

**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

EARL F. ARAKAKI, et al.,

Plaintiffs – Appellants,  
v.

LINDA LINGLE et al.,

State Defendants – Appellees,

HAUNANI APOLIONA, et al.,

OHA Defendants – Appellees,

MICAH KANE, et al.,

HHCA/DHHL Defendants –  
Appellees,

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

Defendants – Appellees,

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

SCHHA Defendants/Intervenors –  
Appellees,

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

HUI Defendants/Intervenors – Appellees.

**No. 04-15306**

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

PLAINTIFFS-APPELLANTS'  
MOTION FOR INJUNCTION TO  
PRESERVE STATUS QUO  
PENDING APPEAL;

DECLARATION IN SUPPORT OF  
MOTION FOR INJUNCTION TO  
PRESERVE STATUS QUO  
PENDING APPEAL, EXHIBITS 1  
– 14;

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**PLAINTIFFS-APPELLANTS’ MOTION FOR INJUNCTION  
TO PRESERVE STATUS QUO PENDING APPEAL**

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## **PLAINTIFFS-APPELLANTS' MOTION FOR INJUNCTION TO PRESERVE STATUS QUO PENDING APPEAL**

**Introduction.** Plaintiffs-Appellants are fourteen individual citizens of the United States of America, five women and nine men, all born and raised in, or long-time residents of, Hawaii. All are taxpayers of the State of Hawaii and beneficiaries of Hawaii's Public Land Trust created in 1898 when the public lands of the government of Hawaii were ceded to the United States with the requirement that all revenues or proceeds, with certain exceptions, "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Included among Plaintiffs-Appellants are persons of Japanese, English, Filipino, Hawaiian, Irish, Chinese, Scottish, Polish, Jewish, German, Spanish, Okinawan, Dutch, French and other ancestries.

Pursuant to Rules 8(a)(2) and 27(a)(1) and (2) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 27-1, Plaintiffs-Appellants move for an injunction to preserve the status quo, i.e., to protect Plaintiffs-Appellants and others similarly situated from further irreparable loss resulting from trust and constitutional and other federal law breaches by Defendants-Appellees, pending this appeal.

## **MOVING FIRST IN DISTRICT COURT IMPRACTICABLE.**

Under FRAP Rule 8(a) a party must ordinarily move first in the district court for an order granting an injunction but may move in the court of appeals where “moving first in the district court would be impracticable.”

Here, the District Court has dismissed all of Plaintiffs’ claims, some for lack of standing, and the remainder because “the Political Status of Hawaiians” is “Currently Being Debated in Congress”. Order Dismissing Plaintiffs’ Remaining Equal Protection Claims, January 14, 2004, Docket 354 at 19 *et seq.*, 2004 WL 102480 (D. Hawaii). “Because no claims remain for adjudication, the Clerk of the Court is directed to enter final judgment in favor of the Defendants and to close the case.” *Id* at 26. On November 21, 2003, DKT 323 at 30, (*Arakaki v. Lingle*, 299 F.Supp.2d 1114 (D. Hawaii 2003)) the District Court dismissed, for want of standing, Plaintiffs’ claims against the Hawaiian home lands program and against the United States and the HHC/DHHL Defendants. Long before the final dismissal, the District Court on May 8, 2002, Docket 117, Order Granting in Part and Denying in Part Motions to Dismiss on Standing Grounds; etc. (the “Standing” Order) had dismissed Plaintiffs’ claims as beneficiaries of the Public Land Trust (*Id.* at 20), ruled that Plaintiffs, as state taxpayers, did not have standing to challenge Ceded Land rent payments or payments as “settlements” or the

issuance of bonds or other borrowings for the HHC, the DHHL, or OHA. (*Id.* at 17 – 20). (The “Standing” Order is reported at *Arakaki v. Cayetano*, 299 F.Supp.2d. 1090 (D. Hawaii 2002)) Such rulings were all made without the benefit of evidence, without factual findings, without complying with the rules applicable to summary judgments and in disregard of the rule that, for purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.<sup>1</sup> *Graham v. FEMA*, 194 F.3d 997 (9<sup>th</sup> Cir. 1998). It would be futile to ask the District Court to issue an injunction against parties the District Court has dismissed and to forbid conduct the District Court has held Plaintiffs may not even challenge.

### **RELIEF SOUGHT**

Plaintiffs-Appellants ask this Court to issue an order, pending this appeal, that will:

- a. Enjoin the State Defendants-Appellees (collectively the ‘State’) from making any further distributions from the Hawaii Public Land Trust (‘PLT’) to the Office of Hawaiian Affairs (‘OHA’), except to the

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<sup>1</sup> A true copy of the Complaint in this case is Exhibit 1 to the attached declaration in support. Copies of all exhibits cited in this motion are attached to that declaration, unless otherwise specified.

extent of 20% of the net income, if any, derived from the lands in the PLT;

b. Enjoin the OHA Defendants-Appellees (collectively ‘OHA’) from paying or encumbering the approximately \$313 million OHA now holds in trust for “native Hawaiians” as defined in §10 -2 HRS, “any descendant of not less than one half part of the races inhabiting the Hawaiian Islands previous to 1778”<sup>2</sup>, which trust corpus consists of previous distributions to OHA from the PLT and earnings on those distributions;

c. Enjoin the State from making any further transfers to or for the Hawaiian Homelands Trust Fund (i.e., transfers of money, or property in lieu of money, pursuant to Act 14, S.L.H. 1995 of \$30 million per year for 20 years); and

d. Enjoin issuance by the HHC/DHHL Defendants-Appellees

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<sup>2</sup> Throughout this motion, Plaintiffs-Appellants will use the terms “Native Hawaiian”, “native Hawaiian” and “Hawaiian” as they are defined and used in §10-2 HRS. “Native Hawaiian” and “native Hawaiian”, both of which require at least 50% “Hawaiian” blood, are substantially identical under the OHA laws and the Hawaiian Homes Commission Act and each is a subset of “Hawaiian” which includes all such descendants of any degree of blood quantum. It should be noted that “Hawaiian” has other meanings. See e.g. *Rice v. Cayetano*, 528 U.S. 495, 499 (2000) (describing Petitioner Rice as “a citizen of Hawaii and thus himself a Hawaiian in a well-accepted sense of the term”). Also, “Native Hawaiian” is used in some federal statutes in the one-drop of blood sense, e.g., Pub. L. 103-150, 107 Stat. 1510 (1993) (the so-called “Apology Resolution”).

