

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' MOTION TO
EXPEDITE HEARING;

DECLARATION OF COUNSEL
IN SUPPORT OF MOTION TO
EXPEDITE HEARING, EXHIBIT
1;

CERTIFICATE OF SERVICE

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APPELLANTS' MOTION TO EXPEDITE HEARING

Pursuant to Ninth Circuit Rule 27-12, Plaintiffs/Appellants Earl F. Arakaki, et al (Appellants) hereby move to expedite the hearing of this appeal. Specifically Appellants request that oral argument be heard during this Court's next scheduled session in Honolulu, Hawaii November 1 - 5, 2004 or as soon thereafter as possible, consistent with the Court's due consideration of the briefs.

The grounds for this motion are that "in the absence of expedited treatment, irreparable harm may occur or [portions of] the appeal may become moot." Rule 27-12(3).

As described in the Opening Brief, this case is a straightforward challenge to two state agencies (the Department of Hawaiian Home Lands, DHHL, and the Office of Hawaiian Affairs, OHA), both based on the same explicitly racial classifications, and both therefore presumptively unconstitutional. They must be stricken down unless the court finds they pass strict scrutiny. In addition to the constitutional violation, both agencies give "native Hawaiians" (descendants of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778) special benefits in the lands and revenues of the public land trust denied to Plaintiffs and other beneficiaries, thereby openly breaching the trustees' fiduciary duty of impartiality under black letter trust law.

The irreparable harm that may occur.

As described in Appellants' Motion For Injunction To Preserve Status Quo Pending Appeal filed herein by mail April 12, 2004, at 25 - 32 and in Appellants' Opposition To State's and OHA's Motions for Extension of Time To File Briefs filed herein by mail June 12, 2004, at 7 - 11, researching

only part of their history shows that DHHL and OHA have cost the State treasury (including appropriations, loss of revenues, debt incurred and loss of investment earnings) about \$1 Billion to date and, at the current expenditure rate, threaten to cost perhaps another \$2 Billion over the next 10 years unless they are enjoined. (See the itemized compilations in Exhibits 6 and 7 filed with Plaintiffs' opposition dated June 12, 2004.)

Appellants endured 22 months of delays in the trial court. During 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.")

Based on the rate of expenditures shown in the itemized compilations, Exhibits 6 and 7 filed June 12, 2004 (approximately \$60 million per year for DHHL and approximately \$22 million per year for OHA), about \$130.3 million flowed from, or never reached, the State treasury during those 22 months because of these two invidiously discriminatory programs.

This Court has not yet acted on Appellants' Motion For Injunction To Preserve Status Quo Pending Appeal filed April 12, 2004. If no relief pending this appeal is granted, it is likely that money will continue to flow out of, or never reach, the State treasury at the average rate of about \$6.83 million per month. The resulting losses to the pocketbooks of Appellants and others similarly situated, both as taxpayers and as public land trust beneficiaries, will likely continue unabated. The benefits of the better state schools, parks, roads, public health, safety, security and quality of life those moneys could have provided in each of those months, but for the invidious discrimination, can never be restored. The State is immune from a claim for damages. The ability of this Court's final judgment to redress their injuries for those and future months before final judgment, if Appellants ultimately prevail, will be substantially diminished.

In addition, there is the ongoing issuance of more Homestead leases of valuable residential, ranch and farm land (in which each Appellant, like every beneficiary of the public land trust, owns an equitable interest) for 99 years at \$1 per year. On July 2, 2004 DHHL announced it 'expects to award 104 lots at the end of the year' in the Villages of Leali'i in Maui. 'We' removing to put people on the land and we can't move fast enough. This offers us an opportunity to accelerate the process.' (See Exhibit 1 to the attached Declaration.) This will create, by the end of this year, potential claims from 104 more Homesteaders, if Appellants ultimately prevail and all such leases are withdrawn, unless the disclosure and waiver as requested in Appellants' Motion for Injunction to Preserve Status Quo is granted. (See Reply in Support filed May 4, 2004 at 31 for the specific disclosure and waiver which will reasonably protect against claims for breach of the covenant of quiet enjoyment.) In the absence of an injunction and if the

hearing of this appeal is not held in the November 1 – 5, 2004 session of the Ninth Circuit panel in Hawaii, the next hearing date may be delayed until May 2005, or even later, and hundreds more Homestead leases may be issued and, for six or more months, \$6.8 million more per month may continue to drain out of the State treasury. That will moot the ability of the Court, if Appellants prevail, to redress the losses they have suffered during those months.

