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Before the U.S. Senate Committee on Energy and Natural Resources

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INTRODUCTION

Thank you for this opportunity to testify before this oversight committee to the Hawaiian Homes Commission Act. In your invitation to testify, you request that I address the nature of the relationship between the beneficiaries of the Hawaiian Homes Commission Act (HHCA) and the federal government during the period 1921 to the present. Secondly, you ask that I comment on the performance of the State of Hawai`i and the federal government in the administration of the Hawaiian Home lands, including those actions covered by these governments' responses to the 1983 Federal-State Task Force Report on the HHCA.

Let me open by suggesting to this committee is losing the benefit of much talent and knowledge in the hearts and minds of many in Hawai`i who cannot come to contribute to hearings held only in Washington. I urge you to consider holding additional hearings in Hawai`i as you undertake this major challenge in conducting oversight on the HHCA to build on and not duplicate the record of the Senate Select Committee on Indian Affairs, which held extensive hearings on the HHCA in August 7-11, 1989. As we approach the 100th anniversary of the overthrow of the Hawaiian Kingdom, native initiatives are mounting to reestablish a Hawaiian sovereign entity and to seek redress and restoration from the United States for its role in that event.

This committee should keep this perspective in mind if it intends to deal with the interrelationship between recognizing self-determination for Hawaiians and redressing the many pressing concerns involving the Hawaiian Homes Commission

Act (HHCA). Congress should be prepared to deal with the complex issues relating to the possibility of incorporating the lands in the Hawaiian home lands inventory into the domain of the sovereign entity that ultimately surfaces from current efforts to develop a structure for a Hawaiian sovereign entity.

The Native Hawaiian Legal Corporation has represented various clients who have encountered a variety of problems related to the administration of the HHCA. In addition to litigation and administrative advocacy before the Hawaiian Homes Commission, we have provided testimony on various issues to legislative bodies, including the Senate Select Committee on Indian Affairs and the State Legislature. The corporation is also supporting the initiatives of Hawaiians to restore their sovereign status in some form.

I. NATURE OF THE RELATIONSHIP BETWEEN THE BENEFICIARIES AND THE FEDERAL GOVERNMENT.

The State of Hawai`i has already outlined the nature of the federal government's trust responsibility. In short, the state maintains that trust relationship was firmly rooted in the HHCA legislation and the congressional intent to save a dying race and to rehabilitate its people. While I agree with this analysis in part, I further maintain that there is an abundance of evidence of an implied trust created at the time of the 1921 legislation *under prevailing legal guidelines of the U.S. Supreme Court.* In addition, this committee should also draw support for this conclusion that, once established in the Joint Resolution of Annexation of July 7, 1898, Public Resolution No. 51, 55th Congress, 2nd Session, 30 Stat. 750 (July 7, 1898) [hereafter, "Newlands Resolution"] and reaffirmed in the Hawai`i Organic Act, the federal trust relationship to native Hawaiians was never terminated and continues until today, although in different forms. This conclusion is clearly in line with both the political and cultural history of Hawai`i, and the evolution of its land laws since the "not so great" Mahele of 1848[1].

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[1] I avoid the commonly misleading term," *Great Mahele*", simply because it unfairly characterizes the devastating historical repercussions of this land division on the Hawaiian people and culture. See, J.J. Chinen, *The Great Mahele* (1958); Levy, *Native Hawaiian Land Rights*, 63 Calif. L. Rev. 858 (1975); Van Dyke, Chang, Aipa, Higham, Marsden, Sur, Tagomori, and Yukumoto, *Land and Water Resource Management in Hawaii* 163 (1979); M. Kelly, *Changes in Land Tenure in Hawaii, 1778-1850* (1956)

A. *The Creation of the Federal Trust Duty to Native Hawaiians in 1921.*

1. The Common Law Foundation.

In United States v. Mitchell, 445 U.S. 535 (1980), members of the Quinault Tribe sued the United States for mismanagement of timber assets on their tribal allotments. The Court held that the General Allotment Act did not provide the claimants with a claim for relief because the Act contemplated that the allottee, rather than the federal government, manage the land. Under this interpretation, the Act only created a "limited trust relationship between the United States and the allottee that did not impose such a duty. Accordingly, the Court remanded the case to the Claims Court to determine whether claimants could base liability on any other statute.

On remand, the Claims Court held that the Indian timber management statutes, 25 U.S.C.A. § 406-07, 466 could be the basis of a duty to manage the lands as a trustee. The Supreme Court agreed contrasting the "bare trust created by the General Allotment Act" with the more comprehensive timber management statutes that imposed responsibility on the federal government to manage the Indian resources and lands for the benefit of the Indians. From this relationship, the Court found that the federal government owed the Quinault Indians a fiduciary obligation to manage these resources. Furthermore, it held that the Indians could recover damages sustained as a result of a breach of that trust due to its mismanagement of those resources. United States v. Mitchell, 463 U.S. 206, 224-26 (1983).[2] [hereafter, "Mitchell II"].

In arriving at this holding, the Supreme Court determined that a fiduciary relationship existed:

> ... a fiduciary relationship **necessarily** arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common law trust are present: a trustee (the United States), a beneficiary (the Indian

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(unpublished thesis available in the University of Hawaii Library).

[2] *Citing* Restatement (Second) of the Law of Trusts §§ 205-212 (1959); G. Bogert, *The Law of Trusts and Trustees* § 862 (2d ed. 1965); 3 Scott, *The Law of Trusts* § 205 (3d ed. 1967).

> allottees), and a trust corpus (Indian timber, lands, and funds). [*citing* Restatement (Second) of the Law of Trusts § 2, Comment h, at 10 (1959)]. "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) **even though nothing is said expressly in the authorizing or underlying statute** (or other fundamental document) about a trust fund, or a trust or fiduciary connection." Navajo Tribe of Indians v. United States, 224 Ct.Cl. 171, 183, 624 F.2d 981, 987 (1980). (emphases added).

Mitchell II, 463 U.S. at 224-226. It is significant to note that the court reached this holding *independently* from any separate analysis on any federal duty owed to Indian tribes under the Indian Commerce Clause of the U.S. Constitution.[3]

The U.S. Supreme Court would agree that the Hawaiian Homes Commission Act, with its elaborate control over the trust property set aside under the Act, created a fiduciary trust duty in the United States to benefit native Hawaiians. As in the case of the Quinault Indians in Mitchell II, the HHCA established an elaborate system of control over "available lands" which were set aside from the larger corpus of the lands ceded to the United States by the Republic of Hawai`i. Under the HHCA, Congress specified a detailed land management system to be administered by the Hawaiian Homes Commission, prescribing, among other things:

(1) the administrative structure to be established;
(2) the qualifications of beneficiaries;
(3) the conditions of lease terms;
(4) the limits of acreage to be leased;
(5) the qualifications of successors to leases issued;
(6) the rights of homesteaders to "government-owned" water;
(7) the technical assistance to be provided to farm and ranch lessees;
(8) the types of related uses to which the lands could be put under general leases and licenses; and
(9) the various funds in which various revenues were to be placed in administering the program.

This detail in the administrative structure of the homesteading program signifies the

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[3] "Congress is authorized to regulate Commerce ... with the Indian Tribes." U.S. Const., Art. I, Sec. 8, cl. 18.

degree to which the United States established control over the trust corpus. The control exercised by the federal government over these properties and revenues at the inception of the HHCA demonstrates that a fiduciary relationship necessarily arose between the United States and native Hawaiians, as it did in the Mitchell II case, beyond a "bare trust".

The elements of a common law trust are also present. The United States delegated a fiduciary duty to manage the assets and programs of the HHCA to the Hawaiian Homes Commission (trustee). As discussed later, this delegation merely created the duty in an agent of the federal government. The President appointed the territorial governor at the time. The governor appointed the commission member. In fact, until 1935, the governor himself was a member of the commission. The HHCA clearly delineated native Hawaiians as the exclusive beneficiaries of this trust. Finally, the HHCA set aside a specific (albeit inexact) corpus of land and revenues (a portion of the revenues from the leases of other public lands leased for sugar cultivation and water collection) for this trust (trust corpus),.

Moreover, as in Mitchell II, this fiduciary relationship was established *even though there was no express language of such an obligation or duty.* The Secretary of Interior's delegate makes much about the absence of an explicit reference to a trust in the HHCA or its legislative history, and explicitly discounting then-Secretary Lane's understanding at the time of the duties being created. Letter to Hon. Daniel K. Inouye from Timothy W. Glidden, dated January 23, 1992. He also discounts the analysis of the Hawai`i Supreme Court in Ahuna v. Dept. of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161 (1982) as dicta. Id.

What Mr. Glidden fails to recognize is the Mitchell II decision, is still controlling law in this area. Silence or the absence of explicit mention of a federal fiduciary duty to native Hawaiians in the HHCA and its legislative history is not dispositive of the existence of a trust or fiduciary responsibility. It is the nature of the control exercised over property to be used for an identified beneficiary class that is ultimately determinative. Mr. Glidden's preoccupation with the law on express trusts is also misplaced, in that he ignores the much greater body of law involving implied and constructive trust. Given the congressional history on the HHCA indicating an

intention to save a dying race by assisting with the settlement of the native Hawaiian on homestead land, a strong case for an implied trust can be made. In this sense, his discounting of the Ahuna reasoning on this subject is unwarranted if not illogical.

2. The Statutory Foundation.

By 1920, the Hawaiian race was on the verge of extinction. H. Rep. No. 839, 66th Cong., 2d Sess. (1920) at 2-4. Territorial Senator Wise testified that the pure Hawaiian race, once thought to number 400,000 at the time of Captain Cook's arrival, had dropped precipitously to 22,600 by 1919. Id. at 3. Accordingly, in 1921, Congress enacted the HHCA to rehabilitate the Hawaiian race. S. Rep. 123, 67th Cong., 1st Sess. (1921) at 2. Congress recognized that Hawaiians had lost possession and control of over nine-tenths of the real property in Hawai`i, based on tax assessed value. H. Rep. No. 839 at 6. As Prince Jonah Kuhio Kalanianaole testified:

> The Hawaiian race is passing. And if conditions continue to exist as they do today, this special race of people, my people, will pass from the face of the earth. ...
>
> The legislation proposed seeks to place the Hawaiian back on the soil, so that the valuable and sturdy traits of that race, peculiarly adapted to the islands, shall be preserved to posterity.

59 Cong. Rec. 7453, 66th Cong., 2d Sess. (1920).

As a result of this situation, Congress intended to further a trust relationship which existed between the federal government and native Hawaiians. Ahuna v. Dept. of Hawaiian Home Lands, 64 Haw. 327, 336-7, 640 P.2d 1161, 1167-68 (1982). Then-Secretary Franklin K. Lane testified:

> One thing that impressed me ... was the fact that the natives of the islands **who are our wards**, I should say, **and for whom in a sense we are trustees**, are falling off rapidly in numbers and many of them are in poverty.

H. Rep. No. 839 at 4. The House Committee on Territories thus reported:

> Your committee is ... of the opinion that (1) the Hawaiian must be placed upon the land in order to insure his rehabilitation; (2) alienation of such land must, not only in the immediate future but also for years to come, be made impossible; (3) accessible water in adequate amounts must be

provided for all tracts; (4) the Hawaiian must be financially aided until his farming operations are well underway.

Id. at 7; Ahuna, 64 Haw. at 336-37.

Furthermore, Congress assigned major trust responsibilities to the HHC to assure that the purposes of the HHCA would be fulfilled. The HHC has exclusive power over the "available lands". Congress explicitly exempted these lands from the reach of the territorial governor and the commissioner of public lands. HHCA § 226. Even when the trust lands were temporarily managed by the Commissioner, he was restricted to only leasing the lands and then subject to returning it to the HHC upon demand. HHCA § 212. The sale or alienation of Hawaiian home lands was prohibited. HHCA § 208.

This legislative history and structure clearly support the inference of a trust duty on the part of the United States toward native Hawaiians.

B. ***The Root of the Federal Trust Responsibility - the Newlands Resolution***

While the HHCA can stand alone as the source of a federal trust duty to native Hawaiians, that duty can also be viewed as a *continuation* of a pre-existing duty established at least since the United States annexed Hawai`i. Under this alternative, but also consistent, view, the United States could not have unilaterally terminated an on-going trust relationship in the absence of explicit notice to the beneficiaries. II Scott, *Trusts*, § 106 (4th Ed. 1987). Furthermore, the federal government would have the burden of showing that a trust does not exist, as opposed to imposing the burden to establish the existence of a trust on native Hawaiian rights advocates and the State of Hawai`i.

The Historic Trust of the Kingdom. The roots of the trust duty assumed by the United States in 1898 can be traced to the unique history of land tenure in Hawai`i prior to annexation. Prior to Western contract, Hawaiians had no concept similar to fee simple ownership. Rather, the land was held in trust for the gods, administered by a chief, and the use rights of each segment of the Hawaiian population were recognized. The 1840 Constitution of the Hawaiian Kingdom codified this trust concept by stating

that while King Kamehameha I "was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, . . . it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property."[4]

For centuries until the *Mahele* (division) in 1848, the reigning king or chief owned all of the lands in Hawai`i. With the political and economic changes in the 120 years following Western contact, the ancient land tenure system gave way to the formal recognition of private land title. In the *Mahele* of 1848, King Kamehameha III began the process of creating individual land ownership. He set aside approximately 1.5 million acres of Government lands to the "chiefs and people forever." In re Estate of His Majesty Kamehameha IV, 2 Haw. 715 (1864). He also reserved another 1 million acres during the Mahele for himself. Id. Until 1864, these lands, originally referred to as the King's lands, were considered private property by a succession of Hawaiian monarchs. By legislative act, the King's lands were made inalienable, and became known as the Crown lands.[5] The Crown and Government lands formed the corpus of the trust ceded to the United States at annexation.

Following the overthrow of the Hawaiian Monarchy in 1893, the Crown Lands were effectively merged with the existing Government lands. Liliuokalani v. U.S., 45 Ct.Cl. 418 (1910). Subsequently, the Republic of Hawaii purportedly ceded the approximately 1.75 million acres of former Government and Crown lands to the United States by consenting to the Newlands Resolution in 1898.[6] The opening paragraph of the Newlands Resolution ceded and transferred to the United States "the absolute fee

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[4] L. Thurston, *The Fundamental Law of Hawaii*, 3 (1904).

[5] 2 *Revised Laws of Hawaii, 1925*, 2177-2179.

[6] There is a long-standing debate over whether the United States acted properly to annex Hawai`i. Critics note that the congress, in annexing Hawai`i, used a joint resolution, when the only legal means to do so was by treaty, which President Cleveland withdrew from U.S. Senate consideration because of concerns over illegal U.S. involvement in the overthrow of Queen Liliu`okalani in 1893. T. Osborne, *Empire Can Wait* 10-16 (1981); M. K. McKenzie, *Native Hawaiian Rights Handbook* 14 (1991). Accordingly, any statements I make with respect to the legal effect of those legislative acts are made presuming, without conceding, that they were legal.

and ownership of all public, Government, or Crown Lands . . . belonging to the Government of the Hawaiian islands, together with every right and appurtenance thereunto appertaining . . ." The succeeding paragraphs vested all property and rights in the U.S., terminated treaties with foreign nations, and provided that the land laws of the U.S. should not apply to Hawaii. 30 Stat. 750-52. Instead, the Newlands Resolution further provided that Congress would enact special laws for the management and disposition of these ceded lands. In adopting the Newlands Resolution, Congress specifically determined that:

> The existing land laws of the United States relative to public lands shall **not** apply to such land in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: Provided, That all revenue form or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military , or naval purposes of the United States, or may be assigned for the use of the local government, **shall be used solely for the benefit of the inhabitants of the Hawaiian Islands** for educational and other public purposes. (emphases added).

Thus, the legal basis for managing all lands ceded to the United States in 1898 is unique. In particular, the language of the resolution indicates that the revenue and proceeds from those lands could *only* be used to benefit the inhabitants of the islands for educational and other public purposes.

Subsequently, in enacting the Hawai`i Organic Act, Congress mandated that these same public properties:

> ... remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President of of the Governor of Hawaii [sic].

Hawai`i Organic Act of April 30, 1900, ch. 339, § 91, 31 Stat. 141, 159. Congress also reaffirmed the obligation earlier written into the Newlands Resolution to require that:

> All funds arising from the sale or lease or other disposal of public land shall be appropriated by the laws of the government of the Territory of Hawaii and applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation, approved July 7, 1898.

