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII."[4]

An analysis of the meaning of article XII, ' 4 requires consideration of other related provisions of the Constitution, as amended in 1978. "A constitutional provision must be construed in connection with other provisions of the instrument, and also in light of the circumstances under which it was adopted and the history which preceded it, and the natural consequences of a proposed construction . . . ." In re Carter, 16 Haw. 242, 244 (1904). See also Haw. Rev. Stat. ' 1-16 (1985); Att'y Gen. Op. No. 83-2 (April 15, 1983).

A companion provision to article XII, 4, which also had its origin in 1978 Constitutional Convention is article XII, 6. Section 6 refers to the trust established in article XII, 4 in a manner that leaves no doubt that the ability to alienate public trust land conferred by 5(f) of the Admission Act was recognized as continuing after the 1978 amendments to the constitution. Section 6 states that the Office of Hawaiian Affairs ("OHA") board:

> [S]hall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural

resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; Hawaiians and Hawaiians. [Emphases added.]

This language acknowledges expressly the continued viability of the power, first conferred upon the State by ' 5(f) of the Admission Act, to alienate ceded lands.

If the State did not have continuing authority and power to dispose of ceded lands, "proceeds from that pro rata portion" could not be generated. Further, an interpretation which would render the reference to "proceeds" superfluous should not be adopted. Littleton v. State of Hawaii, 6 Haw. App. 70, 73, 708 P.2d 829, 832 (1985). Therefore, the power and authority to generate proceeds from, or power to alienate, lands held in public trust, exist under article XII, ' 4.

Another provision of the Constitution, article XI, ' 10, also supports the State's continued authority to alienate ceded lands. Article XI, ' 10 of the Hawaii Constitution provides that the "public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law." Although repeal of this provision was proposed in 1978, the repeal was not validly ratified. Kahalekai v. Doi, 50 Haw. 324, 342, 590 P.2d 543, 555 (1979). Absent valid ratification, the proposed repeal was a nullity. Id.; 16 C.J.S. Constitutional Law ' 14 (1984); 16 Am. Jur. 2d Constitutional Law '' 41 and 44 (1979).

Moreover, the proposed repeal was not intended to diminish the power to alienate the public lands for fee home and farm ownership. In fact, Delegate Anthony Chang emphasized: "[t]his [repeal of article X, ' 10] would not preclude the State from developing house or farm lots on public lands, but merely broaden the purpose to which public lands would be used." 1 Proceedings of the Constitutional Convention of Hawaii 1978 (hereinafter referred to as "1978 Proceedings"), at 445-46.[5]

The history of article XII, ' 4, contains nothing to suggest that the section was intended to override the power to sell or dispose of the public trust land provided for in ' 5(f) of the Admission Act.[6] Rather, the history indicates that article XII, ' 4 was intended to reiterate the trust contained in the Admission Act. According to the Standing Comm. Rep., ' 4 "recites the trust corpus of section 5(b) and names the two principal beneficiaries established in section 5(f) of the Admission Act - those [who are] native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended, and the general public." Stand. Comm. Rep. No. 59, 1978 Proceedings, at 643-44.7

Courts have recognized that article XII, ' 4 must be interpreted by reference to the terms of the Admission Act, ' 5(f). According to the Hawaii Supreme Court, "Article XII, ' 4 was added to the Hawaii Constitution to expressly

recognize the trust purposes and trust beneficiaries of the ' 5(f) trust." Pele Defense Fund v. Paty, 73 Haw. 578, 603, 837 P.2d 1247, 1263 (1992), cert. denied, __U.S. __ , 113 S. Ct. 1277, 122 L. Ed. 2d 671 (1993). The Supreme Court wrote: "Article XII, ' 4 imposes a fiduciary duty on Hawaii's officials to hold ceded lands in accordance with the ' 5(f) trust provisions." Id., 73 Haw. at 605, 837 P.2d at 1264. There can be no "doubt that the provisions of the [Admission] Act must be looked to when we consider the nature and extent of the State's duties and powers." Price v. State of Hawaii, 921 F.2d 950, 955 (9th Cir. 1990).

