TESTIMONY
SCR 40/SR 25
LATE

LATE TESTIMONY

TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2009

ON THE FOLLOWING MEASURE:
S.R. NO. 25, URGING THE GOVERNOR AND THE ATTORNEY GENERAL TO WITHDRAW THE APPEAL TO THE UNITED STATES SUPREME COURT OF THE HAWAII STATE SUPREME COURT DECISION, OFFICE OF HAWAIIAN AFFAIRS V. HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAII, 117 HAWAII 174 (2008).

BEFORE THE:
SENATE COMMITTEE ON WATER, LAND, AGRICULTURE, AND HAWAIIAN AFFAIRS AND ON JUDICIARY AND GOVERNMENT OPERATIONS

DATE: Tuesday, February 17, 2009 TIME: 3:15 PM

LOCATION: State Capitol, Room 211

TESTIFIER(S): Mark J. Bennett, Attorney General
or Lisa M. Ginoza, First Deputy Attorney General

Chairs Hee and Taniguchi and Members of the Committees:

The Department of Attorney General opposes this resolution.

The resolution requests the Governor and Attorney General to withdraw the pending appeal described in the resolution's title.

The Governor and her Administration are fully committed to the support of Native Hawaiian rights. This support has been concretely expressed by, among other things, resumption of ceded land payments to OHA, unwavering support of the Akaka Bill, vigorous defense of numerous federal court lawsuits seeking to cripple or destroy programs seeking to better the condition of Native Hawaiians, including OHA itself, and a strenuous effort, with the help and ultimately the endorsement of OHA, to resolve outstanding issues relating to ceded land revenues.

This lawsuit was filed in 1994. Although the lawsuit sought to stop all ceded lands transfers (in addition to two particular transfers), the State's defense sought to preserve intact the State's right to manage the ceded lands for the benefit of all its citizens. The lawsuit claimed that as a result of the Apology Resolution the State lacked good title to the State's public lands, and that therefore the State could not transfer any of those lands, no matter how

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important the public purpose of the transfer. Hawaii's Admission Act and various state statutes allow for such transfers, and indeed the particular transfer that motivated the lawsuit was a transfer to promote affordable housing. This proposed transfer comported completely with the Admission Act and Hawaii's Constitution, both of which contemplate and sanction transfers to help promote home ownership. The Cayetano Administration defended the case for the same legal reasons advanced by the present Administration -- the State owns the ceded lands and has the legal right to sell, exchange, or transfer the ceded lands when appropriate to do so for trust purposes. This legal right was in no way affected by the Apology Resolution, as is clear from the text of the Resolution and from its legislative history. Many of these points were fully stated in an opinion letter prepared by Governor Cayetano's Attorney General, Margery Bronster, Op. Att'y Gen. 95-03, attached to this testimony.

Like the Cayetano Administration, the Lingle Administration is defending the rights of the Legislative and Executive branches to manage the public trust lands as provided for in our State Admission Act, our State Constitution, and our State statutes, for the benefit of all of Hawaii's citizens.

The fact that the State owns the ceded lands and has a right to transfer them, does not in any way diminish Native Hawaiians' political and moral claims. What it does mean is that the claims have to be pursued in and vindicated in the political branches of government, not in the courts. That is the position the State has taken for almost fifteen years.

The ceded lands at issue are explicitly entrusted to the State for the benefit of all the citizens of this State. We believe the Hawai'i Supreme Court's decision was wrong for reasons fully spelled out in our filings in state courts and with the United States Supreme Court. Plaintiffs chose to initiate and pursue this lawsuit. This Administration very much regrets that choice. But, like the Cayetano Administration, the Governor and her Administration believe that the

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suit must be defended. The sovereign dignity of this State and the interest of all its citizens require nothing less. It is our hope that the United States Supreme Court will confirm that the Apology Resolution did not diminish the State's full rights and ownership in the ceded lands. We believe the appeal is in the best interests of all Hawaii's citizens, and thus respectfully oppose these proposed resolutions.

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BENJAMIN J. CAYETANO
GOVERNOR

MARGERY S. BRONSTER
ATTORNEY GENERAL

STEVEN S. MICHAELS
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

July 17, 1995

The Honorable Benjamin J. Cayetano
Governor of Hawaii
Executive Chambers
Hawaii State Capitol
Honolulu, Hawaii 96813

Dear Governor Cayetano:

Re: Authority to Alienate Public Trust Lands

This responds to your request for our opinion as to whether the State has the legal authority to sell or dispose of ceded lands.

For the reasons that follow, we are of the opinion that the State may sell or dispose of ceded lands. We note that any proceeds of the sale or disposition must be returned to the trust and held by the State for use for one or more of the five purposes set forth in § 5(f) of the Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959)(the "Admission Act").

In Part I of this opinion, we determine that under the Admission Act and the Constitution the State is authorized to sell ceded lands. In Part II, we conclude that the 1978 amendments to the State Constitution do not alter the State's authority.

I. The Admission Act Authorizes the Sale or Disposition of Public Trust Land.

The term "ceded land" as used in this opinion is synonymous with the phrase "public land and other public property" as defined in § 5(g) of the Admission Act:

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

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The United States granted the ceded lands to the State of Hawaii in § 5(b) of the Admission Act. That section, in relevant part, declares:

> (b) Except as provided in subsections (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property . . . .

Section 5(f) of the Admission Act imposes a trust upon these lands and appoints the State as the trustee.[1] The section states:

> (f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), <u>together with the proceeds from the sale or other disposition of any such lands</u> and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for <u>the development of farm and home ownership on as widespread a basis as possible</u> for the making of public improvements, and for the provision of lands for public use. <u>Such lands, proceeds, and income shall be managed and disposed of</u> for one or more of the foregoing purposes <u>in such manner as the constitution and laws of said State may provide</u>, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the

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[1]Section 5 essentially continues the trust which was first established by the Newlands Resolution in 1898, and continued by the Organic Act in 1900. Under the Newlands Resolution, Congress served as trustee; under the Organic Act, the Territory of Hawaii served as trustee.

