

NO. 04-15306

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EARL F. ARAKAKI, et al.,

Plaintiffs – Appellants,

v.

LINDA LINGLE et al.,

State Defendants – Appellees,

HAUNANI APOLIONA, et al.,

OHA Defendants – Appellees,

MICAH KANE, et al.,

HHCA/DHHL Defendants –  
Appellees,

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

Defendants – Appellees,

STATE COUNCIL OF HAWAIIAN  
HOMESTEAD ASSOCIATIONS, and  
ANTHONY SANG, SR.,

SCHHA Defendants/Intervenors –  
Appellees,

HUI KAKO'O 'AINA  
HO'OPULAPULA, BLOSSOM  
FEITEIRA and DUTCH SAFFERY,

HUI Defendants/Intervenors – Appellees.

D.C. No. CV-02-00139 SOM/KSC  
District of Hawaii, Honolulu

APPELLANTS' OPPOSITION TO  
STATE'S AND OHA'S MOTIONS  
FOR EXTENSION OF TIME TO  
FILE BRIEFS;

DECLARATION OF COUNSEL,  
EXHIBIT 1 - 8;

CERTIFICATE OF SERVICE

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## **APPELLANTS' OPPOSITION TO STATE'S AND OHA'S MOTIONS FOR EXTENSION OF TIME TO FILE BRIEFS**

The State and HHCA/DHHL Defendants-Appellees (collectively "State"), in their motion dated June 8, 2004 seek a 28 day extension, until August 3, 2004, to file their answering brief. The OHA Defendant-Appellees (collectively "OHA") moved June 9, 2004 for a similar extension.

With all due respect to counsels' personal, vacation and travel plans, their motions do not show, under the particular circumstances of this case, the good cause, diligence or substantial need required for extensions by Circuit Rule 31-2.2. Appellants oppose those motions, as well as any other motions by any other Defendants/Appellees for any extensions of briefing, for the following reasons:

**Delay has characterized this case at every turn.** Further delays now would be particularly unfair to Appellants who have already endured 22 months of delays in the trial court. During all those months, Plaintiffs were prevented from moving for, and being heard on, summary judgment on the merits while the trial court: considered and reconsidered standing issues raised by Defendants; considered and reconsidered bifurcation issues raised by Defendants; set a protracted hearing schedule over Plaintiffs' objection ; then, after exhaustive briefing, *sua sponte* continued the first round hearing over Plaintiffs' objection ; then *sua sponte* continued it again over Plaintiffs'

objection, this time ordering that the first round motions were “deemed withdrawn without prejudice subject to being refiled”; let the United States out, then brought it back in, then let it out again; struck Plaintiffs’ motion for partial summary judgment; and declined to issue an appealable standing order. Finally, 22 months after the suit was filed, the trial court granted the motion to dismiss on “political question” grounds, substantially the same motion the court had denied only 2 months and 4 days after the case was filed. (See Appellants’ Opening Brief at 55 -66, ‘V. TWENTY TWO MONTHS OF DELAY.’) Plaintiffs-Appellants view these requests for extensions as a continuance of the delay, delay and delay that has characterized this case at every turn. The “just, speedy and inexpensive determination” contemplated by Rule 1 FRCP has, so far, been withheld from these Plaintiffs/Appellants.

**Appellees have not shown diligence or substantial need.** Under Circuit Rule 31-2.2(b) an extension of time may be granted for filing briefs **only upon ... a showing of diligence and substantial need.** (Emphasis added.)

This Court’s February 25, 2004 Time Schedule Order provides, **The parties shall meet the following time schedule: The brief of Appellee/Respondent shall be filed and served, pursuant to FRAP 32**

**and Circuit Rule 32-1; 7/6/04.** (Emphasis added.)

The State's counsel requests the extension primarily because he will be out of town for 19 days from June 17 through July 5, 2004 on a trip to China with his elderly parents. "This China trip was planned back on December 13, 2003." That might be a compelling reason to ask the court to change the briefing schedule, but not to **delay** it. If counsel had mentioned the planned China trip in early March (after receiving the Time Schedule Order dated February 25, 2004), the briefing schedule could easily have been advanced by about 19 days. Appellants would certainly not have objected. To avoid a 28 day delay, Appellants would have been glad to file their opening brief 19 days earlier. That would have allowed Mr. Lau to make his contribution to the answering brief, have it filed and served and then leave for his trip. Presumably this Court would have approved advancing the schedule if counsel were in accord.