Id., § 73(e).

These enactments clearly demonstrate that Congress intended that all these ceded lands remain subject to a special trust solely for the benefit of "the inhabitants of the" islands. The United States in effect retained legal title to the lands ceded, holding it in trust, while delegating daily management functions to the new territory for the benefit of its inhabitants. In doing so, Congress expressly provided for elaborate control over the property ceded to it at annexation, specifying many conditions and terms for its management and disposition.Id., § 73(a)-(r). Thus, again a fiduciary relationship "necessarily" arose between the United States and inhabitants of the islands. Mitchell II at 224-226.

Furthermore, while these provisions gives "possession, use, and control" of the land base to the Territory, it is clear that the United States really retained power over the lands. Under the Organic Act, the President appointed the Territorial Governor, as well as all the justices to the Territorial Supreme Court. Organic Act, §§ 66, 82. The Governor in turn appointed a host of public officials, including the Commissioner of Public Lands, who had direct responsibility for management decisions affecting the disposition of the public lands. Id. § 80.

The Unique Hawai`i Land Trust. This unique treatment of the management of the public lands of the new Territory of Hawai`i is significant, since it was the result of the recognition that the federal land laws simply did not apply to Hawai`i because of the Republic's unique land tenure and utilization schemes. Note, *Hawaii's Ceded Lands*, 3 U.H. Law Rev., 101, 117-18, n. 90 (1981). Typically, after receiving title to inland lands on the continent ceded to it by he new states, the federal government was not limited by the restraints of a public trust over those lands. Rather, it held title to those lands subject only to a more general power to manage, own and, where desirable to promote economic growth, *convey* them to private interests *without* the restriction of any public trust duty. Indeed, this largesse historically fueled the westward expansion and continental unification of the nation, by allowing the exploitation of timber, mineral and grazing resources on these lands. Id.; Wilkinson, "The Public Trust Doctrine in Public Land Law" 14 U.C. Davis L. Rev. 269, 274-76

(Winter, 1980).

Unlike the pattern set for the management of federal public lands on the continental United States, the delegation of management responsibility to the new Territory reflected congressional intent to distinguish the lands ceded to the United States by the Republic of Hawai`i from the rest of the continental federal lands inventory. 3 U.H. Law Rev., 101, 110 (1981). None of the revenues from these lands went to the United States, but remained in the Territory. However, as one commentator noted, the United States retained both the legal fee title to the ceded public lands and the trust obligation to benefit Hawai`i's people.

> The territorial government had in effect become a conduit of Congress. **For all practical purposes the ceded lands had not changed hands.** Building on Hawaii's existing land administration scheme, Congress prescribed several significant changes in the Organic Act to insure widespread use of public lands for settlement and homesteading. Otherwise, the territory was given direct control over the public lands and was authorized to dispose of them as a governmental entity ... The federal government continued to hold absolute title to the public domain, but did so only "in trust" for the islands' people.

Id., at 110. In essence, the United States assumed title to the lands ceded to it *in trust* for the inhabitants of the new Territory.[7] On the other hand, this duty was *not* the same

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[7] During 1947 debates in the U.S. House of Representatives, Hawaii's delegate addressed the bill proposed at the time to admit Hawai`i as a new state:

> It is the belief of the people of Hawaii that title to these lands properly should repose with them following the admission of Hawaii to the Union as a State. The revenues from these lands have always been received by the government of the Territory, and not by the United States Government. *This is evidence that the United States assumed title to the lands in trust until this responsibility could be assumed by the State of Hawaii.* The benefits from ownership of the lands never were ceded to the Federal Government.

93 Cong. Rec. 7917. (emphasis added).

Hence, it was at least the opinion of the delegate from Hawai`i in 1947 that the U.S. was acting as a trustee over the lands obtained at annexation. These lands included those set aside 26 years earlier upon enactment of the HHCA.

This understanding apparently persisted throughout the political history of the HHCA. For example the subject was also discussed in the State's first constitutional convention, when delegate Tavares, while engaged in a debate over the constitutionality of the HHCA, also acknowledged that the United States, through the Newlands resolution, had established a trust over the public land assets that the Republic of Hawai`i had ceded to the federal government in 1898.

as that which might arise under the common law public trust doctrine.[8]

There is support for this interpretation in a U.S. Attorney General opinion issued in response to a concern for the continuation of public land sales and leases by the Hawaiian government after annexation but prior to the passage of the Hawaii Organic Act. In that opinion, U.S. Attorney General Griggs declared that disposal of a 50-acre parcel by public auction was exclusively within the power of Congress under the Newlands Resolution.

> He read the Joint Resolution's provision for the enactment of special land legislation as not extending life to Hawaii's previous land laws, but merely **impressing on the United States' title a "special trust"** which restricted the use to which the revenues could be put. (emphasis added).

3 U.H. Law Rev. at 119, n.95. In effect, the United States held the public lands ceded to it by the Republic in trust for the future state of Hawaii, as it had held territories on the continent for other states.[9] This reading is consistent with the political recognition that following the annexation, the United States had acquired much of its holdings in Hawai`i for no compensation by simply "setting aside" 287,000 acres of ceded lands desired for federal, especially military, uses between 1898 and 1900. These set asides formed the basis for congressional enactment of a requirement that the United States return land to the State of Hawai`i once no longer needed for federal use, in recognition of the state's "long-recognized residual interest" in the ceded lands thought to be held in trust by the United States.[10] S. Rep. No. 675, 88th Con., 1st

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[8] 3 U.H. Law Rev. at 122.

[9] 3 U.H. Law Rev. at 121-22, *citing* Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845) (which describes the United States' temporary holding of title in terms of a trust.

[10] This prevailing view was mirrored in the congressional history of the passage of Public Law 88-233, requiring the return of ceded lands held by the federal government to the State of Hawai`i once not needed by the United States, which:

> ... is replete with references to this Act as being grounded in the special status given the ceded domain by the federal government upon annexation. The Director of the Bureau of the Budget, for example, states in its communication to the President concerning Draft 1 of S. 2275 that:

Sess. (1963).

This trust is analogous to that inferred on behalf of Indian tribes who originally occupied certain lands "acquired" by the United States. The U.S. generally recognized the Indian's right of use and occupancy, even when the U.S. held title, and was obligated to manage those lands as a trustee. The terms of the governing agreement or treaty by which the cession of lands was made ultimately determined whether a trusteeship was created. Ash Sheep Co. v. United States, 252 U.S. 159, 164 (1920). Accordingly, in such cases, the cession of title was not absolute, but subject to a trust, where any dispositions of ceded land were to be used for the purposes specified in the agreement or treaty. Minnesota v. Hitchcock, 185 U.S. 373, 394 (1902). See, 3 U.H. Law Rev. at 122, n. 118.

The Continuing Trust. Once established, the United States could not resign its trust duties unless the relinquishment was consistent with the terms of the trust, or done with the consent of all the beneficiaries, if they have the capacity to give such consent. II Scott, Trusts, § 106 (4th Ed. 1987). Thus, when Congress enacted the HHCA in 1921 and set aside about 200,000 acres for the exclusive benefit of native Hawaiians, it could not have terminated this trust responsibility to the inhabitants of the territory without acting inconsistently with the original trust.

The United States also continued to hold legal title to those "available lands" of the HHCA "in trust". Congress delegated management power over the home lands to a Hawaiian Homes Commission, whose 5 members were to be appointed by the Governor and confirmed by the territorial senate. Act of July 9, 1921, Pub. L. No. 34, ch. 42, § 202. Of course, the Governor was appointed by the President. Organic Act § 66. It is no secret that this system was totally controlled by the federal government and

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> [a]bsent new legislation, the State of Hawaii will be denied those lands to which the territory was entitled during its 60 years of existence, and there will be a significant departure from the heretofore accepted concept of the special trust status of those lands.
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> We believe such action is fully justified in keeping with the manner in which the lands and properties were acquired and the history of the **special trust status** in which they were held.

Letter from Director, Bureau of the Budget to the Hon. Lyndon B. Johnson (October 18, 1963). 3 U.H. Law Rev. 129, n. 149. See, also, 22 Op. Att'y Gen. 574 (1899); 22 Op. Att'y Gen. 627 (1899).

not subject to popular election.

Furthermore, the United States did not seek the consent of any of the inhabitants to abandon its trust duty to inhabitants of the islands upon the passage of the HHCA. What it did do is create a separate trust solely for the benefit of the *native Hawaiian* inhabitants of the islands,[11] setting aside a subset of the ceded lands for this purpose. Clearly, native Hawaiians were a large proportion of the "inhabitants of the islands" at the time of the resolution and Organic Act and had special reasons for having the lands of their former sovereign held in trust by the United States.[12] This move was consistent with the trust established under the Newlands Resolution in 1898.

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[11] At the time of the passage of the HHCA, the House of Representatives specifically considered the constitutionality of the act, finding that there was no legal obstacle to implementing the homestead program exclusively for the benefit of native Hawaiians:

> In the opinion of your committee there is no constitutional difficulty whatever involved in setting aside and developing lands of the Territory for native Hawaiians only. The privileges and immunities clause of the Constitution, and the due process and equal protection clauses of the 14th amendment thereto, are prohibitions having reference to State action only, but even without this defense the legislation is based upon a reasonable and not an arbitrary classification and is thus **not** unconstitutional class legislation. Further, **there are numerous congressional precedents for such legislation in previous enactments granting Indians and soldiers and sailors special privileges in obtaining and using the public lands**. Your committee's opinion is further substantiated by the brief of the attorney general of Hawaii (see hearings, pp. 162-164) and **the written opinion of the solicitor of the Department of the Interior** (see hearings, pp. 130-131). (emphases added).

H.R. Rep. No. 839, 66th Cong., 2nd Session 11 (1920).

[12] As early as 1840, the Kingdom codified the notion that the King held all lands as a trustee for the people:

> Kamehameha I, was the founder of the kingdom, and to him belonged all of the land ... though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and he had management of the landed property.

Since the United States merely took what title the Republic of Hawai`i could grant, it could only claim what that presumed sovereign could hold, the fee title to public land that was perpetually held in trust for the benefit of the people. See, Van Dyke, Chang, Aipa, Higham, Marsden, Sur, Tagomori, and Yukumoto, *Land and Water Resource Management in Hawaii* 148, 154 (1979).

C. *The Constitutionality of the HHCA*

In Morton v. Moncari, 417 U.S. 535 (1974), the U.S. Supreme Court drew a distinction between unlawful racial discrimination and an employment preference designed to foster a political objective. The Bureau of Indian Affairs had imposed a policy favoring the hiring of Indians on its staff, in order to promote greater self-determination amongst Indian tribes. Finding that Indian tribes have a unique political relationship with the United States government pursuant to the Indian commerce clause, the court held that the preference was not racial discrimination but "reasonably and directly related to legitimate, nonracially based goal." Id.

Similarly, Congress had an express motive in enacting the HHCA which was not racially based, but rather to rehabilitate a people subject to factors that were rapidly leading to the decline of their population in great numbers. Earlier, in 1898 and in 1900, Congress had annexed Hawai`i to provide for a trust income to be used solely for the benefit of the inhabitants of Hawai`i. Congress' was concerned specifically with native Hawaiians in the population of Hawai`i's inhabitants. This concern was reasonably related to a legitimate and nonracially based goal, the protection and conservation of a dying race, for whom in part the U.S. had accepted the role of a trustee in accepting the lands ceded to it by the Republic of Hawai`i.

D. *The Co-trusteeship of the United States Following Statehood*

When Hawai`i became a state, the United States transferred the daily administrative tasks of running the homestead program to the state, while retaining various important oversight functions. Admission Act of March 18, 1959, Pub. L. No. 86-3. These oversight responsibilities included the power to approve all proposed land exchanges and legislative amendments to the HHCA that increase the encumbrances on the trust lands or reduce the benefits to beneficiaries, and the right to sue to remedy a breach of trust by the new state. Id. §§ 4, 5(f). In this process, the U.S. transferred the fee title to the home lands to the new State. Id. § 5(b). Congress retained the power to amend the HHCA. HHCA § 223.

Despite these substantive review powers, two federal district court cases

intimated in *dicta* that the U.S. no longer had a trustee role.[13] However, these decisions are questionable authority for this proposition, in view of the retained powers of the federal government in administering the act under a compact with the state. These powers indicate more than a "tangential supervisory role" over the trust. These provisions give the United States ultimate veto power over state decisions with which it may disagree, indicating that it holds a co-trusteeship role with the state. II Scott, *Trusts*, § 185; Bogert, *Trusts and Trustees*, § 122 (1984). Finally, the statements of a former deputy solicitor for the Department of the Interior acknowledged its role as a "essentially that of a trustee", acknowledging the continuing nature of the relationship since the passage of the HHCA. Letter to Phillip Montez from Deputy Solicitor for the Department of the Interior dated Aug. 27, 1979.

The dicta of the Ninth Circuit notwithstanding, the better view is that the United States has a continuing trust role to fulfill in the administration of the HHCA. This view was acknowledged by Congress in a committee report on proposed amendments to the HHCA, in which the "continuing responsibility to assist native Hawaiians and achieve the legislative goals of the HHCA" was affirmed. H. Rep. 99-473, 99th Cong., 2d Sess. (1986) at 2.

II. THE ADMINISTRATION OF THE HHCA

Given the relatively short time afforded to review the federal and state governments' reported actions taken in response to the Federal-State Task Force on the Hawaiian Homes Commission Act, I must reserve the opportunity to comment on additional concerns that may not have been covered in the following testimony. In view of the volume and complexity of the issues, I have only presented a partial list of comments I may have on the scope of topics covered by the task force report.

A. *The Role of the Federal Government*

By all accounts, the role of the federal government in promoting the purposes of

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[13] Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 588 F.2d 1216, 1224, n. 7 (9th Cir. 1978); Price v. State of Hawaii, 746 F.2d 623, 631 (9th Cir. 1985).

the HHCA has been dismally limited. If anything, the United States has been involved in some of the more serious breaches of trust that have befallen the program during the period 1921-59. I raise the following prominent concerns about the federal government's role in administering, or failing to properly administer, the HHCA.

Land use issues fall into several categories: (1) uses of land without any proper conveyance to the federal government; (2) uses of land that have generated only nominal consideration for the trust; (3) federal activities that raise concerns about potential impacts on nearby trust lands.

Uses with No Valid Conveyance. In two known instances, federal agencies are using trust land for no compensation under illegal executive orders[14]: (1) the U.S. Navy's use of Lualualei (1,356 acres) on O`ahu for a radio communications facility and weapons storage; and (2) the Federal Aviation Agency's use of lands at Keaukaha (50 acres) for avigation purposes.

The use of the lands at Lualualei was the subject of a lawsuit that was dismissed because the U.S. District Court found that the state had filed its quiet title lawsuit beyond the 12-year statute of limitations on actions against the federal government to quiet title to lands in dispute.[15] As amicus curiae, our office joined the State in an unsuccessful attempt to convince that Ninth Circuit that the trial court erred in applying the wrong standard in determining the whether the state was on reasonable notice of the federal claim to the title of Lualualei.[16]

I urge this committee to consider either amending the Quiet Title Act to allow the federal district court to hear the claim of the State to the lands at Lualualei, or to explore a legislative solution to the lack of available land on O`ahu to meet current homestead housing demand. Given adequate resources, it is possible that the lands at Lualualei by itself, or equivalent acreage, could support enough residential homesteads to meet if not exceed the current demand for houselots on O`ahu. The

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[14] Aki v. Beamer, No. 76-1044 (D. Haw. Feb. 21, 1978).

[15] State of Hawai`i v. United States, 676 F.Supp. 1024, 1039 (D. Haw. 1988).

[16] State of Hawai`i v. United States, 866 F.2d 313 (9th Cir. 1989).

U.S. Navy has claimed that national security interests prevent it from returning these lands, once set aside for the use of the federal military for no compensation, to the state. I invite you to inquire with the Navy to determine:

1. whether the end of the cold war has eliminated the strategic value of Lualualei and thereby warrant a return of this parcel to the State, pursuant to Public Law 88-233;
2. whether the 1,457 acres of ceded lands at Bellows recreation area in Windward O`ahu can be used to partially compensate for the refusal of the Navy to return Lualualei.[17]

Similarly, this committee should explore like grounds for seeking the return of the 50 acres at Keaukaha now being used by the Federal Aviation Agency, also under an illegal executive order.

