Appeal No. 04-15306
(Dist. Ct. Civil No. CV02-00139 SOM/KSC)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| EARL F. ARAKAKI, EVELYN C. ARAKAKI, EDWARD U. BUGARIN, SANDRA PUANANI BURGESS, PATRICIA A. CARROLL, ROBERT M. CHAPMAN, BRIAN L. CLARKE, MICHAEL Y. GARCIA, ROGER GRANTHAM, TOBY M. KRAVET, JAMES I. KUROIWA, JR., FRANCES M. NICHOLS, DONNA | ) | ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII<br><br>HONORABLE SUSAN OKI MOLLWAY |

*[caption continued on next page]*

DEFENDANT-INTERVENORS/APPELLEES STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS AND ANTHONY SANG, SR.'S ANSWERING BRIEF

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MALIA SCAFF, JACK H. SCAFF, ALLEN H. TESHIMA, THURSTON TWIGG-SMITH,

Plaintiff-Appellants,

vs.

LINDA LINGLE, in her official capacity as GOVERNOR OF THE STATE OF HAWAI`I; GEORGINA KAWAMURA, in her official capacity as DIRECTOR OF THE DEPARTMENT OF BUDGET AND FINANCE; RUSS SAITO, in his official capacity as COMPTROLLER and DIRECTOR OF THE DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES; PETER YOUNG, in his official capacity as CHAIRMAN OF THE BOARD OF LAND AND NATURAL RESOURCES; SANDRA LEE KUNIMOTO, in her official capacity as DIRECTOR OF THE DEPARTMENT OF AGRICULTURE; TED LIU, in his official capacity as DIRECTOR OF THE DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM; RODNEY HARAGA, in his capacity as DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION,

State Defendant-Appellees,

HAUNANI APOLIONA, Chairperson; ROWENA AKANA; DONALD B. CATALUNA; LINDA DELA CRUZ; DANTE CARPENTER; COLETTE Y.P. MACHADO; BOYD P. MOSSMAN;

OSWALD STENDER; and JOHN D. WAIHE`E, IV; in their official capacities as trustees of the Office of Hawaiian Affairs,

OHA Defendant-Appellees,

MICAH KANE, Chairman; and WONDA MAE AGPALSA; HENRY CHO; THOMAS P. CONTRADES; QUENTIN KAWANANAKOA; HERRING K. KALUA; MILTON PA; and JOHN A.H. TOMOSO in their official capacities as members of the Hawaiian Homes Commission,

HHCA/DHHL Defendant-Appellees,

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

Defendant-Appellees,

STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATION; ANTHONY SANG, SR.,

Defendant-Intervenors/Appellees,

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

Defendant-Intervenors/Appellees.

CORPORATE DISCLOSURE STATEMENT

The State Council of Hawaiian Homestead Associations ("SCHHA") is a domestic nonprofit corporation organized under the laws of the State of Hawai`i. SCHHA has no parent corporations and issues no stock.

DATED: Honolulu, Hawaii, July 30, 2004

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SANG, SR.

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## I. STATEMENT OF JURISDICTION

Defendant-Intervenors/Appellees State Council of Hawaiian Homestead Associations and Anthony Sang, Sr. (collectively "SCHHA") agree with Plaintiff-Appellants Earl F. Arakaki, et al.'s (collectively, "Arakaki") statement of jurisdiction.

## II. STATEMENT OF THE CASE

SCHHA disputes certain portions of Arakaki's Statement of the Case and instead incorporates by reference the Statement of the Facts set forth herein.

## III. STATEMENT OF THE FACTS

The history of this case is reflected in the history of the native Hawaiian[1] people, which has been recounted in numerous sources. *See, e.g., Arakaki v. Cayetano,* 198 F. Supp. 2d 1165 (D. Haw. 2002); *Rice v. Cayetano*, 528 U.S. 495 (2000); Gavan Daws, *Shoal of Time* (1968) ("Daws"); Lawrence H. Fuchs, *Hawai`i Pono: A Social History* (1961) ("Fuchs"). These sources plainly show that native Hawaiians suffered greatly from the impact of the outside world, particularly the

[1] This brief will follow the convention of using "native Hawaiian" to refer to "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778" as defined in the Hawaiian Homes Commission Act, and "Hawaiian" to refer to people of native Hawaiian ancestry without regard to blood quantum.

United States, and by the turn of the Twentieth century were facing extinction. Their numbers had dwindled due to introduced diseases, they had lost homesteads to wealthy interests and speculators, and many were in poverty. *See Ahuna v. Dep't of Hawaiian Home Lands*, 64 Haw. 327, 336, 640 P.2d 1161, 1167 (1982) (citing testimony of Former Secretary of the Interior Franklin L. Lane before the House Committee on the Territories, H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920) (hereinafter "H.R. Rep. No. 839")). Prince Kuhio, elected delegate to Congress, said in 1920 that "[i]f conditions remain as they are today, it will only be a matter of a short space of time when this race of people, my people, renowned for their physique, their courage and their sense of justice, their straight-forwardness, and their hospitality, will be a matter of history." Daws at 296-97. In fact, Congressional materials characterized native Hawaiians as a "dying race" due to their high mortality rates. *See Arakaki,* 198 F. Supp. 2d at 1171. The declining condition of the native population was the subject of much conversation, and "one of the words most frequently used was 'rehabilitation.'" Daws at 297; *see also* H.R. Rep. No. 839 (entitled "Rehabilitation of Native Hawaiians"). It was recognized that native Hawaiians had not adapted well to the city, and that a decreasing number of them owned land. *See* Fuchs at 71. "[A]fter much discussion, the conclusion was reached that the Hawaiian could be made a useful member of society again only . . . by making special, exclusive provisions for his welfare to

protect him against the ruinous competition of more aggressive races . . . ." Daws at 297.

A. The Hawaiian Homes Commission Act

In response to this situation, Congress in 1921 enacted the Hawaiian Homes Commission Act ("HHCA," also referred to as the "Hawaiian Homelands" program), which provided more than 200,000 acres of ceded public land for the rehabilitation of native Hawaiian people. *See* HHCA, Pub. L. No. 67-34, 42 Stat. 108 (1921). The HHCA created programs for loans and long-term leases for native Hawaiians, which the HHCA defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *See id.* The legislative history of the HHCA, which describes native Hawaiians as "our wards" and Congress as "trustees," shows Congressional intent to create a trust in these lands. *See* H.R. Rep. No. 839 (statement of Franklin K. Lane); *see also Rice v. Cayetano*, 963 F. Supp. 1547, 1551 (D. Haw. 1997), *aff'd* 146 F.3d 1075 (9th Cir. 1998), *rev'd on other grounds,* 528 U.S. 495 (2000), (construing same).

B. The Admission Act

As a condition of statehood, the new State of Hawai`i adopted the HHCA as part of its own constitution. *See* Admission Act of March 18, 1959 § 4, Pub. L. No. 86-3, 73 Stat. 4 ("Admission Act"). The United States granted Hawai`i the approximately 200,000 acres set aside under the HHCA, to be held by the State "as

a public trust" for the "betterment of the conditions of native Hawaiians, as defined in the [HHCA]." *Id.* § 5(f). The United States, however, reserved to itself the power to enforce the trust, and reserved to itself the right to consent to any change in the qualifications of lessees under the program. *See id.* §§ 4, 5(f). Article XII, section 1 of the Hawai`i Constitution adopts the HHCA as a law of the State, and recognizes that the consent of the United States is required for the HHCA's amendment or repeal. *See also* Haw. Const. Art. XII § 2 (accepting the terms of the HHCA as a compact with the United States). The Department of Hawaiian Home Lands ("DHHL") now administers the land originally set aside under the HHCA, through the executive direction of the Hawaiian Homes Commission ("HHC"). *See* Haw. Rev. Stat. § 26-17 Michie (2000); HHCA § 202(a).

C. Subsequent Federal Acts Reaffirming and Clarifying Congress' Special Relationship with Native Hawaiians

Even in modern times, Congress has deemed it necessary to establish for the benefit of native Hawaiians and their descendants numerous federal programs. This legislation, like the HHCA, is premised on explicit recognition of a "trust relationship," a "political relationship between the United States and the Native Hawaiian people," or a "trust responsibility for the betterment of the conditions of Native Hawaiians." *E.g.*, Native Hawaiian Education Act, 20 U.S.C. § 7512 (12), (13); Native Hawaiian Health Care Act, 42 U.S.C. § 11701(18). Moreover, in the Native Hawaiian Education Act, Congress found explicitly that the Act's services

were not extended to the beneficiaries because of race, but because of their "*unique status as the indigenous people of a once sovereign nation to whom the United States has established a trust relationship*" and that the relationship is "political." *See also* Hawaiian Homelands Ownership Act of 2000, 25 U.S.C. §§ 4221-4243 (2000) (same).

As demonstrated above, Congress has recognized and attempted to address problems related to health care, education and poverty in the native Hawaiian community, and those concerns are strikingly borne out by statistics. Native Hawaiians, as the greater population of which native Hawaiians are a part, are disproportionately overrepresented as victims of infant mortality, diabetes and asthma, and as inmates in correctional facilities. Native Hawaiians are also less likely to achieve higher education, and more likely to be homeless or to need public financial assistance. *See* Office of Hawaiian Affairs, *Native Hawaiian Data Book* (2002), *available at* http://www.oha.org/pdf/DataBook030220.pdf.

