

DEFENDANTS-INTERVENORS-APPELLEE-§ HUI KAKO-⊕  
AINA HOOPULAPULA, BLOSSOM FEITEIRA AND  
DUTCHY SAFFERY-§ ANSWERING BRIEF

Defendants-Intervenors-Appellees Hui Kako-⊕ Aina Hoopulapula, Blossom Feiteira and Dutch Saffery (hereafter Hui Kako-⊕) submit this Answering Brief in support of the decisions of the U.S. District Judge dismissing the Plaintiffs-Appellants Complaint for Declaratory Judgment.

Hui Kako-⊕ is a non-profit corporation whose members are qualified applicants for Hawaiian Home Lands leases, eligible applicants for Hawaiian Home Lands leases who have not applied, lease applicants awaiting native Hawaiian qualification verification and Lessees who have not been able to occupy their lots. Defendant Appellee Blossom Feiteira is a native Hawaiian who is on the Department of Hawaiian Home Lands (hereafter ADHHL@) waiting list. Defendant Appellee Dutchy Saffery is an eligible native Hawaiian under the Hawaiian Homes Commission Act, Pub.L. No. 67-37, 42 Stat. 108 (1921) (hereafter HHCA). She has not applied for a lease. As beneficiaries of the HHCA, they were granted

intervention under Rule 12(a) of the Federal Rules of Civil Procedure. See Hui's SEOR 1.

I. STATEMENT OF JURISDICTION

Hui Kako'e agrees that the District Court has subject matter jurisdiction over the plaintiffs' complaint and claims under 28 U.S.C. §§ 1331, 1343, 2201, and 2202. The appeal is appealable and was timely filed by Plaintiffs.

II. STATEMENT OF THE CASE

Plaintiffs are suing the State and HHCA/DHHL Defendants, the trustees of the Office of Hawaiian Affairs, State of Hawaii (hereafter 'AHOHA'), and the United States of America for declaratory and injunctive relief. They sue as state taxpayers and as beneficiaries of the public land trust established by Congress in §5(f) of the Admission Act of March 18, 1959. [Pub.L. 86-3, 73 Stat 4.] Plaintiffs challenge the constitutionality of those state and federal laws that confer rights and benefits on native Hawaiians, including the HHCA, as amended, and the Admission Act, by which Hawaii became a state of the United States in 1959. They contend these laws are racially discriminatory and violate the equal protection clauses of the Fifth and Fourteenth Amendments. They contend that the State and DHHL's administration of the Hawaiian Home Lands Trust and the public lands trust discriminates against them as beneficiaries of the Newlands Resolution, EOR 2. The District Court has ruled that Plaintiffs' public land trust claims [are] to be limited to challenges to the trust created by the Admissions Act in 1959....@ EOR 5 at 18.

Defendants-Intervenors-Appellees State Council of Hawaiian Homestead Associations and Anthony Sang, Sr. (SCHHA) were granted intervention by the District Court. CR #26. As

stated above, Hui Kako~~o~~ was granted intervention by right. Both intervenors are themselves or have members who are native Hawaiian beneficiaries of HHCA.

In a series of orders, the District Court dismissed the Plaintiffs' complaint for the reasons that:

1. Plaintiffs' state taxpayer standing does not allow them to challenge the State's payments to DHHL under Session Laws of Haw, Act 14 (Reg. Sess. 1995) EOR 5 at 18; Hui Addendum 1.
2. Plaintiffs' state tax payer standing does not allow them to challenge the federal lessee requirements for the Hawaiian Home Lands lease program; EOR 14 at 30.
3. Plaintiffs' breach of public land trust claims were a generalized grievance under the Equal Protection Clause for which Plaintiffs lack standing. EOR 5 at 27.
4. Plaintiffs' state tax payer standing did not include standing to challenge any federal law. EOR 28 at 2.
5. The political status of Hawaiians is a political question best left to the Congress. EOR 28 at 19 and 25.

### III. STATEMENT OF FACTS

It is undisputed by Plaintiffs that at the time of contact with the west in 1778, the native Hawaiian population in Hawaii stood at 300,000. It is likewise undisputed that the native population stood at 40,000 at the time of overthrow and annexation. EOR 3.

