

WILLIAM K. MEHEULA (2277)  
Winer Meheula Devens & Bush  
Pali Palms, Suite A-300  
970 N. Kalaheo Avenue  
Kailua, Hawai'i 96734  
Telephone: (808) 254-5855

HAYDEN ALULI (3388)  
Grosvenor Center, Mauka Twr.  
737 Bishop Street, Suite 1875  
Honolulu, Hawai'i 96813  
Telephone: (808) 533-3388

Attorneys for Plaintiffs  
PIA THOMAS ALULI, JONATHAN  
KAMAKAWIWO'OLE OSORIO,  
CHARLES KA'AI'AI, and KEOKI  
MAKA KAMAKA KI'ILI

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

OFFICE OF HAWAIIAN	)	CIVIL NO. 94-4207 (SSM)
AFFAIRS, ROWENA	)	(Declaratory Judgment)
AKANA, HAUNANI	)	
APOLIONA, DONALD	)	<b>INDIVIDUAL</b>
CATALUNA, LINDA DELA	)	<b>PLAINTIFFS' CLOSING</b>
CRUZ, CLAYTON H.W.	)	<b>ARGUMENT;</b>
HEE, COLETTE MACHADO,	)	<b>CERTIFICATE OF</b>
CHARLES OTA, OSWALD	)	<b>SERVICE</b>
STENDER, and JOHN	)	
WAIHE'E, IV, in their official	)	JUDGE: The Hon. Sabrina
capacities as members of the	)	S. McKenna
Board of Trustees of the Office	)	TRIAL DATE: November
of Hawaiian Affairs, PIA	)	20, 2001
THOMAS ALULI,	)	
JONATHAN	)	
KAMAKAWIWO'OLE	)	
OSORIO, CHARLES	)	
KA'AI'AI, and KEOKI	)	
MAKA KAMAKA KI'ILI,	)	
	)	
Plaintiffs	)	
	)	

vs.	)
	)
HOUSING AND	)
COMMUNITY	)
DEVELOPMENT	)
CORPORATION OF	)
HAWAII, DONALD K. W.	)
LAU, in his capacity acting	)
as Executive Director of	)
Housing and Community	)
Development Corporation of	)
Hawaii, WESLEY R.	)
SEGAWA, chairperson,	)
NADINE K. NAKAMURA,	)
KURT H. MITCHELL,	)
DON FUJIMOTO, ALLAN	)
LOS BANOS, JR., SUSAN	)
CHANDLER, CRAIG	)
HIRAI, RONALD S. LIM,	)
and BRADLEY J.	)
MOSSMAN, Members of	)
the Board of Directors of	)
Housing and Community	)
Development Corporation of	)
Hawaii, STATE OF	)
HAWAII, BENJAMIN	)
CAYETANO, in his official	)
capacity as Governor, State	)
of Hawaii,	)
	)
Defendants	)
_____	)
	)

**INDIVIDUAL PLAINTIFFS’ CLOSING ARGUMENT**

**I. SUMMARY OF ARGUMENT**

Defendants are trustees of the ceded lands trust. As trustees, they are guided by trust instruments and trust principles. The relevant trust instruments include the Admission Act, the Hawaiian Constitution and the Apology Resolution. The relevant trust principles are: (1) the duty of care; (2) the duty of loyalty; (3) the duty of impartiality; (4) the duty not to comply with a term of the trust which the trustee knows or should know is illegal; and (5) the duty to depart from the terms of the trust under certain circumstances. The duty of impartiality has particular significance in this case for two reasons: (a) there are two beneficiaries:

native Hawaiians and the general public; and (b) native Hawaiian beneficiaries have a claim to title to the ceded lands.

§ 5(f) of the Admission Act and Art. XII, § 6 of the Hawaiian Constitution can be read to have implicitly granted the State of Hawaii (“State”) the authority to sell ceded lands to further trust purposes as long as the State complies with the public trust doctrine and its fiduciary duties. The central issue in this case is whether, in light of admissions in Act 354 (1993), Act 359 (1993) and the Apology Resolution (collectively referred to as the “1993 Legislation”),<sup>1</sup> the State would breach fiduciary duties if it sold ceded lands before the Hawaiians’ claim to ownership of the ceded lands is resolved. The answer is that the State would breach fiduciary duties because the admissions in the 1993 Legislation recognized the Hawaiians’ unrelinquished claim to title to the ceded lands. The 1993 Legislation also acknowledged that ceded lands are important to the welfare of Hawaiians thereby establishing irreparable harm if ceded lands are permitted to be sold before the claim is resolved.<sup>2</sup>

In addition to the admissions in the 1993 Legislation regarding the Hawaiians’ claim to the ceded lands, an evaluation of some of the legal theories that may support the Hawaiians’ claim demonstrates that the claim is not frivolous. Evidence was presented on three legal theories: the Law of Nations, American Indian law and international law regarding human rights.

The Court has the inherent power to issue an injunction order and/or trustee instructions barring the State from selling ceded lands (except remnants) until the Hawaiians’ claim to the ceded lands is resolved, or until the injunction order and/or instructions are modified by this Court or another Court of competent jurisdiction.

The doctrine of political question does not prohibit the Court from issuing an order enjoining the sale of ceded lands because the Court has manageable standards to decide this adversarial issue. Moreover, two prior decisions in this case and thus the law of the case support dismissal of this defense. The doctrine of sovereign immunity also does not apply

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<sup>1</sup> Act 354 (1993), Ex. 548; Act 359 (1993) Ex. 6; and the Apology Resolution, Ex. 1.

<sup>2</sup> Although the Admission Act, the Hawaii Constitution and HRS Chapter 10 distinguish between “native Hawaiians” and “Hawaiians,” the Apology Resolution and Hawaiian Homelands Ownership Act of 2000, Ex. 162, do not draw this distinction and instead use the term “Native Hawaiians.” The Hawaiian Homelands Ownership Act of 2000 defines “Native Hawaiian” as “a descendant of the aboriginal people, who, prior to 1778, occupied and exercised sovereignty in the area that currently constitutes the State of Hawaii.” See ¶ 59(B) of judicial notice order, Ex. 145. Three of the Individual Plaintiffs are “native Hawaiians” and all four of them are “Hawaiians” as defined in HRS § 10-2. See Individual Plaintiffs’ identity stipulation, Ex. 397. For the sake of brevity, the remainder of this memorandum uses the term “Hawaiians,” which is intended to include “Hawaiians” and “native Hawaiians” as defined in HRS § 10-2.

because Plaintiffs are seeking prospective injunctive relief and the State waived sovereign immunity in H.R.S. Chapter 673. Finally, the defense of estoppel does not apply because the admissions in the 1993 Legislation caused Plaintiffs to consider whether the State would breach fiduciary duties if it sold ceded lands.

II. **WOULD THE STATE BREACH FIDUCIARY DUTIES IF IT SOLD CEDED LANDS?**

A. **The Ceded Lands Trust**

Under HRS § 673-1(a), the State is liable for “breach of trust or fiduciary duty resulting from the acts or omissions of its agents, officers<sup>3</sup> and employees in the management and disposition of trust funds and resources.”<sup>4</sup> The reference to “resources” includes resources of: “(2) The native Hawaiian public trust under Article XII, sections 4, 5, and 6 of the Constitution of the State of Hawaii implementing section 5(f) of the Admission Act.” Therefore, “resources” includes the ceded lands.

5(f) of the Admission Act dated 3/18/59 states:

(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

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<sup>3</sup> It is clear that the Board of HCDCH as officers of the State owe ceded lands trust fiduciary duties to Hawaiians. Thus, the fact that DLNR transferred approximately 500 acres of ceded lands to HFDC, now HCDCH, for the Leialii project, on 11/4/94, is not relevant.

<sup>4</sup> Act 395 (1988), Ex. 346.

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.<sup>5</sup>

Article XII, sections 4, 5, and 6 of the Hawaii Constitution, which were added in the 1978 Constitutional Convention and the 11/7/78 election, state:

Section 4. The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding there from lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

Section 5. There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members.

Section 6. The OHA Board shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians.<sup>6</sup>

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<sup>5</sup> Admission Act, Ex. 73.

<sup>6</sup> Hawaii Constitution, Ex. 6K.

In addition, Article XVI, section 7 provides:

Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII.

Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992) involved a request to undo an exchange of ceded lands. The Supreme Court held that "PDF has a right to bring suit under the Hawaii Constitution to prospectively enjoin the State from violating the terms of the ceded lands trust."<sup>7</sup> The decision also addressed the State's fiduciary duties as follows:

(FN18.) See also Ahuna v. Department of Haw'n Home Lands, 64 Haw. 327, 640 P.2d 1161 (1982). This case involved the Department's duties as trustee of the Hawaiian home lands. The issue of whether the Hawaiian Homes Commission Act, which is incorporated into article XII, § 2 of the Hawaii Constitution, provides a private right of action was not addressed, because it was raised for the first time on appeal. Id. at 332-33, 640 P.2d at 1165. Nevertheless, the court determined the fiduciary duties that the government, as trustee, owed to the native Hawaiian beneficiaries of the trust. The court held, in part, that "the conduct of the government as trustee is measured by the same strict standards applicable to private trustees." Id. at 339, 640 P.2d at 1169 (citations omitted). The court applied this high standard of fiduciary duty to the government in deciding whether: (1) the trustee administered the trust solely in the interest of the beneficiaries; and (2) whether the trustee used reasonable skill and care to make trust property productive. Id. at 340, 640 P.2d at 1169. The court agreed with the Department that "a trustee must deal impartially when there is more than one beneficiary," but held that the trustees "failed to sufficiently demonstrate that they considered the interests of all beneficiaries." Id., 640 P.2d at 1170.

The State owes this same high standard to the beneficiaries of the ceded lands trust and, as stated in the

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<sup>7</sup> Pele Defense Fund v. Paty, 73 Haw. 578, 601, 837 P.2d 1247 (1992).

text, the beneficiaries of this trust should not be left powerless to prevent the State from allegedly neglecting its obligations. (Emphasis added.)<sup>8</sup>

Ahuna v. Department of Haw'n Home Lands applied the duty of impartiality to the Department of Hawaiian Home Lands ("DHHL") as trustee of the Hawaiian home lands trust. The Court examined the reasons behind DHHL's decision to withhold 3.5 acres from a lease award of 10 acres to a beneficiary. DHHL argued that the 3.5 acres might be used in the future for a public highway extension that would benefit all the citizens of Hawaii. The Court held that DHHL breached the duty of impartiality by giving undue weight to the interests of the State and failing to consider the interests of the native beneficiary.<sup>9</sup> Ahuna also ruled that "the court will strictly scrutinize the actions of the government" in reviewing whether it complied with its fiduciary duties.<sup>10</sup>

Even though this case involves the ceded lands trust, as opposed to the Hawaiian home lands trust, Ahuna directly applies because here the Hawaiian beneficiaries have a claim to ownership of the ceded lands. Under these circumstances, the State as trustee must be careful not to infringe on the Hawaiian beneficiaries' interests because, if the ownership claim to the ceded lands is valid, as with the Hawaiian home lands trust, the Hawaiian beneficiaries would be the "primary"<sup>11</sup> beneficiaries.

#### B. Trust Instruments and Trust Principles

The Restatement of the Trust (Third) § 187 (1992), entitled "Control Of Discretionary Powers," provides: "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." Some of the comments to § 187 state:

a. When powers are discretionary. The exercise of a power is discretionary except to the extent to which its exercise is required by the terms of the trust or by the principles of law applicable to the duties of trustees. As to the principles of law applicable to the duties of trustees, see §§ 169-185.

By the terms of the trust or by the principles of law

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<sup>8</sup> Id. at 605 n.18, 837 P.2d at 1264 n. 18.

<sup>9</sup> Ahuna v. Department of Haw'n Home Lands, 64 Haw. 327, 338-42, 640 P.2d 1161 (1982).

<sup>10</sup> Id. at 339.

<sup>11</sup> Id. at 341.

applicable to the duties of trustees, it may be the duty of the trustee to exercise a power conferred upon him, or, on the other hand, he may have discretion whether to exercise the power or not. Even though it is the duty of the trustee to exercise a power, he may have discretion as to the time, manner, and extent of its exercise. . . .

13. j. Interpretation of trust instrument as to extent of discretion. The extent of the discretion conferred upon the trustee depends primarily upon the manifestation of intention of the settlor. The language of the settlor is construed so as to effectuate the purposes of the trust. The mere fact that the trustee is given discretion does not authorize him to act beyond the bounds of a reasonable judgment. The settlor may, however, manifest an intention that the trustee's judgment need not be exercised reasonably, even where there is a standard by which the reasonableness of the trustee's conduct can be judged. This may be indicated by a provision in the trust instrument that the trustee shall have "absolute" or "unlimited" or "uncontrolled" discretion. These words are not interpreted literally but are ordinarily construed as merely dispensing with the standard of reasonableness. In such a case the mere fact that the trustee has acted beyond the bounds of a reasonable judgment is not a sufficient ground for interposition by the court, so long as the trustee acts in a state of mind in which it was contemplated by the settlor that he would act. But the court will interfere if the trustee acts in a state of mind not contemplated by the settlor. Thus, the trustee will not be permitted to act dishonestly, or from some motive other than the accomplishment of the purposes of the trust, or ordinarily to act arbitrarily without an exercise of his judgment. (Emphasis added)

Furthermore, HRS § 557A-102 states:

"Terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

C. Duty of Impartiality

The duty of impartiality applies where the beneficiaries have differing interests.<sup>12</sup> The Restatement of the Trust (Third) § 183 (1992), entitled

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<sup>12</sup> Jubinsky testimony on 11/27/01 at 42.