The State's failure to raise the China trip until it was too late to advance the briefing dates, disproves that it has been diligent.

Nor is there any showing that Mr. Lau is the only attorney familiar with the case and available to help prepare the State's answering brief. Charleen M. Aina, a capable attorney with more experience than Mr. Lau, has been an active participant in all phases of this case as she was in all

phases, including the appellate phase in the Ninth Circuit, in *Arakaki I*. The Attorney General's office has been in the thick of related litigation at least since 1996 when *Rice v. Cayetano* began. The Attorney General himself, Mark J. Bennett, Esquire, prior to taking office January 2, 2003, was a litigation partner for nine years in the 4<sup>th</sup> largest law firm in the State of Hawaii, specializing in complex litigation. (Biographical sketch from A.G. website, Exhibit 1 to attached declaration of counsel.) He has actively participated in this case, personally handling the court presentations at one or more key hearings. Another partner in Mr. Bennett's former firm is Robert Klein, General Counsel for OHA and attorney for the SCHHA Intervenor-Defendants-Appellees in this case.

OHA's counsel offers even less showing of cause for an extension: a vague reference to commuting back and forth to the East Coast to visit counsel's "very ill" mother and that her husband and co-counsel, John Van Dyke, is going to be teaching in East Europe June 17 to July 5, 2004. There is no mention of OHA's other co-counsel, Melody MacKenzie; and no explanation of whether, during the last three and one half months, she and Mr. Van Dyke and Melody MacKenzie have begun drafting the answering brief or made any actual effort to prepare to put it into final form ready to mail to the Ninth Circuit on July 6, 2004. Nor is there any mention of

Robert Klein, **who is OHA's General Counsel**, a former associate justice on the Hawaii Supreme Court, who, as previously noted, is a partner in the 4<sup>th</sup> largest law firm in Hawaii. He is thoroughly familiar with this case because he represents the SCHHA Defendants-Appellees. His firm presumably could pitch in with legal and staff help if necessary. With respect to the issues in this appeal, the SCHHA Defendants-Appellees' interests coincide with those of both OHA and the HHCA/DHHL Defendants/Appellees.

Nor have the State or OHA demonstrated any real substantial need. As to their arguments that the extension is needed because of the "complexity" and "the large number of issues plaintiffs -appellants have chosen to raise in their Opening Brief", neither of those factors should have been a surprise or be a justification for an extension. The State and OHA and all Defendants-Appellees were aware that the final judgment (Excerpts of Record, "ER", 29) filed January 15, 2004 encompassed six different orders listed in the judgment itself and that the Notice of Appeal (ER 31) filed February 12, 2004 appealed from those six listed orders as well as the various bifurcation and scheduling orders and postponements and the order striking Plaintiffs' counter motion for partial summary judgment, the denial of discovery and the award of costs to Defendants. In the Civil Appeals

Docketing Statement also served on Defendants on February 12, 2004 the Principal Issues Proposed to be Raised on Appeal were listed as: Standing; political question; issue preclusion; standard of review of racial classification; ‘Mancari defense’; strict scrutiny; just, speedy and inexpensive determination.” At the Assessment Conference with the Chief Circuit Mediator and all counsel on April 16, 2004, Appellants’ counsel mentioned that, because of the many issues raised, the opening brief would probably exceed the page limits and suggested a stipulation for that purpose. (As it turned out the opening brief, after considerable trimming, was within the word limits.)

Every issue raised in this appeal was raised and thoroughly briefed in the trial court. Thus, for at least the last three months, Appellees have known the issues that would be covered in the opening brief and that the opening brief would probably be lengthy; they have, or should have, Plaintiffs’ arguments and legal memoranda and their own opposing briefs and memoranda filed in the trial court as to every one of those issues. And they have known that their answering briefs were due July 6, 2004.

Appellants emailed the opening brief to Appellees on June 4, 2004, the same day it was posted to this Court and served, together with the hard copies of the opening brief and Excerpts of Record, by mailing. (Exhibit 2

to the attached declaration of counsel.) That was eight days ago. There is no reason for all Appellees to not now have their answering briefs well underway. In an email to Appellees' counsel on June 8, Appellants' counsel said, "There is still abundant time for you to cut and paste and edit and copy and file timely briefs by July 6, 2004. I urge you to do so. Justice delayed is justice denied." (See Exhibit 3 to the declaration of counsel filed herewith.)