The United States should respond to the recommendation of the Federal-State Task Force and seek legislation for a general private right of action to pursue claims of breaches of trust involving the HHCA. In addition, it should participate in and fund the reconvening the task force on a periodic basis so regular monitoring of actions taken can occur, particularly in monitoring actions to correct improper uses of trust lands.

Nominal Compensation. In two instances in 1964, the federal military executed 65-year leases with the State of Hawai`i for $1. The Army holds one lease for 295 acres at Pohakuloa on the island of Hawai`i for a military training facility. In addition, the Navy has a similar lease for 25 acres at Kekaha, Kaua`i for a storage facility.

I urge this committee to demand the immediate return of these lands in the same environmental state as when the leases were first executed, or: (1) to compel the military to enter into immediate negotiations to develop a reformed lease to reflect a fair market rental in each instance; or (2) to explore an exchange of property to compensate the trust for the lost income and use of these two parcels.

Impacts of Federal Activities on Nearby Trust Lands. In at least three instances, the federal government is involved in activities that pose a risk to the potential use of nearby trust lands for future homesteading:

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[17] See, 3 U.H. Law Rev. at 137-38.

1. **Lualualei**. The Navy claims that its use of these lands has created a hazardous blast zone which impacts any planned use of several lots awarded to homesteaders in this area. In addition, the Army's artillery firing at Schofield Barracks on one side of the Waianae mountains on O`ahu pose a potential threat to the use of 7 unimproved lots in this area on the other side of the mountain range.
2. **Kamaoa-Pueo**. The Corps of Engineers is participating in a joint project with the State of Hawai`i to construct a breakwater and small boat ramp at Kaulana at South Point, island of Hawai`i. Some homesteaders fear that the construction will merely encourage non-Hawaiian fishermen to fish the waters off the point, long a productive area for certain types of fish upon which traditional Hawaiian fishermen have depended for years. The DHHL apparently supports the project because the State will contribute $50,000 to infrastructural improvements in the Kamaoa-Pueo homesteads.
3. **Kekaha**. The military is planning to construct a Pacific Missile Range Facility adjacent to the trust lands at Kekaha, Kaua`i, from where missiles will be launched for a variety of military test purposes. Native Hawaiians are concerned with the impacts on the 14,000 acres of trust lands less than a mile away. Although the state and many community leaders, including have opposed the project, the military is apparently proceeding with its plans.

The United States needs to coordinate its activities to comprehensively document the potential impacts of its projects and to avoid them if they pose threats to the current and future uses of homestead lands.

B. *The Role of the State of Hawai`i*

In contrast to the federal government, the state has taken several steps to begin addressing the multitude of problems crippling the effective administration of the HHCA. Relatively speaking, the Waihe`e administration, as a whole, has done more for promoting the purposes of the HHCA than any prior state administration.

Nevertheless, in absolute terms, I have grave concerns about the ability of the current administration to seriously tackle the fundamental challenges confronting the program.

I have long personally contended that nothing short of a major restructuring of the administration of the HHCA is necessary to effectively place native Hawaiians on the residential, pastoral, and agricultural not to mention aquacultural) homesteads to which they are entitled. At a minimum, if it is to be serious about reforming the HHCA, the state government must consider a significant boost in priority for its administration of the HHCA. This must be a bold and courageous act to shift massive support to the Hawaiian Homes program. See, attached Letter from Rep. David Hagino to Governor John Waihe`e (September 24, 1991). Currently, the state has properly reported that it has increased funding for the administrative and capital improvements budgets of the DHHL to unprecedented levels. While this is true, consider the following countervailing factors:

(1) Fiscal Support for Administration. While general fund appropriations went from zero in 1986 to over $4.3 million per year in the current biennium, the DHHL still ranks last in state funding of its operating budget, which remains at about 0.1% of the entire $7.8 billion state budget for fiscal biennium 1991-93. See, attached chart. This amount only provides 46% of the operating budget needs, despite a 1978 constitutional requirement that the Legislature fund the programs and administrative budget of the DHHL. In contrast, the DHHL must rely on its **special** funds, fed by the leasing of its lands to primarily non-Hawaiians, to pay for a majority of its operating costs.

I note that the state has never conducted the management audit recommended by the task force to determine how it could improve its delivery of services to beneficiaries. Such an audit would be helpful, for example, to determine whether the DHHL is unduly extending its reliance on general lease revenues to support its revenue bonds. This approach appears to conflict with the task force recommendation to avoid such a strategy and conform more closely to the mandate of Art. XII, Sec. 1 of the Hawai`i Constitution, which requires the Legislature to fund the programs and operating budget of the DHHL, so that trust lands can be freed up for homesteading rather than continuing general leasing.

(2) Financing of Capital Improvements. While the state has authorized $114 million in capital improvement bonds since 1985, $43 million of that amount is in **revenue** bonds, as opposed to general obligation bonds. Revenue bonds must be repaid from the revenue from the general leasing of trust lands. Because of the limitations on the rental value of the poor lands placed in the Hawaiian home lands inventory, the DHHL can only afford to float a maximum of $25 million in revenue bonds without committing more lands to general leasing. The state has only floated $18 million of this bond authority. The remainder of the revenue bonds $18 - 25 million, is at best phantom financing. The additional $25 million pledged for this fiscal year still represents only a little more than 2-3% of the total infrastructural costs of settling the 14,000 homesteaders the state has pledged to help settle by the year 2000. In order to meet this goal, the DHHL is training staff to develop housing in master planned communities, contrary to Task Force recommendation 29.

In this light, I am puzzled by the state's refusal or hesitancy to follow the recommendations of the task force (# 23-26) to convene an Advisory Committee on Funding Sources. Given the great need for creativity and assistance, I would expect that such a forum could generate alternative strategies for using trust lands effectively to settle more homesteaders.

(3) Lack of Resources for Farm and Ranch Development. Because of the lack of resources to do its massive job, the DHHL is currently giving farm and pastoral homestead applicants low priority in the provision of resources, services and technical assistance as intended under HHCA § 219 - 221. As it struggles to duplicate the housing development functions of the Hawaii Finance and Development Corporation, many of the potential programs envisioned by Congress to assist with the settlement of native Hawaiians have been shortchanged. Clearly, the support services for the pastoral and agricultural homesteading program have been given a lower priority to settling homesteaders on residential lots, where demand is greatest. However, the many shortcomings in services being made available to other homestead applicants is apparent in the delays in making pastoral and farm lot awards, construction of water supply facilities and transmission lines for irrigation, technical assistance to budding farmers and ranchers, etc. Unfortunately, contrary to task force recommendation 28(a),

the DHHL has not even surveyed the beneficiaries to determine their choices for lot award options, especially for lots large enough to support self-sufficient farms and ranches. Instead, the DHHL refuses to make such opportunities available to those seeking such options.

(4) Planning for Water Reservations to Support Homesteads. The State Water Code envisioned the protection of DHHL water rights as well as the quantification of reserved water in State and County plans to promote coherent water management. There have been serious difficulties in implementing this scheme, in part because of the lack of adequate quantification by the HHC of the current and foreseeable needs of homesteaders. This lack of information has hampered planning for water management of water-short areas like Moloka`i and Waimea, where water source development threatens to divert existing water supplies away from homestead areas in dire need of irrigation water planning.

(5) The Lack of Beneficiary Participation. Since President Nixon initiated the United States policy to promote the self-determination of native Americans, the federal government has regularly reaffirmed that approach to dealing with the indigenous people of this nation. Unfortunately, there is no similar policy on the state level to include meaningful beneficiary participation in the planning for the resolution of past problems of the trust and future actions for the program. Up to now, there has been no obvious policy to actively engage beneficiaries in planning for their futures, outside of periodic briefings to "inform" them of what plans are being made for them. For example, very few beneficiaries have direct knowledge of the responses of either the federal or state governments to the recommendations of the Federal-State task force presented to this committee. Similarly, in planning for the past uses of land by public agencies under illegal executive orders and proclamations, the Governor's task force was made up strictly of state agency personnel, without any beneficiary involvement. Not even the Office of Hawaiian Affairs was invited to participate in the report recently released for consideration by the legislature. That report recommends payment of $11-17 million in compensation for back rent not paid to DHHL since Statehood in 1959 for uncompensated uses of trust lands.

These are a handful of some of the more important challenges and problems

confronting beneficiaries, some of whom have been waiting decades for homesteads. Again due to the shortage of time, I have prepared only a partial list, but would be happy to elaborate on other important concerns as appropriate in the future.

CONCLUSION

I would be pleased to accept any questions you may have and would be happy to provide you with additional information as you conduct your important deliberations.

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TESTIMONY ON OVERSIGHT HEARINGS ON THE HAWAIIAN HOMES COMMISSION ACT OF 1920 BEFORE THE UNITED STATES SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

THE HONORABLE J. BENNETT JOHNSTON
CHAIRMAN

TESTIMONY OF WARREN PRICE, III
ATTORNEY GENERAL
STATE OF HAWAII

WASHINGTON, D.C.

FEBRUARY 6, 1992

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today. Today I would like to address the role of the federal government in the Hawaiian Homes Commission Act of 1920 (HHCA), 42 Stat. 108, between its adoption by Congress and the President in 1921 and the admission of Hawaii as a state into the Union in 1959.

For the first time in seventy years since the passage of the Act, the United States Department of Interior has formally stated that it does not view the Hawaiian Homes Commission Act as having created a trust obligation on the part of the United States in 1921 and that the State of Hawaii's trust duties to carry out the very same terms only arose as a result of Hawaii's Admission Act (1959), 73 Stat. 4.

To understand the nature of the obligations which the United States impressed upon itself with the adoption of the Hawaiian Homes Commission Act of 1920, 42 Stat. 108, Act of July 9, 1921 (HHCA), it is necessary to review briefly the context in which the United States acquired the lands which came to be designated as "Hawaiian home lands" and how, with the passage of the Act, the United States accepted specific obligations and duties to manage a corpus of approximately 203,000 acres of public lands for the benefit of qualified native Hawaiian beneficiaries. In adopting the Hawaiian Homes Commission Act the federal government both furthered and enhanced a "special trust" relationship it had already undertaken when the United States acquired by cession and without consideration or expense in

1898 the public government and crown lands of Hawaii in trust from the Republic of Hawaii.

I. Hawaii Ceded Its Public Lands in Trust to the United States Upon Annexation (1898).

In 1849, 1875, and 1884, the Government of Hawaii and the United States entered into and ratified a series of formal Treaties of Friendship, Commerce and Navigation.

In 1893, western businessmen in Hawaii overthrew the legitimate government and the reigning monarch of Hawaii, Queen Liliuokalani, with the unlawful support and threat of force posed when U.S. Minister John L. Stevens landed and placed United States Marines in front of government buildings, Five years later in 1898, Hawaii was annexed to the United States. Hawaii's 1.8 million acres of public (formerly Government and Crown) lands were "ceded" by the Republic of Hawaii to the United States without compensation of any kind. Congress accepted Hawaii's public lands in trust by the Joint Resolution of Annexation ("Newlands Resolution"), Public Resolution No. 51, 55th Congress, 2nd Session, 30 Stat. 750 (July 7, 1898). Title to these "ceded" lands were transferred by the Republic to the United States subject to a trust duty imposed on the lands by the government of Hawaii and accepted by Congress in its Joint Resolution of Annexation. Congress recognized that Hawaii was unlike any other land acquired by the United States. Hawaii had an intact culture, social order, and land tenure

system dating back more than one thousand years to the first migrations, circa 800 A.D. Accordingly, in a provision unique in American law, the public land laws of the United States were not to apply and existing Hawaiian land laws were to remain in force. Thus, while title vested in the United States, the beneficial use was separated and remained with the inhabitants of Hawaii, except where the United States set aside such lands for its own needs. The Joint Resolution provided that,

> [t]he existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition; PROVIDED, that all revenue from or proceeds from the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or as may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Id.

II. Congress Adopted the Hawaii Organic Act to Govern the Territory (1900).

Two years after Annexation, Congress adopted the Hawaii Organic Act, 31 Stat. 141 (1900), creating the Territory of Hawaii as the agent of the United States to manage and govern the Hawaiian Islands. During this period (1900-1959) the President appointed all of the Territorial Governors, by and with the advice and consent of the United States Senate. The President also appointed the Justices of the Hawaii Supreme Court by and with the advice and consent of the United States Senate (Organic Act § 82). The Territorial Governor directly oversaw and controlled the Executive Branch (Organic Act, § 66) and appointed the Commissioner and Board of Public Lands who in turn managed all the "public lands" (Organic Act,

§ 73). For many years the Governor as representative of the President was also the Commander in Chief of the Army and the Navy in Hawaii. The Organic Act reaffirmed the trust provision in the Newlands Resolution providing that funds from all public lands would be "applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the Joint Resolution of Annexation approved July 7, 1898." (§§ 73(e) and 91). Thus, from 1900 to 1959, Hawaii was under the comprehensive and pervasive control of the federal government.

III. The United States Recognized Its "Special Trust" over Hawaii's Public Lands.

In 1961, the Attorney General of the United States issued an opinion reaffirming that the ceded lands of Hawaii were in fact a "special trust," the "naked title being held by the Federal Government for the benefit of the people of Hawaii." 22 Op. Att. Gen. 574 (June 12, 1961) cited in S. Rep. 675, 88th Cong. 1st Sess. reprinted in 1964 U.S. Code Cong. & Ad. News 1362, 1364, and 1366. This reflected views long held by Hawaii's Delegates to Congress as well as the people of Hawaii. 93 Cong. Rec. 7917 (remarks of Mr. Farrington, House debate on H.R. 49, June 30, 1947). Moreover, in 1963, Congress passed and the President signed Pub L 88-233 which lifted the five year deadline of August 21, 1964 for the United States to determine its continuing need for and conveyance of Hawaii's "ceded lands" back to the State under § 5 (e) of Hawaii's Admission Act. 77 Stat. 472 (1963). Passage of the Act prevented a "reverse land grant" to the United States whereby Hawaii would "lose its long recognized

residual interest in such lands and the 60 year practice of returning such lands to Hawaii when they were no longer needed." supra at 1363. The executive communication from the Director of the Bureau of the Budget, Kermit Gordon, to the Honorable Lyndon B. Johnson, then President of the Senate transmitting the legislation also recognized the trust status of these lands. "History clearly indicates that those [ceded] lands were regarded as having been held in a special trust status by the United States for the benefit of the Hawaiian people." supra at 1366.

IV. Congress Passed the Hawaiian Homes Commission Act of 1920 Designating 203,000 Acres of Hawaii's Public Lands as "Available Lands" for Native Hawaiian Beneficiaries.

On July 9, 1921 President Harding signed into law the Hawaiian Homes Commission Act (HHCA), 42 Stat. 108 (1920) designating approximately 203,000 acres of then existing "public lands" as "available lands" for purposes of the Act. Under the Act any public lands then under sugar cultivation, in forest reserves, or held under lease or certificate of occupation were excluded. HHCA § 203. Consequently, the lands were "second class land of the Territory." "[A] large portion of it that is rather poor pastoral land. . . ." (Territory Attorney General Irwin, U. S. House, Hearings, 1921, p. 16.) and generally of inferior quality. The Hawaiian Homes Commission was established with the Territorial Governor originally designated as chairman (until 1935) and four other members appointed by the Governor. Later the number was expanded to eight. All were appointed by the Territorial Governor. Title to the lands remained in the United States until 1959 when it was transferred

to the new State of Hawaii. "[T]he Congress of the United States reserve[d] the right to alter, amend, or repeal the provisions of this title." HHCA § 223. Between 1921 and 1959 Congress exercised its authority by amending the HHCA twenty-two (22) times. Moreover, during the territorial period, the land was never under the control of the Territory. The Act expressly provided that,

> [t]he powers and duties of the governor, the commissioner of public lands, and the board of public lands, in respect to the lands of the Territory, shall not extend to lands having the status of Hawaiian home lands, except as specifically provided in this title.

HHCA § 206

The acknowledged primary purpose of the act was the "rehabilitation of native Hawaiians" who as a people were "dying." In 1778, Captain Cook had estimated the Hawaiian population at 400,000. Territorial Senator John H. Wise of the Legislative Commission of the Territory and one of the authors of the Act, testified that between 1832 and 1919 the population of full blooded Hawaiians had declined from approximately 113,319 to 22,600. H.R. Rep No. 839, 66th Cong., 2d Sess. 4 (1920).