“Duty To Deal Impartially With Beneficiaries,” states: “When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.”<sup>13</sup> The comments to § 183, provide, in part, as follows:

- a. Applicability of Section. The rule stated in this Section is applicable whether the beneficiaries' interests in the trust property are concurrent or successive.

By the terms of the trust the trustee may have discretion to favor one or more beneficiaries over others. The court will not control the exercise of such discretion, except to prevent the trustee from abusing it. See § 187.

Moreover, in order to comply with the duty of impartiality among various beneficiaries, there is “the general duty to act, reasonably informed.”<sup>14</sup>

#### D. Power of Sale

The Restatement of the Trust (Second) § 190 (1959), entitled “Power of Sale,” provides:

The trustee can properly sell trust property if

- (a) a power of sale is conferred in specific words, or
- (b) such sale is necessary or appropriate to enable the trustee to carry out the purposes of the trust, unless such sale is forbidden in specific words by the terms of the trust or it appears from the terms of the trust that the property was to be retained in specie in the trust.

Comment b of § 190 states:

- b. The language of the trust instrument. The trustee can

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<sup>13</sup> The 1959 version of this rule was cited in Ahuna v. Department of Haw'n Home Lands, 64 Haw. 327, 340, 640 P.2d 1161 (1982).

<sup>14</sup> Comment on Subsection (1) of Restatement of the Trust (Third) § 50 (Tentative Draft No. 2, March 10, 1999) entitled “Enforcement And Construction Of Discretionary Interests” provides:

On the other hand, a court will not permit abuse of discretion by the trustee. What constitutes an abuse depends on the terms of the trust, as well as on basic fiduciary duties and principles. Of particular importance are the purposes of the power and the standards, if any, applicable to its exercise (see Comments d-f) and the extent of the discretion conferred upon the trustee (Comment c). Relevant fiduciary principles include (i) the general duty to act, reasonably informed, with impartiality among the various beneficiaries and interests. (Emphasis added.)

properly sell trust property if it appears from the language used in the trust instrument that a power of sale was intended to be conferred upon him, although it is not conferred in specific words. Thus, an authorization or direction to the trustee to "invest and manage," or to "invest and reinvest," or to "dispose of" the trust property, may confer a power of sale both of real and personal property. In determining the meaning of a provision in the trust instrument resort can be had to the whole of the instrument and to the surrounding circumstances.

If a trustee is authorized to sell trust property only for a particular purpose, he cannot properly sell except for that purpose. So also, if he is authorized to sell only under certain circumstances, he cannot properly sell except under those circumstances. Thus, if by the terms of the trust the trustee is authorized to sell trust property if such sale is necessary to raise money for the support of the beneficiary, he cannot properly sell unless it reasonably appears necessary to sell property for this purpose.

Given the "proceeds from the sale or other disposition of any such lands" and "home ownership" language in § 5(f) of the Admission Act and similar language in Article XII, § 4 and § 6 of the Hawaiian Constitution, it appears that the United States may have intended to grant the State the power to sell ceded lands to accomplish purposes of the trust. Both John Jubinsky and David Getches testified that the State had the power to sell ceded lands but they differed on whether the State would breach fiduciary duties if it did so.<sup>15</sup>

#### E. Illegality

The Restatement of the Trust (Second) § 166 (1959), entitled "Illegality," provides:

(1) The trustee is not under a duty to the beneficiary to comply with a term of the trust which is illegal.

(2) The trustee is under a duty to the beneficiary not to comply with a term of the trust which he knows or

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<sup>15</sup> Jubinsky testimony on 11/27/01 at 25 ("Q I thought your last answer to the question about [Act] 359 is that you did not consider it relevant to the question of whether or not the state had the power to sell ceded land but that you did not analyze it from the standpoint of whether or not the state would be breaching fiduciary duties? A That's correct. That's correct."); Getches testimony on 11/27/01 at 91-92 ("Q And is it your opinion that in terms of the statute as it relates to Hawaii that there is no absolute prohibition under 5(f) trust for the trustee to alienate or sell lands? A I need to clarify. Absolute prohibition, I would say that there is no prohibition in the sense that the state government lacks the power to transfer. But if you view prohibition more broadly to include avoiding of trust and exposing the state to liability for waste or decisions that are abuses of discretion, there is a question.")

should know is illegal, if such compliance would be a serious criminal offense or would be injurious to the interest of the beneficiary or would subject the interest of the beneficiary to an unreasonable risk of loss.

(3) To the extent to which a term of the trust doing away with or limiting duties of the trustee is against public policy, the term does not affect the duties of the trustee. (Emphasis added.)

Comments on § 166 state, in part, as follows:

a. No duty to comply. The trustee is not under a duty to the beneficiary to do an act which is criminal or tortious. See § 61. It is immaterial that the act is not criminal or tortious at the time of the creation of the trust, if it becomes so before the time for performance.

d. Duty not to comply. Not only is the trustee under no duty to the beneficiary to comply with a term of the trust which is illegal, but he is ordinarily under a duty not to comply.

e. Application to court. If the trustee is in doubt whether a term of the trust is illegal, he may apply to the proper court for instructions. See § 259. The court will direct or permit the trustee to deviate from a term of the trust if it appears to the court that compliance is illegal. (Emphasis added.)

The Restatement of the Trust (Third) § 28 (Tentative Draft No. 2, March 10, 1999) entitled “General Rule Concerning Unlawful Purposes,” states: “[a]n intended trust or a trust provision is invalid if its purpose or performance is unlawful.” The Comment to § 28 provides, in part, as follows:

a. Types of unlawful purposes or effects. An intended trust or a particular provision in the terms of a trust is invalid if: (1) its performance would result in the commission of a criminal or tortious act by the trustee; (2) its purpose is fraudulent; (3) the trust was created for an unlawful consideration; or (4) its enforcement would be contrary to public policy. This list is not necessarily exclusive.

The last of these situations, (4) above, is treated in detail in § 29.

Voidable transfers compared. The types of situations considered in this section involve impermissible

purposes or provisions of the trust itself. Analogous but different are trusts that may fail in whole or in part because a third party is entitled to set aside the settlor's transfer to the trustee or to reach the property in the trustee's hands. Illustrative are cases in which the trust property had been illegally acquired by the settlor and cases in which the transfer to the trustee constitutes a fraudulent transfer under applicable creditors' rights law. (The law of fraudulent conveyances is not within the scope of the Restatement of this subject). . . .

If a settlor transfers property upon a trust the terms of which provide for the trustee to engage in conduct which at the time of the creation of the trust is lawful but which, owing to a change of law or of circumstances, subsequently becomes unlawful, the terms in question become unenforceable. . . .

On the consequences of analogous situations in which a transfer constitutes a fraudulent conveyance or involves property unlawfully acquired, see Comment a. Also, more generally, see Restatement Second, Property (Donative Transfers) § § 34.1-34.3 (rights of spouse, issue, and creditors of transferor). (Emphasis added.)

The Restatement of the Property (Second) § 32.3 (1992), entitled “Document Of Transfer Relating To Land,” concerns requirements for effectuating a donative transfer. Comment c of § 32.3 states: “Donor's ownership of the land to which the document of transfer relates. The discussion under Comment a of § 32.2 is relevant here.” Comment a of § 32.2 provides, in pertinent part, as follows:

The donor cannot transfer to the donee a greater beneficial interest in the subject matter of the gift than the donor owns. If the donor purports to give the donee a greater interest in the subject matter of the gift than the donor owns, the donee will receive whatever it is that the donor could have given the donee in the subject matter of the gift.

F. The State Would Breach Its Fiduciary Duties by Selling Ceded Lands if they were Illegally Acquired

Although the State, as trustee, may have been granted the power to sell ceded lands, under Restatement of the Trust (Second) § 166(2), the State has a duty not to exercise that power if such sale is illegal. Under Comment (a) of Restatement of the Property (Second) § 32.2, the ceded lands trust would have no greater interest in the ceded lands than the

United States could have given the State at the time of admission.<sup>16</sup> If the United States illegally acquired the ceded lands, the State would violate § 166(2) if it sold ceded lands. Significantly, since comment (a) of Restatement of the Trust (Third) § 28 provides that the trust may fail in whole or in part where the trust property is illegally obtained from a third party, the situation places even greater burdens on the trustee where the settlor illegally acquired the property from a beneficiary. Under these circumstances, the trustee would clearly breach fiduciary duties, specifically the duty of impartiality, if it sold ceded lands against the interests of the Hawaiians before resolution of whether the United States as settlor illegally acquired the ceded lands. If the State is unclear as to whether the United States illegally acquired the ceded lands, under Comment e of § 166, the State should seek instructions from the Court before selling ceded lands.

G. 1993 Legislation Manifests the Settlor's Intent, Includes Material Information and Constitutes Changed Circumstances

As stated earlier, a trustee must be reasonably informed about matters relating to the trust including subsequent expressions of the settlor's intent in order to properly comply with its duty of impartiality.<sup>17 18</sup> Here, the 1993 Legislation includes material information about the ceded lands and the Apology Resolution includes manifestations of the United States' intent with respect to the ceded lands.<sup>19</sup>

Another relevant trust principle is set forth in Hawaiian Trust et als. v. Conser et als., 40 Haw. 245 (1953) as follows:

That a court of chancery may authorize a trustee to depart from the terms of the trust is well settled, but such departure is justified only "upon the occurrence of emergencies or unusual circumstances not anticipated by

<sup>16</sup> See also, Brownlie, Principles of Public International Law (1998), pp. 122, Ex. 366 ("Nemo dat quod non habet: no man can give another better title than he himself has."); and Kela v. Pahuilima, 5 Haw. 525 (1886) ("no one can give a title which he does not possess.")

<sup>17</sup> Comment on Subsection (1) of Restatement of the Trust (Third) § 50 (Tentative Draft No. 2, March 10, 1999) entitled "Enforcement And Construction Of Discretionary Interests."

<sup>18</sup> Getches testimony on 11/27/01 at 93 ("It would be incumbent on the trustee to take into account all of its responsibilities, informed by as much information as it has about the trust. This is not traditional trust law you ask about you could look to the trust instrument. In this case the trust instrument would be the sum total of the legal, institutional, and historic facts that bear on the definition and interpretation of the trust.")

<sup>19</sup> David Getches testified that the Apology Resolution is a trust instrument, see Getches testimony on 11/27/01 at 101-102.; and John Jubinsky testified that the State as trustee should consider relevant information in the Apology Resolution, see Jubinsky testimony on 11/27/01 at 46-47.

the settlor, in order to carry out his ultimate purpose, and to preserve, or to prevent loss or destruction of, the trust estate \* \* \*." (54 Am. Jur., Trusts, § 284, p. 225.)

As stated in Johns v. Johns, 172 Ill. 472, 485, 50 N. E. 337, 342, the court, in refusing to order a sale, even though the beneficiaries consented to the sale, stated: "The mere fact that a sale of the land might benefit the beneficiaries more than the compliance with the terms of the trust does not furnish a reason for a decree ordering the title of the land to be disposed of in opposition to the manifest wish of the donor. The duty of the court in dealing with such a trust is to observe and carry out the purposes and plans of the donor, unless the preservation of the subject-matter of the trust, or some other like necessity, demands interference with his will and intention."

Again, 3 Bogert, Trusts and Trustees, part 2, section 742, page 571, states: "Something in the nature of an emergency is required to move the court to authorize a deviation from the settlor's plan of administration \* \* \*." (Emphasis added)

Gonser is consistent with Restatement of the Trust (Second) § 167 (1959), entitled "Change of Circumstances," which states:

(1) The court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust; and in such case, if necessary to carry out the purposes of the trust, the court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust.

(2) Under the circumstances stated in Subsection (1), the trustee can properly deviate from the terms of the trust without first obtaining the permission of the court if there is an emergency, or if the trustee reasonably believes that there is an emergency, and before deviating he has no opportunity to apply to the court for permission to deviate.

(3) Under the circumstances stated in Subsection (1), the trustee is subject to liability for failure to apply to the court for permission to deviate from the terms of the trust, if he knew or should have known of the existence of those circumstances. (Emphasis added.)

Comments on § 167 provide, in part, as follows:

a. Change of circumstances. If owing to circumstances not known to the settlor and not anticipated by him compliance with a specific direction by the settlor would defeat or substantially impair the accomplishment of the purposes of the trust, the court will permit or direct the trustee not to comply with the specific direction. This is true even though it is provided by statute that every conveyance by the trustee in contravention of the trust shall be absolutely void. . . .

In order to carry out the purposes of the trust, the court may permit or direct the trustee not to perform an act directed by the terms of the trust. . . .

g. Liability for failure to apply to court for permission to deviate. Under the rule stated in Subsection (3), the trustee may be liable to the beneficiary although he complies with the terms of the trust if he neglects to apply to the court for permission to deviate from the terms of the trust. (Emphasis added.)