It is undisputed that following his election in 1893, President Grover Cleveland caused to be conducted an investigation by James Blount into the overthrow of Liliuokalani and withdrew the treaty of annexation then pending before the US Congress. EOR 7 at & & 36 and 37. President Cleveland transmitted the findings of the Blount investigation in 1893 to the US Congress, recommending this subject to the extended powers and wide discretion of the Congress@ Hui SEOR 2 at 3-5; Hui Addendum 2 and EOR 7 & & 37 and 38.<sup>1</sup>

In 1921 the Congress passed the Hawaiian Rehabilitation Act, or HHCA. In 1959 the Congress passed the Hawaii Statehood Act, admitting Hawaii into the union upon the condition that the HHCA be adopted as a provision of the Hawaii State Constitution. The territorial lands held by the United States were ceded to the State of Hawaii upon the trust set forth in Section 5 (f).

Plaintiffs in this action seek to have the HHCA and those portions of the Admissions Act which confer any benefit or right on native Hawaiians determined to be invalid.

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<sup>1</sup> President's Message Relating to the Hawaiian Islands, H.R. Exec. Doc. No. 47, 53<sup>rd</sup> Cong. 2d Sess., XIV-XV (1893) is attached in its entirety as Hui Addendum 2.

IV. COUNTERSTATEMENT OF STANDARD OF REVIEW

Hui Kakoʻe adopts the counter statement of the standard of review set forth in the Answering Brief of the Office of Hawaiian Affairs (OHA) Defendants-Appellees.

V. ARGUMENT

The Plaintiffs in this case include the grandson of Lorrin Thurston, a member of the Committee of Public Safety which overthrew the Hawaiian monarch, Liliuokalani, in 1893 and a signator to the Newlands Resolution. EOR 2 and 7, & 34. They are represented by counsel who was himself admitted to the Hawaii bar in 1958, before the passage of the Admissions Act, and was a member of the 1978 Constitutional Convention.

Defendant Twigg Smith's uncle was himself the chairman of the Hawaii Statehood Commission.

It would appear that both individuals were uniquely situated to have given voice to their grievance over the passage of the Admissions Act and the incorporation of the HHCA into the Hawaii State Constitution in 1959. This lawsuit has been brought some 43 years after passage of the Admissions Act and 81 years after passage of the HHCA by the Congress. And although the Plaintiffs seek to couch their prayer as being for prospective relief, what they seek is a determination by the Federal Court that both Congressional acts violate the Fourteenth and Fifth Amendments. Plaintiffs have invoked 42 USC ' 1983 to bolster their claim to have standing as trust beneficiaries. But, such breach of public land trust claims must be timely filed under the applicable state statute of limitations, which has been determined to be two years pursuant to Haw. Rev. Stat. ' 657-7. Pele Defense Fund v. Paty, 73 Haw. 578, 595, 837 P.2d 1247 (1992). And, although the Plaintiffs cite to statements made by President Reagan in 1986 and President

Bush in 1990 questioning the constitutionality of HHCA, no reason has been given by Plaintiffs as to why it took yet another decade to bring suit. EOR 1, ' 18, p. 10.

A. THE DISTRICT COURT RULED CORRECTLY IN DISMISSING THE COMPLAINT ON THE GROUNDS THAT IT RAISED A NON JUSTICIABLE POLITICAL QUESTION.

The United States has long recognized with respect to its involvement in the overthrow of Liliuokalani that “[a] substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair.” President’s Message Relating to the Hawaiian Islands, H.R. Exec. Doc. No. 47, 53<sup>rd</sup> Cong., 2d Sess., XIV-XV, December 18, 1893, Hui Addendum 2. The architects of this lawsuit, like the oligarchy of the Committee of Public Safety, seek to frustrate Congressional reparative action manifest in the HHCA and the provisions of ' 5(f) of the Admissions Act. This time it is 14 Plaintiffs who seek to dismantle the endeavors of an elective body over the course of 83 years.

1. The Congress has Plenary Power Over the Federal Public Lands Under the Property Clause.

As has been recently affirmed in the U.S. Supreme Court in United States v. Lara , 124 S.Ct. 1628, 541 US\_\_\_ (2004) “[T]he Constitution grants Congress broad general powers to legislate with respect to Indian tribes, powers that we have consistently described as plenary and exclusive.” In its opinion, the Court goes on to analogize to instances when the Congress has “made adjustments to the autonomous status of other such dependent entities.” Id. At 9. Lara cites the Property Clause, as well as the Indian Commerce Clause, as sources of that power. Id. At 5-6. Unquestionably, in the proper exercise of its plenary powers over federal public lands, the Congress passed the HHCA.

2. The Congress has the Plenary Power to Admit States Into the Union.

The Plaintiffs contend that the Congress, in its passage of the Hawaii Statehood Act, violated the Equal Protection Clause of the Constitution by ceding lands to the State of Hawaii subject to a trust, one of whose purposes being the betterment of the conditions of native Hawaiians and by requiring the incorporation of the HHCA into its constitution. Appellee Hui Kakoʻo concurs with the briefing of Appellee State Council of Hawaiian Homeland Associations (hereafter SCHHA) on the limitations previously applied by the courts on the Congress's exercise of its constitutional authority. Facts lying within those limitations have not been plead or argued in this lawsuit by the Plaintiffs.