(collectively ‘HHC/DHHL’) of any further Hawaiian Homestead leases or related agreements without: (a) first disclosing to all parties involved (including proposed lessees, developers, lenders, guarantors, contractors, investors, partners, joint venturers) that this suit seeks to invalidate and avoid such leases and could impair related financing and other contractual arrangements; and (b) requiring all such parties to waive any and all claims against HHC/DHHL or the State in the event that such leases or other contractual arrangements are invalidated, avoided or impaired as the result of a judgment or settlement of this suit.

### **GROUNDS FOR THE MOTION**

The grounds for this motion are that: Plaintiffs-Appellants will likely prevail on the merits and if injunctive relief is not granted may suffer irreparable loss; or serious questions are raised and the balance of hardships tips sharply in Plaintiffs-Appellants’ favor.

### **LEGAL ARGUMENT SUPPORTING THE MOTION**

#### **Power of court of appeals to grant injunction to preserve status quo pending appeal**

FRAP Rule 8(a)(2) provides, in part, that when a motion in the district court is not practicable, a motion for an order “granting an injunction while an appeal is pending” may be made to the court of appeals.

We have the power to "suspend, modify, restore, *or grant an*

*injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."* Fed.R.Civ.Proc. 62(g). This rule, along with Rule 62(c), "codifies the inherent power of courts to make whatever order is deemed necessary to preserve the status quo and to ensure the effectiveness of the eventual judgment." (Emphasis added.) C. Wright & A. Miller, 11 *Federal Practice and Procedure*, § 2904 at 315 (1973). *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9<sup>th</sup> Cir. 1988). *See also Plomb Tool Co. v. Fayette R. Plumb Inc.*, 171 F.2d 945 (9<sup>th</sup> Cir.1948).

As a necessary incident to its power to issue writs in aid of, or to protect, its appellate jurisdiction, a court of appeals has power to grant an injunction to prevent irreparable harm to the parties during the pendency of an appeal. *Eastern Greyhound Lines v. Fusco*, 310 F.2d 632 (6<sup>th</sup> Cir. 1962). *See also Public Utilities Commission of District of Columbia Transit Co.*, 214 F.2d 242 (D.C. Cir. 1954).

### **The standard for stay or injunction pending appeal**

As with preliminary injunctions, the nature of the showing required to justify a stay pending appeal may vary with the circumstances presented. If the balance of hardships tips decidedly in favor of the party seeking a stay, it may be sufficient showing on the merits to show the existence of serious

legal questions. *Wright, Miller & Cooper, Federal Practice and Procedure, Jurisdiction 3d*, §3954, Stay or Injunction Pending Appeal, at 298.

“The standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction \* \* \* [T]here are two interrelated legal tests \* \* \*. At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury. \* \* \* At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor. \* \* \* ‘[T]he relative hardship to the parties’ is the ‘critical element’ in deciding at which point along the continuum a stay is justified. \* \* \* In addition, in cases such as the one before us [involving restoration of disability benefits to Social Security recipients], the public interest is a factor to be strongly considered.” *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). In ruling on a request for an injunction pending appeal, the court of appeals must engage in the same inquiry as when it reviews the grant or denial of a preliminary injunction. *Walker v. Lockhart*, 678 F.2d 68 (8<sup>th</sup> Cir. 1982).

### **Relevant Hawaii legal history**

**1898 – Annexation. The public land trust established for inhabitants of the Hawaiian Islands**

In 1898, the Republic of Hawaii ceded its public lands (about 1.8 million acres formerly called the Crown lands and Government lands) to the United States with the requirement that all revenue from or proceeds of these lands except for those used for civil, military or naval purposes of the U.S. or assigned for the use of local government "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes". *Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, Resolution No. 55, known as the "Newlands Resolution"*, approved July 7, 1898; Annexation Act, 30 Stat. 750 (1898) reprinted in 1 Rev. L. Haw. 1955 at 13-15).

The Newlands Resolution established the Public Land Trust (sometimes referred to as the "Ceded Lands Trust" and, after 1959, sometimes also referred to as the "Section 5(f) trust.") Such a special trust was recognized by the Attorney General of the United States in Op. Atty. Gen. 574 (1899) and by the Hawaii Supreme Court in *State v. Zimring*, 58 Haw. 106, 124, 566 P.2d 725 (1977) and *Yamasaki*, 69 Haw. 154, 159, 737 P.2d 446, 449 (1987); see also Hawaii Attorney General Opinion July 7, 1995 (A.G. Op. 95-03) to Governor Benjamin J. Cayetano from Margery S. Bronster, Attorney General, "Section 5 [Admission Act] essentially continues the trust which was first established by the Newlands Resolution



in 1898, and continued by the Organic Act in 1900. Under the Newlands Resolution, Congress served as trustee; under the Organic Act, the Territory of Hawaii served as Trustee.”

In 1898, about 31% of the inhabitants of Hawaii were of Hawaiian ancestry and the remaining 69% were of other ancestry. Robert C. Schmitt, *Demographic Statistics of Hawaii, 1778-1965* (Honolulu, 1968).