Restatement of the Trust (Second) § 259 (1959), entitled “Application To Court For Instructions,” states: “The trustee is entitled to apply to the court for instructions as to the administration of the trust if there is reasonable doubt as to his duties or powers as trustee.” Comment (a) of § 259 provides:

When trustee entitled to instructions. The trustee is entitled to instructions of the court in respect to such matters as the proper construction of the trust instrument, the extent of his powers and duties, who are beneficiaries of the trust, the character and extent of their interests, the allocation or apportionment of receipts or expenditures between principal and income, the persons entitled to the income or to the trust property on the termination of the trust. The costs incurred in the application to the court for instructions are payable out of the trust estate, unless the application for instructions was plainly unwarranted so that it was improper for the trustee to incur the expense of making the application. See § 245.

H. Does the 1993 Legislation constitute changed circumstances?

The following provisions from the 1993 Legislation amount to an admission that the Hawaiians’ possess an unextinguished claim to the

ceded lands:<sup>20</sup>

Act 354 (1993) states, in part, as follows:

Until the provisional government was recognized by John L. Stevens, the Kingdom of Hawaii was recognized as an independent nation by the United States, France, and Great Britain. Many native Hawaiians and others view the overthrow of 1893 and subsequent actions by the United States, such as supporting establishment of the provisional government and later the Republic of Hawaii, the designation of the crown and government lands as public lands, annexation, and the ceding of public lands to the federal government without the consent of native Hawaiians, as illegal. Because the actions taken by the United States were viewed as illegal and done without the consent of native Hawaiians, many native Hawaiians feel there is a valid legal claim for reparations. Many native Hawaiians believe that the lands taken without their consent should be returned and if not, monetary reparations made, and that they should have the right to sovereignty, or the right to self-determination and self-government as do other native American peoples.

The legislature has also acknowledged that the actions by the United States were illegal and immoral, and pledges its continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians.<sup>21</sup>

Act 359 (1993) provides, in part, as follows:

Throughout the 19<sup>th</sup> century and until 1893, the United States:

- (A) Recognized the independence of the Hawaiian Nation;
- (B) Extended full and complete diplomatic recognition to the Hawaiian government; and
- (C) Entered into treatise with the Hawaiian government to govern commerce and navigation in 1826, 1842, 1849, 1875 and 1887.

In pursuit of that conspiracy, the United States Minister and the naval representative of the United States caused armed forces of the United States to invade the sovereign Hawaiian Nation in support of the overthrow of the indigenous and lawful government, and the United States Minister thereupon extended diplomatic recognition to the

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<sup>20</sup> The following provisions from the 1993 Legislation were also included in the judicial notice order, Ex. 345.

<sup>21</sup> Act 354 (1993), Ex. 548.

provisional government formed by the conspirators without the consent of the native Hawaiian people or the lawful Government of Hawaii in violation of treaties between the two nations and of international law.

In 1898, Hawaii was annexed to the United States through the Newlands Resolution without the consent of or compensation to the indigenous people of Hawaii or their sovereign government. As a result, the indigenous people of Hawaii were denied the mechanism for expression of their inherent sovereignty through self-government and self-determination, their lands and their ocean resources.<sup>22</sup>

Apology Resolution dated 11/23/93 states, in part, as follows:

Whereas, from 1826 until 1893, the United States recognized the independence of the Kingdom of Hawaii, extended full and complete diplomatic recognition to the Hawaiian Government, and entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887;

Whereas, on July 4, 1894, the Provisional Government declared itself to be the Republic of Hawaii;

Whereas, through the Newlands Resolution, the self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States;

Whereas, the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government;

Whereas the Congress, through the Newlands Resolution, ratified the cession, annexed Hawaii as part of the United States, and vested title to the lands in Hawaii in the United States;

Whereas the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum; . . .<sup>23</sup>

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<sup>22</sup> Act 359 (1993), Ex. 6.

<sup>23</sup> Apology Resolution, Ex. 1.

Professor Davianna McGregor<sup>24</sup> testified that her 1989 doctorate dissertation<sup>25</sup> served as a primary source for the historical statements in the 1993 Legislation. She explained that in the 1970s and 1980s new historical information from the 1800s was published because unlike previous historians, she and others understood Hawaiian language, and that this contributed to the general acceptance of the historical events described in the 1993 Legislation.<sup>26</sup> Thus, much of the new historical information set forth in the 1993 Legislation was probably not known or anticipated by the United States when it passed the Admission Act. Specifically, in 1959, Congress probably was not prepared to admit that the overthrow was illegal, the United States violated treaties and international law, and that Hawaiians have an unresolved claim to the ceded lands. Significantly, the State has put on virtually no evidence contesting the existence or validity of the Hawaiians' claim to the ceded lands. In fact, the Defendants' sole expert witness, John Jubinsky<sup>27</sup> admitted that the Hawaiians have an unextinguished claim to the ceded lands.<sup>28</sup> Consequently, under Gonser and the Restatement of the Trust (Second) § 167(3), the 1993 Legislation constitutes changed circumstances requiring the State to apply to the court for permission to withhold its exercise of the power to sell ceded lands pending resolution of the Hawaiians' claim to the ceded lands.<sup>29 30</sup>

#### I. The State's Basis for Selling Ceded Lands

The stipulation on the State's basis for its belief that it can sell ceded lands states:

<sup>24</sup> Professor McGregor is a Professor in the Ethnic Studies Department at the University of Hawaii and her curriculum vitae is Ex. 18.

<sup>25</sup> 12/89 McGregor, Dissertation for doctor of philosophy entitled "Persistence on the Land," Ex. 19.

<sup>26</sup> McGregor testimony on 11/20/01.

<sup>27</sup> Mr. Jubinsky, practices real estate, and trust law, see 11/27/01 testimony at 4, 38-47. His curriculum vitae is Ex. 4B.

<sup>28</sup> Jubinsky testimony on 11/27/01 at 32 and 38.

<sup>29</sup> Even the Senate of the 2000 Hawaii Legislature recognized this change in position. S.R. No. 45 (2000), Ex. 28 at 58 states:

WHEREAS, in Public Law 103-150, Congress acknowledged the participation of the United States in the suppression of the inherent sovereignty of the Native Hawaiian people, thereby solidifying the varied positions of previous administrations disputing responsibility. (Emphasis added.)

<sup>30</sup> In response, to the following question: "If one of two beneficiaries tells the trustee that the settlor never owned the trust property but she always did, and she presents the trustee with an admission by the settlor which supports that contention, what should the trustee do? Mr. Jubinsky, responded: "Well, depends on the facts. But ultimately you might have to go to court and ask for instructions." Jubinsky testimony on 11/27/01 at 47.

1. The State of Hawaii believes that it has the power to sell ceded lands to promote public purposes;
2. This belief is based upon, among other things, the language of the Admission Act, the Constitution of Hawaii, provisions in the Hawaii Revised Statutes by which the Legislature authorized sales in certain circumstances, Attorney General Opinion 95-03 and the Hawaii Supreme Court decisions in State v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977) and, most recently in Trustees of OHA v. Bd. of Land & Nat. Resources, (Sup. Ct. No. 19774) (11/12/98) (“Ewa Marina”) affirming that A.G. Op. 95-03 is a correct statement of Hawaii law;
3. Governor Benjamin Cayetano has not formally requested an Attorney General opinion revisiting A.G. Op. 95-03;
4. He has twice formally instructed the Housing & Community Development Corporation of Hawaii (“HCDCH”) to proceed with the public housing projects at Leiali’i and La’i’opua - first in 1995 after he received Attorney General 95-03, and again in 1998 after the Supreme Court issued the Ewa Marina opinion; and
5. The HCDCH believes that it does not need any other authorization from Governor Cayetano or his administration to proceed with those projects.<sup>31</sup>

The State primarily relies upon the 7/17/95 Attorney General opinion no. 95-03 (“AG’s opinion”).<sup>32</sup> The AG’s opinion concluded that based on § 5(f) of the Admission Act and Art. XII, § 6 of the Hawaii constitution, the State is authorized to sell ceded lands, and noted that “any proceeds of the sale or disposition must be returned to the trust and held by the State for use for one or more of the five purposes set forth in § 5(f) of the Admission Act.”<sup>33</sup> The AG’s opinion, however, does not address the 1993 Legislation. It also does not consider whether, in light the 1993 Legislation, the State would breach fiduciary duties owed to Hawaiians if it sold ceded lands before their claim to the ceded lands was resolved. Thus, the AG’s opinion and the State have not addressed: (1) the 1993 Legislation; (2) whether the United States illegally acquired the ceded

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<sup>31</sup> Stipulation re Attorney General Opinion, Ex. 404. This position is consistent with the testimony of Sharyn Mirashiro, HFDCH executive director, on 11/21/01, and Gilbert Agaran-Colom, chairperson of DLNR, on 11/21/01.

<sup>32</sup> 7/17/95 Attorney General’s opinion no. 95-03, Ex. 3L.

<sup>33</sup> Id., at 1.

lands; (3) whether the State would breach fiduciary duties by selling ceded lands before the Hawaiians' claim is resolved; and (4) whether, under the circumstances, the State should seek instructions from the Court.

The State also argues that Hawaii legislation, such as Chapter 171, also authorizes the State to sell ceded lands. This legislation, however, simply follows the directive of § 5(f) of the Admission Act that: "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."<sup>34</sup> If the State would breach fiduciary duties by selling ceded lands despite purported authorization to do so under the Admission Act, further authorization from a state statute, which was authorized by the Admission Act, does not change the outcome. Moreover, Article XVI, § 7 provides that "[s]uch legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII."

The State's reliance on State v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977) and, Trustees of OHA v. Bd. of Land & Nat. Resources, (Sup. Ct. No. 19774) (11/12/98) ("Ewa Marina") similarly does not address its fiduciary duties in light of the 1993 Legislation. Zimring was decided before 1993 and does not involve the sale of ceded lands. Ewa Marina also does not involve the sale of ceded lands, and, although Ewa Marina was decided after 1993, the State's fiduciary duties, given the admissions in the 1993 Legislation, was not at issue. Consequently, Ewa Marina does not have collateral estoppel application to this case because one cannot conclude that: "(1) the issue decided in the prior adjudication is identical to the one presented in the action in question; . . . (3) the issue decided in the prior adjudication was essential to the final judgment."<sup>35</sup>

The Defendants have argued that the State can disregard the Apology Resolution because the 8/6/93 report on the Apology Resolution provides, in part, as follows: "In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that enactment of S.J. Res. 19 will not result in any changes in existing law."<sup>36</sup> Subsection 12 of rule XXVI of the Standing Rules of the Senate states:

12. Whenever a committee reports a bill or a joint resolution repealing or amending any statute or part thereof it shall make a report thereon and shall include in

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<sup>34</sup> Admission Act § 5(f), Ex. 17.

<sup>35</sup> Casumpang v. ILWU, Local 142, 94 Hawai'i 330, 13 P.3d 1235, 1243 (200).

<sup>36</sup> Ex. M attached to Defendants' Proposed Findings of Fact, Conclusions of Law and Order filed 11/5/01.

such report or in an accompanying document (to be prepared by the staff of such committee) (a) the text of the statute or part thereof which is proposed to be repealed; and (b) a comparative print of that part of the bill or joint resolution making the amendment and of the statute or part thereof proposed to be amended, showing by stricken through type and italics, parallel columns, or other appropriate typographical devices the omissions and insertions which would be made by the bill or joint resolution if enacted in the form recommended by the committee. This paragraph shall not apply to any such report in which it is stated that, in the opinion of the committee, it is necessary to dispense with the requirements of this subsection to expedite the business of the Senate.

Thus, Subsection 12 only requires that any repeal or amendment to existing law be noted in the Report. It does not require the notation of any clarification or elaboration of Congress' intent or admissions of material fact regarding existing law. Furthermore, since the Admissions Act does not grant the State unfettered discretion to sell ceded lands, the State cannot disregard admissions in the Apology Resolution even if there was no change in existing law. Additionally, in all likelihood, Congress did not consider whether it had to protect Hawaiians against abuse of discretion by the State since the Apology Resolution stated that it "recognizes and commends efforts of reconciliation initiated by the State of Hawaii . . . with Native Hawaiians,"<sup>37</sup> and the State subsequent submitted resolutions encouraging Congress to pursue reconciliation.<sup>38</sup>

The Defendants also argue that the Apology Resolution does not create any new claims.<sup>39</sup> Regardless, the Apology Resolution is law.<sup>40</sup> It also manifests the settlor's intent, it describes changed circumstances and it includes admissions that Hawaiians have an unrelinquished claim to the ceded lands.<sup>41</sup> Under these circumstances, the fact that the Apology Resolution may not create a new cause of action does not excuse the State from complying with its fiduciary duties.

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<sup>37</sup> Apology Resolution, Ex. 1.

<sup>38</sup> House Concurrent Resolution No. 41, (2000), Senate Resolution No. 45 (2000), and House Concurrent Resolution No. 23 (2001), Ex. 58 at 56-62.

<sup>39</sup> Defendants' Trial Memorandum at 3738.

<sup>40</sup> Exs. 520-24.

<sup>41</sup> Getches testimony on 11/27/01 at 87 ("Q Speaking of the apology resolution, you agree that the apology resolution in and of itself does not create a legal claim for native Hawaiians, or basis for a legal claim? A The apology resolution creates the grounds that would be asserted in a native land claim. It acknowledges several of the bases of such a claim.")

In summary, none of the Defendants' arguments permits the State to breach its fiduciary duties by selling ceded lands before the Hawaiians' claim is resolved.