Then Secretary of Interior Franklin K. Lane testifying for the Administration before the House Committee on the Territories characterized the purpose of the Act in the following way.

> One thing that impressed me there was the fact that the natives of the islands who are our wards, I should say, and for whom in a sense we are trustees, are falling off rapidly in numbers and many of them are in poverty. They never owned the land of the islands. The land was owned by the King originally and they had in 1848 what they called a mahele, in which there was a division. As a result of that and legislation that passed subsequently, we [the U.S.] have approximately 1,600,000 acres of public lands in the islands.

H.R. Rep. No 839, 66th Cong. 2d Sess. 4 (1920)

The term "ward" connotes a notion of trusteeship. Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 336 640 P. 2d 1160, 1167 (1982) (citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)); Morton v. Mancari, 417 U.S. 535 (1974).

While the language employed by the Congress in 1920 seldom used the term trust with regard to Indians, but rather guardian and ward as was the custom at the time, there can be little doubt that the relationship Congress envisioned with Hawaiians was parallel to that of Indians with which Congress was most familiar. Hearings before Committee on Territories, pp. 130-131 (February 3, 4, 5, 7 & 10 1920) (66th Cong. 2nd Session) (remarks of Solicitor of the Department of Interior)

During the deliberations, Congress carefully analyzed the relationship between Native Hawaiians and Congress. Secretary of the Interior Franklin Lane:

> Secretary LANE. . . . I think we have got a situation there that can be distinguished from any other situation. We have got the right to set aside these lands for this particular body of people, because I think the history of the islands will justify that before any tribunal in the world.

Mr. DOWELL. And you base your opinion as a matter of right and not as a matter of citizenship?

Secretary LANE. I would base it upon the broad ground that the United States wishes to care for a certain body of its people whose islands have come to us and for whom we feel a moral obligation to care.

Mr. DOWELL. In other words, you would establish the same principle that is established in dealing with the Indians?

Secretary LANE. It would be an extension of the same idea.

The CHAIRMAN. . . . [T]he United States Government has just as much right -- to provide lands for the Hawaiians as it has to provide lands for the Indians.

Hearings before the Committee on the Territories, pp. 129 & 130 (66th Cong., 2d Sess.).

On the last day of the committee hearings, two members queried the chairman on the United States' relationship to Native Hawaiians:

The CHAIRMAN. " . . . [T]he Hawaiians were deprived of their lands without any say of their part, either under the kingdom, under the republic, or under the United States Government.

Mr. DOWELL. Her equity. That is true.

The CHAIRMAN. And the Indians were deprived of their lands regardless of their wishes or welfare, except to say, "You move away from here and we will give you this. You go away from Georgia and Alabama and Mississippi over into Oklahoma and we will give you those lands. We want these ourselves." Of course there is a treaty proposition, although they were forced to sign. When they would not sign, we went to war with them and made them sign.

Hearings before the Committee on the Territories, p. 170 (66th Cong., 2d. Sess.)

Implementing the federal obligation for Native Hawaiians that Secretary Lane had expressed, the Hawaiian Homes Commission Act provided homesteads through 99 year leases to Native Hawaiians. These leases were not "allotments" under the Indian General Allotment Act of 1887, 25 U.S.C. § 331 et. seg. ("Dawes Act") where the U.S. retained title for a 25 year trust period, but leases of fixed terms and conditions that could never be alienated because title remained forever in the U.S.

In Pence v. Kleppe, 529 F.2d 135 (9th cir. 1976) the Ninth Circuit Court of Appeals recognized that "the word 'Indian' is commonly used in this country to mean 'the aborigines of America.'" In Naliielua v. State of Hawaii, Civil No. 90-00063 (D. Haw. May 29, 1990) aff'd on other grounds, Civil No 90-15842, (9th Cir. August 5, 1991), the federal district court for Hawaii citing Pence recently examined and expressly upheld the actions of the Hawaiian Homes Commission Act on the basis of that "Congress' unique obligation towards Indians" also extended to native Hawaiians or the indigenous people of Hawaii and provided ample authority for the Congress to legislate for the native people of the state.

In 1920, Secretary of the Interior Lane drew a parallel between the experiences of "Indians" on the continental United States and "Hawaiians." He pointed out how in both cases contact with the western diseases (in the case of Hawaiians "brought to them by sailors a long time ago") of smallpox, measles, and influenza

had "ravaged" their people. H.R. Rep. No. 839, 66th Cong., 2d Sess. 5 (1920). The Committee then found that:

> (l) the Hawaiian must be placed upon the land in order to insure his rehabilitation; (2) alienation of such land must, not only in the immediate future but also for many years to come, be made impossible; (3) accessible water in adequate amounts must be provided for all tracts; and (4) the Hawaiian must be financially aided until his farming operations are well underway.

H.R. Rep No. 839, 66th Cong., 2d Sess. 7 (1920)

These are the statements of a guardian about its ward. Moreover, the United States required the new State of Hawaii "as a compact" to adopt the Hawaiian Homes Commission Act "as a provision of the Constitution of said State" (Admission Act, § 4). As in the situation with "Indians," Congress was concerned that the corpus of lands not be lost through mismanagement and that the State assume, as sucessor in interest, "the distinctive obligation of trust incumbent upon the government in its dealing with these dependent and sometimes exploited people." Seminole Nation v. U.S. 316 U.S., 286, 296 (1912). While the State adopted the Hawaiian Homes Commission Act and made it state law, the United States reserves and maintains authority under the terms of the Act. To insure achievement of the purposes of the Act, Congress reserved to itself the right to "alter, amend or repeal the provisions of this title." HHCA § 223. The Act is "subject to amendment or repeal only with the consent of the United States" and any

amendment proposed by Hawaii's legislature which could "change" "the qualifications of lessees" or "increase" "encumbrances . . . on Hawaiian home lands" requires the "consent of the United States." Hawaii Admission Act, § 4.

Congress required (and still requires) the Secretary of Interior to approve all land exchanges between the Hawaiian Homes Commission and any other party. HHCA § 204 (3). Twice since 1986 Congress has reviewed proposed amendments and in three particular cases refused to consent.

While the Hawaiian Homes Commission was solely a creation of and under the complete control of the federal government before Statehood, some uncertainty over the Act's continuing status as federal law lead the Ninth Circuit Court of Appeals in 1979 to decline jurisdiction in a post-Statehood dispute over an unconsummated land exchange. In the early 1970s the County of Hawaii built a flood control project on Hawaiian home lands but failed to transfer lands of equivalent value back to the Hawaiian Homes Commission. In a suit brought by beneficiaries to complete the land exchange the Ninth Circuit found no implied right of action under § 5(f) of Hawaii's Admission Act for citizen suits and concluded that the administration of the Hawaiian Homes Commission Act in this instance did not present a "federal question" under 28 U.S.C. 1331 (a). Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 588 F.2d 1216, 1226-1227 (9th Cir. 1979), cert. denied, 444 U.S. 826, 100 5. Ct. 49, 62 L.Ed. 33 (1979)

(Keaukaha I) rev'd on other grounds, 739 F.2d 1467 (9th Cir. 1984) (Keaukaha II). Because this action was "[i]n essence. . . against state officers to compel them to administer state lands in conformance with the state constitution" the court viewed the problem as primarily a matter of state rather than federal law and held that, after Statehood, the administration of the Act was transferred to the State. The court concluded that the question presented to it did not "arise under" federal law for purposes of subject matter jurisdiction under 28 U.S.C. 1331 (a). Although recognizing that "the historical source of these rights was a federal statute," the court explained that its decision had to be governed by the clear "state" nature of the action on the facts presented here. Keaukaha (I), 588 F.2d at 1226-1227.

Subsequently, the court reversed its decision as to the existence of a federal cause of action following the decision of the United States Supreme Court in Maine v. Thiboudot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed. 2d 555 (1980) which held that 42 U.S.C. 1983 provided a cause of action for alleged deprivation of rights created purely by federal statute. In the second opinion the court noted that,

> [w]hile the management and disposition of the home lands was given over to the state of Hawaii with the incorporation of the Commission Act into the state constitution, the trust obligation is rooted in federal law, and power to enforce that obligation is contained in federal law.

Keaukaha (II), 739 F.2d at 1472.

While the specific reference was probably to Hawaii's Admission Act, the federal "root" of the HHCA which was passed by Congress and signed by the

President has never been in doubt. Statehood simply realigned responsibilities between the federal government and the new state of Hawaii after 1959. The State simply became the successor in interest to the federal government's title and many, but not all, of its responsibilities. The substantive duties under the Hawaiian Homes Commission Act arose in 1921 by an Act of Congress. They were the same on the day before Statehood as on the day after Statehood. They did not spring into existence for the first time in 1959. There is no legislative history in the debates over Hawaii's Admission Act indicating that Congress first contemplated the creation of a trust on Hawaiian Home lands in 1959. It has never been suggested in this or any other judicial decision that the Hawaiian home lands were not federal in nature or control from 1920 to 1959 when fee title was vested in the U.S. and the same Hawaiian Homes Commission Act was managed under complete federal authority. In 1959, the federal government transferred some of its public trust obligation over Hawaii's public lands, pursuant to its original obligation under the Newlands Resolution (1898) to the State in § 5(f) of the Admission Act. The added special relationship regarding the Hawaiian home lands was addressed separately in § 4 of the Admission Act. In passing to Hawaii a trust relationship over the Hawaiian home lands, the U.S. could not transfer more than it had; in fact by retaining many powers, it transferred less.

V. The Origin of the United States' Trust Duty in the 1920 Hawaiian Homes Commission Act.

The federal government first imposed the duty upon itself in 1920 by adopting the HHCA and then transferring a part, but not all, of that duty to the state in 1959. That trust obligation under the Act to native Hawaiian beneficiaries did not arise simply at statehood. It originated first in the 1898 Joint Resolution of Annexation and then in Congress's passage of the HHCA in 1920 and the designating of particular public lands for the special use by a distinct class of beneficiaries under specific terms. It was more than a vague act of charity. Congress's action was grounded in the recognition that the United States had acquired a previously independent nation and that Hawaii's indigenous people were now dependent upon the United States.

It is not necessary to conclude, although it may be possible, or indeed true, that "Hawaiians" as the aboriginal and native people of the Hawaiian islands are "Indians" for purposes of the United States Constitution. But even if Hawaiians or native Hawaiians are not deemed "Indians" for constitutional purposes or contemplated as "Indians" under federal statutes passed to carry out treaty obligations, the guardian-ward relationship recognized and adopted by the terms and conditions in the Hawaiian Homes Commission Act imposed a trust responsibility on the federal government.

The United States Supreme Court long ago recognized that even if Indian tribes may be "domestic dependent nations. . . in a state of pupilage" that "their relation to the United States resembles that of a ward to his guardian." Cherokee Nation v. Georgia. 30 U.S. (5 Pet.) 1, 17 (1831); United States v. Creek Nation, 295 U.S. 103, 110 (1935); Seminole Nation v. United States, 316 U.S. 286 (1942); Menominee Tribe v. United States, 59 F. 2d 135 (Ct. of Claims. 1944); Mondiesten Bank of Pomo Indians v. United States, 363 F. 2d 1238 (N.D. Col. 1973). The case of native Hawaiians as wards, too, is compelling.

In Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161 (1982), the Hawaii Supreme Court expressly found that the trust duty originated in the 1920 Hawaiian Homes Commission Act itself.

> Thus from our review of the evolution of the HHCA and its impact on native Hawaiians, we conclude (l) that the federal government set aside certain public lands to be considered Hawaiian home lands to be utilized in the rehabilitation of native Hawaiians, thereby undertaking a trust obligation benefiting the aboriginal people; and (2) that the State of Hawaii assumed this fiduciary obligation upon being admitted into the Union as a state.

64 Haw. 338, 338 (1982) (emphasis added).

The United States's assumption of title, management, and complete control of Hawaii's public lands in 1898 subject to an express trust in the Joint Resolution of Annexation, the direct assumption of all executive and judical governing authority of Hawaii in 1900 with the adoption of the Organic Act, the Congressional recognition in passing the Hawaiian Homes Commission Act of a duty to

rehabilitate a dying people, and the detailed terms of the Hawaiian Homes Commission Act itself give rise to the most fundamental kind of fiduciary obligation. United States v. Mitchell, 463 U.S. 206 (1983). In Mitchell, the United States Supreme Court held that,

> a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands and funds).[30] [Footnote 30. See Restatement (Second) of Trusts §2, Comment h, p. 10 (1959).] [W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided therwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection. Navajo Tribe of Indians v. United States, 224 Ct. Cl. 171, 624 F. 2d 981, 987 (1980).

U.S. v. Mitchell, 463 U.S. 206, 225 (1983)

On August 27, 1979, the Office of the Solicitor for the Department of the Interior issued an opinion to the Western Regional Office of the U.S. Commission on Civil Rights finding that the U.S. did indeed have a trust duty to Hawaiian Homes during the Territorial Period.

> . . . it is the Department's position that the role of the United States under section 5(f) is essentially that of a trustee. Prior to statehood, the United States itself held title to the home lands in trust for native Hawaiians. The terms of that trust were defined by the provisions of the Hawaiian Homes Commission Act, 1920. . . . Taken together, the responsibilities of the federal government are more than merely supervisory and the United Stataes can be said to have retained its role as trustee under the act while making the state its instrument for carrying out the trust.

Id.

VI. The Creation of a Trust.

A "trust" is

> a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it [or in the case of a charitable trust, for a charitable purpose].

Restatement of Trusts (ALI), Second, §§ 2 and 348

The basic elements of a trust are simple.

1. Trust Property. For a trust to exist, there must be a trust property. The HHCA clearly designates specific "available lands" from the public lands that are to be Hawaiian home lands. HHCA § 203. While the exact boundaries required further determination, it is undisputed that a corpus of land, to which the United States held title and control, was set aside by Congress for a specific use in 1921.

2. Settlor or Grantor. A person or entity with title to the property must actually transfer or place the property in the trust. The Congress pursuant to both the Indian commerce clause (Act I, § 8, Cl. 3) and the "property" clause (Art. 4 § 3) and its power to govern territories kept title in the United States and removed the defined "available lands" from the control of the Territorial Commissioner of Public Lands. By an act of Congress the "available lands" were placed under the Hawaiian Homes Commission. HHCA § 203.

3. Trustee. The person or entity holding title to the property is the trustee. In this case the United States retained title to the property from 1920 to 1959 and transferred title of the designated lands to the State in 1959. The State became the successor in interest to the U.S. The U.S. retained some trust duties after 1959. HHCA; Admission Act §§ 4 & 5.

4. Beneficiaries. The HHCA specifically establishes the beneficiaries as any "native Hawaiian" who is defined to be "any descendent of not less than one-half part of the blood of the races inhabitating the Hawaiian Islands previous to 1778." HHCA § 201.

5. Intention to Create Trust. The settlor must intend to create a trust relationship and enforceable duties, but it is immaterial whether or not the word trust is used. Restatement of Trusts, 2nd, § 23: U.S. v. Mitchell, 463 U.S. 206, 225 (1983). The manifestation to create a trust may be oral, written or by conduct. No particular form of words is necessary. Restatement of Trusts, 2nd, § 24(2). To determine intent one must look to the definiteness, or indefiniteness of the property, the beneficiary class, the relation of the parties, the motive which might reasonably be supposed to have influenced the settlor in making the desposition. Id. If necessary, acts prior to, contemporaneous with, and even after the manifestation of intent claiming to create the trust may be relevant in determining the settlor's intent. Restatement of Trusts, 2nd, § 24.

The HHCA clearly defines:

(1) the lands included;
(2) the criteria to be a beneficiary;
(3) the relationship among the affected parties;
(4) the interests of the beneficiaries;
(5) the motives of the settlor in making the disposition; and
(6) the unambiguous terms of administration.

There is no basis for suggesting that this act would fail as a trust because of indefiniteness, uncertainty or lack of a present intent. As indicated earlier, the lands were already subject to the express "special" trust in the Joint Resolution of Annexation. As discussed earlier, the legislative history itself relies upon and makes express the direct analogy to the United States as a guardian to a people whose situation paralleled that of the "Indians." This parens patriae role was well accepted by Congress which was at that time overseeing the administration of "Indian" tribes. As the Court pointed out in U.S. v. Mitchell (II), 463 U.S. 206, 227 (1983),

> [i]ndeed, it is the very recognition of the inability of Indians to oversee their interests that led to federal management in the first place.