Under the laws of the Kingdom of Hawaii, persons of Hawaiian ancestry, merely by virtue of that ancestry, had no special entitlement to the use, income or proceeds of the public lands of the Kingdom of Hawaii. The King conducted his government for the common good and not for the private interest of any one man, family or class of men among his subjects.

Constitution of 1852, Article 14. Every adult male subject, whether native or naturalized, was entitled to vote. *Id.*, Section 78. Everyone born in the Kingdom (except children of foreign diplomats) was a native-born subject of the Kingdom. In the last half of the 19th century, the government of the Kingdom actively encouraged immigration and offered immigrants easy naturalization and full political rights. For example, the Civil Code of 1858 provided that “[e]very foreigner so naturalized shall be deemed to all intents and purposes a native of the Hawaiian Islands ... and ... shall be entitled to all the rights, privileges and immunities of an Hawaiian subject.”

### **1921 - The Hawaiian Homes Commission Act**

In 1921, Congress enacted the Hawaiian Homes Commission Act, 42 Stat. 108 (1921) ("HHCA") which set aside about 200,000 acres of the ceded lands and provided for long term leases (99 years renewable for another 100 years) of Homestead lots (at one dollar per year) to "native Hawaiian" persons, defined in ' 201(7) as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."

### **1959 - The Admission Act**

In 1959, when Hawaii became a state, the United States transferred title to the ceded lands (less those parts retained by the U.S. for national parks, military bases and other public purposes) back to Hawaii with the requirement in the Admission Act §4 that the State adopt the Hawaiian Homes Commission Act ("HHCA") and in §5(f) that the State hold the ceded lands "as a public trust" for "one or more" of five purposes ("for the support of public schools and other public educational institutions", "for the betterment of the conditions of native Hawaiians as defined in the Hawaiian Homes Commission Act" (i.e., "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778"), "for the development of farm and home ownership", "for the making of public improvements" and "for the provision of lands for public use."

### **1978 - Hawaii Constitution amended, creates OHA.**

In 1978, Hawaii's Constitution was purportedly amended to establish an Office of Hawaiian Affairs ("OHA"). Amended Article XII, Section 6 provides that the board of trustees of OHA "shall exercise power as provided by law; to manage and administer the proceeds from the sale...and income...including all income and proceeds from that pro rata portion of the trust referred to in Section 4 of this article for native Hawaiians." (Section 4 does not specify any pro rata portion.)

In 1980, the Hawaii Legislature enacted Section 10-13.5 H.R.S. "Twenty per cent of all funds derived from the public land trust, described in Section 10-3, shall be expended by the office [OHA], as defined in section 10-2, for the purposes of this chapter."

### **2000 - *Rice v. Cayetano* strikes down OHA's voting restriction. "Hawaiian" and "native Hawaiian" are racial classifications.**

On February 23, 2000, the Supreme Court in *Rice v. Cayetano*, 528 U.S. 495 (2000), struck down OHA's Hawaiians-only voting restriction. In applying the Fifteenth Amendment, the Court rejected the State's and OHA's arguments to the contrary and held the definitions of "Hawaiian" and "native Hawaiian" are racial classifications.

"Ancestry can be a proxy for race. It is that proxy here." *Rice*, 528 U.S. at 514. "Noting that "[t]he definitions of ' native Hawaiian' and ' Hawaiian' are changed to substitute ' peoples' for

' races,' " the drafters of the revised definition "stress[ed] that this change is non-substantive, and that ' peoples' does mean ' races.' " ... Again, your Committee wishes to emphasize that this substitution is merely technical, and that ' peoples' does mean ' races' " *Id.* at 516.

The next definition in Hawaii's compilation of statutes [“Native Hawaiian”] incorporates the new definition of "Hawaiian" and preserves the explicit tie to race: ... This provision makes it clear: "[T]he descendants ... of [the] aboriginal peoples" means "the descendants ... of the races." *Id.* at 516.

Those definitions, which the highest court in the land has determined to be racial classifications, are the foundation and the only reason for the existence of OHA and HHC. The HHCA's purpose is expressly and exclusively racial: "The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms and spirit of such act." Haw. Const. Art. XII §1. The spirit of the HHCA "looking to the continuance of Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out." Art. XII §2. OHA's purpose is equally racial: to hold property "in trust for native Hawaiians and Hawaiians." Art. XII §§ 5, 6. Under Hawaii State law, if the Defendant OHA Trustees or HHCA/DHHL Defendants were to divert trust assets to the use of the public, they would breach that trust. *Ahuna v. DHHL*, 64 Haw. 327, 342-43, 640 P.2d 1161 (1982).

**PLAINTIFFS-APPELLANTS ARE LIKELY TO PREVAIL**

## ON THE MERITS AND ON STANDING

(These and other points will be more fully covered in the briefs. They are summarized in condensed form here to demonstrate that Plaintiffs will likely prevail or at the very least, raise serious questions.)

**The merits.** Plaintiffs will ultimately prevail on the merits in this case because the Constitution of the United States does not allow any governmental actor, federal, state or local, to impose racial discrimination in favor of some, and against other, citizens without strict scrutiny. *Shaw v. Reno*, 509 U.S. 630, 641 et. seq., 113 S.Ct. 2816, 2823-24, et. seq., (1993); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229-30 (1995); *City of Richmond v. J.A. Croson*, 488 U.S. 469, (1989).

A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.” *Personal Adm’r of Massachusetts et. al. v. Feeney*, 442 U.S. 256 , 272, 99 S.Ct. 2282, 2292 (1979). “Once a prima facie case of invidious discrimination is established, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.” *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972). See also *Miller v. Johnson*, 515 U.S. 900, 920, 115 S. Ct. 2475, 2490

(1995) (to satisfy strict scrutiny, State must demonstrate that its legislation is narrowly tailored to achieve a compelling interest); *University of California Regents v. Bakke*, 438 U.S. 265, 305, 98 S.Ct. 2733, 2756 (1978).