### III. EVALUATION OF THE HAWAIIANS' CLAIM TO THE CEDED LANDS.

Although the resolution of the Hawaiians' claim to the ceded lands is not sought by Plaintiffs in this case, an evaluation of the claim is appropriate because if the claim is meritless, the State arguably would not breach fiduciary duties by selling ceded lands before resolution of the claim. If the claim has merit and is not frivolous, and the State cannot prove that it has good title, then the State should not sell ceded lands pending resolution of the claim. This evaluation will consider: (1) admissions regarding the claim by the State and the United States; and (2) theories that may apply to return ceded lands to Hawaiians.

Act 359 and the Apology Resolution state that "[o]n December 18, 1893, in a message to Congress, President Grover Cleveland reported fully and accurately on these illegal actions."<sup>42</sup> Therefore, in addition to the 1993 Legislation, a reasonable trustee should consider the statements in President Cleveland's address. Some of the important statements in President Cleveland's address include:

But there is no pretense of any such consent on the part of the Government of the Queen, which at the time was the undisputed and was both the *de facto* and *de jure* government. P.451

When our Minister recognized the provisional government the only basis upon which it rested was the fact that the Committee of Safety had in the manner above stated declared it to exist. It was neither a government *de facto* nor *de jure*. P.453

The law of nations is founded upon reason and justice, and the rules of conduct governing individual relations between citizens or subjects of a civilized state are equally applicable as between enlightened nations. The considerations that international law is without a court for its enforcement, and that obedience to its commands practically depends upon good faith, instead of upon the mandate of a superior tribunal, only give additional sanction to the law itself and brand any deliberate

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<sup>42</sup> Judicial notice order, Ex. 345 ¶14.

infraction of it not merely as a wrong but as a disgrace.”  
P.456-57

She knew that she could not withstand the power of the United States, but she believed that she might safely trust to its justice. Pp. 453-54. (Emphasis added.)<sup>43</sup>

In addition to the above admissions, Mr. Jubinsky also admitted that Hawaiians have a claim to the ceded lands and that the claim has not been extinguished.<sup>44</sup> Thus, based on the admissions in the 1993 Legislation and the Cleveland address, and Mr. Jubinsky’s testimony, it appears that the Hawaiians’ claim to the ceded lands has merit.

An evaluation of the various claims that other indigenous peoples have successfully used to obtain a return of native lands is also instructive. The Plaintiffs’ evidence focused on three categories of law: the Law of Nations, American Indian law and the international law regarding human rights.

A. Law Of Nations

The Law of Nations is the international law applicable to the relations between nation states.<sup>45</sup> A nation is recognized as a state when it meets the criteria of statehood.<sup>46</sup> Since most indigenous peoples do not meet this criterion, the Law of Nations has generally not effectively protected their land rights.<sup>47 48</sup>

The general criteria for statehood are: (1) permanent population; (2) defined territory; (3) government; (4) capacity to enter into treaties with other States (independence); and (5) certain degree of civilization.<sup>49 50</sup>

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<sup>43</sup> Cleveland’s message to Congress, H. R. Rep. No. 243, 53d Cong., 2d Sess., 3-15 (1893) (12/18/1893), Ex. 330.

<sup>44</sup> Jubinsky testimony on 11/27/01 at 32 and 38.

<sup>45</sup> Anaya testimony on 11/27-28/01 at 134.

<sup>46</sup> Anaya, *Indigenous Peoples on International Law* (1996) pp. 15-19, Ex. 34.

<sup>47</sup> United States v. Rogers, 45 U.S. 567, 571 (1846) (“The native tribes, who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by European governments, nor regarded as the owners of the territories they respectively occupied.”)

<sup>48</sup> Anaya testimony on 11/27-28/01 at 123-24.

<sup>49</sup> Brownlie, *Principles of Public International Law* (1998), pp. 70-77, Ex. 366.

<sup>50</sup> Dr. Anaya testified that Brownlie, *Principles of Public International Law* (1998) is a “very reliable source” on public international law. Anaya testimony on 11/27-28/01 at 125.

Most indigenous peoples do not fully qualify for statehood because: (1) their territory is not defined; (2) their government structure does not comport with European structures; (3) they have not entered into treaties with the powerful states (“Family of Nations”); and/or (4) they, in the eyes of Western states, have not achieved the requisite degree of civilization, which often included a failure to sufficiently cultivate and define territory in order to own it.<sup>51 52</sup>

Under the Law of Nations, a nation state is entitled to sovereignty and “equality of states,” which have been defined as:

The principal corollaries of sovereignty and equality of states are (1) jurisdiction, *prima facie* exclusive, over a territory and permanent population living there; (2) duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor.<sup>53</sup>

OHA’s international law expert, James Anaya,<sup>54</sup> similarly wrote that “state sovereignty” under international law entitles nation states to “exclusive jurisdiction, territorial integrity, and non-intervention in domestic affairs.”<sup>55 56</sup> The doctrine of equality of states thus protects states from intervention by other states.

The Law of Nations also has rules that govern the manner in which nation states can legally acquire territory. The United States’ Department of Justice has described these modes of acquisition as follows:

Territory is acquired by discovery and occupation where no other recognized nation asserts sovereignty over such territory. In contrast, when territory is acquired by treaty, purchase, cession, or conquest, it is acquired from another nation. These methods are permissible under international law and have been approved by the Supreme Court.<sup>57</sup>

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<sup>51</sup> Anaya, *Indigenous Peoples on International Law* (1996) pp. 15-19, Ex. 34.

<sup>52</sup> Anaya testimony on 11/27-28/01 at 127.

<sup>53</sup> Brownlie, *Principles of Public International Law* (1998), p. 289, Ex. 366.

<sup>54</sup> Dr. Anaya’s curriculum vitae is Ex. 32.

<sup>55</sup> Anaya, *Indigenous Peoples on International Law* (1996) p. 15, Ex. 34.

<sup>56</sup> Anaya testimony on 11/27-28/01 at 130-31.

<sup>57</sup> 10/4/88 Memorandum of Office of Legal Counsel to the Department of State re Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea,

Nation states used the doctrine of discovery to obtain land over areas that were not recognized as the territory of other nation states. These lands were called *terra nullius* (vacant lands). Many indigenous peoples, including American Indian tribes, lost their lands to nation states through the doctrine of discovery.<sup>58</sup> Dr. Anaya described this process as follows:

By deeming indigenous peoples incapable of enjoying sovereign status or rights in international law, international law was thus able to govern the patterns of colonization and ultimately to legitimate the colonial order, with diminished or no consequences arising from the presence of aboriginal peoples. For international law purposes, indigenous lands prior to any colonial presence were considered legally unoccupied or *terra nullius* (vacant lands). Under this fiction, discovery was employed to uphold colonial claims to indigenous lands and to bypass any claim to possession by the natives in the "discovered" lands.

Another attribute of not achieving statehood was that the United States, under its plenary power, could abrogate treaties with American tribes.<sup>59</sup> In Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), the Court held that "as with treaties made with foreign nations . . . the legislative power might pass laws in conflict with treaties made with the Indians." An Indian law commentator recently wrote:

Thus, Lone Wolf accepted the rationale of the Chinese Exclusion cases that, as a matter of domestic law, a subsequently enacted statute or treaty could repeal a provision of an earlier treaty. However, unlike foreign powers, which had access to a host of international law remedies for enforcement of treaties with the United States, the Indian nations were perceived to be domestic, dependent nations without an international sovereign's recourse to the federal courts or to international remedies. The Court in Lone Wolf found this unproblematic, observing that the United States should only abrogate the treaty when doing so would be "in the interest of the country and the Indians themselves," and suggesting that the aggrieved Indian nations could always petition Congress for relief.<sup>60</sup>

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pp. Ex. 336. See also, Brownlie, Principles of Public International Law (1998), pp. 125-167, Ex. 366.

<sup>58</sup> Anaya, Indigenous Peoples on International Law (1996) p. 22, Ex. 34.

<sup>59</sup> Id.

<sup>60</sup> Rebecca Tsosie, Sacred Obligations: Intercultural Justice And The Discourse Of Treaty Rights, 47 U.C.L.A. L. Rev. 1615, 1623-24 (2000).

B. Hawaiian Kingdom under the Law of Nations

By most accounts, the Hawaiian Kingdom had achieved statehood by the mid-1800s and maintained that status up until the overthrow.<sup>61</sup> The United States and the State have admitted as much in the 1993 Legislation. The Permanent Court of Arbitration at the Hague in Larsen v. Hawaiian Kingdom found that: “A perusal of the material discloses that in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties.”<sup>62</sup> Professor Anaya also testified that the Hawaiian Kingdom satisfied the criteria for statehood.<sup>63</sup> This is because the Hawaiian Kingdom, especially during the term of King Kamehameha III, adopted European legal and political systems. For example, the Hawaiian Kingdom adopted the Mahele process, a private land ownership system,<sup>64</sup> and adopted civil and criminal laws.<sup>65</sup> The Hawaiian Kingdom also entered into treaties with most of the “Family of Nations” including:

Belgium in 1862;  
Bremen in 1851;  
Denmark in 1846;  
France 1846 and 1857;  
Germany in 1879;  
Great Britain in 1836, 1846 and 1851;  
Hamburg in 1848;  
Hong Kong (Colony of Great Britain) in 1884;  
Italy in 1863;

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<sup>61</sup> Getches, *Alternative Approaches to Land Claims: Alaska and Hawaii* (1986), Ex. 39, at 331, states:

Other Native Americans have not been compensated for loss of sovereignty or the right of self-determination. The Hawaiians’ situation may merit a different treatment, however, because their government was one fully recognized as a member of the international community. Indian tribes were seen as having some, but not all, aspects of sovereignty. They became subject to the superior sovereignty of nations which “discovered” them but retained a recognized sovereignty of their own. Neither European countries nor the United States ever followed such an approach toward the Hawaiian Kingdom. (Emphasis added.)

<sup>62</sup> Arbitral Award, Larsen v. Hawaiian Kingdom (2/5/01), Ex. 354 at § 7.4. The chief arbitrator and author of this arbitral award, James Crawford, was cited in Mabo v. Queensland for his 1977 article entitled “The Criteria for Statehood in International Law.” See Ex. 569 at 27.

<sup>63</sup> Anaya testimony on 11/27-28/01 at 131-32.

<sup>64</sup> 1891 Hawaiian Almanac and Annual “A Brief History of Land Title in the Hawaiian Kingdom”, Ex. 370.

<sup>65</sup> The treaties and conventions with the United States are Exs. 305, 306, 352, 353.

Japan in 1871 and 1886;  
Netherlands in 1862;  
New South Wales (Colony of Great Britain) in 1874;  
Portugal in 1882;  
Russia in 1869;  
Samoa in 1887;  
Spain in 1863;  
Swiss Confederation in 1864;  
Sweden and Norway in 1852;  
Tahiti (Protectorate of France) in 1853;<sup>66</sup>  
and the United States in 1849, 1870, 1875, 1883, 1884.<sup>67</sup>

Since the Hawaiian Kingdom was a nation state, its territory was not *terra nullius*.<sup>68</sup> Consequently, the United States could not invoke the doctrines of discovery or occupation to obtain title to the territory of the Hawaiian Kingdom. Instead, under the Law of Nations, the United States had to rely on “treaty, purchase, cession, or conquest.”<sup>69</sup> The United States, in the Newlands Resolution, purported to obtain title to the ceded lands by cession from the Republic of Hawaii. The Newlands Resolution, in pertinent part, states:

Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining. (Emphasis added.)  
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<sup>66</sup> 7/5/01 Hawaiian Kingdom Complaint filed with U.N. Security Council, pp. 21-39, Ex. 355.

<sup>67</sup> Exs. 312, 315-18.

<sup>68</sup> Professor Anaya testified that territory of the Kingdom of Hawaii was not *terra nullius* and thus could not be acquired through the doctrine of discovery. Anaya testimony on 11/27-28/01 at 132-34.

<sup>69</sup> 10/4/88 Memorandum of Office of Legal Counsel to the Department of State re Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea, pp. Ex. 336.

<sup>70</sup> 7/17/1898 Joint Resolution to provide for annexing the Hawaiian Islands to the United States, Ex. 17.

Thus, an important inquiry is whether the United States received good title to the ceded lands from the Republic of Hawaii.

A maxim of international law, and also American property law and Hawaii case law, is: “*Nemo dat quod non habet*: no man can give another better title than he himself has.”<sup>72</sup> Mr. Jubinsky also admitted that this doctrine applies to whether the State has good title to the ceded lands.<sup>73</sup> The United States and the State, in the 1993 Legislation, admitted that the Provisional Government obtained the ceded lands through an “illegal overthrow.” Mr. Jubinsky also questions whether the Provisional Government obtained good title to the ceded lands at the overthrow.<sup>74</sup>

The quality of the title that the United States obtained from the Republic of Hawaii is also impacted by the armed intervention by the United States that allowed the Committee of Safety to depose Queen Liliuokalani on 1/17/1893. The Apology Resolution and Act 359 admit that the intervention was a “violation of treaties between the two nations and of international law.”<sup>75</sup> The most relevant treaty is the Treaty of 1849 that states in Article I: “There shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, his heirs and his successors.”<sup>76</sup> Dr. Anaya also testified that the United States violated the right of non-intervention by participating in the 1893 overthrow.<sup>77</sup>

Given the illegality of the overthrow, the breach of the Treaty of 1849 and the violation of the duty of non-intervention, one may conclude that the Provisional Government did not obtain good title to the ceded lands. The next inquiry is whether any legal doctrine cured any such defect in title. Mr. Jubinsky admitted that he knows of no doctrine that cures any

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<sup>71</sup> It is important to note that in Newlands Resolution, the United States accepted from the Republic of Hawaii both “sovereignty” over the Hawaiian Islands and “ownership” of the ceded lands.