If Appellants' sole attorney, representing fourteen individual citizens, can cover all those issues and file a timely brief, surely the State, DHHL and OHA with their deep resources, offices full of attorneys and staff and ready access to private law firms, if needed, should be expected to follow the rules and file on time as well.

**The harm to Appellants of further delays.**

The State asserts that the requested 4-week extension will cause no significant prejudice to Plaintiffs. OHA joins in the assertion, "the alleged injury to their pocketbooks is miniscule."

The prejudice is in adding four more weeks to the already too-long-delayed time before this Court can shine the light of judicial review on the invidious discrimination presented in this case. The trial court refused to consider that obvious and explicit racial discrimination, or to issue an appealable order, for 22 months.



The extension would mean, among other irreparable injuries to Appellants, four weeks more of the State diverting 20% of public land trust revenues to OHA on the false premise that they represent the pro rata share of the trust income for “native Hawaiians” ( descendants of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778 who make up less than 6% of the trust beneficiaries). The State does no trust accounting for the public land trust, although as trustee it has a fiduciary duty to do so. (Restatement, 2d, Trusts § 172). The State therefore does not know whether the public land trust generates **any** net income after paying the expenses of generating the revenues and administering the trust. But the State knows from the State Attorney General’s argument to the Hawaii Supreme Court, “It is a well -established principle of the law of trusts that beneficiaries are entitled only to the net income from the trust.” (Ex. G filed 4/11/02 with DKT 88 and filed herewith as Ex. 4.) If the public land trust produces no net income, as appears highly likely, these so called public land trust distributions to OHA are merely a scheme for transferring hundreds of millions from the general fund, consisting mostly of taxpayer revenues, to OHA.

These diversions of public land trust revenues exclusively for the “native Hawaiian” beneficiaries, and for no other beneficiaries, (openly and

undeniably in violation of the trustee's duty of impartiality under black letter trust law and presumptively invalid under the Constitution) are regular and ongoing for all receipts from the public land trust. The Governor issued Executive Order No. 03-03 on February 11, 2003 (filed with DKT 345 12/22/03 and filed herewith as Exhibit 5) requiring all departments to establish ceded lands proceeds trust holding accounts, calculate OHA's portion by "multiplying the actual receipt by the ceded/non-ceded fraction, and multiplying the result by 20%.", deposit OHA's portion into the trust holding account, and transfer it to OHA quarterly.

Although the State and OHA call the impact on Plaintiffs "insignificant" or "miniscule", our Nation's history and the decisions of this Court and the Supreme Court suggest otherwise. It was King George III's attempt to tax tea that spurred the colonists to action and laid the groundwork for the American Revolution. This Court in *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1180 (9<sup>th</sup> Cir. 1984) said taxpayer standing does not depend on the magnitude of the injury. In *Napeahi v. Paty*, 921 F.2d 897 (9<sup>th</sup> Cir. 1990) this Court upheld Mr. Napeahi's standing as a beneficiary of the public land trust to challenge the State's abandonment of tidal land to private property owners although he apparently had no stake in the outcome other than as a trust beneficiary. The Supreme Court has said, "To deny

standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.” *U.S. v. Scrap*, 412 U.S. 669, 688 (1973). The Supreme Court has allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a \$5 fine and costs, and a \$1.50 poll tax. ' The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation. *Id.*, 412 U.S. at 690, fn 14.

The expense of these two programs is something more than a trifle. Researching only part of their history to date shows the estimated total cost to the State treasury, including amounts paid by the State, debt service on bonds issued to pay them, loss of revenues and investment earnings, has been about \$1 billion. (Plaintiffs’ itemized compilations were filed 9/18/02 as Exhibits A and B to DKT 208 and are filed herewith as Exhibits 6 and 7.) Those analyses show that about \$60 million per year continues to pour out of or to never reach the State treasury because of HHC/DHHL and about \$22 million per year because of OHA.

The \$30 million for payment this fiscal year for the Hawaiian home

land trust fund, included as part of the bond issue on approximately April 29, 2004 (See Exhibit 4 to Plaintiffs-Appellants' Reply dated May 4, 2004) may not yet have been disbursed. In the past the State's practice has been to make the payment on the last working day of the fiscal year unless they need the resources earlier. (Depo of Neal Miyahira, at 53 filed herewith as Exhibit 8.) A prompt injunction by this Court might preserve the status quo as to that payment and as to the next tranche of public land trust distributions to be transferred, pursuant to Executive Order 03-03 (Exhibit 5.) to OHA within 10 days after June 30, 2004.