D. Senate Bill 344

Currently pending before the 108th Congress is Senate Bill 344, officially entitled "A bill 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." The bill was introduced by Hawai`i senator Daniel K. Akaka, and

is commonly called the "Akaka Bill." Among other things, the bill recognizes the right of the Hawaiian people to adopt organic governing documents and hold elections to form a governing entity, and would extend federal recognition to the governing entity as the representative governing body of the Hawaiian people upon election of officers and certification by the Secretary of the Interior. *See* Native Hawaiian Recognition Act of 2003, 108th Cong. § 7 (2003).

E. The Litigation Below

On March 4, 2002, Arakaki filed his Complaint for Declaratory Judgment and for an Injunction. Excerpts of Record ("ER") 1. The Complaint alleged, *inter alia*, that Arakaki, as a beneficiary of a public land trust, was injured by diversions of land and revenues to DHHL and OHA, and that appropriations to DHHL and OHA harmed Arakaki as a taxpayer. *Id.*

On May 8, 2002, the court issued its Order Granting in Part and Denying in Part Motions to Dismiss on Standing Grounds. ER 5. In that Order the court determined that plaintiffs had state taxpayer standing, which was limited to claims that challenged direct expenditures of tax money. *Id.* The court dismissed Arakaki's claim of breach of trust obligations because, *inter alia*, while Arakaki might have had standing to *enforce* the terms of a trust established by the Admission Act, Arakaki sought instead to have one of the terms of section 5(f)

declared unconstitutional. *Id.* at 26-27. The court found this to be a generalized grievance. *Id.*

On September 3, 2002, the court filed its Order Granting Defendant United States of America's Motion to Dismiss. ER 8. This Order recognized that, because the scope of a state taxpayer challenge is limited to direct expenditures of state tax revenues, Arakaki could not challenge the Hawaiian Homelands program or OHA *in toto*. *Id.* at 3-4. Consequently, since none of the remaining claims could therefore be asserted against the United States, the District Court dismissed the United States as a defendant. *Id.* at 4-5.

The Ninth Circuit filed its opinion in *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003) on September 2, 2003. In response to that opinion, the court vacated its earlier order dismissing the United States, ER 12, and at a status conference on September 8, 2003, invited the parties to submit briefings on the impact of *Carroll* to the instant case. After a hearing on those motions, the court on November 21, 2003 filed its Order Granting Defendants Motions to Dismiss Plaintiff's Claim Regarding the Hawaiian Homelands Lease Program. ("HHCA Order," ER 14). The court stated:

> *Carroll* teaches that any challenge to the lessee requirements of the Hawaiian Home Lands lease program necessarily involves a challenge to the Admission Act, which is a federal law. The court therefore grants Motions 2 thorough 5 in part, dismissing Plaintiffs' claim challenging the Hawaiian Home Lands lease program based on lack of standing. State taxpayer standing is too limited to permit a challenge

> to a federal law and therefore does not allow Plaintiffs to challenge the Hawaiian Home Lands lease program, which is mandated by both state and federal law.

HHCA Order, ER 14, at 5. Accordingly, the United States, the DHHL, the HHC, Defendant-Intervenors Hui Kako`o `Aina Ho`opulapula and SCHHA were dismissed from the case.

On January 14, 2004, the court issued its Order Dismissing Plaintiffs' Remaining Equal Protection Claim ("Political Question Order," ER 28). This order dismissed OHA, the sole remaining defendant in the case. ER 28. In the Order, the court catalogued acts of Congress intended to benefit not only native Hawaiians, as the HHCA did, but all Hawaiians, and discussed the language in those acts suggesting a unique legal relationship between Congress and the Hawaiian people. *Id.* at 22. The court held that "[t]he political status of Hawaiians is currently being debated in Congress, and this court will not intrude into that political process." *Id.* at 3. Final Judgment in Favor of Defendants and Against Plaintiffs was entered in the case on January 15, 2004.

SCHHA filed its Bill of Costs on February 9, 2004 and, on April 14, 2004, the Report of Special Master on Plaintiffs' Objections to Defendants' Submission of Bill of Costs was filed, recommending the award of costs to defendants. *See* SCHHA's Supplemental Excerpts of Record ("Supp. ER") 1. On May 5, 2004, the

court filed its Order Adopting and Affirming Report of Special Master on Plaintiffs' Objections to Defendants' Submission of Bill of Costs. ER 34.

## IV. SUMMARY OF ARGUMENT

### A. Arakaki's Constitutional Challenge to the Hawaiian Homelands Program Presents a Non-Justiciable Political Question

The Court below did not err in dismissing Arakaki's equal protection claim against OHA as a nonjusticiable political question. *See* Political Question Order, ER 28. Arakaki's Opening Brief, however, fails to recognize that the Political Question Order addressed only the single remaining claim against OHA, and instead argues broadly that even the claims related to the Hawaiian Homelands program did not present political questions. This question was not before the District Court at the time it issued the Political Question Order, as the Hawaiian Homelands claim had earlier been dismissed for lack of standing. *See* HHCA Order, ER 14. Because the Opening Brief makes the argument, SCHHA is compelled to demonstrate that the District Court's disposition on political question grounds would likewise have been correct, though for other reasons, as applied to Arakaki's challenge to the Hawaiian Homelands program, had those claims not already been dismissed on standing grounds. This is because the Hawaiian Homelands program and the Admission Act were born directly out of Congressional exercises of three independent, plenary powers committed to Congress by the Constitution: the power to regulate and dispose of federal

property; the power to admit states to the Union; and the power to recognize and protect indigenous peoples. A history of federal case law demonstrates that these powers are reserved for Congress, alone, and application of the political question doctrine thus precludes judicial review of the Hawaiian Homelands program and the Admission Act.

B. Arakaki Has Not Established Standing to Challenge the Hawaiian Homelands Program Based Upon Status as a Trust Beneficiary

Arakaki appears to argue two alternative theories to support standing as a trust beneficiary. Arakaki's first theory is that he is a beneficiary of the 1898 Newlands Resolution and that "Congress, by enacting the [HHCA] in 1921, caused the United States to violate its fiduciary duty as trustee of the public land trust." Opening Brief at 22. This theory is fatally flawed for a number of reasons, including, *inter alia*, Arakaki's failure to establish: that the Newlands Resolution established a trust in the first instance; that the terms of any such trust were not wholly superseded by subsequent legislation; that the terms of the HHCA were inconsistent with the terms of the Newlands Resolution; or that such a breach as that alleged would be redressable. The second theory on which Arakaki relies is likewise terminally flawed. Arakaki appears to argue that, as a beneficiary of a land trust established by the Admission Act, he has standing to challenge, as unconstitutional, the terms of the trust. There is no authority, however, conferring standing on a plaintiff who seeks to *challenge* the terms of a trust of which he is a

beneficiary, rather than to *enforce* the terms of such a trust. Instead, Arakaki presents a nonjusticiable generalized grievance.

C. Arakaki's Status as a State Taxpayer Does Not Confer Standing to Challenge the Hawaiian Homelands Program

The District Court was correct in dismissing, for lack of standing, Arakaki's claims regarding the Hawaiian Homelands program. As recognized by the District Court, Arakaki has not alleged a direct injury personal to him, but has alleged only injury as a state taxpayer. As shown below, Arakaki's claim is necessarily limited to the scope of his injury as a state taxpayer and, under precedent of such cases as *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991), Arakaki's challenge is properly limited only to expenditures of tax revenues. Moreover, case law such as *Western Mining Council v. Watt*, 643 F.2d 618 (9th Cir. 1981) precludes Arakaki, based solely on his status as a state taxpayer, from challenging federal law, and supports instead the District Court's conclusion that Arakaki's Complaint presents only a generalized grievance.

D. Arakaki Is Not Entitled to Reversal of the Order Denying Him Partial Summary Judgment

The District Court properly struck Arakaki's Motion for Partial Summary Judgment as untimely, and that order should not be reversed. Arakaki's Motion for Partial Summary Judgment was an attempt to circumvent the District Court's order bifurcating the motions, so that motions addressing standing and justiciability would be considered prior to motions addressing the merits of the case. Because

Arakaki's Motion for Partial Summary Judgment went directly to the merits, it was properly and promptly stricken, without further briefing. Moreover, on finding that Arakaki had no standing to challenge the Hawaiian Homelands program, and upon finding that the challenge to OHA presented a nonjusticiable political question, there was no reason for the District Court to reach the merits of the claims, and there is no reason for this Court to do so here.

E. There Was No Undue Delay in this Case in the District Court

This case was responsibly and timely managed by the District Court, and there was no delay to justify the relief Arakaki requests.

F. The Award of Costs to Defendants was Appropriate and Consistent with the FRCP

Pursuant to the Federal Rules of Civil Procedure and common practice, the District Court properly awarded litigation costs to defendants, as prevailing parties. Arakaki does not argue that the costs were unreasonable, and does not allege that any of the Plaintiffs are indigent. To the contrary, the fact that there are numerous Plaintiffs should dispel concern regarding financial hardship, as costs may be divided among them, and the fact that plaintiffs have appealed likewise should dispel concerns regarding a chilling effect of the award.