<sup>72</sup> Brownlie, *Principles of Public International Law* (1998), pp. 122, Ex. 366; Kela v. Pahuilima, 5 Haw. 525 (1886) (“no one can give a title which he does not possess.”); and Comment (a) Restatement of the Property (Second) § 32.2 (1992) (“The donor cannot transfer to the donee a greater beneficial interest in the subject matter of the gift than the donor owns.”)

<sup>73</sup> Jubinsky testimony on 11/27/01 at 34-35 and 37.

<sup>74</sup> Id. at 34-35.

<sup>75</sup> The Apology Resolution, Ex. 1, and Act 359 (1993), Ex. 6.

<sup>76</sup> Treaty between US and Hawaiian Islands (12/20/1849), Ex. 312.

<sup>77</sup> Anaya testimony on 11/27-28/01 at 131..

defect in the Provisional Government's title.<sup>78</sup> One international law treatise describes the situation as follows:

Thus an aggressor, having seized territory by force and committed a delict, may purport to transfer the territory to a third state. The validity of the cession will depend on the effect of specific rules and relating to the use of force by states. Again, a state may transfer territory which it lacks the capacity to transfer. In this type of situation much turns on the extent to which such defects of title may be cured by prescription, acquiescence, and recognition.<sup>79</sup>

Prescription and acquiescence, however, may not apply where there are clear protests<sup>80</sup>, and Queen Liliuokalani and the majority of Hawaiians strenuously objected to the overthrow and annexation.<sup>81</sup> Also, where the acquisition violated a treaty, recognition might only be achieved through arbitration or from a plebiscite<sup>82</sup>, and, in this instance, neither occurred.<sup>83</sup> Thus, arguably no legal doctrine cured any defect in the title to the lands that the Republic ceded to the United States in 1898.

Another potential issue is whether the Newlands Resolution of 1898, the Organic Act of 1900 or the Admission Act of 1959, extinguished the Hawaiians' claim. The general rule is that a unilateral modification or repeal of a provision of a treaty by an Act of Congress, although effective as a matter of domestic law, will not generally relieve the United States of the international legal obligations that it may have under that provision.<sup>84</sup> Furthermore, the Apology Resolution states that the Hawaiians' claim was "never directly relinquished".<sup>85</sup>

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<sup>78</sup> Jubinsky testimony on 11/27/01 at 34-35.

<sup>79</sup> Brownlie, *Principles of Public International Law* (1998), pp. 123, Ex. 366.

<sup>80</sup> *Id.* at 154-57.

<sup>81</sup> "Ku'e: The Hui Aloha 'Aina Anti-Annexation Petitions 1897-1898," Compiled by Nalani Minton and Noenoe K. Silva, Ex. 31; and Memorial to the President, the Congress and the People of the United States of America (10/8/1897), Ex. 334.

<sup>82</sup> Brownlie, *Principles of Public International Law* (1998), pp. 166, Ex. 366.

<sup>83</sup> The Apology Resolution, Ex. 1, states "Whereas the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum." (Emphasis added.)

<sup>84</sup> *Pigeon River v. Cox*, 291 U.S. 138, 160 (1934); and 11/25/96 Memorandum of Office of Legal Counsel to the Department of State re Validity of Congressional-Executive Agreements that Substantially Modify the United States' Obligations under an Existing Treaty, p. , Ex. 338.

<sup>85</sup> The Apology Resolution, Ex. 1.

Therefore, under the Law of Nations, Hawaiians may have a valid claim to the ceded lands.<sup>86</sup> Significantly, the references to violations of international law in the 1993 Legislation and in President Cleveland's 12/18/1893 address to Congress are references to the Law of Nations.<sup>87</sup>

C. American Indian Law

Since most American Indian tribes could not invoke the Law of Nations to recover lands they once possessed, they have used domestic law. American Indians have often convinced the United States to honor aboriginal use rights to land that they enjoyed under prior sovereignty.<sup>88</sup>

David Getches, OHA's Indian law expert,<sup>89</sup> testified that three decisions, each written by Chief Justice John Marshall, defined the basic components of American Indian rights.<sup>90 91</sup> These decisions set forth that tribes were not nation states under the Law of Nations and thus lost their territories based on discovery.<sup>92 93</sup> However, they also recognized Indian title based on aboriginal possession of ancestral lands<sup>94</sup> and that the

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<sup>86</sup> The claim under the Law of Nations would presumably benefit most descendants of subjects of the Hawaiian Kingdom as of 1/17/1893, which would include most aboriginal Hawaiians living today including Individual Plaintiffs and also descendants of non-aboriginal subjects. Even so, Individual Plaintiffs have standing to use the Law of Nations to advocate breach of fiduciary duties because under a Law of Nations claim, they would benefit as descendants of subjects of the Hawaiian Kingdom. Pele Defense Fund v. Paty, 73 Haw. 578, 594, 601, 837 P.2d 1247 (1992) ("In this case, the alleged § 5(f) violations are 'generalized' injuries for which relief granted to the organization would provide a remedy to any individual member. In other words, if a court were to grant PDF an injunction remedying the State's breach of its trust obligations, PDF members and other trust beneficiaries would benefit indistinguishably.")

<sup>87</sup> Anaya testimony on 11/27-28/01 at 131-32, and 138.

<sup>88</sup> Getches, *Alternative Approaches to Land Claims: Alaska and Hawaii* (1986), Ex. 39, at 330.

<sup>89</sup> Professor Getches' curriculum vitae is Ex. 35.

<sup>90</sup> Johnson v. M'Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); and Worcester v. Georgia, 31 U.S. 515 (1832).

<sup>91</sup> Getches testimony on 11/27/01 at 81-82.

<sup>92</sup> Cherokee Nation v. Georgia, 30 U.S. 1, 22 (1831) ("There are great difficulties hanging over the question, whether they can be considered as states under the judiciary article of the constitution. 1. They never have been recognized as holding sovereignty over the territory they occupy. It is in vain now to inquire into the sufficiency of the principle, that discovery gave the right of dominion over the country discovered.")

<sup>93</sup> Getches testimony on 11/27/01 at 85-86.

<sup>94</sup> Johnson v. M'Intosh, 21 U.S. 543, 603 (1823) ("It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right."); Worcester v. Georgia,

United States had a guardian-ward relationship with Indians.<sup>95</sup> Furthermore, the claim of an Indian tribe to particular lands need not be based upon a treaty, statute, or other formal government action.<sup>96</sup>

Although Courts have held that the determination and extinguishment of Indian title based on aboriginal possession raise political and not justiciable issues, courts have enjoined sale of said lands prior to the determination of Indian title.<sup>97</sup> Professor Getches testified on the injunction that the Native Village of Allakaket obtained from the United States District Court for the District of Columbia, in Native Village of Allakaket v. Hickel, Civil Action No. 706-70 (1970).<sup>98</sup> The Village had pending claims for lands in Alaska before the United States Bureau of Land Management when the Secretary of the Interior, Walter Hickel, was attempting to transfer a right-of-way to oil companies to install a pipeline over said lands. The Court enjoined Hickel and his agents from issuing a right-of-way for a pipeline through the area of the village without the consent of the village officials.<sup>99</sup>

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31 U.S. 515, 544 (1832) (“It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.”)

<sup>95</sup> Cherokee Nation v. Georgia, 30 U.S. 1, 18 (1831) (“They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”)

<sup>96</sup> United States v. Santa Fe Pac. R.Co., 314 U.S. 339, 347 (1941) (“Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action.”)

<sup>97</sup> Id. (Suit by the United States of America, as guardian of the Indians of the Tribe of Hualpai in the State of Arizona, against the Santa Fe Pacific Railroad Company, to enjoin the defendant from interfering with the possession and occupancy by the Indians of certain land in northwestern Arizona.); Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919) (Enjoining the Secretary of the Interior and the Commissioner of the General Land Office from offering, listing, or disposing of certain lands in southern Arizona as public lands of the United States pending resolution of pueblo’s claim to title to those lands. “Certainly it would not justify the defendants in treating the lands of these Indians--to which, according to the bill, they have a complete and perfect title--as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation. Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership.”); and Native Village of Allakaket v. Hickel, Civil Action No. 706-70 (1970).

<sup>98</sup> Getches testimony on 11/27/01 at 41-43, and 80-81.

<sup>99</sup> Professor Getches represented the Village in Native Village of Allakaket v. Hickel. Getches testimony on 11/27/01 at 81.

Indian occupancy necessary to establish aboriginal possession requires that the lands in question were the ancestral home of the tribe in the sense that they constituted definable territory occupied exclusively by the tribe (as distinguished from lands wandered over by many tribes).<sup>100</sup> Hawaiians do not have a proof of territory or occupancy problem because fee simple title to the ceded lands was established in the Mahele.<sup>101</sup> This was also admitted in the 1993 Legislation.

The United States Congress often uses its plenary power under the Indian Commerce Clause of the Constitution to recognize Indian tribes as nations within a nation, and to also provide federally recognized and unrecognized tribes with lands and economic benefits.<sup>102</sup> Pursuant to Congress' plenary power, Senators Inouye and Akaka have introduced Bill S 746 to assist the Hawaiians in forming a sovereign entity and to enter into negotiations with the United States, the State and the Hawaiian entity to resolve sovereignty and ceded lands claims.<sup>103</sup> Although this bill has not been enacted, S 746 is an attempt to pursue reconciliation recommended in the Apology Resolution.<sup>104</sup>

It is unclear at this time whether the Supreme Court will prohibit Congress from using its plenary power in favor of Hawaiians because it has not yet been finally determined if Hawaiians are, in constitution terms, Indians.<sup>105</sup> Even so, as a practical matter, if Congress can establish the Hawaiian Home Lands Act, it probably can find a constitutional vehicle to recognize a Hawaiian sovereign entity and to

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<sup>100</sup> United States v. Santa Fe Pac. R.Co., 314 U.S. 339, 345 (1941).

<sup>101</sup> January 1848 Great Mahele, Ex. 375; 1848 Act Relating To The Lands Of His Majesty The King And Of The Government, Ex. 376; 1891 Hawaiian Almanac and Annual "A Brief History of Land Title in the Hawaiian Kingdom", Ex. 370.

<sup>102</sup> Rice v. Cayetano, 528 U.S. 495, 519, and 529-30 (2000)

<sup>103</sup> 4/6/01 Bill S 746, Ex. 27, and 9/21/01 Committee on Indian Affairs report to accompany S 746, Ex. 28.

<sup>104</sup> Excerpts from OHA Board of Trustees Meeting of 11/8/01 pertaining to the report by Dr. Patricia Zell, Majority Staff Director/Chief Counsel of the United States Senate Committee on Indian Affairs, Ex. 542.

<sup>105</sup> Rice v. Cayetano, 528 U.S. 495, 518 (2000) ("If Hawaii's restriction were to be sustained under Mancari we would be required to accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State—and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993—has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. Compare Van Dyke, The Political Status of the Hawaiian People, 17 Yale L. & Pol'y Rev. 95 (1998), with Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L. J. 537 (1996). We can stay far off that difficult terrain, however.")

resolve the Hawaiians' claim to the ceded lands. Ironically, Congress could, in order to resolve the Hawaiians' claim, invoke its "foreign nations" Commerce Clause power,<sup>106</sup> for the same reason that that clause was not applicable to the Cherokee Nation.<sup>107</sup>

As previously discussed, Indian tribes have had to employ aboriginal use rights to obtain land because Congress was permitted to abrogate treaty rights with tribes who could not use international law. Hawaiians may not have these problems. Thus, Hawaiians may be able to resolve their claim to ceded lands in ways used by Indian tribes or in other ways.

#### D. International Human Rights Law

Dr. Anaya testified that there is a developing body of international law that favors indigenous peoples' rights, including the right to traditional lands. These laws include treaties and customary international law.<sup>108</sup> Treaties to which the United States is a party include the International Covenant on Civil and Political Rights<sup>109</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>110</sup> Customary laws are norms that are generally accepted by the

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<sup>106</sup> Article 1, § 8, Cl. 3 ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.")

<sup>107</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831) ("Do the Cherokees constitute a foreign state in the sense of the constitution? . . . The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term *foreign nation* is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.")

<sup>108</sup> Anaya testimony on 11/27-28/01 at 6-13.

<sup>109</sup> International Covenant on Civil and Political Rights, Ex. 153 includes Article I, § 2, which states:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

<sup>110</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Ex. 154, includes General Recommendation XXIII (51), which states:

The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should be far as possible take the form of lands and territories.

international community and can include treaties accepted by other countries but not ratified by the United States including International Labor Organization (“ILO”) Convention No. 169.<sup>111 112</sup>

Dr. Anaya described how the Western Shoshone Indians have used the International Convention on the Elimination of All Forms of Racial Discrimination to stop the United States from using their ancestral lands for mining and nuclear waste storage pending resolution of their claims to the lands.<sup>113</sup> The 8/14/01 UN Committee on Elimination of Discrimination observations on the United States report states:

The Committee expresses concern with regard to information on plans for the expansion of mining and nuclear waste storage on Western Shoshone ancestral lands, for placing their land to auction for private sale and other actions affecting the rights of indigenous peoples. The Committee recommends that the State party should ensure effective participation by indigenous communities in decisions affecting them, including those on their land rights, as required under article 5(c) of the Convention, and draws the attention of the State party to General Recommendation XXIII(51) on Indigenous Peoples which stresses the importance of securing the “informed consent” of indigenous communities and calls, *inter alia*, for recognition and compensation for loss. The State party is also encouraged to use as guidance the ILO Convention 169 on Indigenous and Tribal Peoples.<sup>114</sup>

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<sup>111</sup> ILO Convention No. 169, Ex. 50, includes Article 14, which states:

1. The rights of ownership and possession of the peoples concerned over the lands a\which they traditionally occupy shall be recognized, In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. Governments shall take steps as necessary to identify the land which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

<sup>112</sup> Anaya testimony on 11/27-28/01 at 47-48.