Hawaii, as should be expected of the Aloha State (the most intermarried, integrated, racially blended state in the Nation), promises its citizens even greater protection against racial discrimination than that given by the Fourteenth Amendment. Hawaii's Constitution absolutely prohibits racial discrimination. "No person shall be ...discriminated against in the exercise [of the person's civil rights] because of race ...or ancestry."

Article I, §5 Hawaii Constitution. (The public policy of the State of Hawaii disfavoring racial discrimination is embodied in our statutes and our Constitution. See *e.g.*, HRS § § 76-44, 76-47 (civil service), 171-64 (disposition of public land), 294-33 (no-fault insurance), 304-1 (University of Hawaii), 378-2(1), 378-4 (employment practices), 515-3 (real property transactions), and 612-2 (jury duty). The strength of this expressed public policy against racial discrimination is beyond question.) *Hyatt Corp. v. Honolulu Liq. Comm.*, 69 Haw. 238, 244, 738 P.2d 1205, 1208-09 (1987).

The State of Hawaii and its officers acting in their official capacities can therefore have no interest, much less a compelling interest, in engaging in invidious racial discrimination.

**Standing as beneficiaries of the Public Land Trust (sometimes referred to as the ‘Ceded Lands Trust’ and the ‘§5(f) trust’).**

Plaintiffs-Appellants, like the plaintiffs in at least three other Hawaii Public Land Trust cases decided by the Ninth Circuit, have standing as trust beneficiaries, to seek prospective injunctive relief against further breaches by state officials acting in their official capacities for the Trustee, the State of Hawaii. *Price v. Akaka*, 3 F.3d 1220 (9<sup>th</sup> Cir. 1993). (§1983 action against OHA trustees to challenge expenditure of Public Land Trust funds for referendum to define ‘native Hawaiians’ as all people of Hawaiian ancestry. ‘Price is among the class of §5(f) beneficiaries whose welfare is the object of the action at issue. Therefore, there is little question that the [trustees’] action or inaction has caused him injury, and that a judgment preventing or requiring action will redress it.’ Affirmed that Price has standing but held the OHA trustees had qualified immunity as to the referendum.); *Price v. Akaka*, 828 F.2d 824 (9<sup>th</sup> Cir. 1991). (§1983 action alleging the trustees of OHA managed income in a manner that contravenes §5(f), commingled OHA’s share of that income with other OHA funds; expended none for benefit of native Hawaiians. Cir. Judge Canby, Accept complaint allegations as true and construe in most favorable light. Price has stated a claim and district court has jurisdiction to hear it. Cites common law of trusts, Rest. 2d Trusts, beneficiary right to sue.); *Napeahi v. Paty*,

921 F.2d 897 (9<sup>th</sup> Cir. 1990). (Action alleging State's abandonment of land to private individuals constituted breach of Hawaii's ceded lands trust.

Ninth Circuit held that Napeahi, as a native Hawaiian and beneficiary of this public trust, does have standing to enforce its provisions.) This issue was raised, among other places, in Plaintiffs' 4/11/02 Memorandum in Opposition to OHA's and the State's Motions to Dismiss On Standing Grounds, Docket 88.

### **Taxpayer standing.**

As taxpayers of the State of Hawaii, Plaintiffs-Appellants also have standing to present their claims, as the trial court correctly held, pursuant to the leading Ninth Circuit case on taxpayer standing: *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9<sup>th</sup> Cir. 1984). "Hoohuli involved nearly identical allegations." "The plaintiffs in *Hoohuli* were asserting claims nearly identical to those being asserted here." (Docket 117, the May 8, 2002 Standing order at 14 & 16, also reported at *Arakaki v. Cayetano*, 299 F.Supp 2d 1090, 1098 & 99 (D.Hawaii 2002).

However, nothing in *Hoohuli*, or any other legal authority, authorizes the extraordinary restrictions imposed by the trial court on Plaintiffs' taxpayer standing: "Plaintiffs only have taxpayer standing to challenge direct expenditures of tax money by the legislature"; "Plaintiffs' taxpayer



standing does not allow them to challenge that ‘pass-through’ [revenue from Ceded Land rentals first paid into Hawaii’s General Fund and thereafter paid out to OHA]” (*Id.* DKT 117 at 17.); ‘Plaintiffs similarly lack standing to challenge the State’s payment of \$30 million [per year] to the Hawaiian Home Lands trust. That amount is being paid over time, in satisfaction of a decision by the Hawaii legislature to settle past claims relating to matters administered by DHHL.” (*Id.* DKT 117 at 18.); ‘Plaintiffs lack standing to challenge the State’s issuance of bonds or other borrowing of money from [for] the HHC, the DHHL, or OHA.” (*Id.* DKT 117 at 19.)

Those restrictions amount to the dismissal or partial summary judgment on the merits of substantial parts of Plaintiffs’ claims, based on the pleadings, without the benefit of evidence and without compliance with the rules for summary judgment and in violation of the requirement that “[a]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary to support the claim.’” *Bennett v. Spear*, 520 U.S. 154, 168 (1997).

*Graham v. FEMA*, 149 F.3d 997 (9<sup>th</sup> Cir. 1998): For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the

complaint, and must construe the complaint in favor of the complaining party. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); see also *Usher v. city of Los Angeles*, 828 F.2d 556, 561 (9<sup>th</sup> Cir. 1987) (applying this standard to motions to dismiss in general).

J. Ezra, *Naliielua v. State of Hawaii*, 795 F.Supp. 1099 (1990): In considering a motion to dismiss pursuant to Fed. R. Civ. P 12(b)(6), the court must construe the allegations of the complaint as true and cannot dismiss the complaint “unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Sun Savings & Loan Association v. Dierdorff*, 825 F.2d 187, 191 (9<sup>th</sup> Cir. 1987) quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L.Ed 2d 80, 78 S. Ct. 99 (1957).