Expedited hearing will at least provide Appellants some measure of the just, speedy and inexpensive determination called for by F.R.Civ.P 1.

The status of briefing.

Appellants timely filed and served their opening brief by mail on June 4, 2004. Appellants also emailed to opposing counsel electronic copies of the opening brief the same day.

This Court's February 25, 2004 Time Schedule Order required the briefs of Appellees to be filed and served by July 6, 2004. Appellees moved to extend the filing date to August 3, 2004. Appellants opposed the extension. To the best of Appellants' knowledge, the Court to date has not either granted or denied the requested extension of the time for answering briefs. Appellants have not received any answering briefs from any of the Appellees.

If the Court does extend the time for Appellees' briefs, Appellants plan to file their reply brief or briefs within 14 days (or less) after service of the Appellees' briefs. To help accomplish that, Appellants' counsel has asked opposing counsel to email their answering briefs as soon as they mail hard copies to the Court and to Appellants' counsel. Thus, Appellants expect the briefing of this case will be complete by August 17, 2004.

Counsel for Appellee United States has informed Appellants that the

United States does not oppose the request that the hearing in this case be expedited and scheduled for the Court's Nov. 1-5, 2004 session or as soon thereafter as possible. Other Appellees have not yet responded to counsel's question whether they oppose the request. *Cf.* Rule 27-1(2).

For the foregoing reasons, good cause exists under Rule 27-12(3) to expedite the hearing of Plaintiff's appeal. Hearing should be set for the soonest possible date consistent with the Court's due consideration of the briefs. The next scheduled Ninth Circuit 2004 Court session in Hawaii is November 1 - 5, 2004 in Honolulu. Appellants respectfully request that this appeal be heard during that session.

DATED: Honolulu, Hawaii, July 17, 2004.

H. WILLIAM BURGESS
Attorney for Plaintiffs-Appellants

**DECLARATION OF COUNSEL
IN SUPPORT OF MOTION TO EXPEDITE HEARING**

I declare under penalty of perjury:

1. I am the attorney for Plaintiffs-Appellants in this case, licensed to practice law in all federal and state courts in the State of Hawaii, and admitted to practice before this Court.
2. I make this declaration based on my personal knowledge and belief.
3. On July 13, 2004, I emailed counsel for all Defendants, Intervenors and Appellees a draft of the motion to expedite hearing asking them, pursuant to Circuit Rule 27-1(2), whether they oppose the motion. To date, only Mr. Aaron P. Avila, Counsel for the United States, has responded. He said "The United States does not oppose your request that the hearing in this case be expedited and scheduled for the Court' s Nov. 15, 2004 session or as soon thereafter as possible."
4. Exhibit 1 attached hereto is a true copy of the article from the Maui News of July 2, 2004, "DHHL revives long -stalled Leali'i home development".

DATED: Honolulu, Hawaii, July 17, 2004.

H. WILLIAM BURGESS

http://www.mauinews.com/news/story/072202004_new02DHHL0702.asp

DHHL revives long-stalled Leali' i home development

By VALERIE MONSON, Staff Writer

LAHAINA - A portion of the long-delayed Villages of Leali' i has been resurrected by the Department of Hawaiian Home Lands (DHHL), which expects to award 104 lots at the end of the year with building to follow in early 2005. "What a blessing!" cried Ezekiel "Zeke" Kalua when told of the news. "As a Native Hawaiian, I know there are so many people out there who are hurting. It' s a blessing to hear that 104 families will be awarded lots."

But because many of those families might not be from West Maui, objections have been raised by Na Kupuna O Maui, a group of Native Hawaiian elders who want an agency other than DHHL to develop the project.