<sup>113</sup> Anaya testimony on 11/27-28/01 at 123.

<sup>114</sup> 8/14/01 UN Committee on Elimination of Discrimination observations on United States report, Ex. 564.

Dr. Anaya also represented the Awas Tingni tribe against The Republic of Nicaragua before the Inter-American Court of Human Rights.<sup>115</sup> The 8/31/2001 judgment held, in part, as follows:

The Court deems that . . . the members of the Awas Tingni Community have a communal property right over the lands they currently inhabit, without prejudice to the rights of the neighboring indigenous communities. However, the Court emphasizes that the limits of the territory over which that property right exists have not been effectively delimited and demarcated by the State. . . . In this context, the Court considers that the members of the Awas Tingni Community have the right that the State, a) delimit, demarcate, and title the territory of the Community's property; and b) refrain, until this official delimitation, demarcation and titling is performed, from acts which could cause agents of the State or third parties acting with its acquiescence or tolerance, to affect the existence, value, use, or enjoyment of the resources located in the geographic area in which the Community members live and carry out their activities.<sup>116</sup>

Dr. Anaya opined that any sale of ceded lands prior to resolution of the Hawaiians' claim to those lands would violate international law including (1) International Covenant on Civil and Political Rights, Article I, § 2; (2) International Convention on the Elimination of All Forms of Racial Discrimination, General Recommendation XXIII (51); and (3) customary international law norm of "an obligation made explicit for the government to take steps to make effective those rights ('indigenous peoples' property interests') and to make effective those rights and enjoyment of those rights and to remedy the violation of those rights."<sup>117</sup>

Dr. Anaya also referenced the Mabo v. Queensland<sup>118</sup> case as an example of how domestic courts used international human rights laws to protect the aboriginal property rights.<sup>119</sup> The High Court of Australia reversed prior Australian appellate decisions in holding that the discovery of Australia by England in the mid-1800s may have permitted England to acquire the sovereignty and territory of Australia by characterizing the area as *terra nullius*, but for purposes of determining property ownership

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<sup>115</sup> Anaya testimony on 11/27-28/01 at 60.

<sup>116</sup> 8/31/01 Awas Tingni v. Republic of Nicaragua, Judgment, Ex. 519.

<sup>117</sup> Anaya testimony on 11/27-28/01 at 120-23.

<sup>118</sup> 6/3/92, Mabo v. Queensland, Ex. 569.

<sup>119</sup> Anaya testimony on 11/27-28/01 at 94-98.

of land (as opposed to sovereignty and ownership of country) the Court will use domestic property law based on local custom and traditional native title as it existed prior to discovery and not English or international law.<sup>120</sup> The Court held that employing English law to nullify all property rights of the aborigines would “offend the values of justice and human rights”<sup>121</sup> and instead used customary international norms to influence the common law of Australia.<sup>122</sup> In the end, the Mabo Court granted the aborigines title similar to that accorded American Indians under the Marshall trilogy.<sup>123</sup>

As stated above, Hawaiians can employ remedies available under the Law of Nations because the territory of the Hawaiian Kingdom was not *terra nullius* and the Hawaiian Kingdom was a nation state. However, even if one uses the Mabo dichotomy, under Hawaiian Kingdom law prior to the overthrow, the Hawaiian Kingdom owned the government and crown lands and the monarch had a life estate in the crown lands.<sup>124</sup> In any event, the 1993 Legislation admitted that justice requires reconciliation and thus under international human rights laws, ceded lands should not be sold before resolution of the Hawaiians’ claim.

#### E. Evaluation Summary

The above evaluation of the Hawaiians’ claim to the ceded lands demonstrates that the claim has merit, is not frivolous and is in some respects stronger than claims of other indigenous peoples who have recovered lands.<sup>125</sup> Furthermore, the 1993 Legislation admits that the claim is valid. Accordingly, since the passing of these laws, the duty of impartiality demands that the State withdraw from selling ceded lands pending resolution of the claim because it is not clear that the State has good title to the ceded lands.

American Indian law and the international human rights law also applies to create fiduciary duties for the State in favor of Hawaiians including Hawaiians who do not qualify as “native Hawaiians” under the § 5(f) of the Admission Act and the Article XII, § 4 of the Hawaii Constitution,

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<sup>120</sup> Mabo v. Queensland, Ex. 569 at 36, 47.

<sup>121</sup> Id. at 25.

<sup>122</sup> Id. at 34-35.

<sup>123</sup> Id. at 59-60.

<sup>124</sup> January 1848 Great Mahele, Ex. 375; 1848 Act Relating To The Lands Of His Majesty The King And Of The Government, Ex. 376; and 1891 Hawaiian Almanac and Annual “A Brief History of Land Title in the Hawaiian Kingdom”, Ex. 370.

<sup>125</sup> Dr. Anaya could not identify another indigenous group that could strongly assert that it meet the criteria for statehood and thus could invoke the Law of Nations against an invading state. Anaya testimony on 11/27-28/01 at 134-38.

which requires “not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778.”<sup>126</sup> It is clear that the State owes fiduciary duties to native Hawaiians including Individual Plaintiffs Pia Aluli, Keoki Ki’ili and Charles Ka’ai’ai.<sup>127</sup> However, the Apology Resolution and the Hawaiian Homelands Ownership Act of 2000 do not draw this blood quantum distinction and instead use the term “Native Hawaiians.” The Hawaiian Homelands Ownership Act of 2000 defines “Native Hawaiian” as “a descendant of the aboriginal people, who, prior to 1778, occupied and exercised sovereignty in the area that currently constitutes the State of Hawaii.”<sup>128</sup> Thus, one may argue that the Apology Resolution and the Hawaiian Homelands Ownership Act of 2000 require the State to include non-fifty percent Hawaiians, as ceded lands trust beneficiaries. However, even if that delegation of duties is not clear, as discussed above, American Indian law and the international human rights law create fiduciary duties in favor of Hawaiians regardless of blood quantum on the grounds that the occupying State owes all indigenous peoples a duty to protect their ancestral land rights.<sup>129</sup> Therefore, Individual Plaintiff Jon Osorio who is not a native Hawaiian, as defined in HRS § 10-2, is also a beneficiary of the ceded lands trust and is entitled to the requested injunction against the State Defendants and trust instructions to the State Defendants.

#### IV. **PERMANENT INJUNCTIVE RELIEF IS APPROPRIATE**

##### A. **Hawaii Law On Injunctions**

Rule 65(d) of the HRCP states:

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

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<sup>126</sup> HRS § 10-2.

<sup>127</sup> Individual Plaintiffs’ identity stipulation, Ex. 397.

<sup>128</sup> ¶ 59(B) of judicial notice order, Ex. 145.

<sup>129</sup> *E.g., United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1941) (“Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action.”); and ILO Convention No. 169, Ex. 50, includes Article 14 (“The rights of ownership and possession of the peoples concerned over the lands a\which they traditionally occupy shall be recognized.”)

Penn v. Transportation Lease Hawaii, Ltd., 2 Haw.App. 272, 630 P.2d 646, 649-50 (1981) held:

In reviewing this issue we note that: (1) the power to issue an injunction is discretionary, 42 Am.Jur.2d Injunctions s 24 (1959); and (2) the historical limitations on the injunctive remedy are fundamentally questions of policy which are being re-evaluated in light of the modern merger of law and equity, Kleinjans v. Lombardi, 52 Haw. 427, 478 P.2d 320 (1970).

The modern test for interlocutory injunctive relief is threefold: (1) Is the party seeking the injunction likely to prevail on the merits? (2) Does the balance of irreparable damage favor issuance of an interlocutory injunction? (3) To the extent that the public interest is involved, does it support granting the injunction? Life of the Land v. Ariyoshi, 59 Haw. 156, 577 P.2d 1116 (1978).

The more the balance of irreparable damage favors issuance of the injunction, the less the party seeking the injunction has to show the likelihood of his success on the merits. Fox Valley Harvestore v. A. O. Smith Harvestore Prod., 545 F.2d 1096 (7th Cir. 1976); Benda v. Grand Lodge of Intern. Ass'n, etc., 584 F.2d 308 (9th Cir. 1978). Likewise, the greater the probability the party seeking the injunction is likely to prevail on the merits, the less he has to show that the balance of irreparable damage favors issuance of the injunction.

Where, as in this case, property rights are in dispute, the general rule is that interlocutory injunctions should not be issued to take property out of possession of one person to put it in possession of another; however, when necessary to protect legal rights and to prevent irreparable mischief, modern equity jurisprudence permits an exception to the rule. 42 Am.Jur.2d Injunctions s 79 (1969).

State v. Medeiros, 89 Hawai'i 361, 973 P.2d 736, 740 n.4 (1999) described the Circuit Court's inherent power to issue injunctions as follows:

Neither party raises the unusual procedural fashion in which the injunction issue was broached in the circuit court. Rather than filing an independent civil lawsuit for an injunction, Medeiros simply filed a motion as part of the proceedings of his own criminal case. Amemiya and Carlisle were listed as "parties" on the motion, and the certificate of service recites that both Carlisle and Corporation Counsel (presumably, on behalf of Amemiya) were served with copies. Deputy Corporation Counsel Donna Woo filed a memorandum in opposition to the motion on behalf of both Amemiya

and Carlisle, and fully participated in the hearing held on the issue. She never objected to the procedural stance of the motion. The circuit court then issued an order enjoining the city from enforcing the ordinance in any case.

In its order granting Medeiros's motion, the circuit court ruled that it "had jurisdiction over the matter pursuant to HRS §§ 603-21.9(1) and (6), 603-21.5(3) and 603-21.7(b)." HRS § 603-21.9 (1993) provides in relevant part that

[t]he several circuit courts shall have power:

(1) To make and issue all orders and writs necessary or appropriate in aid of their original or appellate jurisdiction;...

(6) To make and award such judgments, decrees, orders, and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to them by law or for the promotion of justice in matters pending before them.

(Emphases added.) HRS § 603-21.5 provides in relevant part that "[t]he several circuit courts shall have jurisdiction, except as otherwise expressly provided by statute, of: ... (3) Civil actions and proceedings [.]" (Emphases added.) Finally, HRS § 603-21.7 (1993) provides in relevant part that

[t]he several circuit courts shall have jurisdiction, without the intervention of a jury, except as provided by statute, as follows:...

(b) Of actions or proceedings in or in the nature of habeas corpus, prohibition, mandamus, quo warranto, and all other proceedings in or in the nature of applications for writs directed to courts of inferior jurisdiction, to corporations and individuals, as may be necessary to the furtherance of justice and the regular execution of law.

(Emphases added.) In addition, this court has held that

the circuit courts in this state are courts of general jurisdiction. *State v. Villados*, 55 Haw. 394, 520 P.2d 427 (1974). As such, "jurisdiction extends to all matters properly brought before them, unless precluded by constitution or statute." *In re Chow*, 3 Haw.App. 577,

656 P.2d 105, 109 (1982) (citing In re Keamo, 3 Haw.App. 360, 650 P.2d 1365 (1982)).

State v. Dwyer, 78 Hawai'i 367, 370, 893 P.2d 795, 798 (1995).

In short, it appears that the legislature has accorded the circuit courts the power to issue whatever orders are "necessary" to "carry into full effect the[ir] powers" and for the "promotion" or "furtherance" of justice, unless specifically prohibited by statute. There does not appear to be any specific statute forbidding the circuit courts from issuing "civil" orders--such as the injunction in the instant case--during a criminal proceeding. Moreover, inasmuch as Medeiros was automatically subject to the city's "fee" as a direct result of his conviction in the instant case, the circuit court's implied finding that addressing the issue of the validity of the fee ordinance was "necessary" for the "promotion of justice" in Medeiros's case was justified. Accordingly, despite the fact that Medeiros's motion was brought incident to his criminal conviction, the circuit court had subject matter jurisdiction over his motion for an injunction.

B. Law On Permanent Injunctions

City of South Pasadena v. Department of Transportation, 35 Cal.Rptr.2d 113 (Cal. App. 3 Dist. 1994) held: "To qualify for a permanent injunction, the plaintiff must prove (1) the elements of a cause of action involving the wrongful act sought to be enjoined and (2) the grounds for equitable relief, such as, inadequacy of the remedy at law. (5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 774, p. 218.)"

C. Right to Modify Permanent Injunction

Rule 60(b)(5) of the HRCF states:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (Emphasis added.)

Courts applying Rule 60(b)(5) to permanent injunctions have ruled that there must be "a significant change in facts or law [that] warrants revision of the decree [permanent injunction order]," and "the proposed modification [must be] suitably tailored to the changed circumstance."<sup>130</sup>

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<sup>130</sup> Bellevue Manor Associates v. United States, 165 F.3d 1249, 1255 (9<sup>th</sup> Cir. 1999).