## V. ARGUMENT

### A. Arakaki's Constitutional Challenge to the Hawaiian Homelands Program Presents a Non-Justiciable Political Question

Arakaki challenges the District Court's dismissal, by the Political Question Order (ER 28), of the Equal Protection claim against OHA as presenting a political question. The Political Question Order disposed of the final remaining claim against OHA after dismissal of the Hawaiian Homelands-related claims in the November 21, 2003 HHCA Order (ER 14). The HHCA Order dismissed the Hawaiian Homelands-related claims on the basis of a lack of standing to challenge the Hawaiian Homelands program. Arakaki's Opening Brief, however, does not distinguish between the orders or the corresponding interests, and appears to argue that the challenge to the Hawaiian Homelands program does not present a nonjusticiable question. *See* Opening Brief at 2 (framing issue for review as "[w]hether Appellant's challenge to the State's and the United States' use of the racial classifications "Hawaiian" and "native Hawaiian" to determine the recipients of public land and other benefits presents a nonjusticiable political question."); *see also* Opening Brief at 17 ("Defendants/Appellees have the burden of showing that allocations of public lands . . . using these racial classifications survive strict scrutiny."). Because of the breadth of Arakaki's argument, SCHHA is compelled to show that, in addition to the District Court's correct disposition of the Hawaiian Homelands-related claims on the basis of standing, the challenge to the Hawaiian

Homelands program does indeed present a nonjusticiable political question, because it was born directly out of Congressional exercises of plenary powers committed to it by the Constitution. Congress created the Hawaiian Homelands program, and made its continuance a condition of Hawaii's statehood, pursuant to three independent plenary powers, granted by the Constitution, to dispose of federal property, to admit states into the union and to recognize and protect native peoples. Accordingly, Arakaki's challenge to the Hawaiian Homelands programs raises questions that are properly reserved to the halls of Congress rather than to this Court. *See, e.g., United States v. Sandoval*, 231 U.S. 28, 46 (1913).

The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Assoc. v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986). The doctrine recognizes that "courts are ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'" *Id.* (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (1981)). The Supreme Court has further determined that a court may dismiss a case as involving a nonjusticiable political question when one of the following is "inextricable" from the case:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; 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 impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker v. Carr*, 369 U.S. 186, 217 (1962).

1. Congress' Exercise of Plenary Power Under the Property Clause Renders the Challenge to Hawaiian Homelands a Political Question.

The United States Constitution, at Article IV, section 3, clause 2, the "Property Clause," vests Congress with virtually unlimited authority to manage and dispose of federal property: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." This provision reserves exclusively to Congress the plenary authority to acquire, dispose of and manage property owned by the United States. The Supreme Court has repeatedly declared that Congress' authority over federal lands is "without limitation." *Kleppe v. New Mexico,* 426 U.S. 529, 539 (1976); *United States v. State of California*, 332 U.S. 19 (1947); *United States v. City and County of San Francisco*, 310 U.S. 16, 29 (1940). This power includes Congress' disposition, under the Hawaiian Homelands program, of the approximately 200,000 acres of federal land for the benefit of native Hawaiians.

In interpreting the Property Clause, the Supreme Court has observed:

> Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein. Congress "may deal with such lands precisely as a private individual may deal with his farming property." . . . Like any other owner it may provide when, how and to whom its land can be sold. *Congress may prohibit absolutely or fix the terms upon which property may be used.*

*United States v. Midwest Oil Co.,* 236 U.S. 459, 474 (1915) (emphasis added); *see also United States v. Gardner,* 107 F.3d 1314, 1318 (9th Cir. 1997). In *Midwest Oil,* the Court stated that the power to make permanent reservations of mineral rights included the implied power to make temporary withdrawals of oil. The Court rejected a challenge to the President's withdrawal of oil reserves, even though the lands in question had been declared "free and open to occupation, exploration and purchase . . . under regulations prescribed by law," stating the power to make such withdrawal was one that had long been recognized through acts of Congress.[2] As a later opinion construing the Property Clause explained, "neither the courts nor the executive agencies could proceed contrary to an Act of Congress in this congressional area of national power." *United States v. California,* 332 U.S. 19, 27 (1947) (declaring federal power to control oil and gas exploration in submerged coastal lands supreme); *see also Light v. United States,* 220 U.S. 523 (1911) ("[T]he nation is an owner, and has made Congress the

[2] The Court recognized this as an exercise of congressional Property Power by the Executive to which, through custom, Congress had acquiesced. *See Midwest Oil,* 236 U.S. at 471.

principal agent to dispose of its property. . . . Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of.").

The breadth of the Property Power is illustrated by the fact that it extends beyond the boundaries of federal land, permitting Congress to prohibit conduct on private land that would affect federal proprietary rights. *See, e.g., United States v. Alford,* 274 U.S. 264, 267 (1927) (upholding criminal prosecution of one who built fire near but not on federal land, threatening wildfire); *Camfield v. United States,* 167 U.S. 518, 525 (1897) (enjoining erection of fences exclusively on private land that interfered with free access to federal lands); *United States v. Lindsey,* 595 F.2d 5 (9th Cir. 1979) (upholding punishment for violating forest service regulations prohibiting fires and camping even though conduct occurred on adjacent land indisputably owned by the state).

In addition to limiting the use of its property, Congress may dispose of its property to further identified public policies and may make such dispositions subject to express conditions on the property's future use, even though that policy is nowhere enumerated in the Constitution as a prerogative of Congress. For example, Congress routinely used federal land grants, with restrictions on the lands' use, to benefit railroad construction and to promote expansion of the West. *See Leo Sheep Co. v. United States,* 440 U.S. 668, 669-77 (1979). Using this plenary authority to effectuate national policy, Congress also has created national

parks,[3] wilderness areas[4] and wildlife refuges.[5] No enumerated powers underlie such grants. Nor do express enumerated powers underlie other grants or conditions imposed when Congress conveys property to effectuate identified policies of more local focus. *See United States v. San Francisco,* 310 U.S. 16 (1940) (upholding Congress' proprietary authority to grant federal land to San Francisco under a limitation that the land be used solely for construction of a public electrical utility and prohibiting sale of the electricity to private companies).[6]

*Kleppe* demonstrates that Congress' Property Power continues to enjoy the same vitality today as it did during the period of Western expansion. Exercising its authority under the Property Clause, Congress in 1971 passed the Wild Free-roaming Horses & Burros Act, 16 U.S.C. § 1331. Congress deemed regulated animals an integral part of the natural system of public lands and found their

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[3] Yellowstone Nat'l Park Establishment Act, 16 U.S.C. § 21.

[4] Wilderness Act of 1964, 16 U.S.C. §§ 1131-36.

[5] National Wildlife Refuge System Admin. Act of 1966, 16 U.S.C. §§ 668dd & §668ee.

[6] In *Valley Forge Christian Church v. Americans United for Separation of Church & State,* 454 U.S. 464 (1982), the Court rejected a suit by taxpayers alleging that, by conveying property without charge to a Christian college, the Secretary of Health, Education and Welfare had violated the Establishment Clause. *See id.* at 485-86. The Court held that the taxpayers had no standing to challenge the transfer of land under Congress' Property Clause power, as "a taxpayer will be a proper party to allege unconstitutionality only of exercises of Congressional power under the [Taxing and Spending Clause]." *Valley Forge*, 454 U.S. at 470, 480. No constitutional provision beyond the Property Clause was necessary to

management necessary to achieve ecological balance on those lands and to preserve the animals as a "living symbol of the historic and pioneer spirit of the West." *Id.* at § 1. The Act prohibited capture, branding or harassment of unclaimed, unbranded horses and burros on public lands of the United States. The New Mexico Livestock Board, in response to a rancher's complaint, removed nineteen burros from the land pursuant to a state statute authorizing the removal of the animals from public and private lands, but directly contrary to the provisions of the Act. New Mexico asserted that the federal regulation exceeded congressional power under Article IV, as it was subject to state doctrines concerning wild animals, and that the federal Property Power terminated after territories became states admitted to the Union. A unanimous Supreme Court first explained that, when ruling whether the law was "needful" regulation "respecting" public lands, a court must give deference to Congress' plenary power:

> [W]e have repeatedly observed that "[t]he power over the public land thus entrusted to Congress is without limitations."
>
> The decided cases have supported this expansive reading. It is the Property Clause, for instance, that provides the basis for governing the Territories of the United States. And even over public land within the States, "(t)he general government doubtless has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case." We have noted, for example, that the Property Clause gives Congress the power over the public lands "to control their occupancy and use, to protect them from

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support the conclusion that Congress can authorize federal agencies to dispose of property "to meet well-recognized public priorities." *Id.* at 480 & n.16.

> trespass and injury, and to prescribe the conditions upon which others may obtain rights in them . . . ." . . . In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain.

*Kleppe*, 426 U.S. at 539-40. Accordingly, the Court rejected as "too narrow" the state's contentions that the Property Power was limited to the disposition, regulation and protection of federal property. *Id.* at 537. Significantly, after cataloguing the many arenas in which this power is preeminent, the Court summarized that the Property Clause permits Congress to exercise *complete power over property entrusted to it. Id.* at 540.