The restrictions are also contrary to the law in the Ninth Circuit. “Legislative enactments are not the only government activity which the taxpayer may have standing to challenge. (contrasting state taxpayer’ s ability to challenge executive conduct with federal taxpayer’ s).*Cammack v. Waihee*, 932 F.2d 765, 771 (9<sup>th</sup> Cir. 1991).

*Cammack* held that plaintiffs had standing as both State of Hawaii and municipal taxpayers to challenge the expenditure of tax revenues on paid leave days for the Good Friday holiday. (The challenged statute did not

appropriate any funds. ‘Hawaii’s section 8 -1 appropriates no funds to carry out its purposes. By providing for state holidays, however, the statute has at least the **fiscal impact** that many state and local government offices are closed and many state and local government employees need not report to work.’ *Id.* at 767 (emphasis added)).

The *Cammack* Court said at 932 F.2d 770 that municipal taxpayer standing requires no more injury than an allegedly improper municipal expenditure. ‘Thus, we conclude that municipal taxpayer standing simply requires the ‘injury’ of an allegedly improper expenditure of municipal funds, and in this way mirrors our threshold for state taxpayer standing.’ On the same page, the court cites *Hawley v. City of Cleveland*, 773 F.2d 736, 741-42 (6<sup>th</sup> Cir.1985), *cert. Denied*, 475 U.S. 1047, 106 S.Ct. 1266, 89 Led.2d 575 (1986) (municipal taxpayers may challenge city lease of airport terminal space to church where the lease agreement could have a **detrimental impact on the public fisc**) (emphasis added).

Thus, in this and other circuits, state taxpayers may properly challenge any governmental activity, executive conduct as well as legislative enactments, and any allegedly improper expenditure of public funds or allegedly improper lease of public property which could have a detrimental impact on the public fisc.

As to the restriction on challenging “**settlements**”, Act 14, SLH 1995 established the Hawaiian home lands trust fund and referred to a “requirement that the State make twenty annual deposits of \$30,000,000, or their discounted value equivalent, into the trust fund” but actually appropriated only \$30 million per year for the two years 1995-96 and 1996-97. This was a tacit acknowledgement that one legislature cannot bind future legislatures. Section 1 of Act 14 made that express. “The legislature notes and expressly finds that the MOU [Memorandum of Understanding]<sup>3</sup>

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<sup>3</sup>The Memorandum of Understanding (Exhibit 2) was signed December 1 and 2, 1994 in the closing days of the Waihee administration. It set forth the “terms of action” agreed to between the members of the Task Force and the “independent representative of the beneficiaries” as to administrative action and legislation they will “seek”. For example, “the task force will seek ... establishment of the Hawaiian home lands settlement trust fund and the annual payment of \$30,000,000, until a total of \$600,000,000, over a period not to exceed twenty years, is paid into the settlement trust fund.” Par E. Also, Paragraph L “The task force recommends and will seek continuation of the state’s efforts to continue the pursuit of Hawaiian home lands trust claims against the federal government. The legislation sought by the task force is not intended to replace or affect claims of native Hawaiians or Hawaiians with regard to reparations against the federal government. Nothing in this agreement or legislation pertaining to this agreement is intended to affect any claims arising out of the 1893 overthrow, or 1898 annexation, or claims under the public land trust.”

The MOU does not refer to or purport to settle any lawsuit. Nor does it purport to be, in itself, a settlement

does not bind the legislature and that it is the right and duty of the legislature to exercise its independent judgment and oversight in developing such implementing and related legislation which is in the overall public interest.” Section 20 of Act 14 also recognized that the Act might be held invalid in whole or in part and provided that if so, the entire act (with one exception not relevant here) would be invalid. Thus, by its own terms, Act 14 does not purport to be a settlement contract which is binding on future legislatures. The ongoing appropriations of the \$30 million per year pursuant to Act 14 are the independent acts of each subsequent legislature. Like all state laws and all conduct of State officers in implementing them, laws characterized by legislatures as “settlements”, are subject to the United States Constitution and other federal laws. When those state laws impose invidious discrimination that causes injury, as these do to all persons not of the favored race, they may and must be enjoined.

For similar reasons, the approximately \$135 million paid to OHA in May and June of 1993 “for the betterment of the conditions of native Hawaiians” (pursuant to Act 304 SLH 1990 to “satisfy” the amounts payable for the period from June 16, 1980 through June 30, 1991) is not exempt from judicial scrutiny merely because it was financed almost entirely through the

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contract binding on the State, State agencies, all beneficiaries of the public land trust or anyone else.

issuance of general obligation bonds and characterized as a “settlement.” when it was presented to the legislature for approval in 1993.

Act 304 SLH 1990 amended §10-13.5 HRS retroactive to 1980 to provide that twenty per cent of all “revenue” derived from the public land trust shall be expended by OHA for the betterment of the conditions of native Hawaiians. Act 304 defined “revenue” as “all proceeds, fees, charges, rents or other income ...derived from any ...use or activity, that is situated upon and results from the actual use of lands comprising the public land trust.” The previous language, enacted in 1980, had provided that twenty percent of all “funds” derived from the public land trust shall be expended by OHA and did not define “funds”. The effect of this change was dramatic. Instead of calculating the pro rata portion for native Hawaiians from the “income” derived from the public land trust, as allowed by Art. XII, §6 Haw. Const., the twenty percent would be calculated based the gross revenues of the trust itself. (See Exhibit 3, graph showing OHA’s annual PLT receipts at least quadrupling after 1990.) OHA recognized the windfall Act 304 provided. OHA’s financial statement for 1997/1996 at page 35 shows 11/4/96, Advertising Campaign, “Protect 304” Available Appropriation in the total amount of \$1 million. (Exhibit 4, OHA financial statement 1997/1996 at 35, also part of Docket 326, Exhibit E, FYE

1997/1996 at 35.)