Moreover, “[I]t is well settled that a district court retains authority under Rule 60(b)(5) to modify or terminate a continuing, permanent injunction if the injunction has become illegal or changed circumstances have caused it to operate unjustly. See 7 *Moore's Federal Practice*, § 60.26[4].”<sup>131</sup> Accordingly, if the Defendants are concerned that the indefiniteness of when the Hawaiians’ claim to ceded lands will be resolved, it can find solace in knowing that under Rule 60(b)(5), the Court may modify the permanent injunction under the appropriate circumstances.

#### D. Instructions From The Court

As set forth above, Restatement of the Trust (Second) § 166, Comment e, § 167(3) and § 259 (1959) requires the State, in light of the 1993 Legislation, to seek instructions from the Court before selling ceded lands. The Court’s right to instruct is a separate and additional basis, apart from issuing an injunction, for the Court to rule on this matter. Individual Plaintiffs submit that the Court should grant the requested relief as a permanent injunction order and as instructions to the State as trustee not to sell ceded lands pending resolution of the Hawaiians’ ownership claim.

#### E. Indefiniteness Of Term Of Injunction Does Not Bar Injunction

It took the United States 100 years to apologize for the illegality of the overthrow. Congress has not yet passed a reconciliation bill even though it was recommended in the 1993 Apology Resolution.<sup>132</sup> Act 359 (1993) started a process for Hawaiians to form a sovereign Hawaiian entity. However, in 1996, the State refused to follow through with funding for the election of Hawaiian delegates to a convention to prepare nationhood documents.<sup>133</sup> Thus, the State contributed to any delay in resolving the Hawaiians’ claim. Given the long period of time that it has taken for the United States and the State to recognize the illegality of the overthrow and the devastating effect the overthrow has had on the well-being of Hawaiians, any indefiniteness of the time it will take to restore Hawaiian sovereignty and resolve the claim to the ceded lands does not justify permitting the State to sell ceded lands before the claim is resolved. Moreover, the time until resolution may not be extraordinarily long according to the opinion of Dr. Anaya.<sup>134</sup> In addition, if circumstances

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<sup>131</sup> Association For Retarded Citizens Of North Dakota v. Sinner, 942 F.2d 1235, 1239 (8<sup>th</sup> Cir. 1991).

<sup>132</sup> 4/6/01 Bill S 746, Ex. 27, and 9/21/01 Committee on Indian Affairs report to accompany S 746, Ex. 28.

<sup>133</sup> McGregor testimony on 11/20/01.

<sup>134</sup> Anaya testimony on 11/27-28/01 at 151, and 158-61.

substantially change such that the need of an injunction is no longer appropriate, the State can seek modification of the order.

F. Irreparable Harm - Importance Of Land To Hawaiians

The Apology Resolution states, “the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land.”<sup>135</sup> This was also supported by the testimony of OHA Hawaiian cultural experts, Hannah Springer and Pua Kanahahele.<sup>136</sup>

Professor McGregor testified that as a member of the Hawaiian Sovereign Advisory Committee (“HSAC”), which was created by Act 359 (1993), she attended over a dozen meetings in Hawaiian communities.<sup>137</sup> One of the main purposes of the meetings was to determine the will of the Hawaiian people with respect to sovereignty. Professor McGregor pointed to HSAC’s final report, which stated:

The Hawaiian community on each island has almost unanimously called for a measure to ensure that Hawaiian national trust lands, the Hawaiian Homelands and the ceded public trust lands, will not be decreased or misused. The community does not want to get involved with a lengthy process to restore formal recognition of a Hawaiian sovereign nation and end up without a land base.<sup>138</sup>

David Getches testified that although native peoples throughout the United States have many different values, the one point they almost always have in common is the importance of land to their culture and well-being.<sup>139</sup> Professor Getches provided examples where the government offered monetary compensation for lost lands, and tribes have insisted on return of lands and refused to accept money.<sup>140</sup> He also stated that once native lands are alienated, compensation is problematic because the tribes must often use money damages to repurchase lands from private parties, and lands are often not available for repurchase.<sup>141</sup> Professor Getches opined that the better practice is to suspend any sale of ancestral lands until claims for the lands are resolved because

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<sup>135</sup> Apology Resolution, Ex. 1

<sup>136</sup> Professor Kanahahele’s curriculum vitae is Ex. 44.

<sup>137</sup> McGregor testimony on 11/20/01.

<sup>138</sup> 2/18/94 Hawaiian Sovereignty Advisory Commission Final Report, Ex. 10, at 26.

<sup>139</sup> Getches testimony on 11/27/01 at 77-78.

<sup>140</sup> Getches testimony on 11/27/01 at 56-61.

<sup>141</sup> Getches testimony on 11/27/01 at 61-63.

“something we learned in this sordid history of claims and complications is it's very hard to put the egg back together.”<sup>142</sup>

Accordingly, it is clear that selling ceded lands and putting the proceeds in the ceded lands trust or later compensating the Hawaiians with the fair market value of lost lands will not be an adequate remedy.

#### G. Irreparable Harm - Land is Unique

The general rule is that because land is unique, damages are inadequate.<sup>143</sup>

#### H. Irreparable Harm - No State Harm

Even if the Court assumes that the purported affordable housing objective for the Leialii and Laiopua projects satisfies the public purpose doctrine, based on the evidence, the State has not established that it has clear title to the ceded lands. In addition, Defendants did not file a counterclaim to quiet title, and, even if they did, the evidence does not support such relief.<sup>144 145</sup> Accordingly, even if the Court were to deny Plaintiffs' request for an injunction, any purported fee simple transfer by

<sup>142</sup> Getches testimony on 11/27/01 at 63.

<sup>143</sup> Kalinowski v. Yeh, 9 Haw.App. 473, 847 P.2d 673 (1993) (“Contracts for the sale of land have traditionally been accorded a special place in the law of specific performance. A specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money. Furthermore, the value of land is to some extent speculative. Damages have therefore been regarded as inadequate to enforce a duty to transfer an interest in land[.] Restatement (Second) of Contracts § 360, comment e, at 174 (1981).”)

<sup>144</sup> HRS 669-1(a) (“(a) Action may be brought by any person against another person who claims, or who may claim adversely to the plaintiff, an estate or interest in real property, for the purpose of determining the adverse claim.”); and Maui Land & Pineapple Co., Inc. v. Infiesto, 76 Hawai'i 402, 407-08, 879 P.2d 507 (1994) held:

In an action to quiet title, the burden is on the plaintiff to prove title in and to the land in dispute, and, absent such proof, it is unnecessary for the defendant to make any showing. State v. Zimring, 58 Haw. 106, 110, 566 P.2d 725, 729 (1977) (citations omitted). The plaintiff has the burden to prove either that he has paper title to the property or that he holds title by adverse possession. Hustace v. Jones, 2 Haw.App. 234, 629 P.2d 1151 (1981); see also Harrison v. Davis, 22 Haw. 51, 54 (1914). While it is not necessary for the plaintiff to have perfect title to establish a prima facie case, he must at least prove that he has a substantial interest in the property and that his title is superior to that of the defendants. Shilts v. Young, 643 P.2d 686, 689 (Alaska 1981). Accord Rohner v. Neville, 230 Or. 31, 35, 365 P.2d 614, 618 (1961), reh'g denied, 230 Or. 31, 368 P.2d 391 (1962).

<sup>145</sup> Note that Plaintiffs are not seeking to quiet title in this case. However, because the State has not in this case established a right to quiet its title to the ceded land, it in effect cannot sell ceded lands until the Hawaiians' claim is resolved.

the State to third parties would remain clouded by the Hawaiians' claim to the ceded lands.

In addition, it is not likely that title insurance would be available for such transfers without a quiet title order. Mr. Jubinsky acknowledged that under HRS § 431:20, title companies are required to make a determination on "insurability of title in accordance with sound underwriting practices" which considers "other interests against the property title."<sup>146</sup> He also admitted that the Hawaiians' claim to the ceded lands would constitute "other interests against the property title."<sup>147</sup> In addition, under § 22 of Act 350 (1997), HCDCH is probably prohibited from granting a warranty deed that may be required by title companies under these circumstances.<sup>148 149</sup> Another consequence is that without title insurance, the purchasers of ceded lands would not likely qualify as bona fide purchasers.<sup>150</sup> Therefore, the State will not likely suffer irreparable harm if the injunction is granted because under the circumstances there is not likely to be any sales.

#### I. Lane v. Pueblo of Santa Rosa is Good Precedent

Although the Court can apply the law to the facts to reach the correct result without reliance on precedent, the circumstances in Lane v. Pueblo of Santa Rosa<sup>151</sup> are close enough to provide guidance. The Pueblo of Santa Rosa filed the lawsuit to enjoin the Secretary of the Interior, Franklin Lane, from selling certain lands as public lands. The Pueblo Indians alleged that it had "a complete and perfect title to the lands in question" under the laws of Spain and Mexico, prior the United States,' acquisition of that region by the Treaty of Gadsden.<sup>152</sup> A New Mexico

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<sup>146</sup> HRS § 431:20, Ex. 399.

<sup>147</sup> Jubinsky testimony on 11/27/01 at 17-19.

<sup>148</sup> Act 350 (1997) (§ 22 states: "Unless otherwise provided by law, the corporation shall issue quitclaim deeds and leases whenever it conveys, transfers, sells, or assigns any property developed, constructed, or sponsored under this chapter."), Ex. 396.

<sup>149</sup> Jubinsky testimony on 11/27/01 at 12-13.

<sup>150</sup> Restatement of the Trust (Second) § 284(1) (1959), entitled "Bona Fide Purchaser," states: "If the trustee in breach of trust transfers trust property to, or creates a legal interest in the subject matter of the trust in, a person who takes for value and without notice of the breach of trust, and who is not knowingly taking part in an illegal transaction, the latter holds the interest so transferred or created free of the trust, and is under no liability to the beneficiary."; Restatement of the Trust (Second) § 283 (1959), entitled "Where Transfer Is Not In Breach Of Trust," provides: "If the trustee transfers trust property to a third person or creates a legal or equitable interest in the subject matter of the trust in a third person, and the trustee in making the transfer or in creating the interest does not commit a breach of trust, the third person holds the interest so transferred or created free of the trust, and is under no liability to the beneficiary."

<sup>151</sup> Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919).

<sup>152</sup> Id. at 111.

statute “provided that the inhabitants of any Indian pueblo having a grant or concession of lands from Spain or Mexico, such as is here claimed, should be a body corporate and as such capable of suing or defending in respect of such lands.”<sup>153</sup> The Secretary argued that the Ward-Guardian relationship permits the United States to sell the lands as public lands. The Supreme Court responded:

Certainly it would not justify the defendants in treating the lands of these Indians--to which, according to the bill, they have a complete and perfect title--as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation. (Emphasis added.)<sup>154</sup>

The Supreme Court held that Lane was entitled to answer and contest the allegations, but as long as the claim was valid and pending, the Pueblo Indians should be able “to prevent a threatened disposal by administrative officers in disregard of their full ownership.” (Emphasis added.)<sup>155</sup>

Lane is instructive because Hawaiians and the Pueblo Indians of Santa Rosa, unlike most American Indian tribes, have a claim to complete ownership of their lands, not just possessory title of the type described in Cherokee Nation.<sup>156</sup> Where the Pueblo Indians can point to the New Mexico statute as a basis to employ Mexican and Spanish law to resolve their title dispute, the Hawaiians can point to the admissions in the 1993 Legislation as a basis to resolve their claim to ownership of the ceded lands. In fact, the Hawaiians’ situation is arguably stronger than that of the Pueblo Indians because the Hawaiians may be able to invoke the Law of Nations where the Pueblo Indians could not.<sup>157</sup> Thus, Lane is good authority to support the issuance of an injunction in this case.<sup>158</sup>

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<sup>153</sup> Id. at 112.

<sup>154</sup> Id. at 113.

<sup>155</sup> Id. at 113-14.

<sup>156</sup> Cherokee Nation v. Georgia, 30 U.S. 1, 18 (1831) (“They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases.”)

<sup>157</sup> Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 112-13 (1919).

<sup>158</sup> Getches testimony on 11/27/01 at 101 (“Q But basically what that treaty gave these Pueblo Indians in this pueblo was the right to use New Mexico [law] in order to determine their lands rights? A Yes. Q So they had potential claims? A That's right, yes. Q So in this case what we have under the apology bill is something a little stronger than potential claims, because we have an acknowledgement by Congress here to claims to the ceded lands that were never relinquished. Do you agree? A Yes. Q So in that

V. **SOVEREIGN IMMUNITY DEFENSE**

Pele Defense Fund v. Paty, 73 Haw. 578, 609-610, 837 P.2d 1247 (1992) (“PDF”) held that:

The rule in Young, which we adopt, makes an important distinction between prospective and retrospective relief. If the relief sought against a state official is prospective in nature, then the relief may be allowed regardless of the state’s sovereign immunity. See, e.g. Papasan v. Allain, 478 U.S. 265, 278 (1986); Green v. Mansour, 474 U.S. 64, 68 (1985). This is true “even though accompanied by a substantial ancillary effect on the state treasury.” Papasan, 478 U.S. at 278 (citations omitted). However, relief that is tantamount to an award of damages for a past violation of . . . law, even though styled as something else, is barred by sovereign immunity. Id.