The words "public trust" do not require the State to adopt any particular form of management of public lands. "Those words alone do not demand that a State deal with its property in any particular manner . . . . Those words betoken the State's duty to avoid deviating from ' 5(f)'s purpose. They betoken nothing more." Price, 921 F.2d at 956.

The phrase "shall be held by the State as a public trust" in article XII, ' 4, does not mean that the State may not sell the trust land. This language is very like the provision in ' 5(f) of the Admission Act which says that the lands granted to the State "shall be held by said State as a public trust." Significantly, side by side in ' 5(f) with this provision is the language that contemplates proceeds from the sale of the trust land.

The case of State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977), describes common law public trust principles that are generally applicable when a state holds land in trust. The court said:

> Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, e.g., recreation. Sale of the property would be permissible only where the sale promotes a valid public purpose.

58 Haw. at 121, 566 P.2d at 735.

In view of ' 5(f) of the Admission Act, relevant constitutional provisions, and common law public trust principles, we conclude that the State has been and remains empowered to sell trust lands subject to the terms of the trust. This authority was in no way modified by the constitutional amendments made in 1978. In fact, the Constitution, as amended in 1978 refers to proceeds from the sale or disposition of ceded lands with a prospective allocation of such proceeds to OHA.

Very truly yours,

Margery S. Bronster

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

[2] Under ' 171-13, Haw. Rev. Stat., "[e]xcept as otherwise provided by law and subject to other provisions of this chapter, the board may: (1) [d]ispose of public land in fee simple, by lease, lease with option to purchase, license, or permit . . . ." Similarly, ' 171-23, Haw. Rev. Stat. reflects that a land patent or deed may be issued "to the purchaser in fee simple of any public land or other land disposable by the board of land and natural resources."

[3] Haw. Rev. Stat. ' 171-2 defines "public lands" as "all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner . . . ."

[4] Some questions remain as to whether the electorate approved the addition of the last sentence of article XV, ' 7, as proposed by the 1978 Constitutional Convention. See Kahalekai v. Doi, 60 Haw. 324, 590 P.2d 543 (1979).

[5] The constitutuional history reveals that the Constitutional Convention understood that the Admission Act requirements and powers would continue after, and generally be unaffected by, the proposed constitutional amendments. During the debates, Delegate Chang explained the State's authority to manage and dispose of public lands. According to Delegate Change, "[t]he reason that the committee proposal was drafted to delete this portion [article X, ' 5]of the Constitution was because of the evolving concept on the use of public land policy now reflects the uses to which the public lands were suspended to be put in conformance with the Organic Act [sic], and this is the multiple use concept.

"This [repeal of article X, ' 5] would not preclude the State from developing house or farm lots on public lands, but merely broaden the purpose to which public lands should be put. And as I stated, this would be in conformance with the conditions set forth in the Organic Act [sic] with regard to public lands. The purposes to which public lands ought to be put under the terms of the Organic Act [sic] are five in number, and farm and home ownership is only one. . . ." 1978 Proceedings at 445-46. Delegate Change subsequently changed his reference to the Organic Act to the Admission Act. Id. at 446.

[6] The electorate was given "[a] brief description of each of the proposed amendments" in an Informational Booklet which was part of the official 1978 ballot. With respect to article XII, sections 4, 5, and 6, the booklet provided:

If adopted, this amendment

* sets forth the trust corpus and beneficiaries of the Admission Act.
* establishes an Office of Hawaiian Affairs with an elected board of trustees and provides for an effective date.

There was no statement that any change in the purposes of the ' 5(f) trust, or any change in the management or disposition of such public lands subject to ' 5(f), was

proposed or intended. Such change in management and purposes would represent a fundamental change in the trust terms regarding the use and disposition of public lands which would require that the voters be given specific information that such a result was intended. Otherwise, the ratification would be suspect. Kahalekai v. Doi, 60 Haw. 324, 590 P.2d 543 (1979).

[7] In explaining the proposed changes to article XII, Delegate Kekoa Kaapu described the ' 4 amendment as "a redefinition of the public trust, of those elements in the Admission Act which are of benefit to Hawaiians, by setting forth clearly what those two categories of beneficiaries are to make it more easily handleable to administer -- and that is, that the beneficiaries of the public trust under section 5(f) are in fact the general public and native Hawaiians." 1978 Proceedings, at 458 (1980).