With Act 304's broadened definition, the "Office of State Planning" (located in the Governor Waihee's office) and OHA "ascertained" the amount payable to OHA for the period June 16, 1980 through June 30, 1991 and presented it to the legislature in 1993. By Act 35 SLH 1993, "pursuant to Act 304, Session Laws of Hawaii 1990", the legislature appropriated \$136,500,000 out of general obligation bond funds, or so much thereof as may be necessary, for the payment to OHA. On April 27 and 28, 1993, after the legislature had authorized the payment, the Office of State Planning and OHA signed a memorandum which stated in part, "OSP and OHA recognize and agree that the amount specified in Section 1 hereof does not include several matters regarding revenues which OHA has asserted is due to OHA and which OSP has not accepted and agreed to." (See Exhibit 5, Memorandum, item 7, page 9, also part of Docket 331.)

On May 30, 1993 the Office of State Planning paid OHA \$5 million from the general fund "subject to audit" to partially satisfy the amount payable to OHA under Act 304 for the 1980-1991 period. (Exhibit 6.) On June 4, 1993 the Office of State Planning paid OHA \$129, 584,488.85 pursuant to Act 304 for the period of June 16, 1980 through June 30, 1991 "which amount is, however, subject to audit and reimbursement." (Exhibit

7.)

Within 7 months after OHA received the \$135 million vouchers, it filed *OHA v. State* in the Hawaii First Circuit Court suing for substantially more for the same period, i.e., June 16, 1980 through June 30, 1991. See paragraphs 38 through 43 of the Complaint.

On September 12, 2001, the Hawaii Supreme Court in *OHA v. State*, 96 Haw. 388, 401, 31 P.3d 901, 914 (2001) reversed the Hawaii Circuit Court and dismissed the case for lack of justiciability. “Act 304, as applied to revenue derived from that portion of the Honolulu International Airport that sits upon ceded lands, conflicts with federal legislation. Therefore, Act 304--by its own terms--is effectively repealed.”

Plaintiffs believe that the \$135 million paid in 1993, plus 12 annual payments pursuant to the now repealed Act 304 are still held by OHA, plus earnings, as part of the about \$313 million OHA now holds in trust “for the betterment of the conditions of native Hawaiians”. (Ex. 8, Financial Report of OHA as of December 31, 2003, shows NHTF investments (market value) \$313,003,550.31.)

These two “settlements” (the 1993 \$135 million to OHA pursuant to the now-repealed Act 304; and the \$30 million per year for twenty years to the Hawaiian home lands trust ), which the trial court held to be immune



from challenge by Plaintiffs as state taxpayers, have been financed almost entirely by general obligation bonds. These bonds increase the tax burden on Plaintiffs and all other taxpayers who must repay the principal and interest but are excluded from receiving the benefits solely because they are not of the favored race. Exhibits 9 and 10 showing the amounts paid from the general fund on General Obligation Funded Debt through April 1, 2002: \$91,533,355.16 paid for OHA with \$95,854,079.93 still owed and \$35,148,474.85 paid for Hawaiian Home Land Trust Fund with \$126,277,234.55 still owed.

Thus, even if they have standing only as taxpayers, Plaintiffs-Appellants and other taxpayers similarly situated have suffered and continue to suffer genuine pocketbook injuries as a result of these payments. They have been and still are being taxed to pay the bills but are excluded from the benefits solely because they are not of the favored race. It is thus likely that they will ultimately prevail on the merits as taxpayers, and also as beneficiaries of the public land trust.

### **THE IRREPARABLE HARM**

**Threatened harm from further PLT distributions to OHA except to the extent of 20% of the net.**

Under trust law, income beneficiaries are entitled to share only in the

net trust income after expenses. The State Attorney General vigorously and correctly argued this legal point in her Amended Opening Brief to the Hawaii Supreme Court filed May 6, 1997 in *OHA v. State* at page 39, (See Exhibit G filed herein April 11, 2002 at Docket 88). “[I]t is a well-established principle of the law of trusts that beneficiaries are entitled only to the net income from the trust. *In re Bernice P. Bishop Estate*, 36 Haw. 403, 427 (1943) (Kemp, C.J.) (noting that ‘annual income’ clearly refers to the net annual income’); (‘[t]he word ‘income’ as employed in the will unquestionably means net income’).”

For the 23 fiscal years from 1981 through 2003, the State of Hawaii, as trustee of the Public Land Trust, has paid some \$301,397,820 to OHA, purportedly as the 20% pro rata share of the trust income for the native Hawaiian beneficiaries. (Exhibit 11.) But the State has never provided any accounting of the revenues and expenses of the PLT. Plaintiffs sought to compel discovery of this information but were denied, apparently because of the restricted nature of the standing allowed. (See Docket 357 and 359.) But the spreadsheet used by the State for the \$135 million payment to OHA in 1993, Exhibit 5 filed with Docket 359, (Exhibit 12) shows that the 20% paid to OHA was calculated on revenues (i.e., the gross). And the State Attorney General correctly and vigorously argued in her brief in *OHA v.*

*State* that ‘OHA’s claim to 20% of the gross revenue could be satisfied only by allocating additional taxpayer revenue from the general fund.” Excerpts from the State’s brief are contained in Exhibit G filed with Docket #88.

Thus, there is a high likelihood that most, perhaps all, of the \$300 million distributed to OHA over the years supposedly as a 20% ‘pro rata” portion of the PLT income was, in fact, paid or financed with taxpayer money from the general fund **because the PLT never generated any net income properly distributable to any trust beneficiaries.**

The past injuries to Plaintiffs-Appellants and others over the last 24 years resulting from higher taxes or public schools less excellent, roads with more potholes or parks and beaches less safe or clean and the loss of every other aspect of public health and welfare and life that the \$300 million could have brought during those years are gone forever and irreparable. Plaintiffs may not seek compensatory relief here.