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> lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university. [Emphases added.]

The Admission Act § 5(f) expressly acknowledges that ceded or public trust land may be alienated when it refers to "the proceeds from the sale or other disposition of any such lands."

There is further evidence that alienation of the trust land was contemplated and permitted under § 5(f); one of the five enumerated purposes for which the public trust land may be used is, "the development of farm and home ownership on as widespread a basis as possible." (Emphasis added.)

This Admission Act language is echoed in article XI, § 10 of the State Constitution (previously numbered article X, §5) which provides:

> The public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law. [Emphases added.]

The Hawaii Supreme Court has affirmed that "[t]he language of this section refers expressly to farm and home ownership and not leaseholds." Big Island Small Ranchers Ass'n v. State, 60 Haw. 228, 235, 588 P.2d 430, 435 (1978). The history of the 1950 constitution further reflects that fee ownership was intended. Standing Committee Report No. 78, adopted by the Committee of the Whole, stated:

> The Committee unanimously agreed that for the public good, fee simple homes and farms should be made available on as widespread basis as possible, however, it was felt by the Committee that reasonable judgment should be exercised in the manner of making the lands available. . . . The thought of the Committee is that the more families are placed as independent land owners on the public domain, the more stable the economy of the State will be . . . .

1 Proceedings of the Constitutional Convention of Hawaii 1950, at 233 (1960) (emphases added).

Additionally, § 5(f) mandated that the constitution and the law prescribe the manner in which the State was to manage and

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dispose of ceded lands. In adopting article XIV, § 8 (now renumbered, and as amended, article XVI, § 7) "the State affirmatively assume[d] the § 5(f) trust responsibilities." Pele Defense Fund v. Paty, 73 Haw. 578, 586 n.2, 837 P.2d 1247, 1254 n.2 (1992), cert. denied, __ U.S. ____, 113 S. Ct. 1277, 122 L. Ed. 2d 671 (1993). That section provided that:

> [A]ny trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation.

Thus, the State Constitution placed the responsibility for compliance with the Admission Act on the legislature.

The legislature carried out this responsibility by enacting Act 32, 1962 Haw. Sess. Laws 95. Section 1 of the act provided, in relevant part:

> By virtue of section 15 of the Statehood Act, a serious question exists as to whether or not Hawaii has any land laws relating to the management and disposition of the public lands.
>
> It is of immediate importance to the economy and to the people of Hawaii that we adopt a set of laws for the management and disposition of our public lands in accordance with present day needs.

Section 2 of Act 32, codified as chapter 171, Haw. Rev. Stat., contains the provisions for the management and disposition of public lands.[2] Chapter 171 applies to any and all "public lands," including ceded lands or lands the State acquired by

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[2]Under § 171-13, Haw Rev. Stat., "[e]xcept as otherwise provided by law and subject to other provisions of this chapter, the board may: (1) [d]ispose of public land in fee simple, by lease, lease with option to purchase, license, or permit . . . ." Similarly, § 171-23, Haw. Rev. Stat. reflects that a land patent or deed may be issued "to the purchaser in fee simple of any public land or other land disposable by the board of land and natural resources."

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other means.[3] Act 32 recognized the uniqueness of the ceded lands in section -18 of section 2 (codified as Haw. Rev. Stat. 171-18). It prescribed that "all proceeds and income from the sale, lease or other disposition" of ceded lands were to "be held as a public trust." Like section 5(f) of the Admission Act, Haw. Rev. Stat. § 171-18 expressly provides that ceded or public trust land may be alienated. Both the Admission Act and Haw. Rev. Stat. § 171-18 refer to "the proceeds and income from the sale, lease or other disposition" of ceded lands.

Dispositions of ceded lands may also include land exchanges in which the State conveys ceded lands to other parties in exchange for land from those parties. In its definition of ceded lands, the Admission Act deals expressly with land exchanges as a means of disposing of ceded lands.

As noted earlier, § 5(g) of the Admission Act defines "public land and other public property" as:

> the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded. (Emphasis added.)

Land exchanges, like other types of dispositions, were contemplated by the Legislature when it enacted Act 32, 1962 Haw. Sess. Laws 95. Presently codified as chapter 171, Hawaii Revised Statutes, the statute provides for exchanges of public for private lands at §§ 171-50 and -50.2. Because any such exchange must be made for "substantially equal value" § 171-50(b), the value of the ceded land trust is not diminished by the exchange.

This treatment of land exchanges affecting the trust so as not to diminish the value of the trust is an analogue to Haw. Rev. Stat. § 171-18, which provides that proceeds and income from the sale, lease or other disposition of ceded lands "be held as a public trust." Thus, whether the disposition of the ceded lands results in money or land, the proceeds are subject to the trust

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[3]Haw. Rev. Stat. § 171-2 defines "public lands" as "all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner . . . ."

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and must be held by the State for use for trust purposes.

The Admission Act, pursuant to which the State acquired title to ceded lands, allowed the State to sell, alienate, or otherwise dispose of those lands. The State Constitution and laws enacted thereunder also reflect the State's right to sell.

II. The 1978 Constitutional Amendments Did Not Alter the Express Authority to Alienate Public Trust Land.

No law enacted after the Admission Act has altered the alienability of § 5(f) trust land. We appreciate, however, that the argument has been made that a change in the State Constitution in 1978 altered the law on the issue of alienability.