According to Delegate John Waihee, "this proposal does not transfer to the trust any state lands. What is concerned is that section 5(f) of the Admission Act sets out categories of individuals or persons who are to receive the revenues from all public lands that were given to the State of Hawaii . . . . So what the trust would do would be to mandate the section of these revenues from public land which are to be given which are presently mandated by the Admission Act to be held in trust for Hawaiians --would be transferred directly to the new entity which we are calling the Hawaiian affairs trust. So what we're talking about in this paragraph is not the transfer of lands but the transfer of revenues that are generated by public lands . . . . We're not taking away any public lands, we're merely directing some of the revenues that are supposed to go to the Hawaiian people." Id. at 462.

D. THE 1993 APOLOGY RESOLUTION AND ACT 359 OF 1993 DO NOT PROHIBIT THE SALE OF CEDED LANDS

The Individual Plaintiffs claim that the 1993 Apology Resolution[307] and Act 359 of 1993[308] constitute changed circumstances that either create a cloud on title or would render any sale of ceded lands a breach of trust.

Through the 1993 Apology Resolution and Act 359 of 1993, the federal and

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307 1993 Apology Resolution, *supra* note 12, Ex.1

308 This Act created the HSAC. *See* Section II(A)(4)(c), *supra*.

state governments have recognized past injustices to native Hawaiians, and have expressed their support for native Hawaiian sovereignty and reconciliation.[309]

309 *Id*.

In adopting the Apology Resolution, however, Congress did not create a Aclaim@ to any ceded lands.[310] The Senate Report accompanying the 1993 Apology Resolution explicitly provides that its enactment Awill not result in any changes in existing law.@[311]

Likewise, the court does not discern any legislative intent from Act 359 of 1993 that the Legislature intended to create rights that would render the sale of all ceded lands illegal or a breach of trust. The Legislature was undoubtedly aware that just the year before, in 1992, it had passed legislation setting formulas for the calculation of OHA and DHHL=s entitlements to sales of ceded lands at Leali`i and Lai`o`pua.[312] In the 1993 legislation, the Legislature did not attempt to countermand its 1992 authorization of the sales of ceded lands for residential development.

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310 *See Rice v. Cayetano*, 941 F. Supp. at 1546, n. 24, *rev=d on other grounds*, 528 U.S. 495 (2000) (ADefendants= reliance on the 1993 Apology Bill is misplaced. While the United States expressed its deep regret to the Native Hawaiian people for the federal government=s participation in the overthrow of the Kingdom of Hawaii, and pledged to support reconciliation efforts, that bill did not create any substantive rights.@); *See, also, Monet v. United States*, Civ. No. 96-0006 (DAE), at p. 8 (D. Haw. Apr. 19, 1996) (A[T]he court has conclusively held ... that the language of the [Apology] Resolution and the legislative history make it absolutely clear that Pub. L. No. 103-150 does not create any substantive legal rights.@); *Monet v. Obayashi Corp*., Civ. No. 96-0006 (HG), at p. 5 (D. Haw. Apr. 25, 1996) (AContrary to plaintiffs= position, Joint Res. PL 103-150 confers no substantive rights.@).

311 S. Rep. No. 103-126 (1993). Senator Bill Richardson of New Mexico noted that the Federal Apology Resolution Adoes not infer any new rights to native Hawaiians. It is an apology that is long overdue.@

312 Acts 317 & 318 of 1992. *See* Section II(E), *supra*.

Therefore, this argument lacks merit.