Finally, the Court rejected New Mexico's contention that the Act was unconstitutional because, according to the state, Congress was mistaken in finding that the wild horses and burros "were fast disappearing from the American scene." The Court expressly found that congressional exercise of the Property Power did not depend on such findings—correct or incorrect—in the first instance. *See id.* at 540 n.10. The Court observed that findings were neither required nor determinative of the scope of congressional authority. The Court then stated that, even if such findings were made based on conflicting evidence, Congress had weighed that evidence and made a judgment that ought not be second guessed by the Court: "What appellees ask is that we reweigh the evidence and substitute our judgment for that of Congress. *This we must decline to do.*" *Id.* (citations omitted, emphasis added).

Clearly, the Court affirmed that the Property Power is plenary. The Court reaffirmed that congressionally-identified interests are not subject to judicial second-guessing and that determinations of national policy advanced through conditions imposed on property are the exclusive dominion of Congress, irrespective of competing state interests or concerns over the factual bases of such decisions.

Congress' authority under the Property Clause justifies beyond judicial scrutiny that the Hawaiian Homelands program, and the benefits conferred thereunder, must survive Arakaki's constitutional challenge. First, with the enactment of the HHCA, the Hawaiian Homelands programs were created out of federal territorial lands. Lands designated for the Hawaiian Homelands programs by Congress were public lands comprised of ceded former crown and other common lands, obtained by the federal government when Hawai`i became a Territory. *See* Testimony of Prince Jonah Kuhio Kalanianaole, 59 Cong. Rec. 7452-53 (1920). As demonstrated above, Congress' policy determinations, under the Property Clause, to set aside federal territorial land for the benefit of native Hawaiians cannot be gainsaid by the courts.

Second, and importantly, the undisputed congressional policy reason for setting aside 200,000 acres of federal land under the Hawaiian Homelands program was for the rehabilitation of a "dying" people—native Hawaiians. *See, e.g., Rice*, 528 U.S. at 507 (recognizing that "Congress enacted the [HHCA] and created a

program of loans and long-term leases" to "rehabilitate the native Hawaiian population"). Indeed, through the Hawaiian Homelands program, Congress not only specifically recognized, but *defined* the class of Hawaiians—native Hawaiians—that the HHCA was intended to rehabilitate. *See* HHCA § 201 (defining "native Hawaiians"). As instructed by *Kleppe*, Congress' decision, pursuant to the Property Clause, to set aside federal land for the rehabilitation of native Hawaiians must not be second-guessed by the courts.

2. The Trust Obligations and Duties to native Hawaiians Impressed Upon Hawai`i as a Condition of Statehood Were a Constitutionally Proper Exercise of Congress' Power Under the Admission Clause

Immediately preceding the Property Clause, and naturally related to it, the Admission Clause states:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

As with the Property Power, Congress has broad authority over terms of a state's admission to the Union. The Admission Power is limited only to prohibit congressional action that threatens the States' "separate and independent existence," *Coyle v. Smith*, 221 U.S. 559, 580 (1911); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869), or impairs the ability of the States to function effectively in a federal system. *See Fry v. United States,* 421 U.S. 542, 547 n.7

(1975). Thus, in *Coyle*, the Court held that Congress' attempt to force Oklahoma to locate its state capitol in a particular location intruded too far into the prerogatives of statehood and declared this limitation invalid. *Coyle* is unique: *it is the only case that recognized a limitation on the Admission Power exercised by Congress after the Civil War.* This is stunning, given the variety and extent of conditions regularly imposed by Congress when territories join the Union. A simple canvas of Admission acts illustrates the numerous conditions imposed by Congress. Twenty-seven states came into the Union through acts of admission, organic acts, or enabling acts. Every one of these states took federal lands subject to conditions that continued after statehood.

Congress granted enormous tracts of land to these twenty-seven states to fund various public purposes, through later lease or disposition of the lands conveyed. Purposes specified by Congress included establishment of agricultural universities, schools of mining, public primary and secondary schools, reform schools, penitentiaries, asylums, public buildings, schools for the handicapped, hospitals for disabled miners, "charitable institutions," and military institutes. *See, e.g.,* Act of June 20, 1910, c.310 § 25, 36 Stat. 556, 568-79 (New Mexico-Arizona Enabling Act). Congress specified that the schools and universities established pursuant to these grants would remain under state control in perpetuity. *Id.* § 26. Congress identified other more general public purposes for which land grants were made. *See, e.g.,* Pub. L. 85-508 § 6, 72 Stat. 339 (granting lands to Alaska "which

shall be adjacent to established communities or suitable for prospective community centers and recreational areas").

All of these enabling acts also contain provisions requiring the newly formed states to recognize certain Indian rights and Indian property interests and restricting the states' power to affect those rights and interests. *See, e.g.*, New Mexico-Arizona Enabling Act (requiring Arizona to disclaim forever any right to Indian lands acquired by Indians from Congress); Act of June 16, 1906, c.3335 § 3, 34 Stat. 269 (similarly requiring Oklahoma to disclaim rights to Indian lands); Pub. L. 85-508 § 4, 72 Stat. 339 (requiring Alaska to disclaim all the right or title to land held by Indians, Eskimos, or Aleuts, including traditional fishing rights).

Hawai`i's Admission Act is not significantly different than most enabling or admission acts. As with all such statutes, it conveys federal land to the state and identifies purposes (five) for which the lands conveyed by the federal government to the state are to be held in trust. *See* Pub. L. 86-3 § 5(f), 73 Stat. 4. One of the identified purposes, as in other enabling/admission statutes that preceded it, was to require Hawai`i, as a condition of statehood, to preserve land rights previously enjoyed by or conveyed to indigenous peoples through congressional action. *See id.* § 4.

As with other statutes establishing land trusts held for the benefit of particular groups, the Admission Act sets forth the basic procedural requirements for enforcement and modification of the substantive terms of the program and, by

requiring the adoption of the HHCA, sets the terms of participation in the Hawaiian Homelands program, limiting the beneficiaries to native Hawaiians. *See id.* Hawai`i must obey this federal mandate. *See Price v. Akaka*, 928 F.2d 824, 826 n.1 (9th Cir. 1990) (United States strictly limits the manner in which Hawai`i manages homelands and its income). Federal conditions such as this have consistently been held a proper exercise of congressional authority, even though they limit the state's power to regulate or dispose of land. *See, e.g., Stearns v. Minnesota,* 179 U.S. 223, 245 (1900) (conditions, imposed to limit state's ability to regulate certain property, do not improperly interfere with state sovereignty).

That Congress is empowered to create fiduciary obligations on the part of the state to manage lands for the benefit of some class of people or to promulgate some national policy is well established. *See, e.g., Lassen v. Arizona*, 385 U.S. 458 (1967); *Ervien v. United States*, 251 U.S. 41 (1919); *Branson School District v. Romer*, 161 F.3d 619 (10th Cir. 1998). For example, in *Branson*, the Tenth Circuit concluded that Congress created a "fiduciary relationship for the state of Colorado when it conveyed the school lands to the state" and that the "creation of such trust was within Congress' powers under the Constitution." *See Branson*, 161 F.3d at 633. In reaching its conclusion, the Tenth Circuit first recognized that it is beyond dispute that "Congress may create a trust through the manifestation of an intent to create a fiduciary relationship" and that fundamental principles of general trust law apply to such trusts. *Id.* at 633-34. However, Congress need not use any particular

form of words in creating a trust, "and the absence of words 'trust' or 'trustee' in the conveyance is not determinative of the question of whether Congress intended to create a trust." *Id.* at 634. Instead, "the creation of a trust depends on whether the relevant statutory provision contains 'an enumeration of duties' which would justify a conclusion that Congress intended to create a trust relationship." *Id.* at 634. Thus, the Tenth Circuit reasoned that a federal trust exists where Congress creates specific restrictions on the manner in which lands can be managed and disposed of and the duration of their benefits. *See id.* at 634.

Based on the above principles, the Tenth Circuit examined the Colorado Enabling Act, finding that the Act enumerated the state's specific duties in the following ways:

> Congress has prescribed (1) how the school lands are to be disposed, (2) at what minimum price, (3) how the income from these sales is to be held, (4) what may be done with interest on that capital holding, and (5) Congress has provided for the permanence of the benefit of these assets for the common schools.

*Id.* Accordingly, the Tenth Circuit found that, in light of the enumerated duties, Congress intended to create a fiduciary obligation for the state of Colorado to manage school lands in trust for the benefit of the state's common schools. *See id.*

The Admission Act in the instant case presents an even stronger case than in *Branson* that Congress intended to impose on the State of Hawai`i a fiduciary obligation to manage the Hawaiian Homelands in trust for the benefit of native Hawaiians. First, section 5(f) of the Admission Act evinces clear congressional

intent to impose on Hawai`i, through compact, a federal trust of the Hawaiian Homelands that is permanent and controls their management and disposition. Indeed, this Court has recognized that:

> [w]hile the management and disposition of the home lands was given over to the state of Hawaii with the incorporation of the [HHCA] into the state constitution, *the trust obligation is rooted in federal law*, and the power to enforce that obligation is contained in federal law. *Congress imposed the trust obligation as a condition of statehood and as a "compact with the United States."*

*Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467, 1472 (9th Cir. 1984); *see also Price*, 764 F.2d at 628.[7] Section 4 of the Admission Act commands that Hawai`i obtain federal approval for substantive modifications of the Hawaiian Homelands program, such modifications to lessee qualifications.