In 1978, Hawaii amended its constitution to include a specific reference to the public trust established in the Admission Act. Article XII, § 4 provides:

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

In article XVI, § 7, referred to by article XII, § 4, the State affirmatively assumes the Admission Act § 5(f) trust provisions, and consequently the trust purposes, powers, and authority. Pele Defense Fund, 73 Haw. at 586, n.2, and 601, 837 P.2d at 1254, n.2, and 1262. Article XVI, § 7 now provides:

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

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[4]Some questions remain as to whether the electorate approved the addition of the last sentence of article XV, § 7, as proposed

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An analysis of the meaning of article XII, § 4 requires consideration of other related provisions of the Constitution, as amended in 1978. "A constitutional provision must be construed in connection with other provisions of the instrument, and also in light of the circumstances under which it was adopted and the history which preceded it, and the natural consequences of a proposed construction . . . ." In re Carter, 16 Haw. 242, 244 (1904). See also Haw. Rev. Stat. § 1-16 (1985); Att'y Gen. Op. No. 83-2 (April 15, 1983).

A companion provision to article XII, § 4, which also had its origin in 1978 Constitutional Convention is article XII, § 6. Section 6 refers to the trust established in article XII, § 4 in a manner that leaves no doubt that the ability to alienate public trust land conferred by § 5(f) of the Admission Act was recognized as continuing after the 1978 amendments to the constitution. Section 6 states that the Office of Hawaiian Affairs ("OHA") board:

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

This language acknowledges expressly the continued viability of the power, first conferred upon the State by § 5(f) of the Admission Act, to alienate ceded lands.

If the State did not have continuing authority and power to dispose of ceded lands, "proceeds from that pro rata portion" could not be generated. Further, an interpretation which would render the reference to "proceeds" superfluous should not be

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by the 1978 Constitutional Convention. See Kahalekai v. Doi, 60 Haw. 324, 590 P.2d 543 (1979).

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adopted. Littleton v. State of Hawaii, 6 Haw. App. 70, 73, 708 P.2d 829, 832 (1985). Therefore, the power and authority to generate proceeds from, or power to alienate, lands held in public trust, exist under article XII, § 4.

Another provision of the Constitution, article XI, § 10, also supports the State's continued authority to alienate ceded lands. Article XI, §10 of the Hawaii Constitution provides that the "public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law." Although repeal of this provision was proposed in 1978, the repeal was not validly ratified. Kahalekai v. Doi, 50 Haw. 324, 342, 590 P.2d 543, 555 (1979). Absent valid ratification, the proposed repeal was a nullity. Id.; 16 C.J.S. Constitutional Law § 14 (1984); 16 Am. Jur. 2d Constitutional Law §§ 41 and 44 (1979).

Moreover, the proposed repeal was not intended to diminish the power to alienate the public lands for fee home and farm ownership. In fact, Delegate Anthony Chang emphasized: "[t]his [repeal of article X, § 10] would not preclude the State from developing house or farm lots on public lands, but merely broaden the purpose to which public lands would be used." 1 Proceedings of the Constitutional Convention of Hawaii 1978 (hereinafter referred to as "1978 Proceedings"), at 445-46.[5]

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[5]The constitutional history reveals that the Constitutional Convention understood that the Admission Act requirements and powers would continue after, and generally be unaffected by, the proposed constitutional amendments. During the debates, Delegate Chang explained the State's authority to manage and dispose of public lands. According to Delegate Chang, "[t]he reason that the committee proposal was drafted to delete this portion (Continued)

[article X, §5] of the Constitution was because of the evolving concept on the use of public land policy now reflects the uses to which the public lands were supposed to be put in conformance with the Organic Act [sic], and this is the multiple use concept.

"This [repeal of article X, § 5] would not preclude the State from developing house or farm lots on public lands, but merely broaden the purpose to which public lands should be put. And as I stated, this would be in conformance with the conditions set forth in the Organic Act [sic] with regard to public lands. The purposes to which public lands ought to be put under the

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The history of article XII, § 4, contains nothing to suggest that the section was intended to override the power to sell or dispose of the public trust land provided for in § 5(f) of the Admission Act.[6] Rather, the history indicates that article XII, § 4 was intended to reiterate the trust contained in the Admission Act. According to the Standing Comm. Rep., § 4 "recites the trust corpus of section 5(b) and names the two principal beneficiaries established in section 5(f) of the Admission Act - those [who are] native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended, and the general public." Stand. Comm. Rep. No. 59, 1978 Proceedings, at 643-44.[7]

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terms of the Organic Act [sic] are five in number, and farm and home ownership is only one. . . ." 1978 Proceedings at 445-46. Delegate Chang subsequently changed his reference to the Organic Act to the Admission Act. Id. at 446.

[6]The electorate was given "[a] brief description of each of the proposed amendments" in an Informational Booklet which was part of the official 1978 ballot. With respect to article XII, sections 4, 5, and 6, the booklet provided:

> If adopted, this amendment
> * sets forth the trust corpus and beneficiaries of the Admission Act.
> * establishes an Office of Hawaiian Affairs with an elected board of trustees and provides for an effective date.

There was no statement that any change in the purposes of the § 5(f) trust, or any change in the management or disposition of such public lands subject to § 5(f), was proposed or intended. Such change in management and purposes would represent a fundamental change in the trust terms regarding the use and disposition of public lands which would require that the voters be given specific information that such a result was intended. Otherwise, the ratification would be suspect. Kahalekai v. Doi, 60 Haw. 324, 590 P.2d 543 (1979).