Moreover, this was the period when Congressional policy toward "Indians" was characterized by efforts to both assimilate them and to grant allotments so that they might be individually productive on their reservation lands. Dawes Act of 1887, 24 Stat. 388.

It is difficult to imagine a clearer indication of a present intent to establish a guardian relationship than an act of Congress signed by the President to rehabilitate the radically declining population of the indigenous and native Hawaiian people on lands which the U.S. acquired by treaty and, but for the unlawful intervention by the United States' own military forces, who would still have an ongoing government.

Likewise, with regard to enforceable duties there is little doubt that courts can and have examined and found in the terms of the Act itself specific enforceable duties even if in particular cases there may be jurisdictional obstacles. Ahuna v. DHHL, 64 Haw. 327, 640 P.2d 1161 (1982) (lease provision inconsistent with HHCA requirements held invalid); Aki v. Beamer, civ. No. 76-0144 (D. Haw. 1978) (executive order setting aside HH land at Anahola, Kauai held invalid); Ahia v. DOT, 69 Haw. 538, 751 P.2d 81 (Haw. 1988) (commercial lease at South Point boat harbor upheld); DHHL v. Aloha Airlines, civ. No. 6122 (Third Circuit Court, September 24, 1980) (Settlement of DOT public airport use on DHHL land); Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n., 739 F.2d 1467 (9th Cir. 1984) (suit compelling unconsummated land exchange to replace DHHL land allowed); Hawaii v. United States, 676 F. Supp. 1024 (D. Haw. 1988) aff'd 866 F.2d 313 (9th Cir. 1989) (Quiet title suit to recover 1365 acres of DHHL illegally set aside by Territorial executive order to U.S. Navy held barred by statute of limitations).

The terms of the HHCA are precise, well established, and cast in a particular method and form of management. By contrast, the State's trust duty under § 5(f) of Hawaii's Admission Act was given a much broader range of discretion. It provides only that the 5(f) "lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing [five] purposes in such manner as the constitution and laws of said state may provide." Hawaii Admission Act, 5(f), 73 Stat. 4.

Finally, and most importantly, the Hawaiian Homes Commission Act is not simply a program with entitlements. There is no "needs" criteria. An entire people were found to be at risk based upon their status as indigenous people and based upon the consequences of political actions taken by others, including the United States, which affected them. Moreover, title to the land which constitutes the core asset or corpus of the HHCA remained with the United States and now the State of Hawaii. Beneficiaries obtain fixed term leases, but title is forever inalienable.

The Hawaiian Homes Commission Act which was adopted by the United States Congress to rehabilitate a whole people was not simply a social services program. It was an unconditional grant of lands from the already existing ceded land trust intended to promote self sufficiency through homesteading farm land.

While the United States would later transfer a large part of its trust duty to the State, the United States would reserve to itself the right to sue to enforce the

terms of the Hawaiian Homes Commission Act, 73 Stat. 4 (1959), as well as consent to amendments and approve land exchanges. These powers belong to an original trustee or settlor which seeks to insure that a successor trustee meets the trust obligations passed to it. They are not characteristic of social programs.

VII. Conclusion.

While the precise nature of the duties transferred to the State upon its admission to the Union and those retained by the United States remain the subject of some differences, the evidence of intent and actual conduct is clear that a general trust relationship was established over Hawaii's public lands in 1898 and then given special enhanced status on designated "available lands" by the passage of the Hawaiian Homes Commission Act in 1921.

Therefore, it must be concluded, as the Hawaii Supreme Court has already held, that the Hawaiian Homes Commission Act created a trust obligation on the part of the United States in 1921.

TESTIMONY OF TIMOTHY W. GLIDDEN, COUNSELOR TO THE SECRETARY OF THE INTERIOR AND THE SECRETARY'S DESIGNATED OFFICER FOR THE HAWAIIAN HOMES COMMISSION ACT, BEFORE THE COMMITTEE ON ENERGY AND NATURAL RESOURCES, UNITED STATES SENATE, REGARDING THE HAWAIIAN HOMES COMMISSION ACT

February 6, 1992

Mr. Chairman, we appreciate your invitation to appear today at this oversight hearing on the Hawaiian Homes Commission Act (HHCA). Because I am the Secretary's Designated Officer on that subject, I have been asked to present the Administration's statement.

On January 23, 1992, the Department of the Interior provided a written response to questions from you and Senator Akaka in connection with this hearing, and I think there would be no useful purpose served by my repeating any of that material. I will instead focus on the two issues in your January 24, 1992 letters to the Secretary and the Attorney General.

You ask, first, that we "address the nature of the relationship between the beneficiaries of the HHCA and the Federal government during the period 1921 to the present". Our position is that the United State does not serve as trustee for the beneficiaries, nor have we during any period since 1921. We have expressed that view in two previous letters to Senator Inouye.

We addressed the lack of a trustee relationship for the period from Statehood in 1959 forward in our letter to Senator Inouye of October 17, 1989. That letter was necessitated by a letter to a regional office of the United States Commission on Civil Rights, dated August 27, 1979, from the Deputy Solicitor of this Department, which stated that "it is the Department's position that the role of the United States under section 5(f) [of the Statehood Act] is essentially that of a trustee". Frequent reference had been made to that 1979 letter during several days of hearings in Hawaii in August 1989 before Senator Inouye's Select Committee on Indian Affairs. To set the record straight, we stated in our October 19, 1989 letter that we could not stand behind the 1979 letter, because its conclusion was "at war" with a decision of the United States Court of Appeals for the Ninth Circuit. In Keaukaha-Panaewa Community Assoc. v. Hawaiian Homes Commission, 588 F. 2d 1216 (1978), the Court of Appeals stated:

> ...the state is the trustee... The United States has only a somewhat tangential supervisory role under the Admission [Statehood] Act, rather than the role of trustee. (At 1224, n.7)

Our 1989 letter adopted the position of the Court of Appeals on this point.

As to the United States' role during the Territorial period, from enactment of the Hawaiian Homes Commission Act in 1921 to Hawaii's admission to the Union in 1959, we stated in a January 23, 1992, letter to Senator Inouye that the United States did not serve as a trustee for native Hawaiians under the Homes Commission Act during this period either. We stated that our examination of the statute itself, and its amendments, and the legislative histories associated with them, revealed no support for the proposition that the Congress intended at any time in the Territorial period to create a trust, or intended that the United States would serve as a trustee or bear any kind of fiduciary relationship toward the beneficiaries of the Act. We discussed a decision of the Supreme Court of Hawaii which, in dicta, stated the contrary, and we concluded that the dicta were without effective support.

We are aware that there are many in Hawaii who hold a different view, and we presume that their views, and the reasons for them, will be presented during this hearing. We will examine whatever is presented to you on this subject, as well as whatever may otherwise be presented to us, and we will assess all arguments that are presented in good faith and with great care. It is our opinion now, however, for the reasons stated in the above two letters, that the United States has at no time served as a trustee for native Hawaiian beneficiaries of the Hawaiian Homes Commission Act.

You ask, secondly, for our comment "on the performance of the State of Hawaii and the Federal Government in the administration of the Hawaiian Home lands, including those governments' responses to the recommendations of the 1983 State-Federal Task Force Report on the Hawaiian Homes Commission". Turning first to the performance of the Federal Government, I call attention to a long attachment to our January 23 letter to you which recites each of the 36 Task Force recommendations that concern the Federal Government and provides a report on the status of each of those recommendations. I will not review them in detail here, but by way of summary I would state that, apart from some recommendations that are no longer timely, we believe that the United States has taken appropriate action as to all of the recommendations. The Department of the Interior has tried very hard to carry out its responsibilities, as enunciated by the Task Force, and I think we have succeeded. Our record before 1983 was not always exemplary nor

well-ordered; we believe it has been good since then.

As for the performance of the State, particularly since 1983, we would offer an "A" for effort, but a lesser grade for ultimate results--and we suspect the Department of Hawaiian Home Lands and the State would agree with that assessment. The Department of Hawaiian Home Lands has embraced an acceleration strategy to award more leases faster to beneficiaries, and it has developed heroic programs to place native Hawaiians on improved available lands in relatively short order. Yet very long waiting lists remain--although probably not realistically as long as the figures suggest, owing to duplications, unqualified applicants, and some apparently uninterested applicants. Nonetheless, thousands of qualified and interested beneficiaries undeniably await lease awards, and it is unlikely that their aspirations will be satisfied quickly. In the last decade, the State of Hawaii has provided State funds to the Department of Hawaiian Home Lands in substantial quantities. Figures provided to us show total State appropriations to that Department in fiscal years 1981 through 1991 of over $70 million. We understand this to be a reversal of the State's funding practices of earlier years, and of course such funds are important to the achievement of the goals of the Act.

As our written submission to you shows, some months ago we asked the Inspector General of the Interior Department to conduct a program audit of the Hawaiian Homes Commission, and he has done so. A draft audit report is now before us, as well as before the Homes Commission, for comment, and when the report is in final form we will be sure it is available to this Committee. Because the comment period does not expire until February 17, it will be some time thereafter before the report is available. That report, however, will offer further comments on the performance of the State and of the Interior Department on the administration of the Hawaiian Homes Commission Act.

That completes our statement. We will be glad to respond to your questions.

Mr. Roger Clegg, Deputy Assistant Attorney General, is here to respond to whatever questions you may have for the Department of Justice.

WITNESS LIST

Committee on Energy and Natural Resources
Hearing on Hawaiian Homes Commission Act

Thursday, February 6, 1992
9:30 a.m., Room 216, Hart Senate Office Building

The Honorable Patsy T. Mink
U.S. Representative
2nd Congressional District, Hawaii

The Honorable Neil Abercrombie
U.S. Representative
1st Congressional District, Hawaii

Panel I

Mr. Timothy Glidden
Counselor to the Secretary
Department of the Interior
Washington, D.C.

Mr. Roger B. Clegg
Deputy Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C.

Panel II

The Honorable John Waihee
Governor
State of Hawaii

accompanied by: Mr. Warren Price, III
Attorney General
State of Hawaii

Ms. Hoaliku Drake
Chairwoman
Department of Hawaiian Home Lands
Honolulu, Hawaii

Panel III

Mr. Kamaki Kanahele
Chairman, State Council of
Hawaiian Homestead Associations
Waianae, Hawaii

Mr. Alan Murakami
Litigations Director
Native Hawaiian Legal Corporation
Honolulu, Hawaii

Ms. Ann Nathaniel
Former Chairperson, 1983 Federal-State
Task Force on the Hawaiian Homes Commission Act
Hilo, Hawaii

Mr. Charles Maxwell, Sr.
Vice-Chairman, Hawaii Advisory Committee
to the U.S. Commission on Civil Rights
Pukalani, Hawaii

STATEMENT OF SENATOR DANIEL K. AKAKA

BEFORE THE ENERGY & NATURAL RESOURCES COMMITTEE

OVERSIGHT HEARING ON THE HAWAIIAN HOMES COMMISSION ACT

FEBRUARY 6, 1992

Aloha and good morning. Today's hearing of the Senate Energy and Natural Resources Committee will come to order.

This hearing will focus on the responsibility of the federal government and the state of Hawaii under the Hawaiian Homes Commission Act.

The issue which prompted me to convene this hearing has deep, historical roots. During the period when Hawaii was settled by Western influences, Native Hawaiians were systematically dispossessed of their land and their rich culture. The loss of our aina had a profound and devastating effect on my people.

In response to the deteriorating social and economic conditions of Native Hawaiians, Congress set aside 203,000 acres of land in 1921 for the benefit of Native Hawaiians.

According to the Congressional debate at the time of its passage, the purpose of the Hawaiian Homes Commission Act was to "stem the tide of destruction which, unless checked, [will] result in the utter destruction of of this fine race of people."

Thus, Congress enacted the Hawaiian Homes Act to achieve a simple objective: to permit Hawaiians to return to the land so they could once again enjoy their traditional lifestyle. Unfortunately, this simple objective remains unfulfilled.

The seventy-year history of the Hawaiian Homes Commission Act can best be summarized by one word: neglect. Neglect by the federal government, neglect by the Territorial government, and at times, neglect by the state of Hawaii.

Worse yet, if you examine certain land transactions which occurred prior to statehood, the federal government's conduct rises to the level of gross and shameful neglect.

But neglect is not the only reason why we have convened this hearing. The federal government recently compounded its failures by denying the existence of its trust responsibility under the Hawaiian Homes Act during both the territorial and statehood period. In my view, and in the view of many of those testifying today, this change on the part of the federal government comes 70 years too late.

Since the enactment of this legislation, it has been the longstanding view that the Hawaiian Homes Act created a trust obligation on the part of the U.S. government. Actions by Congress and statements by the Department of Interior clearly support this view.

For example, the Hawaii Admissions Act referred to Hawaiian Home lands as a "public trust" at the time it transferred a substantial portion of that trust obligation to the State of Hawaii. There is also strong support for this trust concept in Congressional debate.

When the legislation to create the homelands trust was being considered by Congress, Native Hawaiians were referred to as "wards" of the federal government -- a status that has always carried special meaning for native Americans and has given rise to the well-founded notion of trust responsibility in Indian law. This trust doctrine was confirmed as recently as 1979, when the Deputy Solicitor of the Department of Interior issued an opinion which determined that "the role of United States . . . is essentially that of a trustee."

Now the Interior Department comes before this Committee in an attempt to rescind the long-standing view that the United States has a trust duty to Hawaiians under the Hawaiian Homes Act. Despite unambiguous statements at the time this legislation was enacted that native Hawaiians were "wards" -- toward whom the federal government had an obligation as a "trustee" -- the department has suddenly embraced the sweeping view that [quote] "nothing in the legislative history of the Act <u>in any way</u> supports the notion that Congress intended to create a trust."

The department should not be permitted to succeed in this effort. Interior's premise that there is no federal trust responsibility toward native Hawaiians is a notion founded in politics, and not in law.

The jurisdiction over the Hawaiian Homes Commission Act, which was once vested in the old Committee on Territories, has now passed to the Energy Committee.

At today's hearing we will develop the record on the nature and extent of the federal and state responsibility under the Hawaiian Homes Commission Act. The issue which must be resolved is whether the Congress clearly contemplated establishing a form of trust responsibility when it enacted the Hawaiian Homes Commission Act.

While the federal government's responsibility after 1959 is a matter which we need to examine, for the purposes of this hearing I am much more concerned about the nature of the federal government's responsibility from 1921 to 1959.

Following this hearing we will begin the process of drafting legislation to correct any injustices suffered by native Hawaiian beneficiaries.

Finally, I want to point out that it is not possible to hear every viewpoint and explore every issue relating to federal and state responsibility in a single hearing. The state response to my letter of November 12 runs 180 pages. It's about as thick as the Honolulu phone directory, and that

does not even count the state's written testimony submitted to us today. The federal response is a more modest 20 pages.

We have representatives of the state of Hawaii as well as a panel of outside witnesses that will appear before the committee today. But even with all the written testimony and the oral presentations we will receive today, we will only scratch the surface on some of these issues.

Because we want this hearing to be as open and inclusive as possible, I have asked that the hearing record be left open so that anyone who has a concern about the Hawaiian Homes Commission Act can share it with Congress. Anyone who wishes to submit testimony should forward it to the Committee.

Now, before turning to the witnesses, I would like to invite other members to make their opening remarks.

EXECUTIVE CHAMBERS
HONOLULU

JOHN WAIHEE
GOVERNOR

TESTIMONY ON
OVERSIGHT HEARING ON
THE HAWAIIAN HOMES COMMISSION ACT, 1920, AS AMENDED
BEFORE THE SENATE COMMITTEE ON ENERGY
AND NATURAL RESOURCES

THE HONORABLE J. BENNETT JOHNSTON
CHAIRMAN

BY

Governor John Waihee
State of Hawaii

Washington, D.C.
February 6, 1992

Chairman Johnston, Senator Akaka, Senator Inouye and Members of the Senate Committee on Energy and Natural Resources:

It is a privilege to appear before you today, to assist this Committee in its oversight duties for the programs of the Hawaiian Homes Commission Act, conceived here, by Congress, more than 70 years ago.

In your November letter notifying me of this hearing, you said the Committee was acting in response to "recent developments and concerns". So, what exactly are these recent developments and concerns?

In actuality, the predominant new development and concern is a reawakened public awareness of the problems of a rehabilitation program for native Hawaiians that has now spanned three generations and has yet to deliver all that was envisioned by your predecessors here in 1921.