3. Congress has Power to Legislate Specifically for the Benefit of Native Hawaiians.

There has been much parsing of the term "Indian tribe" and its implications in this lawsuit. As has been stated in F.Cohen's Handbook of Federal Indian Law, 1942, Department of the Interior Report at page 5

[I]n dealing with the Indians the Federal Government is dealing primarily not with a particular race as such but with members of certain social-political groups towards which the Federal Government has assumed special responsibilities.

And, in addressing the issue of whether "Eskimos" were "Indians", courts have determined that the term "Indians" is not a racial classification but a term of art for the aboriginal peoples of America. Pence v. Kleppe, 529 F.2d 135 (9<sup>th</sup> Cir. 1976). Clearly, a source of Congressional authority in dealing with "aboriginal peoples" of the United States derives from the Indian Commerce Clause. But, just as clearly, the historic mandate enunciated in President Cleveland's message to the Congress in 1893, and the many instances of Congressional action discharging the

Federal Government's special responsibility toward native Hawaiians and Hawaiians must also lead this court to conclude (as did the District Court) that Plaintiffs claims raise a political issue that should first be decided by another branch of government. @ EOR 28 at 25.

A. PLAINTIFFS DO NOT HAVE STANDING AS TAXPAYERS TO CHALLENGE PAYMENTS MADE UNDER ACT 14 (HAWAIIAN HOME LANDS TRUST FUND).

Plaintiffs simply lack standing to challenge the State's payment of \$30 million to the Hawaiian Home Lands Trust, as this amount is being paid over time in satisfaction of a settlement. The Hawaiian Home Lands Trust Fund was established by legislative act in 1995 for the purpose of settling all claims against Hawaii in connection with the management, administration, disposition or supervision of the home lands by Hawaii. Act 14, Haw. Sp. Sess. Laws 695- 700, Hui Addendum 1. Plaintiffs have offered no authority, and Defendants are not aware of any, that as taxpayers they are entitled to challenge the settlement.

The collateral attack of settlements is generally prohibited to avoid endless litigation. 47 Am.Jur. '898; *See, Marino v. Ortiz*, 484 U.S. 301 (1988). As stated by the District Court, "[i]f a taxpayer could challenge every settlement, a state could never resolve any dispute by agreement and could be forced to litigate all disputes." @ *Arakaki v. Cayetano*, 299 F. Supp. 2d 1090, 1100 (2002). Furthermore, "[t]o allow Plaintiffs to challenge the settlement in this manner would be tantamount to having the court review the wisdom, at any time, of every legislative decision, regardless of when made, to settle a case rather than to litigate it." @ *Id.* at FN 10.

Not only are collateral attacks on settlements generally prohibited, there is absolutely no authority for the proposition that Plaintiffs have taxpayer standing to collaterally attack the



settlement. Hui Kakoʻe could not locate a single case where taxpayer standing was held sufficient to collaterally attack a settlement and Plaintiffs have not proffered any.

In fact, Plaintiffs seem to concede that they do not have standing to attack a settlement, but instead, they claim that Act 14 is not, and does not purport to be a settlement. However, the plain language of the Act belies this contention. Section 2, of Act 14, specifically states that the purpose of the Act is the settlement of claims. Section 2 provides in relevant part:

Section 2. **Purpose.** The primary purposes of this act are to:

- 1) Resolve all controversies relating to the Hawaiian home lands trust which arose between August 21, 1959 and July 1, 1988;
- 2) Prohibit any and all future claims against the State resulting out of any controversy relating to the Hawaiian home lands trust which arose between August 21, 1959 and July 1, 1988. . .

Act 14, Haw. Sp. Sess. Laws 698 (1995). Similarly, Section 4 of Act 14 provides in relevant part:

**The passage of this Act is in full satisfaction and resolution of all controversies** at law and in equity, known or unknown, now existing or hereafter arising, established or inchoate, arising out of or in any way connected with the management, administration, supervision of the trust, or disposition by the State or any governmental agency of any lands or interests in land which are or were or are alleged to have been Hawaiian home lands, or to have been covered by the HHCA arising between August 21, 1959 and July 1, 1988. (emphasis added)

The passage of this Act shall have the effect of res judicata as to all parties, claims and issues which arise and defenses which have been at issue, or which could have been, or could in the future be, at issue, which arose between August 21, 1959 and July 1, 1988,. . .