[7]In explaining the proposed changes to article XII, Delegate Kekoa Kaapu described the § 4 amendment as "a redefinition of the public trust, of those elements in the Admission Act which are of benefit to Hawaiians, by setting forth clearly what those two categories of beneficiaries are to make it more easily handleable to administer -- and that is, that the beneficiaries of the

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Courts have recognized that article XII, § 4 must be interpreted by reference to the terms of the Admission Act, § 5(f). According to the Hawaii Supreme Court, "Article XII, § 4 was added to the Hawaii Constitution to expressly recognize the trust purposes and trust beneficiaries of the § 5(f) trust." Pele Defense Fund v. Paty, 73 Haw. 578, 603, 837 P.2d 1247, 1263 (1992), cert. denied, __ U.S. ____, 113 S. Ct. 1277, 122 L. Ed. 2d 671 (1993). The Supreme Court wrote: "Article XII, § 4 imposes a fiduciary duty on Hawaii's officials to hold ceded lands in accordance with the § 5(f) trust provisions." Id., 73 Haw. at 605, 837 P.2d at 1264. There can be no "doubt that the provisions of the [Admission] Act must be looked to when we consider the nature and extent of the State's duties and powers." Price v. State of Hawaii, 921 F.2d 950, 955 (9th Cir. 1990).

The words "public trust" do not require the State to adopt any particular form of management of public lands. "Those words alone do not demand that a State deal with its property in any particular manner . . . . Those words betoken the State's duty to avoid deviating from § 5(f)'s purpose. They betoken nothing more." Price, 921 F.2d at 956.

The phrase "shall be held by the State as a public trust" in article XII, § 4, does not mean that the State may not sell the trust land. This language is very like the provision in § 5(f) of the Admission Act which says that the lands granted to the

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public trust under section 5(f) are in fact the general public and native Hawaiians." 1978 Proceedings, at 458 (1980).

According to Delegate John Waihee, "this proposal does not transfer to the trust any state lands. What is concerned is that section 5(f) of the Admission Act sets out categories of individuals or persons who are to receive the revenues from all public lands that were given to the State of Hawaii . . . . So what the trust would do would be to mandate the section of these revenues from public lands which are to be given which are presently mandated by the Admission Act to be held in trust for Hawaiians -- would be transferred directly to the new entity which we are calling the Hawaiian affairs trust. So what we're talking about in this paragraph is not the transfer of lands but the transfer of revenues that are generated by public lands . . . . We're not taking away any public lands, we're merely directing some of the revenues that are supposed to go to the Hawaiian people." Id. at 462.

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State "shall be held by said State as a public trust." Significantly, side by side in § 5(f) with this provision is the language that contemplates proceeds from the sale of the trust land.

The case of State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977), describes common law public trust principles that are generally applicable when a state holds land in trust. The court said:

> Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, e.g., recreation. Sale of the property would be permissible only where the sale promotes a valid public purpose.

58 Haw. at 121, 566 P.2d at 735.

In view of § 5(f) of the Admission Act, relevant constitutional provisions, and common law public trust principles, we conclude that the State has been and remains empowered to sell trust lands subject to the terms of the trust. This authority was in no way modified by the constitutional amendments made in 1978. In fact, the Constitution, as amended in 1978 refers to proceeds from the sale or disposition of ceded lands with a prospective allocation of such proceeds to OHA.

Very truly yours,

Margery S. Bronster
Attorney General

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TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2009

ON THE FOLLOWING MEASURE:
S.C.R. NO. 40, URGING THE GOVERNOR AND THE ATTORNEY GENERAL TO WITHDRAW THE APPEAL TO THE UNITED STATES SUPREME COURT OF THE HAWAII STATE SUPREME COURT DECISION, OFFICE OF HAWAIIAN AFFAIRS V. HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAII, 117 HAWAII 174 (2008).

BEFORE THE:
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LOCATION: State Capitol, Room 211

TESTIFIER(S): Mark J. Bennett, Attorney General
or Lisa M. Ginoza, First Deputy Attorney General

Chairs Hee and Taniguchi and Members of the Committees:

The Department of Attorney General opposes this resolution.

The resolution requests the Governor and Attorney General to withdraw the pending appeal described in the resolution's title.

The Governor and her Administration are fully committed to the support of Native Hawaiian rights. This support has been concretely expressed by, among other things, resumption of ceded land payments to OHA, unwavering support of the Akaka Bill, vigorous defense of numerous federal court lawsuits seeking to cripple or destroy programs seeking to better the condition of Native Hawaiians, including OHA itself, and a strenuous effort, with the help and ultimately the endorsement of OHA, to resolve outstanding issues relating to ceded land revenues.

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important the public purpose of the transfer. Hawaii's Admission Act and various state statutes allow for such transfers, and indeed the particular transfer that motivated the lawsuit was a transfer to promote affordable housing. This proposed transfer comported completely with the Admission Act and Hawaii's Constitution, both of which contemplate and sanction transfers to help promote home ownership. The Cayetano Administration defended the case for the same legal reasons advanced by the present Administration -- the State owns the ceded lands and has the legal right to sell, exchange, or transfer the ceded lands when appropriate to do so for trust purposes. This legal right was in no way affected by the Apology Resolution, as is clear from the text of the Resolution and from its legislative history. Many of these points were fully stated in an opinion letter prepared by Governor Cayetano's Attorney General, Margery Bronster, Op. Att'y Gen. 95-03, attached to this testimony.

Like the Cayetano Administration, the Lingle Administration is defending the rights of the Legislative and Executive branches to manage the public trust lands as provided for in our State Admission Act, our State Constitution, and our State statutes, for the benefit of all of Hawaii's citizens.

The fact that the State owns the ceded lands and has a right to transfer them, does not in any way diminish Native Hawaiians' political and moral claims. What it does mean is that the claims have to be pursued in and vindicated in the political branches of government, not in the courts. That is the position the State has taken for almost fifteen years.