In the last five years, there have been many Congressional and State legislative hearings, many of which have focused on sad events of the past. While it is important to look back, it is even more important for us to determine what must be done now and to take action now.

For us to take advantage of this renewed public interest and sentiment, concerns must be channelled into a critical look at the very foundation of the Hawaiian Home Lands program, and who and what is responsible for its present condition.

Therefore, I welcome the Committee's timely inquiry; in particular, the Committee's primary focus on the nature of the relationship between the beneficiaries of the Hawaiian Homes Commission Act and the Federal government.

In January of this year, my office submitted a report to this Committee in response to your inquiries, on six subjects: 1) a status report on the State's actions to

implement the 1983 Federal State Task Force Report; 2) objectives of the general leasing program; 3) objectives of the land exchange program; 4) progress of the homestead acceleration program; 5) compilation and description of wrongful and improper actions by the federal and state governments; and 6) a discussion of federal responsibility, for the lay reader. In recognition of the relationship of these issues to this hearing, I recommend that the report be entered into the official record.

We could easily fill the short amount of time we have here today with yet another catalog of controversies, but you have appropriately focused on two essential issues -- who is responsible for the Hawaiian Home Lands trust, and what it will take to fulfill the mission of the trust.

First let me briefly outline the steps the State of Hawaii is taking to fully acknowledge its responsibilities to the beneficiaries of the Hawaiian Home Lands Trust. Then, I will describe the State's view of what constitutes federal responsibility. And finally, let me comment on what would happen without the federal government's acknowledgement of its special relationship with native Hawaiians.

As a compact with the United States, the State of Hawaii adopted the Hawaiian Homes Commission Act as part of the State Constitution in 1959. It was as if the new State, like a new parent, agreed to take on the responsibility of caring for an undernourished, neglected stepchild, who had been previously left to fend for herself.

During the early statehood years, the program received a small, but steady, stream of funds for capital improvements and loan capitalization. However, for the most part, the program relied on its own revenue sources. Regular general fund

appropriations for department administration and operations began in 1989, the same year the federal government made its very first appropriation for the program. I will outline our most recent funding proposals in a minute.

The first major impetus for reform and remedial action of the Hawaiian Home Lands program was the report and recommendations of the 1983 Federal State Task Force. In my report to your Committee last month, there is a brief status report on each of the Task Force's 134 recommendations. The State has completed, or is more than half way towards completing, two-thirds of the recommendations identified as being the State's responsibility.

A year ago I submitted a proposal to the Legislature to resolve controversies of both the Hawaiian home lands trust and the public land trust. My proposal is entitled An Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust. The Action Plan is now the most up-to-date cataloging of Home Land controversies, as it draws not only on the Federal State Task Force Recommendations but other audits, state legislative and Congressional testimony.

The Action Plan was approved by the state legislature and now serves as the guide for future State actions in addressing Hawaiian Home Lands issues.

In addition to the recommendations in the Action Plan, in the last year or two, the State has offered new legal avenues for beneficiaries to pursue claims of Trust breaches in State court and before a newly formed claims panel. My report to your committee last month provides greater detail on the State's waiver of sovereign immunity to permit beneficiaries the right to sue for breach of trust for actions occurring after July 1, 1988.

For individual beneficiaries with claims for actual damages which occurred after statehood, but before July 1988, the legislature provided a process for retroactive remedy. The Hawaiian Homes Individual Claims Review Panel will review the claims of beneficiaries and make recommendations to the Legislature on the validity of each claim, and the payment and/or corrective action that may be called for. Beneficiaries dissatisfied with the Panel and Legislative action may still bring action in State circuit courts.

Now back to the Action Plan. One prominent recommendation in the Plan was launched a year ago when I established a Land Claims Task Force to resolve the wrongful and improper uses of Trust assets. The Department of Hawaiian Home Lands has, and is still, submitting claims for the set asides of Trust land for public purposes without compensation to the Trust. Other categories of claims include alienation of lands from the Trust, long term leases for nominal rents, and boundary disputes.

The Task Force prepared its first package of claims resolutions, which are now being reviewed by the Hawaiian Home Lands Commissioners and will be considered in this session of our legislature. A year from now the Task Force should be submitting its second and final package of resolutions.

Among the issues the Task Force will be addressing are those wrongs we readily admit were committed after statehood. That includes the alienation of up to 15 acres of land by grant or sale to private parties. The removal of most of these parcels from the Trust did occur after Statehood, on the basis of applications and/or agreements in existence prior to Statehood.

The State also acknowledges that after Statehood five parcels of land totalling three acres were set aside by executive orders for public purposes. The Task Force has recommended that the State pay back rent to the Department of Hawaiian Homes as compensation for past use of the Trust lands.

The State is also committed to being responsible for the correction of any post-Statehood circumstances which resulted from wrongful actions initiated prior to Statehood.

The Task Force's first package of resolutions is a major part of an administration bill introduced this session. I like to think of it as our first **omnibus-Hawaiian Homes-house-straightening act**. No doubt there will be other acts to follow.

In the bill I have asked the Legislature to appropriate 12 million dollars for back rent compensation of land claims verified so far. The bill also includes an appropriation of $925,500 to pay the Department its entitlement for new State uses of public lands that once generated income for the Trust. There is also an appropriation of $150,000 to conduct an audit of the Trust's entitlement to revenues from public lands leased for sugar cane cultivation.

The **omnibus-house-straightening** effort is not limited to correcting past improper uses of land or revenue, it is also designed to build homes for native Hawaiians. The bill includes an additional appropriation of 25 million dollars for capital improvements for Trust lands and the acquisition of new, more easily developed lands.

To further promote private partnerships for native Hawaiian housing, last month I asked our State Land Use Commission and the State's Housing Finance Development Corporation to promote the use of Hawaiian Home Lands as an off-

site option for developers to meet their affordable housing requirements. That means a developer could build their required affordable housing on Hawaiian Home Lands for its beneficiaries.

Upon legislative approval of my supplemental request, total state appropriations in support of the Hawaiian Home Lands program will grow to a total of 268 million dollars since statehood.

I hope I have conveyed to you the State's commitment to meet its trust obligation. We are moving simultaneously on several different fronts: 1) opening legal avenues that will expose the State to unknown liability; 2) untangling title claims dating back to 1922; 3) calculating past compensation due by the State and federal governments for wrongful use of the trust; 4) paying for all permanent positions and resulting operating expenses, and doing all that we can to build more houses.

The people of Hawaii accept this trust obligation and expect the State to do nothing less than to meet its responsibilities to the descendants of the first inhabitants of our islands. However, our citizens do not believe the State has the sole responsibility for the Hawaiian Home Lands program. They believe the Congressional and judicially determined intent remains: 1) that the federal government has a trust obligation to native Hawaiians that began with the passage of the Hawaiian Homes Commission Act; 2) that the federal government had sole responsibility for actions taken under the Hawaiian Homes Commission Act prior to statehood; and 3) since Statehood, responsibility is shared by the federal and state governments.

Therefore, just as the State has an obligation to provide compensation and otherwise restore the Trust to its original condition, as outlined by Congress in 1921, **even more so does the federal government.**

I am joined in this belief, responsibility and obligation by the Hawaii State Legislature. This is strongly expressed in Senate Concurrent Resolution 24, passed by unanimous consent on January 30 and 31 by the respective houses. In the resolution, the Legislature calls upon the President and Congress "to formally affirm, honor and fulfill the federal trust obligation to the native Hawaiian people as provided under the Hawaiian Homes Commission Act" and further "declares its support and authorization of the State's vigilant pursuit of federal claims to restore and strengthen the Hawaiian Home Lands trust."

The State has discovered at least six categories of wrongs on the part of the federal government, before and after statehood. They are:

1. **Establishing a Trust without any regular funding,** requiring the program to become totally dependent on controversial sources of revenue, which the Hawaiian Home Commission was not allowed to manage for itself;

2. **Diverting revenues earned from the Trust's own assets** by placing ceilings on the amount of revenue that could be collected in the Trust's own accounts, and giving the surplus to the general fund of the Territory. Ceilings were not removed until after Statehood.

3. **Alienating Trust** lands by selling close to 130 parcels to private parties without any compensation paid to the Trust.

4. **Using Trust lands for public purposes without compensation.** Although the practice of setting aside land through executive orders and proclamations was questioned, the Territorial Attorney General upheld the activity. Judicial

determinations since 1975 established that no such authority exists. In addition, the federal government entered into two 65 year leases that include 320 acres of Trust lands for the nominal rate of $1 for the entire term.

5. **Permanent set asides of land** without compensation or land exchange. Two executive orders set aside over 1,356 acres of Lualualei Trust lands for military purposes. When the State sought to have the lands returned, the Court granted the federal government's motion to bar the action due to a statute of limitations.

6. **Discriminatory denial of federal dollars on the basis of race,** despite Congressional intent to assist the Hawaiian Home Lands program with federal funding. The current federal administration has attempted to prevent the release of funds due to the Department of Justice's assertion that federal dollars cannot be used to benefit a "racial class", unless the group is a recognized tribe with an acknowledged sovereign government.

If I may return to the analogy of the undernourished and abused stepchild, if this Trust program is to flourish and mature, it will require more than the honorable intentions of a step parent to make things right. It will require an admission of paternity from the true parent of the program, and a commitment to meet its parental obligations.

Without a present and future partnership between the federal and state governments, it is unlikely that the mission of the Hawaiian Home Lands program can ever be met. When the State accepted its responsibility for the Trust at Statehood, it accepted a program almost irreparably damaged. If the program had been properly managed through the territorial period, it is possible we would have

no reason for meeting here today. As it is, we must have the federal government join with us if we are to regain the ground, both literally and figuratively, that was originally staked out by Congress.

In 1983, the Federal State Task Force (with appointees named by either my predecessor or the Department of the Interior) made the recommendation that the federal government and the State each provide 125 million dollars to the Hawaiian Home Land program. Well, from Statehood to the end of the next fiscal year, State appropriations will total more than twice that recommended sum, with 167 million dollars since 1983. When you add appropriations to the many other remedies that I have outlined as actions the State is ready and willing to undertake, you can begin to see why the people in my state are wondering, where is the federal commitment?

Finally, I would like to comment briefly on the response your committee received from the Department of the Interior on the questions you had asked of both State and federal administrations.

The Department of Interior response defines its role and responsibility for the Hawaiian Home Lands program so narrowly it is like reading the job description of a tightrope walker. It sounds like the Interior Department only ventures out to do its job when there are proposed land exchanges or amendments to the Act. These requirements, according to Interior (although the State and its Attorney General do not agree), do not constitute "responsibilities" and certainly not "trust responsibilities"; rather, to Interior these are merely statutory requirements. In the meantime, Interior waits willingly and anxiously to be of assistance to the Department of Hawaiian Home Lands.

For the moment, let us overlook Interior's role in monitoring and recommending potential breach of trust actions against the State of Hawaii. And let us overlook Interior's prerogative in requesting audits of the Department of Hawaiian Home Lands.

If, for just this moment, we were to consider that the Department of Interior had only this most limited role, I need to draw your attention to how much is riding on that narrow stance. Interior's position is a pivotal one because of Interior's arguments that characterize native Hawaiians not as a native people, not as beneficiaries of a trust, but as a racial class. This argument raises, for example, broader questions about the ability of Congress to earmark appropriations to the Hawaiian Home Lands program.

If, in resting on the shoulders of Interior's position, the federal administration never recommends that native Hawaiians be recognized as a native people, then native Hawaiians may also be discriminatorily denied the opportunity to participate in programs provided to every other public housing and community development agency in the country. After all, the State cannot unilaterally choose to change the federally prescribed definition of persons eligible for benefits under the Act.

Congress's ability to establish special programs for native Hawaiians, such as the Native Hawaiian Health Act, and the Native Hawaiian Education Act will also come into question.

In such a scenario, native Hawaiians stand a risk of becoming a special class without benefits and rights of ordinary citizens, let alone the benefits and rights of Native Americans. This, I believe, is not what Congress intended.

Mr. Chairman, I have here today two respected leaders of my Cabinet, Mrs. Hoaliku Drake, chairperson of the Hawaiian Homes Commission, and Mr. Warren Price, the Attorney General of the State of Hawaii. Mrs. Drake and Mr. Price will provide testimony and be available for questions.

JOHN WAIHEE
GOVERNOR
STATE OF HAWAII

HOALIKU L. DRAKE
CHAIRMAN
HAWAIIAN HOMES COMMISSION

STATE OF HAWAII
DEPARTMENT OF HAWAIIAN HOME LANDS
P. O. BOX 1879
HONOLULU, HAWAII 96805

TESTIMONY ON

OVERSIGHT HEARING ON THE

HAWAIIAN HOMES COMMISSION ACT, 1920, AS AMENDED

BEFORE THE SENATE COMMITTEE

ON ENERGY AND NATURAL RESOURCES

THE HONORABLE J. BENNETT JOHNSTON
CHAIRMAN

By Hoaliku L. Drake, Chairman
Hawaiian Homes Commission
Department of Hawaiian Home Lands
State of Hawaii

Washington, D.C.

February 6, 1992

SUMMARY OF TESTIMONY

Mr. Chairman and Members of the Senate Committee on Energy and Natural Resources:

ANO AI ME KEALOHA IA OU KOU APAU. (May the warmth that emanates from within me embrace you forever.)

I am Hoaliku L. Drake, Chairman of the Hawaiian Homes Commission. I thank you for this opportunity to testify before you.

In our testimony we have addressed the nature of the relationship between the beneficiaries of the Hawaiian Homes Commission Act and the Federal government since the beginning of the Hawaiian Home Lands Program in 1921, the performance of the State of Hawaii and the Federal government in the administration of the program, and those governments' responses to the recommendations of the 1983 Federal-State Task Force on the Hawaiian Homes Commission Act.

To provide you with background information, Part I of our testimony briefly discusses what the Department of Hawaiian Home Lands is doing today. This part notes that the department is emphasizing the building of affordable homes to meet beneficiary needs.

Part II discusses the State's responsibilities to the Trust. Of particular significance is the discussion of the current project to resolve land claims of the Trust. An interagency task force has been diligently working to accelerate the resolution of the claims. A first settlement

proposal addresses compensation for the past use of 29,700 acres of Hawaiian home lands that had been illegally set aside by executive action. This settlement package has been taken to our beneficiaries for their review. The Hawaiian Homes Commission will be meeting soon to consider the beneficiaries' views and to decide on the proposed settlement, which includes cash, lands, or a combination of both cash and land. The settlement package will then be sent to the State Legislature this month for a decision. Other settlement packages are scheduled for presentation next year.

Part III discusses trust responsibilities of the Federal government. Federal assistance to the program, -- in direct financial aid or services, -- has been totally inadequate.

Our testimony also identifies the wrongs that have occurred from the very beginning of the Act, resulting in the outright loss of land from the Trust and the loss of compensation to the Trust because lands had been set aside for public uses without compensation to the Trust.

I would like to expand on how one of the illegal takings of trust lands is adversely impacting the program. The Trust has the least lands on Oahu, 6,600 acres, less than 4% of total holdings. Yet this is the island with the highest demand for residential homesteads.

Lualualei Valley, on the island of Oahu, is less than 30 miles from downtown Honolulu. Prior to statehood, the U. S. Government allowed the Territorial Commissioner of Public Lands to sell 54 parcels of Hawaiian home lands in Lualualei without any compensation to the Trust. Two executive orders issued by a Territorial Governor set aside more than 1,356 acres of trust lands for military and other purposes.

The U. S. Naval Magazine and Radio Station is the dominant user of Lualualei lands. Much of the flat valley area is now within munition storage blast zones or electromagnetic radiation zones. The Navy has drilled its own wells into the underlying aquifer which has an estimated potable water capacity of ten million gallons a day.

The land now used by the Navy can be consolidated with other trust lands to develop a master-planned community of about 2,200 acres. The development can support at least 4,000 housing units. The department's inability to use and develop that land, taken from the Trust, deprives beneficiaries of not only homestead opportunities, but jobs, since a master-planned community would include commercial and service facilities.

In 1986 the State of Hawaii filed suit in the U. S. District Court against the United States to return the land to the Trust but was barred from asserting its claim. The issue remains: the obligation of the Federal government to make the

Trust whole requires return of the lands, replacement of the lands taken, or compensation for the lands.

When the State of Hawaii agreed to take on the responsibility for the Hawaiian Home Lands Trust in 1959, the Trust turned over to its management was not whole, due to a number of wrongful acts that occurred when the Federal government, the predecessor trustee, was in charge.