This Court has not yet acted on Appellants' motion dated April 12, 2004 for injunction to preserve status quo pending appeal. If the Court does not intend to issue an injunction to preserve the status quo, it is critical to require timely filing of the answering briefs so that Appellants can promptly reply and this appeal can be decided expeditiously. Otherwise, the ongoing irreparable losses to Plaintiffs and others similarly situated will continue unabated and, the final judgment, if Appellants prevail, cannot accord full and effective redress.

DATED: Honolulu, Hawaii, June 12, 2004.

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H. WILLIAM BURGESS  
Attorney for Plaintiffs-Appellants

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D.C. No. CV-02-00139 SOM/KSC  
District of Hawaii, Honolulu

DECLARATION OF COUNSEL  
IN SUPPORT OF APPELLANTS'  
OPPOSITION TO EXTENSION  
OF TIME TO FILE BRIEFS;

EXHIBITS 1 – 8.

DECLARATION OF COUNSEL IN SUPPORT OF APPELLANTS'  
OPPOSITION TO EXTENSION OF TIME TO FILE BRIEFS

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

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

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

3. The attached exhibits are true copies of:

Exhibit 1. Biographical sketch of Attorney General Mark J. Bennett, Esq. from the current Hawaii A.G. website;

Exhibit 2. Email I sent June 4, 2004 at about 2:29 pm to all counsel attaching Appellants' Opening Brief;

Exhibit 3. Email I sent June 8, 2004 to all counsel urging them to cut, paste, edit, copy and file timely briefs by July 6, 2004 (2 pages);

Exhibit 4. Attorney General of Hawaii's amended opening brief filed May 6, 1997 in OHA v. State. (50 pages. Page 39 contains the quoted language "well-established principle of the law of trusts that beneficiaries are only entitled to the net income from the trust.") This was filed as part of DKT 88 4/11/03 in the trial court;

Exhibit 5. Executive Order No. 03-03 delivered to me by Deputy Attorney General Charleen Aina, August 21, 2003 in response to discovery requests in this case. This was filed as part of DKT 345 on December 22, 2003 in the trial court;

Exhibit 6. Cost of HHC/DHHL to State Treasury Seven Years – 7/1/95 – 6/30/2002 (Including expenditures, debts incurred and loss of revenues). This is an itemized compilation, including some estimates. It was filed as part of DKT 208 9/18/02 in the trial court;

Exhibit 7. Cost of OHA to State Treasury, Twelve Years – 7/1/90 – 6/30/2002 (Including expenditures, debts incurred and loss of revenues). This is an itemized compilation, including some estimates. It was also filed as part of DKT 208 9/18/02 in the trial court;

Exhibit 8. The cover page and pages 12 and 53 of the deposition 12/5/02 of Neal Miyahira, Budget Division Chief, with the Department of Budget and Finance, and former Director of Finance, State of Hawaii;

4. At the Assessment Conference with Mr. Lombardi, Chief Circuit Mediator and all counsel on April 16, 2004, I mentioned that, because of the many issues in the appeal, the opening brief would probably exceed the page limits and suggested a stipulation for that purpose. Mr. Lombardi said that, since, as all counsel had indicated, the case would not be amenable to the

mediation program, that would not be appropriate for involvement of his office. (As it turned out, with considerable trimming, the Opening Brief did not exceed the word volume limits.)

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

6. The State's declaration dated June 8, 2004 at page 5 asserts "plaintiffs did not seek expedited review in this Ninth Circuit appeal, further proving that they would not be prejudiced by the requested 4-week extension." Actually Plaintiffs -Appellants' motion for injunction to preserve status quo pending appeal filed by mailing April 12, 2004, spells out in detail the facts proving that, without an injunction pending the appeal, money will continue to gush out of the State treasury causing further



irrevocable losses to continue and that the effectiveness of the Court's final judgment to redress their injuries, if Plaintiffs-Appellants prevail, will be substantially diminished.

7. If the State's counsel had informed me in March that he was planning a trip to China in June and therefore would be asking for a 28 day extension to file his answering brief, I would have been happy to advance the briefing schedule, file the opening brief about 19 days earlier so that he could timely file the answering brief before leaving on his trip.

DATED: Honolulu, Hawaii, June 12, 2004.

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H.WILLIAM BURGESS

**CERTIFICATE OF SERVICE**

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

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DATED: Honolulu, Hawai`i this 12th day of June, 2004.

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H. WILLIAM BURGESS  
Attorney for Plaintiffs-Appellants