The ceded lands at issue are explicitly entrusted to the State for the benefit of all the citizens of this State. We believe the Hawai'i Supreme Court's decision was wrong for reasons fully spelled out in our filings in state courts and with the United States Supreme Court. Plaintiffs chose to initiate and pursue this lawsuit. This Administration very much regrets that choice. But, like the Cayetano Administration, the Governor and her Administration believe that the

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suit must be defended. The sovereign dignity of this State and the interest of all its citizens require nothing less. It is our hope that the United States Supreme Court will confirm that the Apology Resolution did not diminish the State's full rights and ownership in the ceded lands. We believe the appeal is in the best interests of all Hawaii's citizens, and thus respectfully oppose these proposed resolutions.

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BENJAMIN J. CAYETANO
GOVERNOR

MARGERY S. BRONSTER
ATTORNEY GENERAL

STEVEN S. MICHAELS
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808)586-1500

July 17, 1995

The Honorable Benjamin J. Cayetano
Governor of Hawaii
Executive Chambers
Hawaii State Capitol
Honolulu, Hawaii 96813

Dear Governor Cayetano:

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In Part I of this opinion, we determine that under the Admission Act and the Constitution the State is authorized to sell ceded lands. In Part II, we conclude that the 1978 amendments to the State Constitution do not alter the State's authority.

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The United States granted the ceded lands to the State of Hawaii in § 5(b) of the Admission Act. That section, in relevant part, declares:

> (b) Except as provided in subsections (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property . . . .

Section 5(f) of the Admission Act imposes a trust upon these lands and appoints the State as the trustee.[1] The section states:

> (f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), <u>together with the proceeds from the sale or other disposition of any such lands</u> and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for <u>the development of farm and home ownership on as widespread a basis as possible</u> for the making of public improvements, and for the provision of lands for public use. <u>Such lands, proceeds, and income shall be managed and disposed of</u> for one or more of the foregoing purposes <u>in such manner as the constitution and laws of said State may provide</u>, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the

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[1]Section 5 essentially continues the trust which was first established by the Newlands Resolution in 1898, and continued by the Organic Act in 1900. Under the Newlands Resolution, Congress served as trustee; under the Organic Act, the Territory of Hawaii served as trustee.

LATE TESTIMONY

> lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university. [Emphases added.]

The Admission Act § 5(f) expressly acknowledges that ceded or public trust land may be alienated when it refers to "the proceeds from the sale or other disposition of any such lands."

There is further evidence that alienation of the trust land was contemplated and permitted under § 5(f); one of the five enumerated purposes for which the public trust land may be used is, "the development of farm and home ownership on as widespread a basis as possible." (Emphasis added.)

This Admission Act language is echoed in article XI, § 10 of the State Constitution (previously numbered article X, §5) which provides:

> The public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law. [Emphases added.]

The Hawaii Supreme Court has affirmed that "[t]he language of this section refers expressly to farm and home ownership and not leaseholds." Big Island Small Ranchers Ass'n v. State, 60 Haw. 228, 235, 588 P.2d 430, 435 (1978). The history of the 1950 constitution further reflects that fee ownership was intended. Standing Committee Report No. 78, adopted by the Committee of the Whole, stated:

> The Committee unanimously agreed that for the public good, fee simple homes and farms should be made available on as widespread basis as possible, however, it was felt by the Committee that reasonable judgment should be exercised in the manner of making the lands available. . . . The thought of the Committee is that the more families are placed as independent land owners on the public domain, the more stable the economy of the State will be . . . .

1 Proceedings of the Constitutional Convention of Hawaii 1950, at 233 (1960) (emphases added).

Additionally, § 5(f) mandated that the constitution and the law prescribe the manner in which the State was to manage and

LATE TESTIMONY

dispose of ceded lands. In adopting article XIV, § 8 (now renumbered, and as amended, article XVI, § 7) "the State affirmatively assume[d] the § 5(f) trust responsibilities." Pele Defense Fund v. Paty, 73 Haw. 578, 586 n.2, 837 P.2d 1247, 1254 n.2 (1992), cert. denied, __ U.S. ____, 113 S. Ct. 1277, 122 L. Ed. 2d 671 (1993). That section provided that:

> [A]ny trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation.

Thus, the State Constitution placed the responsibility for compliance with the Admission Act on the legislature.

The legislature carried out this responsibility by enacting Act 32, 1962 Haw. Sess. Laws 95. Section 1 of the act provided, in relevant part:

> By virtue of section 15 of the Statehood Act, a serious question exists as to whether or not Hawaii has any land laws relating to the management and disposition of the public lands.
>
> It is of immediate importance to the economy and to the people of Hawaii that we adopt a set of laws for the management and disposition of our public lands in accordance with present day needs.

Section 2 of Act 32, codified as chapter 171, Haw. Rev. Stat., contains the provisions for the management and disposition of public lands.[2] Chapter 171 applies to any and all "public lands," including ceded lands or lands the State acquired by

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[2]Under § 171-13, Haw Rev. Stat., "[e]xcept as otherwise provided by law and subject to other provisions of this chapter, the board may: (1) [d]ispose of public land in fee simple, by lease, lease with option to purchase, license, or permit . . . ." Similarly, § 171-23, Haw. Rev. Stat. reflects that a land patent or deed may be issued "to the purchaser in fee simple of any public land or other land disposable by the board of land and natural resources."

LATE TESTIMONY

other means.[3] Act 32 recognized the uniqueness of the ceded lands in section -18 of section 2 (codified as Haw. Rev. Stat. 171-18). It prescribed that "all proceeds and income from the sale, lease or other disposition" of ceded lands were to "be held as a public trust." Like section 5(f) of the Admission Act, Haw. Rev. Stat. § 171-18 expressly provides that ceded or public trust land may be alienated. Both the Admission Act and Haw. Rev. Stat. § 171-18 refer to "the proceeds and income from the sale, lease or other disposition" of ceded lands.