The State of Hawaii has agreed to take remedial actions to right those wrongs that occurred since taking over the Trust in 1959. The Federal government's obligation to take remedial actions for those wrongs that began prior to statehood is clear, but has yet to be recognized by the Federal government.

In a culturally Hawaiian sense, the creation of the Hawaiian Home Lands Program was inspired and conceived in the spirit of aloha. In the spirit and context of ho'oponopono (to set things right), we ask the Congress of the United States to set right those wrongs that occurred long ago and to correct those deficiencies that continue today.

On behalf of all native Hawaiians who will benefit from your actions, I thank you for the opportunity to make this plea. MAHALO A NUI LOA.

Mr. Chairman and Members of the Senate Committee on Energy and Natural Resources:

I am Hoaliku L. Drake, Chairman of the Hawaiian Homes Commission. I thank you for this opportunity to testify before you in your oversight hearing on the Hawaiian Homes Commission Act, 1920, as amended, (hereinafter referred to as "Act.")

Part I. The Department of Hawaiian Home Lands

The Act is administered by the Department of Hawaiian Home Lands, one of 18 principal departments of the State of Hawaii. The Hawaiian Homes Commission, whose nine members are appointed by the Governor of Hawaii with the advice and consent of the State Senate, heads the department. The Chairman of the Commission serves as the full-time administrator.

Pursuant to the Act, the department provides direct benefits to native Hawaiians, that is, persons of at least 50% Hawaiian blood, in the form of 99-year homestead leases at an annual rental of $1. Homestead leases may be extended for an aggregate term not to exceed 199 years. Such leases are for residential, agricultural, or pastoral purposes. Aquacultural leases are also authorized, but none have been awarded. The intent of the homesteading program is to provide for the economic self-sufficiency of native Hawaiians through the provision of land.

Other benefits provided by the Act include financial assistance through direct loans or loan guarantees for home construction, home replacement or repair, and for the

development of farms and ranches; technical assistance to farmers and ranchers; and the operation of water systems.

In addition to administering the homesteading program, the department also leases land and issues revocable permits and licenses for lands not in homestead use. Revenues from lands in commercial, industrial, and other income-producing uses support homestead development activities and are also used to finance temporary positions. A full discussion of the general leasing of Hawaiian home lands is included in the Report on the Hawaiian Home Lands Program prepared by the Office of the Governor and submitted earlier to the Committee.

The Native Hawaiian Rehabilitation Fund, established by amendments to the Hawaii Constitution in 1978 and incorporated in the Act, enables the department to fund programs and projects for the educational, economic, political, social and cultural advancement of native Hawaiians. This fund is derived from 30% of the State's revenues from sugarcane leases and water licenses.

The actual number of native Hawaiians is not known. A population survey by the Office of Hawaiian Affairs in 1984, based on random sampling, estimated that there were 80,953 native Hawaiians in the State. Of that number 53,267 were 20 years or older.

Hawaiian home lands are located on the islands of Oahu, Kauai, Molokai, Maui, and Hawaii, with a total estimated

acreage of 187,413. Exhibit "A" contains two tables: Table 1 shows the distribution and use of Hawaiian home lands; Table 2 shows homestead leases, by islands and by types of leases.

In August, 1989, the U. S. Senate Select Committee on Indian Affairs and the U. S. House Committee on Interior and Insular Affairs held hearings throughout the State on the administration of the Hawaiian Home Lands Program. From the eloquent and moving testimonies submitted, new insights were gained as to the hopes and aspirations of native Hawaiians in the fulfillment of the Act. Beneficiaries strongly conveyed a need for affordable housing. In particular, the provision of homestead leases under the Act was seen as a way to meet the needs of native Hawaiians for affordable housing.

In response, the department has committed itself towards making a major impact on the housing needs of native Hawaiians within this decade. Our resources are being directed towards the acceleration of housing development on Hawaiian home lands through the construction of off-site and on-site improvements and homes. We have established a goal to deliver more than 14,000 homes to our people over a ten-year period based on a needs assessment.

The Department is very much aware of the need to step up placement of beneficiaries on the land. In the 71 years since the Act was enacted, only about 20% of the land is in homestead use. The demand is high; today there are more than 22,000

applications for homestead leases, although the actual number of interested individuals may be far below that number because a person may apply for two types of leases and inactive applications have not been purged from the list. Members of the same family applying for homestead lots also tend to overstate demand. The number of families on the list was estimated at 12,300.

The goal of providing more than 14,000 homes takes into account estimated affordable housing needs and anticipated growth in the waiting lists. To meet the goal will require large outlays for land development and for interim loan financing for home construction.

The department currently has under design or construction a number of projects to develop homestead lots for building homes. The target is to complete by December 1994 4,000 lots.

Part II. State of Hawaii Responsibilities for the Trust

The responsibilities assumed by the State of Hawaii for the Hawaiian Home Lands Trust are clear. Upon statehood, the State entered into a compact with the United States and assumed the duties of management and disposition of Hawaiian home lands. The State further agreed to adopt the Act as a

provision of the State Constitution. This compact was further affirmed by this statement in the Constitution:

> "The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out." [Hawaii Const., Art. XI, Sec. 2 (1959), renumbered Art. XII, Sec. 2, (1978).]

Upon statehood the State of Hawaii assumed title to Hawaiian home lands, title to which had been vested in the Federal government since 1898.

The State's trust responsibilities have been reaffirmed in court decisions. The Hawaii Supreme Court in Ahuna v. DHHL, 64 Haw. 327 (1982), concluded that the State of Hawaii assumed a fiduciary obligation upon being admitted into the Union as a state. Further, the Court concluded that the Hawaiian Homes Commission is the specific state entity obliged to carry out the fiduciary duty under the Act on behalf of eligible native Hawaiians.

It is clear that the Hawaiian Homes Commission has these obligations to beneficiaries of the Trust:

1. To act exclusively in the interests of beneficiaries under the Act;
2. To hold and protect the trust property for the beneficiaries of the Act;

3. To exercise such skill and care as a person of ordinary prudence would exercise in dealing with one's own property in the management of Hawaiian home lands; and,

4. To adhere to the terms of the Trust as set forth in the Act.

In 1982 the Federal-State Task Force on the Hawaiian Homes Commission Act, comprised of eight members from Hawaii and three from the U. S. Department of the Interior, was formed. The purpose of the Task Force was to make recommendations to the Governor of Hawaii and to the U. S. Secretary of the Interior on ways to better effectuate the purposes of the Act and to accelerate the distribution of benefits to the beneficiaries of the Act.

The Task Force studied four substantive areas in depth: Federal and State trust and/or legal responsibilities; land and other trust assets; financial management; and acceleration of homestead awards. The Task Force submitted its report in August 1983.

Among its findings were a number of controversies relating to the Hawaiian Home Lands Trust, including land inventory discrepancies, unlawful takings and uses of Hawaiian home lands, and the use of trust lands without compensation for past use. The Task Force also recommended that the Hawaii Legislature enact legislation granting beneficiaries the right

to sue for breach of trust in State courts and that Congress enact legislation granting beneficiaries the right to sue for breach of trust in Federal court.

In 1988 the Native Hawaiian Judicial Relief Act was enacted (Act 395, SLH 1988) granting beneficiaries the right to sue for breach of trust for actions that occurred from July 1, 1988. The 1988 legislation also required the Governor to submit an action plan to resolve controversies that had occurred prior to that date. The State Legislature has accepted the Governor's Action Plan with amendments, is highly supportive, and has assumed oversight of the plan's implementation.

One of the recommendations of the Governor's Action Plan provided for the formation of a Land Claims Task Force made up of the Office of State Planning, the Department of Hawaiian Home Lands, the Department of Land and Natural Resources, and the Attorney General. The Task Force was not to study the issues, but to resolve the claims to make the Trust both whole and stronger. The Task Force has been working since February 1991 to verify and accelerate resolution of this department's claims. A first settlement proposal has been developed to address compensation for the past use of 29,700 acres of Hawaiian home lands that had been set aside for public purposes by Executive Orders and Governor Proclamations.

The settlement proposal has been taken to the beneficiaries through public meetings that we held last month to obtain their input. The Hawaiian Homes Commission will be meeting soon to consider the beneficiaries' comments and recommendations and meeting soon to decide on the proposed settlement, which includes cash, lands, or a combination of both cash and land. The settlement package will then be sent to the State Legislature this month for a decision. Other settlement packages are scheduled for presentation next year.

From the beginning of the Act through 1987, with the exception of six years during the Territorial period, the program did not receive any external funding for administrative expenses. The program was entirely dependent upon general leasing revenues and a pro rata share of receipts from the leasing of sugarcane lands and water licenses for all of its administrative costs, although appropriations were made to capitalize home loan funds and for infrastructure development, including water system improvements.

The department did not receive any external funding for administrative costs until the fiscal year beginning July 1, 1988, when the legislature, acting upon Governor John Waihee's recommendation, appropriated $972,803 from the General Fund to finance a portion of the operating budget. Since that time State General Fund support has increased in each of the

subsequent fiscal years. In the current fiscal biennium period, more than $8.3 million in State General Fund monies have been provided.

Part III. Federal Trust Responsibilities

From the beginning of its enactment in 1921 until Hawaii was admitted into the Union in 1959, the Act was a Federal law. Title to Hawaiian home lands vested in the United States. The Governor of the Territory of Hawaii, an appointee of the President of the United States, was designated as Chairman of the Hawaiian Homes Commission until 1935. Members of the Commission were appointed by the Governor. The Hawaiian Homes Commission was not made a part of the Territory's Executive Branch, and indeed, its status could be compared with other independent boards and commissions of the Federal government. The Territory of Hawaii itself was administered by the U. S. Department of the Interior.

The proof of Federal responsibilities as trustee for the Hawaiian Homes program is well documented in the discussion on this subject in the Report on the Hawaiian Home Lands Program submitted earlier to the Committee.

A section of the same report titled "A Discussion and Compilation of Wrongful and Improper Actions of the Federal and State Governments," lists six categories of wrongs on the part of the United States. They include: (1) no funding; (2) a

limitation imposed on revenues derived from trust assets that could be used for the program; (3) alienation of Hawaiian home lands; (4) public use of Hawaiian home lands without compensation; (5) permanent reservation of trust lands without compensation or land exchange; and, (6) discriminatory denial of Federal funds for the benefit of native Hawaiians.

The actions (or non-actions) of the Federal government associated with each of these categories are discussed in the report and need not be repeated here. However, I would like to emphasize that Federal assistance to the program has been negligible if not lacking.

To our knowledge, there has been no Federal monies provided the program during the Territorial period except for a grant of $62,000 from the Federal Emergency Administration of Public Works in 1935. This grant was the Federal government's share of the cost in the development and improvement of the Molokai water system, for which the total cost was $252,918.

In 1935 the Act was amended by Congress to provide that the Secretary of the Interior "...shall designate from his Department some one experienced in sanitation, rehabilitation, and reclamation work to reside in the Territory of Hawaii and cooperate with the Commission in carrying out its duties. The salary of such official so designated by the Secretary of the Interior shall be paid by the Hawaiian Homes Commission while he is carrying on his duties in the Territory of Hawaii, which

salary, however, shall not exceed the sum of $6,000 per annum." (Section 224 was subsequently amended to substitute the State for the Territory, the department for the Commission, and by removing the ceiling on salary.)

Colonel G. K. Larrison was appointed to serve as Hawaiian Homes Representative in Hawaii beginning January 1, 1936, but following his retirement in June 1939, the position has not been filled.

The 1983 Federal-State Task Force on the Act recommended in 1983 that the State and Federal governments each make matching contributions of $25 million annually in appropriations or services for a period of five years to support the program to accelerate awarding homestead lots. No federal funds were appropriated, although since Fiscal Year 1985 more than $114 million for capital improvement projects were made available by the State (including authorization to issue $43 million in revenue bonds). This year's executive budget request includes an additional $25 million for CIP.

Federal assistance was made available recently through Congressional action in the form of $4.8 million in HUD appropriations for Hawaiian home lands infrastructure development. Of this amount, only $1.2 million has been released to the department by HUD.

The lack of an accurate inventory of Hawaiian home lands, a deficiency pointed out by the Federal-State Task Force, can be traced to the original Act because it did not specify exact acreage or specific boundary descriptions. Only the approximate number of acres in terms of "more or less" were stated for designated locations. The problem continues to the present.

At our request the Bureau of Land Management, Department of the Interior completed an assessment of survey needs in June 1991. The report estimates that $1.75 million will be needed to survey all 34 tracts of land.

A number of breaches of trust have been identified involving the outright loss of land from the trust and the illegal set aside of lands for public uses without compensation. These include:

(1) Illegal executive orders and federal claims to fee title of Hawaiian home lands at Lualualei (1,356.496 acres), Waimanalo (3.397 acres), and Keaukaha (5.470 acres).

(2) Illegal grants to private parties, later condemned by the U. S. at Lualualei (141.420 acres).

(3) The use of lands without compensation to the Trust from 1921 to 1959 resulting from former set asides by executive orders and proclamations, land ownership claims that have been verified as trust lands, and the use of trust lands for highway purposes.

(4) Federal use of Hawaiian home lands for one dollar for a 65-year term with no benefits to the Trust at Humuula (295 acres) and Waimea (25.686 acres).

(5) Ammunition blast zones and electromagnetic zones created by activities of Federal agencies that extend over Hawaiian home lands at Lualualei and Waimea (Kauai) thereby affecting how trust lands can be used.

I would like to expand on how one of the illegal takings of trust lands is adversely impacting the program. The Trust has the least lands on Oahu, 6,600 acres, or about less than 4% of total holdings. Yet this is the island with the highest demand for residential homesteads. It is estimated that about 67% of our applicants would prefer a residential homestead on Oahu if more lands were available.

Lualualei Valley, on the island of Oahu, is less than 30 miles from downtown Honolulu. Prior to statehood, the U. S. Government allowed the Territorial Commissioner of Public Lands to sell 54 parcels (557.44 acres) of Hawaiian home lands in Lualualei without any compensation to the Trust. Two executive orders issued by a Territorial Governor set aside more than 1,356 acres of trust lands for military and other purposes.

The U. S. Naval Magazine and Radio Station is the dominant user of Lualualei lands. Much of the flat valley area is now within munition storage blast zones or electromagnetic radiation zones. The Navy has drilled its own wells into the

underlying aquifer which has an estimated potable water capacity of ten million gallons a day.

The land now used by the Navy, if returned to the Trust, can be consolidated with other trust lands to develop a master-planned community of about 2,200 acres. The development can support at least 4,000 housing units. The department's inability to use and develop that land, taken from the Trust, deprives beneficiaries of not only homestead opportunities, but jobs, since a master-planned community would include commercial and service facilities.

In 1986 the State of Hawaii filed suit in the U. S. District Court against the United States to return the land to the Trust. In 1988 the court granted the United States' motion for summary judgment barring the State's action under the 12-year statute of limitations in the Federal Quiet Title Act. This decision was affirmed by the Ninth Circuit Court of Appeals in 1989, thus preventing the Department of Hawaiian Home Lands from asserting its claim to lands illegally taken from the Trust. The issue remains: the obligation of the Federal government to make the Trust whole requires return of the lands, replacement of the lands taken, or compensation for the lands.

Part IV. Summary and Conclusion

When the State of Hawaii agreed to take on the responsibility for the Hawaiian Home Lands Trust in 1959, the

Trust turned over to its management was not whole, due to a number of wrongful acts that occurred when the Federal government, the predecessor trustee, was in charge.

The State of Hawaii has agreed to take remedial actions to right those wrongs that occurred since taking over the Trust. The Federal government's obligation to take remedial actions for those wrongs that began prior to statehood is clear, but has yet to be recognized by the Federal government.

In a culturally Hawaiian sense, the creation of the Hawaiian Homes Program was inspired and conceived in the spirit of aloha. In the spirit and context of ho'oponopono (to set things right), we ask the Congress of the United States to set right those wrongs that occurred long ago and to correct those deficiencies that continue today.

On behalf of all native Hawaiians who will benefit from your actions, I thank you for the opportunity to make this plea. MAHALO A NUI LOA.