An injunction now forbidding State Defendants from distributing to OHA any further ‘pro -rata share” of annual funds derived from the PLT for ‘native Hawaiians”, except to the extent of 20% of the net income, if any, would at least preserve the status quo pending this appeal. To implement it, the State Defendants, who act for the State which is the Trustee of the PLT, should be required, if they wish to make any further distributions to OHA

from the PLT pending this appeal, to account for the PLT, for the periods relevant to the proposed distribution, in accordance with generally acceptable accounting principles applicable to public trusts, i.e., substantially the same fiduciary standards applicable to private trusts, and to furnish such accounting to Plaintiffs at least 30 days prior to any and every proposed future distribution to OHA from the PLT.

The PLT is for the benefit of all the people of Hawaii. *Rice v. Cayetano*, 528 U.S. 495, 525, 120 S.Ct. 1044, 1061 (2000), Breyer concurring, “But the Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii. The Act specifies that the land is to be used for the education of, the developments of homes and farms for, the making of public improvements for, and public use by, *all* of Hawaii’ s citizens, as well as for the betterment of those who are "native.”

The government as trustee has the same fiduciary duty as private trustees. *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 339, 640 P.2d 1161, 1189 (1982) (the conduct of the government as trustee is measured by the same strict standards applicable to private trustees, citing *United States v. Mason*, 412 U.S. 391 (1973)). See also *Price v. Akaka*, 928 F.2d 824, 827 (9<sup>th</sup> Cir. 1991) citing the Restatement 2d of the Law of Trusts as applicable to conduct of the State of Hawaii as trustee of Hawaii’s Public

Land Trust.

**Threatened harm from OHA's further disbursing or encumbering the \$313 million it now holds.**

OHA has the authority and duty, under the OHA laws, to use the about \$313 million trust fund *only* for native Hawaiians. Hawaii Attorney General opinion No. 83-2 (1983 WL 41853 (Hawaii A.G.)) 'Legislature may not ..(internal citation omitted) ...authorize OHA to use funds derived from the public land trust, to better the conditions of 'Hawaiians,' as defined in Section 10-2(5), as distinguished from 'native Hawaiians,' as defined in Section 5(f) of the Admission Act.'

The Complaint, Prayer, ¶ A.2., (Exhibit 1) asks the court as part of the final judgment to declare these moneys, and all other property held by OHA, to be general funds and property of the State of Hawaii, to be used for constitutional and non-discriminatory purposes in compliance with the public land trust for the inhabitants of the State of Hawaii.

If, between now and final judgment, OHA spends or encumbers some or all of the amounts in this trust fund, and Plaintiffs-Appellants prevail, some or all of the approximately \$313 million will be irreparably lost and the effectiveness of the final judgment to grant relief to Plaintiffs will be irrevocably diminished.

**Threatened harm from further payments of \$30 million per year**

**for Hawaiian home lands.**

If the State Defendants make any further payments between now and final judgment on account of the \$30 million per year to the Hawaiian home lands trust fund, referred to in Act 14, SLH 1995, through the issuance of general obligation bonds, or some other method such as transfer of cash or land in lieu of cash, the tax burden on Plaintiffs-Appellants, and others similarly situated, will be irrevocably increased or their equitable ownership of the public lands will be irrevocably diminished. If, between now and the final judgment, the HHCA/DHHL Defendants spend or encumber some or all of those amounts, and Plaintiffs-Appellants prevail, some or all of those payments will be irreparably lost and the effectiveness of the final judgment to grant relief to Plaintiffs will be irrevocably diminished.

**Threatened harm from further Homestead leases without full disclosure and waiver.**

In June 2003, the Hawaiian Homes Commission approved the DHHL's Strategic Plan. Goal 1 of the plan is: "Within five years, provide every qualified native Hawaiian beneficiary on the waiting list an opportunity for homeownership or land stewardship on homestead lands." (Exhibit 13, DHHL's RFP Feb. 17, 2004)

According to Exhibit 14, the DHHL Annual Report FY 2001-02 (the latest available) as of June 30, 2002, there were then a statewide total of

7,292 Homestead leases (5,834 residential; 1,076 agricultural; and 382 pastoral). The DHHL had loans receivable from 1,235 native Hawaiian beneficiaries in the amount of \$45.023 million and guaranteed another 506 loans in the amount of \$18.866 million. In addition FHA guaranteed another 2,173 loans in the total amount of \$228.403 million. The total loans receivable were \$292.403 million for a total of 3,917 accounts.

As of the same date, June 30, 2002, there were 31,318 applications on the waiting list for Homestead awards pending but, because some applicants hold two applications, there were “approximately 20,000 applicants.”

(Exhibit 14.)

If the State and DHHL actually implement this racially restricted “opportunity for home ownership” for everyone on the waiting list by June 30, 2008, a massive and unprecedented number of new lots, perhaps 4,000 lots per year, will have to be developed and ready for occupancy and about 20,000 new Homestead leases issued. But, if Plaintiffs prevail, as they are likely to, all Homestead leases, including the thousands of new ones, may be invalidated. This creates the potential, between now and final judgment, of thousands of disappointed native Hawaiian home buyers with massive claims (perhaps in the \$ billions) against the State fisc and irrevocable injury to the taxpayer pocketbooks of Plaintiffs-Appellants and others similarly

situated. To avoid this risk, the HHC/DHHL Defendants should be required, pending this appeal, to do what any prudent land lessor/developer would do: (a) Fully disclose to all proposed Homestead lessees (and other interested parties such as developers, lenders, guarantors, contractors, investors, partners and joint-venturers) that this suit seeks to invalidate and avoid all Homestead leases and, if Plaintiffs prevail, could impair related financing and other contractual arrangements; and (b) require all prospective Homestead lessees and related parties to waive any and all claims against HHC/DHHL or the State in the event that such new Homestead leases or related contractual arrangements are invalidated, avoided or impaired as a result of a judgment or settlement of this suit.