Dispositions of ceded lands may also include land exchanges in which the State conveys ceded lands to other parties in exchange for land from those parties. In its definition of ceded lands, the Admission Act deals expressly with land exchanges as a means of disposing of ceded lands.

As noted earlier, § 5(g) of the Admission Act defines "public land and other public property" as:

> the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded. (Emphasis added.)

Land exchanges, like other types of dispositions, were contemplated by the Legislature when it enacted Act 32, 1962 Haw. Sess. Laws 95. Presently codified as chapter 171, Hawaii Revised Statutes, the statute provides for exchanges of public for private lands at §§ 171-50 and -50.2. Because any such exchange must be made for "substantially equal value" § 171-50(b), the value of the ceded land trust is not diminished by the exchange.

This treatment of land exchanges affecting the trust so as not to diminish the value of the trust is an analogue to Haw. Rev. Stat. § 171-18, which provides that proceeds and income from the sale, lease or other disposition of ceded lands "be held as a public trust." Thus, whether the disposition of the ceded lands results in money or land, the proceeds are subject to the trust

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[3]Haw. Rev. Stat. § 171-2 defines "public lands" as "all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner . . . ."

LATE TESTIMONY

and must be held by the State for use for trust purposes.

The Admission Act, pursuant to which the State acquired title to ceded lands, allowed the State to sell, alienate, or otherwise dispose of those lands. The State Constitution and laws enacted thereunder also reflect the State's right to sell.

II. The 1978 Constitutional Amendments Did Not Alter the Express Authority to Alienate Public Trust Land.

No law enacted after the Admission Act has altered the alienability of § 5(f) trust land. We appreciate, however, that the argument has been made that a change in the State Constitution in 1978 altered the law on the issue of alienability.

In 1978, Hawaii amended its constitution to include a specific reference to the public trust established in the Admission Act. Article XII, § 4 provides:

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

In article XVI, § 7, referred to by article XII, § 4, the State affirmatively assumes the Admission Act § 5(f) trust provisions, and consequently the trust purposes, powers, and authority. Pele Defense Fund, 73 Haw. at 586, n.2, and 601, 837 P.2d at 1254, n.2, and 1262. Article XVI, § 7 now provides:

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

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[4]Some questions remain as to whether the electorate approved the addition of the last sentence of article XV, § 7, as proposed

LATE TESTIMONY

An analysis of the meaning of article XII, § 4 requires consideration of other related provisions of the Constitution, as amended in 1978. "A constitutional provision must be construed in connection with other provisions of the instrument, and also in light of the circumstances under which it was adopted and the history which preceded it, and the natural consequences of a proposed construction . . . ." In re Carter, 16 Haw. 242, 244 (1904). See also Haw. Rev. Stat. § 1-16 (1985); Att'y Gen. Op. No. 83-2 (April 15, 1983).

A companion provision to article XII, § 4, which also had its origin in 1978 Constitutional Convention is article XII, § 6. Section 6 refers to the trust established in article XII, § 4 in a manner that leaves no doubt that the ability to alienate public trust land conferred by § 5(f) of the Admission Act was recognized as continuing after the 1978 amendments to the constitution. Section 6 states that the Office of Hawaiian Affairs ("OHA") board:

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

This language acknowledges expressly the continued viability of the power, first conferred upon the State by § 5(f) of the Admission Act, to alienate ceded lands.

If the State did not have continuing authority and power to dispose of ceded lands, "proceeds from that pro rata portion" could not be generated. Further, an interpretation which would render the reference to "proceeds" superfluous should not be

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by the 1978 Constitutional Convention. See Kahalekai v. Doi, 60 Haw. 324, 590 P.2d 543 (1979).

LATE TESTIMONY

adopted. Littleton v. State of Hawaii, 6 Haw. App. 70, 73, 708 P.2d 829, 832 (1985). Therefore, the power and authority to generate proceeds from, or power to alienate, lands held in public trust, exist under article XII, § 4.

Another provision of the Constitution, article XI, § 10, also supports the State's continued authority to alienate ceded lands. Article XI, §10 of the Hawaii Constitution provides that the "public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law." Although repeal of this provision was proposed in 1978, the repeal was not validly ratified. Kahalekai v. Doi, 50 Haw. 324, 342, 590 P.2d 543, 555 (1979). Absent valid ratification, the proposed repeal was a nullity. Id.; 16 C.J.S. Constitutional Law § 14 (1984); 16 Am. Jur. 2d Constitutional Law §§ 41 and 44 (1979).

Moreover, the proposed repeal was not intended to diminish the power to alienate the public lands for fee home and farm ownership. In fact, Delegate Anthony Chang emphasized: "[t]his [repeal of article X, § 10] would not preclude the State from developing house or farm lots on public lands, but merely broaden the purpose to which public lands would be used." 1 Proceedings of the Constitutional Convention of Hawaii 1978 (hereinafter referred to as "1978 Proceedings"), at 445-46.[5]

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[5]The constitutional history reveals that the Constitutional Convention understood that the Admission Act requirements and powers would continue after, and generally be unaffected by, the proposed constitutional amendments. During the debates, Delegate Chang explained the State's authority to manage and dispose of public lands. According to Delegate Chang, "[t]he reason that the committee proposal was drafted to delete this portion (Continued)

[article X, §5] of the Constitution was because of the evolving concept on the use of public land policy now reflects the uses to which the public lands were supposed to be put in conformance with the Organic Act [sic], and this is the multiple use concept.