EXHIBIT "A"

Table 1. Distribution and Use of Hawaiian Home Lands
(As of June 30, 1991)

	ISLANDS					Total Acreage
	Hawaii	Kauai	Maui	Molokai	Oahu	
USES						
Homestead	26,053	831	541	9,477	921	37,823
General Leases	49,747	16,373	20,677	683	1,805	89,285
Licenses	117	7	15	9,676	18	9,833
Revocable Permits and Other	31,966	1,358	7,762	5,530	3,856	50,472
TOTAL	107,883	18,569	28,995	25,366	6,600	187,413

Table 2. Homestead Leases, by Islands and by Types
(As of January 31, 1992)

	Hawaii	Kauai	Maui	Molokai	Oahu	Total
TYPE OF LEASE						
Residential	1,020	392	437	397	2,239	4,595
Agricultural	442	43	51	387	58	981
Pastoral	255	2	0	0	0	284
TOTAL	1,717	437	488	811	2,407	5,860

TESTIMONY

SUBMITTED TO

THE COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

BY

MRS. ANN KUKAKINA NATHANIEL
FORMER CHAIRPERSON

OF THE

FEDERAL STATE TASK FORCE
ON THE HAWAIIAN HOMES COMMISSION ACT

FEBRUARY 6, 1992

I. INTRODUCTION

Walina, Anoai and Aloha!

In the native tongue of my parents I greet you as we enter into each others lives with a greeting of warmth, respect and amiability.

Thank you for inviting me to testify before this august body.

Honorable Senator Johnston, Senator Akaka and members of this committee, I am Ann Kukakina Nathaniel, former Chairperson of the Federal State Task Force on the Hawaiian Homes Commission Act.

I am a Native Hawaiian as prescribed in the Hawaiian Homes Commission Act and have resided on a Hawaiian homestead since 1957. For all of these years I have been involved with community affairs that affect us, being proactive when action dictated and taking an opposing stance when necessary.

My organizational affiliations range from my Homestead Association, the Board of Directors of the Association of Hawaiian Civil Clubs, Past President and member of the Board of Directors of Alu Like, Inc. a private non-profit organization serving all Hawaiians in the state of Hawaii and for the past two years as a member of the Hawaiian Homes Commission.

"I think a situation is present here that can be distinguished from any other. Perhaps we have a legal right to ask that these lands be set aside. We are not asking that what you are to do be in the nature of largesse or a grant, but as a matter of justice and extend at least a helping hand without cost to the Government of the United States". This is a direct quote from Prince Jonah Kuhio Kalanianaole, Hawaii Delegate to Congress, in his address to the 66th Congress, 2nd Session on April 15, 1920. And thereby hangs a tale of high expectations, disillusionment, frustration and built-in failure.

In forming such a program following the broad outline of the late Senator John Wise of Hawaii, not a dollar of federal funds was ever made available until recently and then there were conditions attached to its use.

The Hawaiian Homes Commission Act followed the Homestead Act of 1862 which provided for the disposition of public lands and required residency, cultivation and improvements of a maximum allotment of acres that varied as years went by.

Homestead lands were designated by the Secretary of the Interior as non-mineral, non-timbered and non-irrigable and Hawaii was not exempt.

II. TASK FORCE OVERVIEW

The Federal State Task Force on the Hawaiian Homes Commission Act was established by mutual agreement between the Former Secretary of Interior and Former Governor George Ariyoshi. The intent was to exhaust all administrative remedies to set things right and the Task Force was given a "broad mandate to recommend ways which the purpose of the Act be effectuated."

Once formally established, we identified our mission as (1) to make recommendations to the Governor of Hawaii and Secretary of the Interior to better effectuate the purposes of the Hawaiian Homes Commission Act and; (2) to accelerate the distribution of benefits of the Act to the beneficiaries.

Four substantive areas were studied in depth which form the basis of the final report:

COMMITTEE ON TRUST AND OR LEGAL RESPONSIBILITY: This committee addressed the Task Force's primary concern, the responsibility of the Federal and State governments for the Hawaiian Homes Trust. A legal subcommittee researched the trust responsibilities.

COMMITTEE ON LAND AND OTHER ASSETS: The focus of this committee was the Hawaiian Homes land inventory and actions affecting the inventory. This land inventory of the Hawaiian Homes Commission forms the basic assets of the trust.

COMMITTEE ON FINANCIAL MANAGEMENT: This committee followed up on the findings and recommendations of the Office of the Inspector General report (1982) relating to the financial management and accounting systems of the Department of Hawaiian Home Lands and other administrative areas.

COMMITTEE ON THE PLACEMENT OF PEOPLE ON THE LAND: Beneficiary needs and desires were studied and how to accelerate the distribution of benefits; a review of existing programs and other potential plans for placing more people on the land.

It became imperative that certain actions be taken to repair and rebuild the diminishing assets of the Hawaiian Homes Trust:

1. That the United States through the Department of Interior and Justice Department must bear responsibility for the past and present misuse of Hawaiian Home Lands;

2. That the State of Hawaii through its Executive and Legislative Branches implement the mandates of the Hawaii State Constitution;

3. Land problems identified by the Task Force be remedied;

4. Strategies based on economic development which addressed the acceleration of the distribution of benefits be implemented.

III. ACCEPTANCE AND AGREEMENTS

Since 1983 several oversight hearings have been held and the Task Force report has been often referred to.

Acceptance of the full report with its findings, recommendations and appendices by the Governor of Hawaii and Secretary of Interior set the stage for better serving the beneficiaries.

The Department of Hawaiian Home Lands was directed to take steps in setting priorities for implementing the Task Force recommendations.

The thrust of the Department's efforts from 1982-86 was (1) to improve management capabilities to enable the Department to effectively plan, develop and implement programs for native Hawaiians; (2) restore trust assets by taking corrective action to resolve problems of the present use of Hawaiian Home Lands by other agencies; and (3) accelerate the distribution of lands.

The most visible activity was the acceleration of awards. Applicants who attended lot selection meetings were informed of known constraints. This acceleration program created additional problems, lack of funds for infrastructure has created much agitation, financial programs in place have criteria that sometimes disqualifies native Hawaiian applicants and the high cost of land on the open market has further escalated the waiting list.

IV. REMEDIES

For years the homestead program of the Hawaiian Homes Commission has been a victim of benign neglect, surviving on the largesse of the Territorial and State Governments. Depending upon the state of the treasury and sympathy of the Legislature, the program either remained inept or made significant progress.

After a slow start, the State executive and legislative Branches are following the mandate of the State Constitution by funding the operating and administrative budgets of the Department of Hawaiian Home Lands, besides contributing upwards of $167 million dollars through capital improvement project appropriations to further develop Hawaiian Home Lands.

Federal funds have been negligible.

All of the land controversies singled out in the Task Force report are being addressed in the Governor's "Action Plan to Address Controversies Under the Hawaiian Home Land Trust and the Public Land Trust" (January 1991).

Former Secretary Watt issued an item-by-item response to those recommendations relating to the government and Interior, taking a positive administrative role in resolving isolated issues.

For instance, the Department of Interior is to serve as a lead agency and designate an officer as contact. This has been complied with. Second, expeditious consideration to pending amendments to the Hawaiian Homes Act was addressed by a procedure that was formulated and accepted to secure congressional consent to pending amendments.

Beneficiaries right to sue - Act 395, Session Laws of Hawaii 1988 - gives native Hawaiians the right to sue in the courts of Hawaii to enforce provisions of the Hawaiian Homes Commission Act.

Former Secretary Watt indicated informal discussions were being conducted with Justice toward early submission of proposed legislation to achieve similar results. However, later communications state native Hawaiians can sue under the old Civil Rights Act and nothing further materialized to my knowledge.

V. TRUST RESPONSIBILITY

The primary purpose of the Hawaiian Homes Commission Act was to place Native Hawaiians on the land and its secondary purpose was to raise revenues sufficient for the Hawaiian Homes Commission to carry out its primary purpose. The Act is intended to provide benefits to present and future generations.

In 1982 the Hawaii Supreme Court determined that the Commission must adhere to the most exacting fiduciary standards and that its actions must measure up to the same strict standards applicable to private trusts.

The Commission has been criticized for breach of trust when a policy decision was made to reduce lot sizes in recent awards.

Self sufficiency for the Department has been the most misunderstood and maligned aspect of the program. Where the

federal government continues to occupy Hawaiian home lands, such as at Lualualei, Oahu, or leases land at nominal rates, assistance is required to return or replace the lands and compensate Hawaiian home lands for use at fair market rates. Action is needed to remove all controversy and add to the financial well-being of the Department.

Findings from the Task Force report indicate that in the years preceding Hawaii's admission to the Union:

1. The Government of the United States served as trustee with respect to Hawaiian Home Lands.

2. Section 4 of the Hawaii Admissions Act - United States assumed a continuing responsibility for certain modification of the Hawaiian Homes Commission Act in certain amendments.

3. United States Secretary of Interior approved all land exchanges.

4. Section 5(f) of the Admissions Act creates a public trust of certain lands. If the trust is breached by the State, the United States may bring suit.

During 39 years of Territorial control the federal government failed to properly carry out their obligation and has not corrected these deficiencies and has not provided compensation for its action.

Former Secretary of the Interior Cecil Andrus stated that the Department of the Interior and the State have either neglected or misinterpreted many of their responsibilities under the Hawaiian Homes Commission Act.

VI. CONCLUSION

A communication from Frederick N. Ferguson, Deputy Solicitor United State Department of the Interior letter to Mr. Philip Montez, Regional Director, Western Regional Office of the United States Commission on Civil Rights, August 27, 1979, stated that "the United States Department of the Interior defines its relationship of the Federal Government to the home land trust as "more than merely ministerial or non-discretionary...the United States can be said to have retained its role as trustee under the act while making the State its instrument for carrying out its trust.

The State Legislature is fulfilling its responsibility and the Governors Action Plan is in place.

Current national policy leaves much to be desired. There has been a continual distancing from the previous opinion that tends toward a denial of any trust responsibility.

During the week of January 21-24, the Hawaiian Homes Commissioners and Department of Hawaiian Home Lands held meetings on all islands discussing land controversies identified in the Action Plan. The voice of the beneficiary community is one of anger, frustration, distrust, and demanding redress.

Until you join with us in partnership to cure these ills, all past actions of omission will remain unresolved. Unless the Federal Government enters into a spirit of reconciliation to help restore the trust, we will remain damaged.

In my opinion, the Federal Government's responsibilities are to:

1. Correct wrongful actions that occurred during the territorial period by restoring lands still under federal control, compensating the Trust for past use, and financing a complete and accurate survey and inventory of trust land assets;

2. Continue to monitor the program diligently and carry out the enforcement, approval and consent requirements in the law; and

3. Provide much-needed financial assistance and services to achieve the program's homesteading mission.

We believe that the Federal government will accept its responsibilities with a sense of commitment. We are hopeful that the next two years will be productive and will move toward making this trust for the Native Hawaiian whole and stronger.

Submitted by:

Ann Kukakina Nathaniel

Mrs. Ann Kukakina Nathaniel

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Statement of Charles K. Maxwell, Sr.
Vice Chairperson, Hawaii Advisory Committee
to the United States Commission on Civil Rights

United States Senate
Committee on Energy and Natural Resources

February 6, 1992
Washington, D.C.

Mr. Chairman, distinguished members of the Committee (with special greetings to Senators Akaka and Inouye), on behalf of the Hawaii Advisory Committee to the United States Commission on Civil Rights may I express our appreciation for this opportunity to appear before you today on this important occasion.

My name is Charles K. Maxwell, Sr. of Pukalani, Maui. I serve as Vice Chairman of the Hawaii Advisory Committee.

The Hawaii Advisory Committee is one of 51 such Advisory Committees appointed nationwide by the Commission. The Advisory Committee is chaired by Andre' S. Tatibouet of Honolulu.

Other members are: Emmett Cahill, Carmen Panui, Faye Kennedy, Alfred Lardizabal, Helen Nagtalon-Miller, Marion Saunders, Barry Shain, Oswald Stender and Anthony Vericella.

With me today is John F. Dulles, staff member of the United States Commission on Civil Rights, who assisted the Advisory Committee in its fact-finding study on Native Hawaiian Homelands issues.

On December 12, 1991, on the grounds of the Iolani Palace in Honolulu, the Advisory Committee released its fact-finding report, A BROKEN, TRUST: The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians.

The document was approved by the Advisory Committee, 11-0, and accepted by the parent United States Commission on Civil Rights, which is chaired by Arthur A. Fletcher.

It contains significant findings and recommendations directed to the Congress, the U.S. Department of the Interior, and the State of Hawaii.

The report's release is the culmination of a twelve year investigative and monitoring process by the Advisory

Committee which in 1980 initially reported on Hawaiian Homelands issues in a report entitled, Breach of Trust? Native Hawaiian Homelands. The Committee conducted additional factfinding meetings in September 1988 and August 1990 to evaluate the effectiveness of the Federal and State governments in meeting trust obligations to Native Hawaiians under provisions of the Hawaiian Homes Commission Act.

With your permission, we would like to introduce the report, A BROKEN TRUST into these proceedings as a part of the official testimony of the Hawaii Advisory Committee to the United States Commission on Civil Rights.

I will now briefly summarize some of the more disturbing findings in the report, as they relate to the Federal Government's responsibilities for the Hawaiian Homes Commission Act:

Finding 1:
The Hawaii Advisory Committee concludes that the United States has failed to exercise its trust obligations to the beneficiaries of the Hawaiian Homes Commission Act, as mandated by Section 5(f) of the Hawaii Admission Act.

The statute specifically entrusts oversight responsibilities to the Federal Government and grants it exclusive authority to enforce the provisions of the act. Despite this, it is clear that the United States has now abandoned any interest in protecting the trust.

This retreat is unacceptable to the Advisory Committee, especially in light of overwhelming evidence that the objectives of the Hawaiian Homes Commission Act have not been achieved in 70 years of Federal and State administration. Refusal by the Federal Government to monitor compliance, investigate complaints, and take appropriate legal actions, constitute a denial of the civil rights of Native Hawaiian trust beneficiaries.

Finding 2:

Unlike other Native Americans, Hawaiians have never received the privileges of a political relationship with the United States. Yet Hawaiians, whose former kingdom was a member of the international community of nations and recognized by the United States, have a compelling case for Federal recognition.

The lack of formal recognition of Native Hawaiians by the Federal Government has resulted in their inability to secure

control of lands and natural resources, develop self-governance mechanisms, enjoy eligibility for Federal programs designed to assist Native Americans and other protected groups, and the denial of valuable legal rights to sue for discrimination. This constitutes disparate treatment and must be remedied without delay.

Finding 3:
With questionable legal authority and negligible compensation, the Federal Government is occupying valuable Hawaiian homelands for purposes unrelated to fulfillment of the trust.

Continued control of these lands in defiance of trust obligations, demonstrates a callous disregard for the interests of the Native Hawaiian beneficiaries. Lualualei alone constitutes one-fifth of all homestead lands on Oahu, where over 5,000 Hawaiian applicants are waiting for leases. The United States has failed to return these valuable parcels to the trust and also refused to exchange them for other suitable Federal lands or provide fair compensation for their past and present use.

Finding 4:

Native Hawaiian beneficiaries are denied the explicit right to sue for enforcement of the trust in Federal court under the Hawaii Admission Act of the Hawaiian Homes Commission Act. Because of the very narrow scope of judicial remedies available in Federal and State courts, and extensive procedural and jurisdictional constraints, beneficiaries are effectively denied full access to judicial remedies for breaches of trust.

In view of the unwillingness of the Federal Government to file such actions on their behalf, beneficiaries are effectively denied the right to judicial redress.

Finding 5:

The United States has failed to provide funding support or sustained technical assistance for implementation of the Hawaiian Homes Commission Act. This failure has persisted despite the fact that the legislation was enacted by the United States Congress and that most of the damage done to the trust occurred during the territorial period.

With respect to State responsibilities, the Advisory Committee acknowledges improved funding support and

increased attention by the Governor in addressing controversies surrounding the many complex issues involving the program. Nonetheless, the Committee finds that the Hawaii Department of Hawaiian Homelands is often unable to compete successfully with other more powerful political influences affecting public policy. It calls for the creation of a new administrative mechanism, concluding, "it is unlikely that the Hawaiian homes program will ever succeed unless the trust functions can be managed in a more independent, aggressive, and creative manner, with increased accountability to the beneficiaries. Indeed, the new administrative structure should be governed and primarily directed by Native Hawaiians."

We thank you for this opportunity to testify and are hopeful that the efforts of the Hawaii Advisory Committee will be of value to your important work.