### **THE BALANCE OF HARDSHIPS**

If the requested injunction is issued, the status quo will be maintained as to the “big ticket” items but both OHA and HHC/DHHL will be able to continue operations with little change. The State *fisc* will save about \$47 million per year and it will be protected against potentially massive claims. If the Defendants-Appellees ultimately prevail, they can, if they choose, disburse the about \$47 million per year withheld, OHA can disburse the \$313 million if it chooses, and the disclosure statements and waivers signed by the new Homestead lessees and related parties will have done no harm.



Without the injunction: the about \$47 million will continue to gush out of the State treasury yearly; thousands of new Homestead leases will be issued, each carrying a huge potential claim if it is invalidated as a result of this case; the \$313 million in the Native Hawaiian Trust Fund held by OHA may be spent or encumbered in part or in full; the irrevocable losses to the pocketbooks of Plaintiffs-Appellants and others similarly situated will continue; and the effectiveness of the court's final judgment to redress their injuries, if Plaintiffs-Appellants ultimately prevail, will be substantially diminished.

DATED: Honolulu, Hawaii, April \_\_\_\_, 2004.

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H. WILLIAM BURGESS  
Attorney for Plaintiffs-Appellants

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

EARL F. ARAKAKI, et al.,

Plaintiffs – Appellants,  
v.

LINDA LINGLE et al.,

State Defendants – Appellees,

HAUNANI APOLIONA, et al.,

OHA Defendants – Appellees,

MICAH KANE, et al.,

HHCA/DHHL Defendants –  
Appellees,

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

Defendants – Appellees,

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

SCHHA Defendants/Intervenors –  
Appellees,

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

Defendants/Intervenors – Appellees.

**No. 04-15306**

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

DECLARATION IN SUPPORT OF  
MOTION FOR INJUNCTION TO  
PRESERVE STATUS QUO  
PENDING APPEAL;

EXHIBITS 1 – 14.

**DECLARATION IN SUPPORT OF MOTION FOR INJUNCTION TO  
PRESERVE STATUS QUO PENDING APPEAL**

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

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

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

3. The attached exhibits are true copies of:

Exhibit 1. Complaint for Declaratory Judgment (Re: Constitutionality of Office of Hawaiian Affairs, Hawaiian Homes Commission and Related Laws) and for an Injunction filed March 4, 2002. (Docket No. 1 in this case.)

Exhibit 2. Memorandum of Understanding signed December 1 and 2, 1994 to document results of Task Force on DHHL Land Title and Related claims. I received this from DHHL pursuant to a U.I.P.A. request in about late January, 2003;

Exhibit 3. Graph of OHA's receipts from State of Hawaii (per OHA financial statements) filed as part of Docket 326 along with copies of OHA

financial statements 1981-2003;

Exhibit 4. Cover page and page 35 of OHA financial statement FYE 1997/1996 also part of Docket 326;

Exhibit 5. Memorandum signed April 27 and 28, 1993 to document results of efforts to ascertain amount to be paid to OHA pursuant to Act 304. This was Exhibit I filed by the State on December 15, 2003 as part of Docket 331.

Exhibit 6. (2 pages) Certification by Office of State Planning April 28, [1993] of \$5 million to be paid to OHA to partially satisfy amount, subject to audit, under Act 304 for period June 16, 1980 –June 30, 1991 for betterment of native Hawaiians. Receipt by OHA May 30, 1993 by OHA of \$5 million to partially satisfy amount, subject to audit, under Act 304 for period June 16, 1980 –June 30, 1991 for betterment of native Hawaiians.

Exhibit 7. (3 pages) Letter from Office of State Planning to OHA June 4, 1993, subject: Act 304 Payment to OHA, enclosing warrants of \$129,584,488.85 “subject to audit and reimbursement to the State of any portion which is in excess of the amount due” OHA and receipt by OHA “subject to audit and reimbursement”. Summary of Calculation of OHA Payment.

Exhibit 8. OHA Financial Report as of December 31, 2003 from page

14 of Ka Wai Ola o OHA (OHA's newsletter), April 2004 issue, Vol. 21, No. 04.

Exhibit 9. OHA Allocation of General Obligation Funded Debt as of April 1, 2002 from State's answers to interrogatories April 12, 2002 as Attachment 7;

Exhibit 10. Hawaiian Home Land Trust Settlement Allocation of General Obligation Funded Debt as of April 1, 2002 from State's answers to interrogatories April 12, 2002 as Attachment 9;

Exhibit 11. State of Hawaii payments to OHA (Per Fiscal year as shown on OHA financial statements.) Compilation 1981 – 2003 filed as part of Docket 326 along with copies of OHA financial statements 1981-2003.

Exhibit 12. Worksheet entitled "OHA Special Work, B&F Reported Revenues 11/92. This was filed by the State of Hawaii as Exhibit 5 in the State First Circuit Court in *Oha v. State*, Civil No. 94-0205-01. (Filed herein by Plaintiffs as part of Docket 348, December 26, 2003.)

Exhibit 13. Cover sheet and Page 2 of DHHL Request for Proposals for Statewide Land Acquisition, Solicitation No. RFP-04-HHL-001 dated February 17, 2004.

Exhibit 14. Cover sheet of DHHL Annual Report FY 2001-02, transmittal to Governor dated March 11, 2003, page 6 (showing numbers on

waiting list), and page 10 (showing Homestead leases as of June 30, 2002).

DATED: Honolulu, Hawaii, April 12, 2004.

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H.WILLIAM BURGESS

**CERTIFICATE OF SERVICE**

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

**MARK J. BENNETT, ESQ.**  
**CHARLEEN M. AINA, ESQ.**  
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