Second, the HHCA itself contains a comprehensive "enumeration of duties which would justify a conclusion that Congress intended to create a trust relationship" between the state and native Hawaiians. For example, the HHCA (1) specifically defines the class of beneficiaries, (2) requires the creation of a specific agency (DHHL) to oversee the Hawaiian Homelands, (3) describes in detail the specific lands subject to the trust, (4) places limitations on the sale and lease of Hawaiian Homelands, and (5) prescribes the manner in which the Hawaiian

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[7] Significantly, although not required, the Admission Act expressly uses the term "trust" in describing the state of Hawaii's fiduciary obligation to "native Hawaiians."

Homelands may be leased to native Hawaiians. Indeed, an examination of the HHCA unquestionably demonstrates that Congress placed numerous enumerated fiduciary duties upon the state of Hawai`i with respect to the Hawaiian Homelands. The Admission Act and the HHCA therefore demonstrate Congress' intent to create a trust relationship with the native Hawaiians and to impose upon Hawai`i a fiduciary obligation to act as trustee for the federal Hawaiian Home Lands trust.

3. Congress Enjoys a Plenary Power to Recognize and Protect Indigenous Peoples

Congress' power to recognize and protect native peoples is well established and not limited to the Indian Commerce Clause. *See, e.g., Bd. of County Comm'rs v. Seber*, 318 U.S. 705, 715-16 (1943) (recognizing Congress' plenary power to regulate Indian affairs). For example, the Supreme Court has observed that, even aside from the Indian Commerce Clause, "long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities." *Sandoval*, 231 U.S. at 45-46.

Congress' power to recognize and protect native peoples arises from the duty to do so:

> From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

> *This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.*

*U. S. v. Kagama*, 118 U. S. 375, 375 (1886).

This plenary power to regulate and protect native peoples includes the power to identify the communities over which that power exists. For example, even after the Supreme Court had concluded that the Pueblo people of New Mexico were too assimilated to constitute an Indian tribe within the meaning of the Intercourse Act, *United States v. Joseph*, 94 U.S. 614, 617-18 (1877), the Court nevertheless deferred to Congress' decision to recognize the Pueblos as Indian communities within the Indian affairs power. *See Sandoval*, 231 U.S. at 47. The Court recognized that the executive and legislative branches of the federal government had engaged in a "uniform course of action" in treating the Pueblos as dependent communities entitled to the federal government's aid and protection, like other Indian tribes. Thus, the previous assertion of guardianship over them, the Court found, "must be regarded as both authorized and controlling." *Sandoval*, 231 U.S. at 47 (citing *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1865): "In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs."). As long as Congress concludes, non-arbitrarily, that a community is "distinctly Indian," "the questions whether, to what

extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *Id.* at 46.

As in *Sandoval*, the courts are an improper forum for Arakaki's challenge to Congress' decision to *recognize* native Hawaiians and provide for their rehabilitation under the Hawaiian Homelands program. Congress' determination that the relationship between the United States and native Hawaiians is that of guardian to ward "must be regarded as both authorized and controlling." Congress has consistently, since 1920, addressed the plight of native Hawaiians, demonstrating a concerted national policy to preserve and protect the very existence of a defined group. The United States Congress has provided a matrix of some 150 laws[8]—in addition to the HHCA—that have recognized and extended benefits to native Hawaiians and their descendants. Arakaki's challenge founders on the historic relationship between the United States and native Hawaiians and is blind to the breadth and depth of Congress' commitment to these people. If these laws were found to be invidious racial discrimination, a substantial body of law "would effectively be erased and the solemn commitment of the Government toward the [native Hawaiians] would be jeopardized." *See Morton v. Mancari*, 417 U.S. 535, 552 (1974).

B. Arakaki Has Not Established Standing to Challenge the Hawaiian Homelands Program Based Upon Status as a Trust Beneficiary

Arakaki challenges the District Court's conclusion that he is without trust beneficiary standing. Tellingly, in the litigation below, Arakaki changed his position with respect to trust beneficiary standing, first claiming status as a beneficiary of the Newlands Resolution of 1898, and later changing that position to claim beneficiary status only under the Admission Act. *See* Order Granting in Part and Denying in Part Motions to Dismiss on Standing Grounds filed May 8, 2002 (ER 5) at 20-22. Arakaki now changes his position again to argue that he is a beneficiary of the trust created by the Newlands Resolution in 1898. As this claim was "deemed abandoned" by the Court below upon express representations by counsel during oral argument, *id.* at 22, it is improperly raised here. Even if that were not the case, however, under either of the two theories Arakaki cannot establish standing as a trust beneficiary to challenge section 5(f) of the Admission Act.

Arakaki argues in essence that he is the beneficiary of the trust settled by the 1898 Newlands Resolution, which set aside ceded lands "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." ER 2. Arakaki further alleges that "Congress, by enacting the [HHCA], in 1921,

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[8] Brief of Amicus Curiae Hawaii Congressional Delegation at Appendix "A" thereto, *Rice v. Cayetano*, 528 U.S. 495 (2000).

caused the United States to violate its fiduciary duty as trustee of the public lands trust." Opening Brief at 22. This theory is fraught with infirmities. First, Arakaki has not established that the Newlands Resolution's language created a trust in the first instance. In any event, since 1959 the federal government has done nothing with respect to the alleged trust, as it no longer holds or controls the trust corpus and can no longer conform or fail to conform to trust terms. *See Price v. State*, 764 F.2d 623, 631 (9th Cir. 1985) (observing that the United States is not a formal trustee of the 5(f) trust). Moreover, Arakaki has not shown, as he must to succeed on this claim, that Congress' setting aside land for the Hawaiian Homelands program was inconsistent with Congress' own purpose in setting aside land for "public purposes." Nor can he, as Congress *itself* determined that setting aside land for the Hawaiian Homes program was in the interest of the public. It is for Congress, not the courts, to determine the "contours of public policy." *See Bob Jones Univ. v. United States*, 461 U.S. 574, 611 (1983); *see also Edison Bros. Stores, Inc. v. Broadcast Music, Inc.*, 954 F.2d 1419, 1426 (8th Cir. 1992) ("Congress thus declared the public policy of the United States and, for us, that is the end of the matter.").

Even if it could be convincingly argued that the United States breached some preexisting trust obligation by passing the HHCA in 1921, and it cannot, it is unclear what remedy the Court could fashion, as that trust has effectively been

superseded. Finally, even if this theory had properly been argued below, any such cause of action would certainly be barred by the statute of limitations or laches, under operation of those same common principles of trust law that Arakaki urges this Court to apply. *See* George Gleason Bogert, *The Law of Trusts & Trustees* § 951 (2001) ("If the trustee violates one or more of his obligations to the beneficiary, . . . any relevant Statute of Limitations will apply").

Alternatively, if Arakaki's claim of standing is as a beneficiary of the trust established by the Admission Act, his claim also fails. Arakaki asserts that the Admission Act, at section 5, creates federal rights which beneficiaries can enforce by invoking 42 U.S.C. § 1983. Opening Brief at 24. While Arakaki cites cases finding beneficiary standing to *enforce* terms of a trust, he cites no cases holding that a trust beneficiary has standing to *challenge the terms* of the trust. Moreover, Arakaki cites cases involving only the specific trust created by the HHCA and incorporated by the Admission Act; he cites no cases in which a Hawai`i citizen, as a member of the general public, was found to have standing to enforce any other part of section 5(f) of the Admission Act. More broadly, Arakaki also cites no authority for the proposition that a citizen of a state with a public land trust has standing as a trust beneficiary either to enforce or to challenge trust terms. The only case cited by Arakaki involving a charitable trust is *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957), which involved plaintiffs who

claimed to have been victims of actual racial discrimination when the government, as trustee of a public land trust established by a will, enforced the terms established by the testator. The plaintiffs' injury was denial of admission to the school based upon their race. By contrast, Arakaki has claimed no such personal injury. Because Arakaki's claim is based upon a generalized grievance, he lacks standing to assert it, as it is well-settled that the rule against generalized grievances applies in equal protection challenges. *See United States v. Hays*, 515 U.S. 737, 743 (1995); *Carroll v. Nakatani*, 342 F.3d 934, 943 (9th Cir. 2003).

C. Arakaki's Status as a State Taxpayer Does Not Confer Standing to Challenge the Hawaiian Homelands Program

In its November 21, 2003 Order, the District Court summarized the basis for dismissal of the United States, the DHHL, the HHC, Defendant-Intervenors Hui Kako`o `Aina Ho`opulapula and SCHHA as follows:

> *Carroll* [*v. Nakatani*, 342 F.3d 934 (9th Cir. 2003)] teaches that any challenge to the lessee requirements of the Hawaiian Home Lands lease program necessarily involves a challenge to the Admission Act, which is a federal law. The court therefore grants Motions 2 thorough 5 in part, dismissing Plaintiffs' claim challenging the Hawaiian Home Lands lease program based on lack of standing. *State taxpayer standing is too limited to permit a challenge to a federal law and therefore does not allow Plaintiffs to challenge the Hawaiian Home Lands lease program*, which is mandated by both state and federal law.