E. FURTHERMORE, PURSUANT TO APPLICABLE LAW, SALES OF CE

1. Hawaii=s Public Lands Trust Provides The Legislature With Of Ceded Lands

Section 5(f) of the Admission Act specifically provides that the State shall manage and dispose of ceded lands Ain such manner as the constitution and laws of the State may provide.@ As the *Yamasaki* Court stated, the Hawaii Constitution adopting the Admission Act placed the Aonus of compliance with the Admission Act on the Legislature.@[313] The Hawaii State Constitution provides that trust obligations under the Public Lands Trust Ashall be complied with by appropriate legislation.@[314]

The legislature=s authority is explained in Attorney General Opinion 95-3, in Section VI(C), above. As stated by the Hawaii Supreme Court in *OHA v. State*:

> ...[W]e would do a disservice to all parties involved if we did not Acknowledge that the State=s obligation to native Hawaiians is firmly established in our constitution. *How* the State satisfies that constitutional obligation requires policy decisions that are primarily within the authority and expertise of the legislative branch. As such, it is incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust. *See* Haw. Const. art. XVI, section symbol 7. Although this court cannot and will not judicially

313 69 Haw. at 161, 737 P.2d at 450.

314 Art. XVI, Sec. 7.

> legislate a means to give effect to the constitutional rights of native Hawaiians, we will not hesitate to declare unconstitutional those [Emphasis added.]

Thus, the Hawaii State Legislature has considerable discretion with respect to the handling of the ceded lands trust.

2. Although General Trust Principles Are Also Applicable To The

[315] 96 Haw. at 401, 31 P.3d at 913.

According to the Hawaii Supreme Court in *Pele Defense Fund v. Paty*, Athe conduct of government as trustee is measured by the same strict standards applicable to private trustees.@[316] The Hawaii Supreme Court noted that, similar to the Hawaiian Home Lands Trust, the State owes a high standard of fiduciary duty to the beneficiaries of the ceded lands trust.[317]

For the reasons stated in Attorney General Opinion 95-3, however, quoted in Section VI(C) above, sales of ceded lands are not prohibited by applicable constitutional and statutory law, and, generally, do not constitute a breach of trust as long as general trust obligations are met. As long as the State does not otherwise breach the high standards applicable to it as trustee, there would be no breach of trust.[318] Because there are no proposed sales of ceded lands currently under consideration, for the reasons stated in Section VII below, it is not appropriate for the court to attempt to determine whether any specific proposed future sale of ceded lands would constitute a breach of trust.

G. WITH RESPECT TO THE SALE OF LEALI`I LANDS, IN THE ALTERNATIVE, BECAUSE SUCH SALE IS FOR A PERMITTED PUBLIC PURPOSE, THERE IS NO BREACH OF TRUST

As explained in the factual findings in Section II(E) above, the sale of ceded

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316 73 Haw. at 604-05, fn. 18.

317 *Id*. The Hawaii Supreme Court referred to various general trust duties.

318 *Id*.

lands at Leali`i was authorized by the Hawaii State Legislature based on a perceived and actual need for residential development in West Maui.[319] Residential development is clearly a permitted purpose for the use of ceded lands.[320]

Plaintiffs would have the court second guess the Legislature=s findings of a public

[319] *See* Section II(E), *supra*.

[320] *See* Section II(A)(2)-(3), *supra*.

need for residential development in West Maui. Because the Legislature has been provided with considerable discretion with respect to the ceded lands,[321] and for reasons of Ajusticiability@ explained in Section VII below, it is not appropriate for this court to second guess the Legislature=s determinations.

Therefore, in the alternative, because the sale of ceded lands at Leali`i was and is for a permitted public purpose, there is no breach of trust.

H. BECAUSE PLAINTIFFS HAVE NOT PREVAILED ON THE MERITS, THE COURT DOES NOT ADDRESS THE ISSUES OF BALANCE OF IRREPARABLE HARM AND PUBLIC INTEREST

As explained in Section IV(A) above, injunctive relief is a remedy, not a cause of action. For injunctive relief to issue on Plaintiffs= claim seeking a permanent injunction based on the allegation that sales of ceded lands constitute a breach of trust, Plaintiffs must first prevail on the merits of the underlying cause of action. The court only reaches the issues of Abalance of irreparable harm@ and Apublic interest in support@ if the Plaintiffs prevail on the merits.

For the reasons stated above, Plaintiffs have failed to prevail on the merits of their allegations that the sale of ceded lands is illegal or would constitute a breach of trust. Accordingly, the court does not reach the Airreparable harm@ and Apublic interest@ issues

VII. PRINCIPLES OF JUSTICIABILITY PROHIBIT THE COURT FROM ADDRESS ORDERING A MORATORIUM ON ALL SALES OF CEDED LANDS

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[321] *See generally,* Sections VI(C) & VI(E)(1), *supra*.