"This [repeal of article X, § 5] would not preclude the State from developing house or farm lots on public lands, but merely broaden the purpose to which public lands should be put. And as I stated, this would be in conformance with the conditions set forth in the Organic Act [sic] with regard to public lands. The purposes to which public lands ought to be put under the

LATE TESTIMONY

The history of article XII, § 4, contains nothing to suggest that the section was intended to override the power to sell or dispose of the public trust land provided for in § 5(f) of the Admission Act.[6] Rather, the history indicates that article XII, § 4 was intended to reiterate the trust contained in the Admission Act. According to the Standing Comm. Rep., § 4 "recites the trust corpus of section 5(b) and names the two principal beneficiaries established in section 5(f) of the Admission Act - those [who are] native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended, and the general public." Stand. Comm. Rep. No. 59, 1978 Proceedings, at 643-44.[7]

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terms of the Organic Act [sic] are five in number, and farm and home ownership is only one. . . ." 1978 Proceedings at 445-46. Delegate Chang subsequently changed his reference to the Organic Act to the Admission Act. Id. at 446.

[6]The electorate was given "[a] brief description of each of the proposed amendments" in an Informational Booklet which was part of the official 1978 ballot. With respect to article XII, sections 4, 5, and 6, the booklet provided:

> If adopted, this amendment
> * sets forth the trust corpus and beneficiaries of the Admission Act.
> * establishes an Office of Hawaiian Affairs with an elected board of trustees and provides for an effective date.

There was no statement that any change in the purposes of the § 5(f) trust, or any change in the management or disposition of such public lands subject to § 5(f), was proposed or intended. Such change in management and purposes would represent a fundamental change in the trust terms regarding the use and disposition of public lands which would require that the voters be given specific information that such a result was intended. Otherwise, the ratification would be suspect. Kahalekai v. Doi, 60 Haw. 324, 590 P.2d 543 (1979).

[7]In explaining the proposed changes to article XII, Delegate Kekoa Kaapu described the § 4 amendment as "a redefinition of the public trust, of those elements in the Admission Act which are of benefit to Hawaiians, by setting forth clearly what those two categories of beneficiaries are to make it more easily handleable to administer -- and that is, that the beneficiaries of the

LATE TESTIMONY

Courts have recognized that article XII, § 4 must be interpreted by reference to the terms of the Admission Act, § 5(f). According to the Hawaii Supreme Court, "Article XII, § 4 was added to the Hawaii Constitution to expressly recognize the trust purposes and trust beneficiaries of the § 5(f) trust." Pele Defense Fund v. Paty, 73 Haw. 578, 603, 837 P.2d 1247, 1263 (1992), cert. denied, __ U.S. ____, 113 S. Ct. 1277, 122 L. Ed. 2d 671 (1993). The Supreme Court wrote: "Article XII, § 4 imposes a fiduciary duty on Hawaii's officials to hold ceded lands in accordance with the § 5(f) trust provisions." Id., 73 Haw. at 605, 837 P.2d at 1264. There can be no "doubt that the provisions of the [Admission] Act must be looked to when we consider the nature and extent of the State's duties and powers." Price v. State of Hawaii, 921 F.2d 950, 955 (9th Cir. 1990).

The words "public trust" do not require the State to adopt any particular form of management of public lands. "Those words alone do not demand that a State deal with its property in any particular manner . . . . Those words betoken the State's duty to avoid deviating from § 5(f)'s purpose. They betoken nothing more." Price, 921 F.2d at 956.

The phrase "shall be held by the State as a public trust" in article XII, § 4, does not mean that the State may not sell the trust land. This language is very like the provision in § 5(f) of the Admission Act which says that the lands granted to the

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public trust under section 5(f) are in fact the general public and native Hawaiians." 1978 Proceedings, at 458 (1980).

According to Delegate John Waihee, "this proposal does not transfer to the trust any state lands. What is concerned is that section 5(f) of the Admission Act sets out categories of individuals or persons who are to receive the revenues from all public lands that were given to the State of Hawaii . . . . So what the trust would do would be to mandate the section of these revenues from public lands which are to be given which are presently mandated by the Admission Act to be held in trust for Hawaiians -- would be transferred directly to the new entity which we are calling the Hawaiian affairs trust. So what we're talking about in this paragraph is not the transfer of lands but the transfer of revenues that are generated by public lands . . . . We're not taking away any public lands, we're merely directing some of the revenues that are supposed to go to the Hawaiian people." Id. at 462.

LATE TESTIMONY

State "shall be held by said State as a public trust." Significantly, side by side in § 5(f) with this provision is the language that contemplates proceeds from the sale of the trust land.

The case of State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977), describes common law public trust principles that are generally applicable when a state holds land in trust. The court said:

> Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, e.g., recreation. Sale of the property would be permissible only where the sale promotes a valid public purpose.

58 Haw. at 121, 566 P.2d at 735.

In view of § 5(f) of the Admission Act, relevant constitutional provisions, and common law public trust principles, we conclude that the State has been and remains empowered to sell trust lands subject to the terms of the trust. This authority was in no way modified by the constitutional amendments made in 1978. In fact, the Constitution, as amended in 1978 refers to proceeds from the sale or disposition of ceded lands with a prospective allocation of such proceeds to OHA.