HHCA Order (ER 14), at 5-6 (emphasis added); *see also* Order Granting in Part and Denying in Part Motions to Dismiss on Standing Grounds, filed May 8, 2002

(ER 5) (dismissing claims "that are not premised on actual expenditures of tax funds"). The court committed no error in so holding.

Arakaki offers no support for the proposition that taxpayer standing permits a challenge to any fiscal action of the State. Quite simply, the scope of Arakaki's state taxpayer challenge may not be broader than his alleged injury. This Court in *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991) recognized standing to challenge a state statute "when the taxpayer is able to show that he has sustained or is immediately in danger of sustaining some *direct* injury" as the result of the challenged statute's enforcement. "The direct injury required by *Doremus* is established when the taxpayer brings a 'good-faith pocketbook action'; that is, *when the challenged statute involves the expenditure of state tax revenues.*" *Cammack*, 932 F.2d at 769 (quoting *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952), and citing *Hoohuli v. Ariyoshi,* 741 F.2d 1169, 1178 (9th Cir. 1984) for the proposition that "pleadings must 'set forth the relationship between taxpayer, tax dollars, and the allegedly illegal government activity'") and *Reimers v. State of Oregon,* 863 F.2d 630, 632 n.4 (9th Cir. 1988) for the proposition that there is "no state taxpayer standing where taxpayer does not challenge the disbursement of state funds")). *Cammack*, however, contains nothing to suggest that the scope of the permissible challenge may be broader than the alleged injury. This Court's more recent decision in *Doe v. Madison School District*, 177 F.3d 789 (9th Cir. 1999) confirms

that the scope of a state taxpayer challenge remains limited to the scope of the alleged injury, as it confirmed that "taxpayer standing," by its nature requires "an injury resulting from a government's expenditure of tax revenues." *Doe*, 177 F.3d at 793. The Court emphasized that a state taxpayer is denied standing "when a plaintiff has failed to allege that the government spent tax dollars solely on the challenged conduct." *Doe*, 177 F.3d at 794 (citing *Reimers*, 893 F.2d 630). Therefore, any expenditure of ceded land lease revenues or issuance of bonds, for example, cannot be the subject of a state taxpayer challenge. For, "[w]ithout evidence of expenditure of tax revenues, the plaintiffs cannot claim standing by virtue of their taxpayer status." *Doe*, 177 F.3d at 796 (quoting *Gonzales v. North Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993). Broadening the scope of permissible challenges to state actions or transactions to include, for example, the disbursement of rental income or issuance of bonds would create such broad standing as to permit those generalized grievances that traditionally have not been recognized under Article III.

Nor can state taxpayer standing, even where it is established, be construed to permit challenges to programs mandated by federal law, such as the one here. This Court in *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003) observed that, because Article XII the Hawai`i Constitution adopted the native Hawaiian lessee requirements imposed by the Admission Act, "Article XII of the Hawaii

Constitution cannot be declared unconstitutional without holding this provision of the Admissions Act unconstitutional." *Carroll*, 342 F.3d at 944. Accordingly, the Court held that any challenge to lessee requirements of the HHCA would necessarily involve a challenge to the Admission Act, as "the Hawaiian classification is both a state and a federal requirement." *Carroll*, 342 F.3d at 944. State taxpayer standing is an insufficient basis for such a challenge. *Western Mining Council v. Watt*, 643 F.2d 618, 631-32 (9th Cir. 1981) is directly relevant to this point. In that case, the plaintiffs, as state taxpayers, challenged the Federal Land Policy and Management Act of 1976 as unconstitutional. The court held the plaintiffs had standing neither as federal taxpayers nor as state taxpayers. As to state taxpayer standing, the Court stated:

> Nor does plaintiffs' status as state taxpayers give them standing to challenge the federal retention and reimbursement policies of § 1701(a)(1) and (13) [relating to use of federal land]. . . .
>
> *In the instant context of a state taxpayer challenge to federal statutes, the policies of the standing doctrine demand that plaintiffs allege some injury which is more definite and individual than the higher state taxes allegedly suffered here.* Apparently as a prudential matter, the Supreme Court has held that "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." Similarly, in *Flast v. Cohen*, the court noted that standing requirements exist so that courts will not be asked to adjudicate "generalized grievances about the conduct of government or the allocation of power in the Federal System."
>
> The increase in state taxes allegedly suffered by plaintiffs is at best a highly generalized injury. A great many federal statutes

> potentially affect the level of state taxes. Here, plaintiffs' interest in the effect of the retention and reimbursement policies on state taxes is shared in somewhat differing degrees by the taxpayers of all states which contain public lands. We hold that this interest is insufficient to give plaintiffs standing to challenge the constitutionality of § 1701(a)(1) and (13). *We do not sit to pass judgment on congressional declarations of policy which affect plaintiffs only in an attenuated and generalized way. Plaintiffs must look to the legislative branch for redress of such generalized grievances.*

*Western Mining Council*, 643 F.2d at 631-32 (citations omitted, emphasis added). This analysis is fully applicable to the instant challenge and Arakaki's attempt to distinguish the case is unavailing.

Arakaki's reliance on *Gwinn Area Community Schools v. Michigan*, 741 F.2d 840 (6th Cir. 1984) and *City of New York v. United States Department of Commerce*, 822 F.Supp. 906 (E.D. N.Y. 1993) is misplaced. While there may be anomalous cases in other circuits, it is clear in the Ninth Circuit, as quoted above, that in a state taxpayer challenge to federal statutes, the policies of the standing doctrine demand that the plaintiff allege some injury which is more definite and individual than a mere increase in taxes. *See* HHCA Order (ER 14) at 26 n.8 (observing that "Ninth Circuit precedent is clear on this point").

Arakaki's reliance on *Green v. Dumke*, 480 F.2d 624 (9th Cir. 1973), is also misplaced. In *Green*, the plaintiff brought an action under 42 U.S.C. § 1983 against a state college after the college denied Greene federal student aid. The college argued that it was "immune from 42 U.S.C. § 1983" because, in denying

aid to the plaintiff, it was acting pursuant to federal law. *Green*, 480 F.2d at 628. The question before the court was thus merely whether 42 U.S.C. § 1983 could apply to a state actor when acting pursuant to federal law. The scope of permissible challenges based on a plaintiff's standing was not at issue in *Green* and, significantly, nothing in the case suggests even remotely that the plaintiff's standing was based upon his status as a state taxpayer. In fact, the plaintiff's standing in *Green* was apparently based on a *direct injury personal to him*, that is, the denial of student aid. Here, Arakaki has alleged no such injury, and the District Court was correct in declaring that "Plaintiffs do not allege discrimination that has caused injuries personal to them." ER 5 at 6 n.4. Arakaki has sufficiently alleged only injuries as a state taxpayer and, as made clear in the Court's previous orders, this permits him to challenge only State expenditures of tax revenues. ER 5 at 14. *Green* does nothing to create standing where it does not exist, as here.

Based on the complete lack of authority to support a challenge to federal law based solely upon standing as a state taxpayer, the District Court was correct in finding that Arakaki was without standing to challenge federal law.

D. Arakaki is Not Entitled to Reversal of the Order Striking Arakaki's Counter-Motion or to This Court's Consideration of that Counter-Motion

Arakaki's argument that the District Court erred in (1) striking Arakaki's Counter Motion for Partial Summary Judgment filed December 15, 2003 and (2)

not granting that motion, are without merit. The District Court made commendable efforts to take this complicated case along in an orderly manner. One such effort was by ordering rounds of motions, the first of which was to address motions that did not turn on the level of scrutiny that might ultimately apply, such as motions concerning jurisdiction and justiciability, and then to address the merits of the case in subsequent rounds. It was in this first round that Arakaki, without leave of court as required by previous order, filed the Counter Motion that is the basis for this point of error. Arakaki is not entitled to the relief he seeks.

First, the District Court's December 16, 2003 Order Striking Plaintiffs' Counter Motion for Partial Summary Judgment (ER 26) did not address that motion on its merits, and the defendants had no opportunity to brief the issues raised therein.

In addition, in order to hold that the District Court erred in not granting the Counter Motion, this Court would first have to determine, *inter alia*, that Arakaki *had* established standing to bring all the claims asserted. Article III, section 2 of the Constitution limits jurisdiction of federal courts to cases or controversies, and "[i]t is well established . . . that before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue." *Whitmore v. Arkansas*, 495 U.S. 149, 154

(1990). This is because "Article III . . . gives the federal courts jurisdiction over only 'cases and controversies,' and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Id.* at 155. As demonstrated above, Arakaki has not established standing to challenge the Hawaiian Homelands program, and the Court therefore is precluded, based on an absence of subject matter jurisdiction, from addressing the merits of Arakaki's claims. Consequently, the Court may not grant the relief Arakaki seeks through his appeal.

E. This Case Has Not Been Unduly or Needlessly Delayed

This case was carefully and responsibly managed, commensurate with the gravity and complexity of the issues before the District Court and with the unexpected events that occurred prior to judgment. Arakaki is not entitled to the relief requested.

F. The Award of Costs to Defendants was Appropriate and Consistent with the FRCP.

Rule 54(d)(1) of the Federal Rules of Civil Procedure provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, *costs other than attorneys' fees shall be allowed as of course to the prevailing party* unless the court otherwise directs . . . ." Emphasis added. Local Rule 54.2 likewise provides that "[c]osts shall be taxed as provided in Rule 54(d)(1) of the Federal Rules of Civil Procedure. The party entitled to costs shall

be the prevailing party in whose favor judgment is entered . . . ." *See also d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886, 896 (9th Cir. 1977) (A party in whose favor judgment is rendered is generally the prevailing party for purposes of Rule 54(d)).