Finally, the court must address Plaintiffs= post-trial alternative request that the court impose a moratorium (or issue a preliminary injunction) on all sales of ceded lands pending resolution of native Hawaiian claims. By Aresolution of native Hawaiian claims@ Plaintiffs appear to mean a complete resolution of native Hawaiian claims to the ceded lands, including possible transfer of lands to a new sovereign native Hawaiian nation or government.[322]

As explained in Section II(A)(4)(c), the federal and state governments have recognized the need for establishment of a sovereign Hawaiian government with its own land base. Article XII, Section 6 of the Hawaii State Constitution and H.R.S. Sections 10-5(2)[323] and 6K-9,[324] which provides for the island of Kaho`olawe to be transferred Ato the sovereign native Hawaiian entity upon its recognition of the United States and the State of Hawaii,@ specifically envision transfer of lands to a native Hawaiian government or OHA, on behalf of native Hawaiians.

In addition, as explained in II(A)(4)(c), movement is taking place at both the federal and state levels toward creation and recognition of a sovereign Hawaiian nation or government.

Thus, Plaintiffs assert that it would be a breach of trust for the State of Hawaii to sell additional ceded lands while native Hawaiian claims are pending, and request a moratorium on all

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[322] *See* OHA=s AProposed Opinion of the Court, Including Findings of Fact, Conclusions of Law,@ filed Dec. 19, 2001, p. 70, & AIndividual Plaintiffs= Closing Argument,@ filed Dec.17, 2001, p. 56.

[323] *See* Section II(3), *supra*.

sales of ceded lands pending resolution of native Hawaiian claims.

As has been explained, however, sales of ceded lands do not necessarily violate the Admission Act, the Hawaii State Constitution, and Hawaii law. Moreover, no additional proposals for the sale of ceded lands are pending.

This court must, therefore, consider whether principles of justiciability prohibit it from delving into issues concerning potential future breaches of trust. As stated in *OHA v. Yamasaki*, Ajusticiability@ refers to a court=s obligation to Acarefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government.@[325] As further explained in *Yamasaki*:

> . . . The proper balance between the coordinate branches [the throughout our country=s history. . . .
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> . . .
>
> . . . When litigation seems premature or subject to unresolved courts speak in terms of >political question.=[326]
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> . . .
>
> When confronted with an abstract or hypothetical question, we

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325 *Yamasaki*, 69 Haw. at 169, 737 P.2d at 455.

326 *Yamasaki*, 69 Haw. at 168-69, 737 P.2d at 454-55.

327 *Yamasaki*, 69 Haw. at 171, 737 P.2d at 456.

The doctrine of justiciability requires courts, Aeven in the absence of constitutional restrictions, [to] still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their own power before acting, especially when there may be an intrusion into areas committed to other branches of government.@[328] The concern Aabout infringing upon the authority of our elected brethren becomes particularly acute whenever a challenge to legislation predates efforts to implement its provisions.@[329] Therefore, the Aestablished, general practice of the courts has been to reserve judgment

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328 *Yamasaki*, 69 Haw. at 170, 737 P.2d at 456 [emphasis added].

329 *Bremner v. City & County of Honolulu*, 96 Haw. 134, 144, 28 P.2d 350, 360 (Haw. App. 2001) *Bremner*, 96 Haw. at 144, 28 P.2d at 360. APrudential rules of judicial self-governance founded in concern about the proper - - and properly limited - - role of courts in a democratic society, ... considerations flowing from our coequal and coexistent system of government, dictate that [the judiciary] accord those charged with . . . administering our laws a reasonable opportunity to . . . enforce them in a manner that produces a lawful result.@ *Id.* Because Ato do

upon a law pending concrete executive action to carry out its policies into effect.@[330]

The Ajusticiability@ principles of Aripeness,@ Athe political question doctrine,@ and the mandate against Aadvisory opinions@ all prohibit this court from addressing issues of whether future proposals for the sale of ceded lands would constitute breaches of trust, and thereby ordering a

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otherwise risks divesting the other branches of government of their fundamental constitutional prerogatives.@ *Id.* (affirming dismissal of action under HRS ' 632-1 for declaratory relief invalidating County zoning ordinance as not ripe until there is actual implementation of a specific development project).