"We' re not happy about it," said Patty Nishiyama. "We want this for the people of Lahaina, both Native Hawaiians and others who were born and raised here. Let DHHL do their homes at Mahinahina."

Lloyd Yonenaka, public information officer for DHHL, said two parcels of the Leali' i project are close to being transferred from the Housing and Community Development Corporation of Hawaii (HCDCH). The Lahaina lands were part of a larger package of state properties across Hawaii for which DHHL agreed to pay HCDCH \$33 million over 15 years.

"We' re moving to put people on the land and we can't move fast enough," said Yonenaka. "This offers us an opportunity to accelerate the process."

Once the lots next to the Lahaina Civic Center are awarded to the Native Hawaiians who are on the list of applicants who have asked for leases on Maui, building could begin immediately, said Yonenaka. Much of the infrastructure - streets, curbs, gutters and sewer lines - was completed a decade ago and needs only to be reinspected.

The deal between DHHL and HCDCH still must be approved by the

Hawaiian Homes Commission later this month, but Yonenaka expects no problems. He said HCDCH adopted the proposal last month. "We don't see that as an issue because we initiated it," said Yonenaka.

The agreement would include the 25-acre parcel that's almost ready for house building and a second parcel probably at least as big that still needs site work, said Yonenaka.

For more than 10 years, the Villages of Leali'i have been stalled by legal challenges from the Office of Hawaiian Affairs because the 1,200-acre project district, planned for a final build-out of 4,800 units, is on ceded lands.

Ceded lands are former government and crown lands appropriated by the Republic of Hawaii after the Hawaiian monarchy was overthrown in 1893. The land was "ceded" to the United States when the islands were annexed, but the annexation resolution specified that the proceeds from the lands "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

Both OHA and Native Hawaiian sovereignty advocates say that ceded lands should be restored to a Native Hawaiian sovereign entity. When the state housing agency proposed to sell the house lots in Villages of Leali'i, OHA objected to sale of any ceded lands.

HCDCH proceeded with development of the first phase, intended to be an affordable-housing project similar to Waiehu Terrace, which was developed by the agency in the 1980s. But OHA was able to block construction of houses over the ceded lands claim.

Ground was broken on the West Maui site in November 1992, and \$30 million worth of infrastructure was put in place by the state. The series of villages was originally intended to include a variety of housing along with parks, a golf course, two elementary schools, a church/day care facility and a commercial town center.

The first parcel - known only as 1A at this point - will feature lots that range from 5,317 square feet to 11,261 square feet with an average size of 6,736. Under Hawaiian Homes, eligible Native Hawaiians will lease the land for \$1 a year for 99 years and be responsible for building their own house.

Nishiyama said her group objects to DHHL getting involved because it "divides our people" on blood quantum. She also said too many other homesteaders live on their lots for just a couple of years, then sell to the highest bidder.

Yonenaka said lessees are permitted to sell their homes and transfer their leases, but only to those who qualify according to standard blood quanta. Descendants must be 25 percent Hawaiian and anyone else must be 50 percent.

Nishiyama said by not restricting the lots to people born and raised on the West Side, more outsiders move in and lifelong residents continue to suffer from the lack of available housing. She said another entity should be brought in to provide the housing and DHHL should focus on its lands at Mahinahina.

But Yonenaka said the 793 acres at Mahinahina are a long way from turnkey while the preliminary work already done at Leali'i makes it a natural. "The reason Leali'i is so attractive is that we can grow," said Yonenaka.

Planning Director Mike Foley also welcomed the addition of the much-needed housing to the desperate West Maui market. Foley said the new subdivision would fit right in with Lahaina because traffic would enter and exit on a four-lane stretch of Honoapiilani Highway at a signalized intersection that's already in place.

Foley said the administration has been trying to work with developers to locate their projects near existing infrastructure (such as traffic signals) and services (such as fire protection), to reduce negative impacts on the community.

Kalua, who is executive director of the West Maui Taxpayers Association but was speaking on his own behalf, said he felt the 104 units would make a noticeable difference in the need for housing on the west side.

"I think it will," he said. "And it's about time."

Valerie Monson can be reached at ymonson@mauinews.com.

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 17th day of July, 2004.

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