Id. at 699. Additionally, the language of Section 6 of Act 14 confirms that the Act was passed as part of a settlement of claims. It provides in relevant part:

Section 6. **The State while not admitting the validity of any claims hereby resolves and satisfies all controversies and claims encompassed by this Act by:**

- (1) The establishment of the Hawaiian home lands trust fund and the requirement that the State make twenty annual deposits of \$30,000,000, or their discounted value equivalent into the trust fund . . .

Id. at 700 (emphasis added).

Given the plain language of the statute, it is abundantly clear that Act 14 was passed to resolve and settle outstanding claims. As such, Plaintiffs do not have standing to collaterally attack the settlement and the Court properly made such ruling.

B. PLAINTIFFS DO NOT HAVE STANDING AS TAXPAYERS TO CHALLENGE THE HAWAIIAN HOMES COMMISSION ACT AND THE ADMISSIONS ACT.

The District Court correctly ruled in its Order Granting Defendants Motions to Dismiss Plaintiffs Claim Regarding the Hawaiian Home Lands Lease Program (EOR 14) for the reason that a state taxpayer standing only allows a plaintiff to challenge the state law underlying the expenditure of state taxes.<sup>6</sup> In dismissing Plaintiffs claim challenging the Hawaiian Home Lands lease program, the court ruled a State taxpayer standing is too limited to permit a challenge to 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.<sup>7</sup> EOR 14 at 5-6 citing to W. Mining Council v. Watt, 643 F.2d 618, 631-32 (9<sup>th</sup> Cir. 1981) Throughout this litigation, the Plaintiffs have failed to demonstrate an injury from the allocation of state tax dollars to DHHL programs, other than a generalized grievance that if some of tax dollars are spent on these programs there are less tax dollars going to things like public school computers and financial aid to graduate students. That the grievance is so general, and that no direct pocket book effect can be shown by Plaintiffs, lends support to the lower court's perception that indeed these matters are best left to the political branches of government, where it must compete with the views of other citizens who would consider that the betterment of the conditions of native Hawaiians would be in the best interests of the people of Hawaii. The words of Grover Cleveland must surely resonate today in describing the events of 1893:

By an act of war, committed with the participation of a diplomatic representative of the United States and without the authority of Congress, the Government of a feeble but friendly and confiding people has been overthrown....On the ground that it can not allow itself to refuse to redress an injury inflicted through an abuse of power by officers clothed with its

authority and wearing its uniform; and on the same ground, if a feeble but friendly state is in danger of being robbed of its independence and sovereignty by a misuse of the name and power of the United States, the United States can not fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation. Hui Addendum 2.

C. THE DISTRICT COURT CORRECTLY RULED THAT PLAINTIFFS=BREACH OF PUBLIC LAND TRUST CLAIMS ARE NOTHING MORE THAN A GENERALIZED GRIEVANCE FOR WHICH THEY LACK STANDING.

Plaintiffs claim that the Congress=passage of the HHCA and Admissions Act ' 5(f) are in breach of the trust they contend was established under the Newlands Resolution. The Plaintiffs do not acknowledge that the public lands trust in Hawaii has been identified as the trust arising out of the cession by the United States of federal lands to the State of Hawaii in 1959. Haw. Rev. Stat. ' 10-2. Rather, Plaintiffs contend that the two federal statutory schemes are in breach of their interests as beneficiaries of a trust they allege was created under the 1898 Newlands Resolution annexing Hawaii as a territory. As such, they do not seek to enforce specific legal obligations under Hawaii=s public land trust and the HHCA, but, rather, to rewrite the Admissions Act, and dismantle the DHHL. It is just this sort of activity which has lead the federal courts into itirating the principle Aa federal court ..is not the proper forum to press general complaints about the way government goes about its business.@ Allen v. Wright, 468 US 737 (1984). See also United States v. Hays, 515 US 737 at 743 (1995).

In many respects, this lawsuit juxtaposes the age old tension between rule by the few and the democracy of the people. Indeed, Plaintiffs appear to be guided by the specter of their ancestors as described by President Cleveland:

The provisional government has not assumed a republican or other constitutional form, but has remained a mere executive council or oligarchy, set up without the assent of the people.

It has not sought to find a permanent basis of popular support and has given no evidence of an intention to do so. Indeed, the representatives of that government assert that the people of Hawaii are unfit for popular government and frankly avow that they can be best ruled by arbitrary or despotic power. Hui Addendum 2.

VI. CONCLUSION

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

Dated: Kailua, Hawaii, \_\_\_\_\_.

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