330 *Id.* The Hawaii Supreme Court stated:

> The need to avoid premature adjudication supports a definition of a Adispute@ that requires more than a Adifference of opinion@ as to policy. The rationale underlying the ripeness doctrine and the traditional reluctance of courts to apply injunctive and declaratory remedies to administrative determinations is Ato prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.@

Id.; *See also, Grace Bus. Dev. Corp. v. Kamikawa*, 92 Haw. 608, 612, 994 P.2d 540, 544 (2000) (affirming dismissal of action for injunctive and declaratory relief regarding liability for general excise and transient accommodations taxes as not ripe without formal administrative decision by director) *quoting Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).

moratorium on all sales of ceded lands.

With respect to Aripeness,@ *Pele Defense Fund v. Paty*[331] makes clear that beneficiaries of the ceded lands trust have standing to bring suit to enjoin dispositions of ceded lands that would constitute breaches of trust.[332] No evidence was presented, however, of any proposed sales of ceded lands other than at Leali`i. In fact, the evidence suggests that the State has been following a self imposed moratorium on the sales of additional ceded lands.[333] Proposed sales could constitute breaches of trust,[334] but for the reasons stated above, not all sales of ceded lands would violate the ceded lands trust.[335]

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331 73 Haw. 578, 837 P.2d 1247 (1992).

332 AThus, we hold that PDF, whose members are beneficiaries of the trust, may bring suit for the limited purpose of enjoining state officials' breach of trust by disposal of trust assets in violation of the Hawaii constitutional and statutory provisions governing the public lands trust.@ 73 Haw. 578, 837 P.2d at 1264 (1992).

333 *See* Section II(C), *supra*.

334 *See* Section VI(H), *supra*.

335 *See* Sections VI(C)-(E), supra.

The case of *Branson School Dist. RE-82 v. Romer*[336] is analogous to the case at hand. Plaintiffs in *Branson* challenged changes to Colorado=s constitution that, *inter alia*, prohibited sale of up to 300,000 acres of trust land granted to Colorado under its enabling act[337] and dedicated to the sole benefit of public schools. Plaintiffs claimed the provisions conflicted with the State=s fiduciary obligations because they were intended to achieve ends other than the benefit of the schools. The court refused to speculate as to the possible future violations of fiduciary duty, stating, A[a]lthough we believe it is possible that an ultimate conflict of interest may some day arrive for the land board, we also recognize that it may not.@[338]

Plaintiffs= preemptive challenge to the sale of any and all ceded lands presents the court with the same issue as the *Branson* court. It is possible that a future proposed sale of ceded lands in the future could present a breach of fiduciary duty. But like the court in *Branson*, the@ripeness doctrine@ prevents the court from speculating as to such future events.

The Hawaii Supreme Court also admonishes against consideration of breach of public trust claims that ask the court Ato settle >political questions= which must be resolved by the political branches of government.@[339] A[J]udicial self-restraint is surely an implied, if not an expressed,

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336 161 F.3d 619, 626 (10th Cir. 1998).

337 Most states after the original 13 colonies were admitted to the union by enabling acts that included grants of federal land to be held in trust for various purposes, usually including support of schools. *See Dept. of State Lands v. Pettibone,* 216 Mont. 361, 368-69, 702 P.2d 948, 952 (1985).

338 161 F.3d at 639.

339 *Yamasaki*, 69 Haw. 154, 737 P.2d 445, *cert. denied*, 484 U.S. 898 (1987).

condition of the grant of authority of judicial review,@[340] and is Afounded in concern about the proper--and properly limited--role of courts in a democratic society.@[341]

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340 *United States v. Butler*, 297 U.S. 1, 78-79 (1936) (Stone, J. dissenting).

341 *Bremner v. City & County of Hawaii*, 96 Haw. 134, 139, *cert. denied*, 96 Haw. 346 (2001).