In this case, after the entry of final judgment, the District Court awarded costs to the Defendants, as prevailing parties, subsequent to issuance of a Special Master's report recommending the award. *See* Supp. ER 1. In his Opening Brief, Arakaki does not challenge the amount of the costs awarded as unreasonable, but suggests that the District Court should have examined questions of whether any of the plaintiffs were indigent or would be rendered indigent by the award of costs, and the potential chilling effect of an award. For support, Arakaki cites *Stanley v. U.S.C.*, 178 F.3d 1069 (9th Cir. 1999), but the case is readily distinguishable. First, in contrast to the circumstances in *Stanley*, here there is no allegation that any of the Plaintiff-Appellants either are indigent or would be rendered indigent by the award of costs. Moreover, *Stanley* involved a single plaintiff and an award of more than $46 thousand; here, by contrast, there are numerous plaintiffs who can allocate the $5,325.67 in costs among themselves as they see fit. Finally, the mere fact that Arakaki has chosen to appeal, potentially exposing the plaintiffs to more costs should the appeal prove unsuccessful, suggests that the award of costs by the District Court has not had a significant chilling effect.

## VI. CONCLUSION

Based upon the above and the records herein, and any oral argument by counsel, SCHHA respectfully requests that this Court affirm the District Court's grant of dismissal as to all claims related to the Hawaiian Homelands program.

DATED: Honolulu, Hawaii, July 30, 2004

ROBERT G. KLEIN
PHILIP W. MIYOSHI
BECKY T. CHESTNUT

Attorneys for Defendant-Intervenors/Appellees
STATE COUNCIL OF HAWAIIAN
HOMESTEAD ASSOCIATIONS and ANTHONY
SANG, SR.

CERTIFICATE OF COMPLIANCE

I hereby certify that Defendant-Intervenors/Appellees State Council of Hawaiian Homestead Associations and Anthony Sang, Sr.'s Answering Brief does not exceed 14,000 words. The actual word count of the entire text of the brief, exclusive of the cover page, the corporate disclosure statement, the table of contents and authority, the statement of related cases, this certification, and the certificate of service is **10,610** words.

DATED: Honolulu, Hawaii, July 30, 2004

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STATE COUNCIL OF HAWAIIAN
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SANG, SR.

## STATEMENT OF RELATED CASES

Defendant-Intervenors/Appellees State Council of Hawaiian Homestead Associations and Anthony Sang, Sr. are aware of no related cases within the meaning of Circuit Rule 28-2.6.

DATED: Honolulu, Hawaii, July 30, 2004

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

ADDENDUM TO
DEFENDANT-INTERVENORS/APPELLEES STATE
COUNCIL OF HAWAIIAN HOMESTEAD
ASSOCIATIONS AND ANTHONY SANG, SR.'S ANSWERING BRIEF

## ***INDEX TO ADDENDUM***

inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

**Section. 3.** He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

**Section. 4.** The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

## ARTICLE III

**Section. 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

**Section. 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[1]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

[1] This section has been affected by the Eleventh Amendment.

**Section. 3.** Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

## ARTICLE IV

**Section. 1.** Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

**Section. 2.** The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[1]

[1] This clause was affected by the Thirteenth Amendment.

**Section. 3.** New States may be admitted by the Congress into this Union; but no new State shall be

formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

**Section. 4.** The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

## ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

## ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

## ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of Our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. IN WITNESS whereof We have hereunto subscribed our Names.

Go. WASHINGTON—*Presidt.*
*and deputy from Virginia*

Attest WILLIAM JACKSON *Secretary*

*New Hampshire*
JOHN LANGDON
NICHOLAS GILMAN

*Massachusetts*
NATHANIEL GORHAM
RUFUS KING

*Connecticut*
WM. SAML. JOHNSON
ROGER SHERMAN

*New York*
ALEXANDER HAMILTON

*New Jersey*
WIL: LIVINGSTON
WM. PATERSON.
DAVID BREARLEY.
JONA: DAYTON

*Pennsylvania*
B FRANKLIN
THOS. FITZSIMONS
THOMAS MIFFLIN
JARED INGERSOLL
ROBT MORRIS
JAMES WILSON
GEO. CLYMER
GOUV MORRIS

*Delaware*
GEO: READ
RICHARD BASSETT
GUNNING BEDFORD jun
JACO: BROOM
JOHN DICKINSON

*Maryland*
JAMES MCHENRY
DANL. CARROLL
DAN OF ST THOS. JENIFER

HAWAII REVISED STATUTES ANNOTATED
THE ADMISSION ACT

An Act to Provide for the Admission of the State of Hawaii into the Union

(Act of March 18, 1959, Pub L 86-3, 73 Stat 4)

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 7(c) of this Act, the State of Hawaii is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Hawaii entitled "An Act to provide for a constitutional convention, the adoption of a State constitution, and the forwarding of the same to the Congress of the United States, and appropriating money therefor", approved May 20, 1949 (Act 334, Session Laws of Hawaii, 1949), and adopted by a vote of the people of Hawaii in the election held on November 7, 1950, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.*

HAWAII REVISED STATUTES ANNOTATED
THE ADMISSION ACT

**Section 4**

As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home -loan fund, the Hawaiian home-operating fund, and the Hawaiian home -development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

HAWAII REVISED STATUTES ANNOTATED
THE ADMISSION ACT
**Section 5**

(a) Except as provided in subsection (c) of this section, the State of Hawaii and its political subdivisions, as the case may be, shall succeed to the title of the Territory of Hawaii and its subdivisions in those lands and other properties in which the Territory and its subdivisions now hold title.

(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, and to all 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.

(c) Any lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawaii shall remain the property of the United States subject only to the limitations, if any, imposed under (1), (2), (3), or (4), as the case may be.

(d) Any public lands or other public property that is conveyed to the State of Hawaii by subsection (b) of this section but that, immediately prior to the admission of said State into the Union, is controlled by the United States pursuant to permit, license, or permission, written or verbal, from the Territory of Hawaii or any department thereof may, at any time during the five years following the admission of Hawaii into the Union, be set aside by Act of Congress or by Executive order of the President, made pursuant to law, for the use of the United States, and the lands or property so set aside shall, subject only to valid rights then existing, be the property of the United States. [Am July 12, 1960, Pub L 86-624, 74 Stat 422]

(e) Within five years from the date Hawaii is admitted into the Union, each Federal agency having control over any land or property that is retained by the United States pursuant to subsections (c) and (d) of this section shall report to the President the facts regarding its continued need for such land or property,

and if the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii.

(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 (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the 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 manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions 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.

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

(h) All laws of the United States reserving to the United States the free use or enjoyment of property which vests in or is conveyed to the State of Hawaii or its political subdivisions pursuant to subsection (a), (b), or (e) of this section or reserving the right to alter, amend, or repeal laws relating thereto shall cease to be effective upon the admission of the State of Hawaii into the Union.

(i) The Submerged Lands Act of 1953 (Public Law 31, Eighty -third Congress, first session, 67 Stat. 29) and the Outer Continental Shelf Lands Act of 1953 (Public Law 212, Eighty -third Congress, first session, 67 Stat. 462) shall be applicable to the State of Hawaii, and the said State shall have the same rights as do existing States thereunder.

C

HAWAII REVISED STATUTES ANNOTATED
THE CONSTITUTION OF THE STATE OF HAWAII
ARTICLE XII. HAWAIIAN AFFAIRS
HAWAIIAN HOMES COMMISSION ACT

**Section 1**

Anything in this constitution to the contrary notwithstanding, the Hawaiian Homes Commission Act, 1920, enacted by the Congress, as the same has been or may be amended prior to the admission of the State, is hereby adopted as a law of the State, subject to amendment or repeal by the legislature; provided that if and to the extent that the United States shall so require, such law shall be subject to amendment or repeal only with the consent of the United States and in no other manner; provided further that if the United States shall have been provided or shall provide that particular provisions or types of provisions of such Act may be amended in the manner required for ordinary state legislation, such provisions or types of provisions may be so amended. The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms and spirit of such Act. The legislature shall make sufficient sums available for the following purposes: (1) development of home, agriculture, farm and ranch lots; (2) home, agriculture, aquaculture, farm and ranch loans; (3) rehabilitation projects to include, but not limited to, educational, economic, political, social and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved; (4) the administration and operating budget of the department of Hawaiian home lands; in furtherance of (1), (2), (3) and (4) herein, by appropriating the same in the manner provided by law.