In this case, Plaintiffs seek an injunction barring future sale of ceded lands. The lesson Hawaiians learned from PDF is that if they allow State officials to sell ceded lands to third parties before seeking an injunction, the doctrine of sovereign immunity will bar Plaintiffs from suing for relief from those sales once they occur. Moreover, the requested injunction would not be “tantamount to an award of damages” or grant Plaintiffs any type of affirmative relief. Under PDF, sovereign immunity does not bar Plaintiffs from seeking the requested injunction.

Defendants cite to Idaho v. Coeur d’Alene Tribe of Idaho, 521 U.S. 261 (1997) for the proposition that a claim for injunctive relief that is the functional equivalent of a quiet title action is barred by sovereign immunity.<sup>159</sup> The Tribe’s complaint, however, prayed for ownership, beneficial interest and exclusive use of submerged lands.<sup>160</sup> Furthermore, the Tribe’s requested injunction was “close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe” including a “bar [on] the State’s principal officers from exercising their governmental powers and authority over the disputed lands and waters.”

<sup>161</sup> In addition, the Tribe filed in federal court despite the availability of

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sense the Pueblo case is good law, in your opinion, concerning issuance of an injunction?

A Yes, I think it is.”)

<sup>159</sup> Defendants’ Trial Memorandum at 31.

<sup>160</sup> In fact, in the companion case, the Coeur d’Alene Tribe was very recently awarded beneficial interest in submerged lands. Idaho v. United States, 121 S.Ct. 2135 (2001), Ex. 537.

<sup>161</sup> Idaho v. Coeur d’Alene Tribe of Idaho, 521 U.S. 261, 282 (1997)

a state forum.<sup>162</sup> This was significant because “no available state forum” was one of the main reasons for the prospective injunctive relief exception to the sovereign immunity rule.<sup>163</sup>

In this case, Plaintiffs do not seek an ownership determination by this Court or even a declaration that they are entitled to the beneficial use and/or occupancy of the ceded lands. Plaintiffs do not even seek to bar the State’s current practice of transferring remnants, and issuing licenses, permits and leases concerning ceded lands. Plaintiffs do not seek anything affirmative. Plaintiffs only seek to enjoin Defendants from engaging in future sales of ceded lands pending a determination of the Hawaiians’ claim to ceded lands.

Furthermore, unlike Idaho v. Coeur d’Alene Tribe of Idaho, this case was not filed in federal court, and the State waived sovereign immunity in HRS Chapter 673.<sup>164</sup> Defendants may argue that § 673-4, entitled “Scope of relief,” limits recovery to land and money. § 673-4 states:

(a) In an action under this chapter the court may only award land or monetary damages to restore the trust which has been depleted as a result of any breach of trust duty and no award shall be made directly to or for the individual benefit of any particular person not charged by law with the administration of the trust property; provided that actual damages may be awarded to a successful plaintiff.

However, as discussed above, the Court has the inherent power to issue injunctions.<sup>165</sup> The Court also has the power to issue instructions to the State, as trustee of the ceded lands trust.<sup>166</sup>

Defendants may also argue that since DLNR transferred approximately 500 acres of ceded lands to HFDC, now HCDCH, on 11/4/94, for the Leialii project, this lawsuit is too late with respect to enjoining the transfer of those lands. However, HCDCH is a political subdivision of the State, and the Board members of HCDCH are officers of the State.<sup>167</sup>

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<sup>162</sup> Id. at 265.

<sup>163</sup> Id. at 271.

<sup>164</sup> Act 395 (1988), Ex. 346.

<sup>165</sup> IV.A., supra.

<sup>166</sup> Restatement of the Trust (Second) § 166, Comment e, § 167(3) and § 259 (1959); and Jubinsky testimony on 11/27/01 at 47.

<sup>167</sup> Act 350 (1997) §§ 2 and 3, Ex. 396.

Thus, they owe ceded lands trust fiduciary duties to Hawaiians,<sup>168</sup> and they can be prospectively enjoined from transferring these lands to non-State entities.

#### VI. POLITICAL QUESTION DEFENSE

Defendants argue that the doctrine of political question bars this Court from granting the requested injunction.<sup>169</sup> Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987) is the most applicable case on whether this matter is justiciable. OHA had filed two lawsuits to compel the State to live up to its commitment to transfer its share of revenues from the public lands pursuant to the 1978 Constitutional Amendment, Article XII, section 6, and subsequent legislation in Chapter 10.

OHA specifically prayed for 20% of the value of the land or 20% of the land obtained by the State in litigation arising out of theft of sand from ceded lands. OHA also requested 20% of the revenues from ceded lands surrounding harbors, land on Sand Island, land on which the Honolulu International Airport is situated and land on which the Aloha Tower Complex stands. The Hawaii Supreme Court dismissed the cases on the grounds that it would involve the court in political questions. The Hawaii Supreme Court specifically held that although the Hawaii legislature had initiated the process of transferring public land trust revenues to OHA, it had not yet worked out all of the details. Consequently, asking the Court to work out the details, would be encroaching on legislative turf because the seemingly clear language of HRS § 10-13.5 actually provides no “judicially discoverable and manageable standards” for resolving the disputes and they cannot be decided without “initial policy determinations[s] of a kind clearly for nonjudicial discretion.” Baker v. Carr, 369 U.S. at 217, 82 S.Ct. at 710.<sup>170</sup>

Before reaching this conclusion, the Yamasaki opinion discussed the historical and theoretical basis of the political question doctrine. It cited Flast v. Cohen, 392 U.S. 83 (1968), to explain that the purpose behind the doctrine is to serve to “limit the business of federal courts to questions presented in an adversarial context and in a form historically viewed as capable of resolution through judicial process.”<sup>171</sup> Yamasaki, in citing Baker v. Carr, cautioned future courts, “a case should not be

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<sup>168</sup> Under HRS § 673-1(a), the State is liable for “breach of trust or fiduciary duty resulting from the acts or omissions of its agents, officers and employees in the management and disposition of trust funds and resources.”

<sup>169</sup> Defendants’ Trial Memorandum at 27.

<sup>170</sup> Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 173, 737 P.2d 446 (1987).

<sup>171</sup> Id. at 168.

dismissed on the ground that it involves a political question without ‘discriminating inquiry into the precise facts and posture of the particular case.’”<sup>172</sup> The Hawaii Supreme Court again cited Baker v. Carr for guidance on deciding when the doctrine applies:

Whether a political question is present or not is “impossib[le] of resolution by any semantic cataloguing.” *Id.* Still, [i]t is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found 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. Unless one of these formulations is inextricable from the case at bar; there should be no dismissal for nonjusticiability on the ground of a political question’s presence.<sup>173</sup>

This case is clearly an adversarial matter capable of resolution through the judicial process. Furthermore, there are trust standards for the Court to apply to resolve this dispute and this is the type of dispute that is traditionally resolved in the judiciary. Finally, a finding that the legislative and executive branches should resolve this dispute (whether Hawaiians can enjoin the State from selling ceded lands before resolution of Hawaiians’ claim to ceded lands) would result in a total denial of any remedy to preserve the status quo until resolution of the claim.

Further, Lane v. Pueblo of Santa Clara, 249 U.S. 110, 114 (1919) and Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992) demonstrate that the United States Supreme Court and the Hawaii Supreme Court do not deem this type of case a non-justiciable matter.

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<sup>172</sup> *Id.* at 169.

<sup>173</sup> *Id.* at 169-70.

Finally, both Judge Heeley and Judge Kevin Chang rejected this defense<sup>174</sup>, and, thus, law of the case should apply.<sup>175</sup>

## VII. ESTOPPEL DEFENSE

In September 1994, OHA first objected to the sale of ceded lands for the Leialii project because attorney William Meheula informed the OHA Board that accepting payment of 20% of the fair market value of the lands might compromise the Hawaiians' claim to ownership of the ceded lands.<sup>176</sup> On 9/15/94, the OHA Board accepted Mr. Meheula's recommendation to include a disclaimer as part of any acceptance of funds.<sup>177</sup> The OHA Board understood that Mr. Meheula's clients would sue the Board if OHA proceeded with the transaction without the appropriate disclaimer language.<sup>178</sup>

At OHA's request, on 9/23/94, the Attorney General's Office suggested disclaimer language that the OHA Trustees "act solely for the purpose of implementing the provisions of Act 318, SLH 1992, and only on behalf of the Office of Hawaiian Affairs, and in no manner do they waive or otherwise act in furtherance or diminution of any claim the Hawaiian people may have in the land comprising the site of the Villages of Leali'i project."<sup>179</sup> On 9/27/94, the OHA Board voted to accept this disclaimer language and requested that it be included in the proposed HFDC agreements.<sup>180</sup>

In 10/94, HFDC decided that it could not include the disclaimer in the HFDC agreements because that would put a cloud on title and title insurance would not be available to buyers in the Leialii project.<sup>181</sup> Even though OHA never signed the HFDC agreements, on 11/4/94, DLNR transferred about 500 acres of ceded lands to HFDC for the Leialii project.<sup>182</sup> OHA refused to accept a check in the amount of

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<sup>174</sup> 6/30/96 Order Denying Defendants' Motion For Partial Summary Judgment And Motion For Rule 54(B) Certification filed 12/15/95, Ex. 540; and 8/27/98 Order Denying Defenant State's Motion To Dismiss Certain Counts And For Partial Summary Judgment filed 3/12/98, Judge Kevin Chang, Ex. 538.

<sup>175</sup> Wong v. City and County, 66 Haw. 389, 395-96, 665 P.2d 157 (1983); and AMFAC, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 121, 114, 839 P.2d 10 (1992).

<sup>176</sup> 10/25/94 HFDC Board Workshop memo, Ex. 143

<sup>177</sup> 9/15/94 OHA Board minutes, Ex. 78.

<sup>178</sup> Hee testimony on 12/3/01; and 9/23/94 Hee letter to Marks, Ex. 555.

<sup>179</sup> 9/23/94 Aina letter to Meheula, Ex. 5; and Marks letter to Hee, Ex. 4.

<sup>180</sup> 9/27/94 OHA Board minutes, Ex. 79; and Hee letter to Conant, Ex. 139.

<sup>181</sup> 10/13/94 Conant letter to Hee, Ex. 140; and 10/25/94 HFDC Board Workshop memo, Ex. 143.

<sup>182</sup> 11/4/94 Conant memo to Hee enc check and Land Patent, Ex. 145.

\$5,573,604.40 for 20% of the purported fair market value of the lands, and instead filed the Complaint in this case on 11/4/94.<sup>183</sup> On 11/9/94, Individual Plaintiffs filed a separate complaint, which relied upon statements in Act 359 (1993) and the Apology Resolution.<sup>184</sup> On 8/19/95, OHA and the Individual Plaintiffs jointly filed the First Amended Complaint in this case that also relied upon statements in the Apology Resolution and Act 359.

Based on the above sequence of events, it is clear that in 9/94, Mr. Meheula believed that the 1993 Apology Resolution and Act 359 (1993) supported the position that the Hawaiians had a claim to ownership of the ceded lands. Mr. Meheula's discussions with the OHA Board caused it to insist that a disclaimer be placed in the HFDC agreements. Although OHA did not earlier object to the transfer of ceded lands for ultimate sale to homeowners in the Leialii project, the 1993 Legislation and Mr. Meheula's discussions with the OHA Board in 9/94 were new events that justified their objection in 9/94.<sup>185</sup> In addition, estoppel is an equitable defense,<sup>186</sup> and the 1993 Legislation obligated the State to seek instructions from the Court before selling ceded lands without prompting by Plaintiffs.<sup>187</sup>

#### VIII. CONCLUSION AND REQUESTED ORDER

For the above reasons, justice requires that the Court: (1) permanently enjoin Defendants, and their agents, officers, employees and any persons acting in concert or participation with them, from selling, transferring or alienating ceded lands, including the ceded lands that comprise the Leialii and Laiopua projects, to entities that are not political subdivisions of the State, as defined in Article 8, § 1 of the Hawaii Constitution,<sup>188</sup>

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<sup>183</sup> 11/4/94 OHA Board minutes, Ex. 81.

<sup>184</sup> Complaint for Injunctive and Declaratory Relief, Civil No. 94-0808(1), Ex. 367.

<sup>185</sup> State v. Mitchell, 94 Hawai'i 388, 15 P.3d 314, 320 (2000) ("A waiver is the knowing, intelligent, and voluntary relinquishment of a known right."); Roxas v. Marcos, 89 Hawai'i 91, 969 P.2d 1209, 1242 (1999) ("Pursuant to the doctrine of judicial estoppel, '[a] party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his action.'")

<sup>186</sup> Fred v. Pacific Indem. Co., 53 Haw. 384, 494 P.2d 783, 786 (1972) (estoppel an equitable defense);

<sup>187</sup> Restatement of the Trust (Second) § 166, Comment e, § 167(3) and § 259 (1959); and Jubinsky testimony on 11/27/01 at 47.

<sup>188</sup> Article 8, § 1 of the Hawaii Constitution states: "The legislature shall create counties, and may create other political subdivisions within the State, and provide for the government thereof. Each political subdivision shall have and exercise such powers as shall be conferred under general laws."

until the claims of native Hawaiians and Hawaiians, as defined by HRS § 10-2, to the ceded lands is settled or resolved, except that the State may continue its current practice of transferring remnants, and issuing licenses, permits and leases concerning ceded lands; and (2) provide instructions to Defendants, and their agents, officers, employees and any persons acting in concert or participation with them, consistent with said permanent injunction.

Dated: Kailua, Hawaii, December 17, 2001.

[signed]  
WILLIAM MEHEULA  
Attorney for Individual Plaintiffs

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