The Hawaii Supreme Court has long recognized the Ainappropriateness of judicial intrusion into matters which concern the political branch of government,@[342] and that A[t]oo often, courts in their zeal to safeguard their prerogatives overlook the pitfalls of their own trespass on legislative functions.@[343] A case should be dismissed Afor non-justiciability on the ground of a political question=s presence@ if any one of the following Aformulations is inextricable from the case at bar@:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political government; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the i unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[344]

This case clearly involves Aa textually demonstrable constitutional commitment of the issue to a coordinate political government,@[345] implicates the concern of an Aimpossibility of a court=s undertaking independent resolution without expressing lack of the respect due coordinate branch[] of government,@ and the possible Apotentiality of embarrassment from multifarious

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342 *Bulgo v. County of Maui*, 50 Haw. 51, 56, 430 P.2d 321, 325 (1967).

343 *Koike v. Bd. of Water Supply*, 44 Haw. 100, 103, 352 P.2d 835, 843 (1960) *quoted in Yamasaki*, 69 Haw. at 172, 737 P.2d at 456-57.

344 *Baker v. Carr*, 369 U.S. 186, 217 (1982) *quoted in Yamasaki*, 69 Haw. at 169 (emph. added).

345 *See* Section VI(E)(1), *supra*.

pronouncements by various departments on one question.@ Thus, the Apolitical question@ doctrine applies.

Finally, the prohibition against the rendering of Aadvisory opinions@ also prohibit this court from attempting to address whether a possible proposed future sale of ceded lands would constitute a breach of trust and ordering a moratorium on that basis. Again, no evidence was presented of any proposed sales of ceded lands other than at Leali`i. In actuality, the evidence suggests that the State has been following a self imposed moratorium on the sales of additional ceded lands.[346] Proposed sales could constitute breaches of trust,[347] but for the reasons stated above, not all sales of ceded lands would violate the ceded lands trust.[348]

Accordingly, principles of justiciability preclude this court from considering issues of whether future proposals for the sale of ceded lands would constitute a breach of trust and ordering a moratorium on all sales of ceded lands.

VIII. CONCLUSIONS AND ORDERS

This opinion has addressed the first three counts of Plaintiffs= First Amended Complaint of August 11, 1995. Count I requested an injunction on all sales of ceded lands, alleging that trust obligations under Article XII, Section 4 of the State Constitution prohibit the sale of fee title to

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346 *See* Section II(C), *supra*.

347 *See* Section VI(H), *supra*.

348 *See* Sections VI(C)-(E), supra.

ceded lands.[349] Based on the same allegation, Count II requested that the court Astop the sale of ceded lands@ at Leali`i to third persons.[350] Count III requested that the court issue a declaratory ruling Athat (a) any conveyance to a third party violates the Hawaii State Constitution and the Admissions Act, (b) and/or any sale of Ceded Lands does not directly or indirectly release or limit claims of Native Hawaiians to those lands.@[351]

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349 *See* First Amended Complaint, filed August 11, 1995, at para. 27-33.

350 *Id. at* para. 39.

351 *Id*. at para. 10.

In Counts IV and V, Plaintiffs challenge the process by which the market value of ceded lands at Leali`i were valued for purposes of compensating OHA.[352] These counts were bifurcated for later determination and not at issue in this trial.[353]

A. CONCLUSIONS

With respect to the proposed residential development at Leali`i on Maui, the court concludes that principles of sovereign immunity, waiver, and estoppel bar Plaintiffs= request for injunctive relief. In the alternative, the court concludes that the State would not be in breach of fiduciary duties owed to native Hawaiians as trustee of the ceded lands trust by proceeding with this development.

With respect to the sale of ceded lands in general, although Congress, the Hawaii State Legislature, and the judiciary have all recognized the illegality of the overthrow of the Kingdom of Hawaii and historical injustices toward native Hawaiians, the political question doctrine and sovereign immunity prohibit consideration of Plaintiffs= allegation of a cloud on the State=s title to ceded lands based on these historical injustices.

Based on the Admission Act, the Hawaii State Constitution, Hawaii statutes, and binding judicial precedent, the State of Hawaii, as trustee of the ceded lands trust of the Hawaii State Constitution, continues to possess the legal authority and power to sell ceded lands for public

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352 *See id.* at para. 44-46.