Thirty percent of the state receipts derived from the leasing of cultivated sugarcane lands under any provision of law or from water licenses shall be transferred to the native Hawaiian rehabilitation fund, section 213 of the Hawaiian Homes Commission Act, 1920, for the purposes enumerated in that section. Thirty percent of the state receipts derived from the leasing of lands cultivated as sugarcane lands on the effective date of this section shall continue to be so transferred to the native Hawaiian rehabilitation fund whenever such lands are sold, developed, leased, utilized, transferred, set aside or otherwise disposed of for purposes other than the cultivation of sugarcane. There shall be no ceiling established for the aggregate amount transferred into the native Hawaiian rehabilitation fund. [Ren and am Const Con 1978 and election Nov 7, 1978]

C

HAWAII REVISED STATUTES ANNOTATED
THE CONSTITUTION OF THE STATE OF HAWAII
ARTICLE XII. HAWAIIAN AFFAIRS
ACCEPTANCE OF COMPACT

**Section 2**

The State and its people do hereby accept, as a compact with the United States, or as conditions or trust provisions imposed by the United States, relating to the management and disposition of the Hawaiian home lands, the requirement that section 1 hereof be included in this constitution, in whole or in part, it being intended that the Act or acts of the Congress pertaining thereto shall be definitive of the extent and nature of such compact, conditions or trust provisions, as the case may be. The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out. [Ren and am Const Con 1978 and election Nov 7, 1978]

(1) Promote the conservation, development, and utilization of agricultural resources in the State;

(2) Assist the farmers of the State and any others engaged in agriculture by research projects, dissemination of information, crop and livestock reporting service, market news service, and any other means of improving the well-being of those engaged in agriculture and increasing the productivity of the lands;

(3) Administer the programs of the State relating to animal husbandry, entomology, farm credit, development and promotion of agricultural products and markets, and the establishment and enforcement of the rules on the grading and labeling of agricultural products; and

(4) Administer the aquaculture program under section 141-2.5.

(d) The functions and authority heretofore exercised by the board of commissioners of agriculture and forestry (except the management of state parks and the conservation, development, and utilization of forest resources, including regulatory powers over the forest reserve provided in Act 234, section 2, Session Laws of Hawaii 1957, and of fish and game resources transferred to the department of land and natural resources), by the farm loan board as heretofore constituted, and by the University of Hawaii with respect to the crop and livestock reporting service and market news service, are transferred to the department of agriculture established by this chapter. [L Sp 1959 2d, c 1, § 22; am L 1961, c 132, § 1(f); am L 1963, c 206, § 1; am L 1965, c 214, § 1 and c 223, § 8(c); Supp, § 14A-21; am L 1967, c 145, § 2; HRS § 26-16; am L 1969, c 4, § 1; am L 1973, c 15, § 1; am L 1982, c 147, § 1; am L 1983, c 12, § 1 and c 141, § 1; am L 1991, c 135, § 1; am L 1995, c 69, § 1; am L 1996, c 166, § 2; am L 1998, c 176, § 4]

**Cross references.** — As to agricultural lands, see Hawaii Constitution, Article XI, § 3. As to department of agriculture, see Chapter 141.

**OPINIONS OF ATTORNEY GENERAL**

**Acts directing governor to make appointments not violative of state constitution.** — Acts directing the governor to appoint the members of boards and appoint chairmen for the boards from among the members, authorizing the boards to delegate to the chairmen the board's authority or so much thereof as may be lawful or proper, and requiring the chairmen to serve full-time at substantial salaries do not violate Haw. Const., Art. V, § 6, authorizing boards to appoint and remove principal executive officers. Op. Att'y Gen. Nos. 94-10 (1994).

## § 26-17. Department of Hawaiian home lands.

The department of Hawaiian home lands shall be headed by an executive board to be known as the Hawaiian homes commission.

The commission shall be composed of nine members. The appointment, tenure, and removal of the members and the filling of vacancies on the commission shall be in accordance with section 26-34 and section 202(a) of the Hawaiian Homes Commission Act of 1920, as amended. The governor shall appoint the chairperson of the commission from among the members thereof.

The commission may delegate to the chairperson such duties, powers, and authority, or so much thereof as may be lawful or proper, for the performance of the functions vested in the commission.

The chairperson of the board shall serve in a full time capacity and shall perform such duties, and exercise such powers and authority, or so much thereof as may be delegated to the chairperson by the board.

The department shall administer the Hawaiian Homes Commission Act of 1920 as set forth in the Constitution of the State and by law.

The functions and authority heretofore exercised by the Hawaiian homes commission as heretofore constituted are transferred to the department of Hawaiian home lands established by this chapter. [L Sp 1959 2d, c 1, § 24; am L 1963, c 207, § 6; am L 1965, c 223, § 8(d); Supp, § 14A-23; HRS § 26-17; am L 1982, c 147, § 2 superseded by c 273, § 2; am imp L 1984, c 90, § 1; am L 1989, c 265, § 3; gen ch 1993]

OPINIONS OF ATTORNEY GENERAL

**Acts directing governor to make appointments not violative of state constitution.** — Acts directing the governor to appoint the members of boards and appoint chairmen for the boards from among the members, authorizing the boards to delegate to the chairmen the board's authority or so much thereof as may be lawful or proper, and requiring the chairmen to serve full-time at substantial salaries do not violate Haw. Const., Art. V, § 6, authorizing boards to appoint and remove principal executive officers. Op. Att'y Gen. No. 64-18 (1964).

**Department of Hawaiian home lands is one of several departments of state government, originally created by federal legislation,** and comes within the meaning of the word "agency" as defined in the Administrative Procedure Act. This result would apply to state legislation only so long as such legislation and the rules adopted pursuant thereto are not within the types of provisions requiring the "consent of the United States." Op. Att'y Gen. No. 63-16 (1963).

~~§ 26-18. Department of business, economic development, and tourism.~~

(a) The department of business, economic development, and tourism shall be headed by a single executive to be known as the director of business, economic development, and tourism.

The department shall undertake statewide business and economic development activities, undertake energy development and management, provide economic research and analysis, plan for the use of Hawaii's ocean resources, and encourage the development and promotion of industry and international commerce through programs established by law.

(b) The following are placed in the department of business, economic development, and tourism for administrative purposes as defined by section 26-35: Aloha Tower development corporation, Hawaii community development authority, high technology development corporation, land use commission, natural energy laboratory of Hawaii authority, the housing and community development corporation of Hawaii, and any other boards and commissions as shall be provided by law.

The department of business, economic development, and tourism shall be empowered to establish, modify, or abolish statistical boundaries for cities, towns, or villages in the State and shall publish, as expeditiously as possible,

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| EARL F. ARAKAKI, EVELYN C. ARAKAKI, EDWARD U. BUGARIN, SANDRA PUANANI BURGESS, PATRICIA A. CARROLL, ROBERT M. CHAPMAN, BRIAN L. CLARKE, MICHAEL Y. GARCIA, ROGER GRANTHAM, TOBY M. KRAVET, JAMES I. KUROIWA, JR., FRANCES M. NICHOLS, DONNA MALIA SCAFF, JACK H. SCAFF, ALLEN H. TESHIMA, THURSTON TWIGG-SMITH,<br><br>Plaintiffs,<br><br>vs.<br><br>LINDA LINGLE, in her official capacity as GOVERNOR OF THE STATE OF HAWAI`I; GEORGINA KAWAMURA, in her official capacity as DIRECTOR OF THE DEPARTMENT OF BUDGET AND FINANCE; RUSS SAITO, in his official capacity as COMPTROLLER and DIRECTOR OF THE DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES; PETER YOUNG, in his official capacity as CHAIRMAN OF THE BOARD OF LAND AND NATURAL RESOURCES; SANDRA LEE KUNIMOTO, in her official capacity as DIRECTOR OF THE DEPARTMENT OF AGRICULTURE; TED LIU, in his official capacity as DIRECTOR OF THE DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM; RODNEY HARAGA, in his | **NO. 04-15306**<br><br>D.C. NO. CV02-00139 SOM KSC<br>District of Hawaii, Honolulu<br><br>CERTIFICATE OF SERVICE |

capacity as DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION,

State Defendants,

HAUNANI APOLIONA, Chairperson; ROWENA AKANA; DONALD B. CATALUNA; LINDA DELA CRUZ; DANTE CARPENTER; COLETTE Y.P. MACHADO; BOYD P. MOSSMAN; OSWALD STENDER; and JOHN D. WAIHE`E, IV; in their official capacities as trustees of the Office of Hawaiian Affairs,

OHA Defendants,

MICAH KANE, Chairman; and WONDA MAE AGPALSA; HENRY CHO; THOMAS P. CONTRADES; QUENTIN KAWANANAKOA; HERRING K. KALUA; MILTON PA; and JOHN A.H. TOMOSO in their official capacities as members of the Hawaiian Homes Commission,

HHCA/DHHL Defendants,

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

Defendants,

STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATION; ANTHONY SANG, SR.,

Defendants-Intervenors,

HUI KAKO'O 'AINA HO'OPULAPULA, )
BLOSSOM FEITEIRA and DUTCH )
SAFFERY, )
)
Defendants-Intervenors. )
)
_____)

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing document were duly served upon the following persons by hand delivering (HD) or mailing (MAIL) said copies, postage prepaid, first class, in a United States post office at Honolulu, Hawaii, as indicated below, on July 30, 2004, addressed as set forth below:

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THE UNITED STATES OF AMERICA

Pursuant to Rule 25(a)(2)(B)(i) and Rule 25(d)(2) of the Federal Rules of Appellate Procedure and Rule 25-2 of the Circuit Court Rules for the Ninth Circuit, the undersigned counsel also hereby certifies that the foregoing document was hand-delivered to a postal clerk at the United States Post Office, postage

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DATED: Honolulu, Hawaii, July 30, 2004

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