353 *See* Order Denying in Part and Granting in Part the . . . Plaintiffs= Motion to Bifurcate Trial, or ... to Continue Trial, entered September 22, 1997.

purposes. This authority has not been changed by Congress=s 1993 Apology Resolution or recent State legislative enactments.

The court fully appreciates the importance of the `aina to the Native Hawaiian People and recognizes the distinct possibility of the creation and recognition of a sovereign Hawaiian government. The court also recognizes that the State, as trustee of the ceded lands trust, owes a high standard of fiduciary duty to the beneficiaries of the ceded lands trust.

The judiciary has repeatedly recognized, however, that the Admission Act and the Hawaii State Constitution expressly place primary responsibility for decisions regarding ceded lands in the legislative branch of government. Moreover, other than the proposed residential development at Leali`i, there is no evidence of any additional proposed sales of ceded lands. Therefore, principles of justiciability, which include the prohibition against consideration of issues not ripe for review, the admonition against the rendering of advisory opinions, and the policy of providing due deference to co-equal branches of government, preclude the court from considering whether a possible future proposed sale of ceded lands would constitute a breach of the high fiduciary duty owed by the State to native Hawaiians as beneficiaries of the ceded lands trust.

At this point, the following concluding comments of the Supreme Court of Hawaii in *OHA v. State* bear repeating:

> . . . [W]e would do a disservice to all parties involved if we did not acknowledge that the State's obligation to native Hawaiians is firmly As such, it is incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust. *See* Haw. Const. art. XVI, ' 7. Although this court cannot and will not judicially legislate a

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Resolution of native Hawaiian claims to ceded lands would indeed be consonant with H.R.S. Section 5-7.5, which provides:

> **[' 5-7.5] AAloha Spirit@.** (a) AAloha Spirit@ is the and presence of the life force, AAloha@, the following unuhi laula loa may be used:
>
> AAkahai@, meaning kindness to be expressed with
>
> ALokahi@, meaning unity, to be expressed with harmony;
>
> AOluolu@, meaning agreeable, to be expressed with
>
> AHaahaa@, meaning humility, to be expressed with modesty;
>
> AAhonui@, meaning patience, to be expressed with
>
> These are traits of character that express the charm, warmth and sincerity of Hawaii's people. It was the working philosophy of native Hawaiians and was presented as a gift to the people of obligation in return. AAloha@ is the essence of relationships in which each person is important to every other person for collective existence. AAloha@ means to hear what is not said, to see what cannot be seen and to know the unknowable.
>
> (b) In exercising their power on behalf of the people and in fulfillment of their responsibilities, obligations and service to the district courts may contemplate and reside with the life force and give consideration to the AAloha Spirit@.

Finally, resolution of native Hawaiian claims to ceded lands would also surely be consonant with H.R.S. Section 5-9, which adopts the following as the State motto:

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[354] 96 Haw. at 401.

AUa mau ke ea o ka aina i ka pono.@[355]

B. ORDERS

Based on the findings of fact and conclusions of law above, the court orders as follows:

1. That judgment enter in favor of all Defendants against all Plaintiffs on Count I of Plaintiffs= First Amended Complaint requesting an injunction on all sales of ceded lands.

2. That judgment enter in favor of all Defendants against all Plaintiffs on Count II of Plaintiffs= First Amended Complaint requesting an injunction on the sale of ceded lands at Leali`i to third persons.

3. That judgment enter in favor of all Defendants against all Plaintiffs on Count III of Plaintiffs= First Amended Complaint requesting a declaratory ruling that (a) any conveyance to a third party Hawaiians to those lands.

Counsel for the OHA Plaintiffs is to coordinate scheduling of a status conference with the court to discuss scheduling for bifurcated Counts IV and V, dealing with valuation of the Leali`i lands.

DATED: Honolulu, Hawaii, _____.

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[355] Pursuant to H.R.S. '5-9, this is translated into English to mean AThe life of the land is perpetuated in righteousness.@

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COURT

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JUDGE OF THE ABOVE-ENTITLED