Very truly yours,

Margery S. Bronster
Attorney General

LATE TESTIMONY

From: mailinglist@capitol.hawaii.gov
Sent: Monday, February 16, 2009 3:31 PM
To: WTLTestimony
Cc: wctanaka@hawaii.edu
Subject: Testimony for SCR40 on 2/17/2009 3:15:00 PM
Attachments: Dear Committee Chair Hee and Committee Members.pdf

Testimony for WTL/JGO 2/17/2009 3:15:00 PM SCR40 + SR25

Conference room: 211
Testifier position: support
Testifier will be present: No
Submitted by: Wayne Tanaka
Organization: Individual
Address:
Phone: (808)398-2205
E-mail: wctanaka@hawaii.edu
Submitted on: 2/16/2009

Comments:

LATE TESTIMONY

Dear Committee Chairs Brian Taniguchi and Clayton Hee, and Committee Members,

Unfortunately, I did not receive notice of this hearing in time to fully develop my testimony. However, if you are not already aware of the inherent danger of a Supreme Court ruling adverse to native Hawaiian claims (a danger not only to native Hawaiians as a class, but to the principles of liberty and freedom recognized on an international level, that supposedly comprise the pride of our society) here is a very short list of articles (out of many more) that detail the intuitively ridiculous interests such a ruling would vindicate:

Chris Iijima, *Race Over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Center Imperialism in* Rice v. Cayetano, 53 RUTGERS LAW REVIEW 91 (2000).

Danielle Conway-Jones, *The Perpetuation of Privilege and Anti-Affirmative Action Sentiment in Rice v. Cayetano*, 3 ASIAN-PACIFIC LAW AND POLICY JOURNAL 372 (2002) *available at* http://www.hawaii.edu/aplpj/articles/APLPJ_03.2_conwayjones.pdf

Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmakeing, and Misremembering*, 57 DUKE L.J. 345 (2008) *available at* http://www.law.duke.edu/shell/cite.pl?57+Duke+L.+J.+345

Please, before you decide not to pass this resolution, I respectfully ask that you take some time to review at least one or two of these short articles, written by some of the foremost legal scholars in Hawai`i, in order to understand the threat that this Supreme Court ruling poses to our island community.

Respectfully yours,
Wayne Tanaka
(808)398-2205
wctanaka@gmail.com

Jocelyn Leialoha M-Doane
Kupu'āina Coalition

(808) 381-3852

LATE TESTIMONY

February 16, 2009

Hawai'i State Senate
Committee on Water, Land, Agriculture, and Hawaiian Affairs
State Capitol
415 South Beretania Street

Aloha Chair Senator Clayton Hee, Vice Chair Senator Jill N. Tokuda, and Senators Bunda, Fukunaga, Kokubun, Takamine, and Hemmings,

I would like to express my ***strong support*** for SCR 40 and SR 25, as an individual and as a spokesperson for Kupu'āina Coalition, an organization of students and recent alumni of the William S. Richardson School of Law (WRSLS). I graduated from WRSLS in 2007 with a Pacific Asian Legal Certificate with a Specialty in Native Hawaiian Law, and focused a large part of my legal education on Native Hawaiian issues. I currently work with a program at the law school furthering Native Hawaiian scholarship and research.

Myself and other passionate colleagues formed Kupu'āina to inform and educate our community about the *OHA v. HCDCH* case and the implications of a review by the U.S. Supreme Court. Today we are focusing our efforts on supporting legislation.

On January 31, 2008, in a **unanimous** decision, the Hawai'i Supreme Court, in *The Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i* ("*OHA v. HCDCH*"), ruled that the State of Hawai'i can not sell Hawai'i's "ceded" lands until the unrelinquished claims of Native Hawaiians are resolved. The Court was careful to stay away from stating that title was "clouded" and rather said, "all of the aforementioned pronouncements indicate that the issue of native Hawaiian title to the ceded lands will be addressed through the political process." The Court's conclusion and injunction was based strongly on our state's unique trust laws.

Despite the fact that Hawai'i's highest court resolved a completely local issue the Lingle Administration appealed this case to the U.S. Supreme Court. Such a decision threatens to divest Native Hawaiians of our unrelinquished claims to land and opens the door to future litigation.

As we saw in *Rice v. Cayetano*, the U.S. Supreme Court does not understand our history and the unique laws created by the people of Hawai'i to address the historical injustices of the Native Hawaiian people. The U.S. Supreme Court's misunderstandings could cripple reconciliation efforts, and lay the foundation for dismantling all Native Hawaiian programs. It also has implications on our State's ability to deal with local issues, which could have negative implications for all of Hawai'i.

We applaud this committee for moving quickly to support SCR 40 and SR 25and confirm its support for the decision of our State's highest court, the Hawai'i Supreme Court, the Court most familiar with Hawai'i's unique laws and policies. SCR 40 and SR 25 are consistent with the State's policy and commitment to reconciliation with the Native Hawaiian people. All three branches of Hawai'i's

LATE TESTIMONY

government and its voting citizenry have recognized the historical injustices committed against the Native Hawaiian people, and the State's role in perpetuating these injustices. In response the State has committed itself to reconcilaition with the Native Hawaiian people as articulated in the State's Constitution, multiple Legislative acts and resolutions, Executive's policies, and the Judiciary's interpretation of the state laws.

The people of Hawai'i, particularly the Native Hawaiian people, have a special connection with the 'āina (land). We endeavor to protect these lands, and SCR 40 and SR 25 would send a strong message to the U.S. Supreme Court that the State of Hawai'i intends to follow through on its commitment to reconciliation with the Native Hawaiian people, for the benefit of all our people.

Mahalo Nui,

Kupu'āina Coalition, Jocelyn Leialoha M-Doane, Derek Kauanoe, Davis Price

LATE TESTIMONY

Davis A. K. Price
daprice@hawaii.edu
(808) 954-5569

Testimony Re: SCR 40 and SCR 25
Hawai'i State Senate
Committee on Water, Land, Agriculture, and Hawaiian Affairs
Hearing: 2/17/09, 3:15 pm

Aloha Chair Senator Clayton Hee, Vice Chair Senator Jill N. Tokuda, and Senators Bunda, Fukunaga, Kokubun, Takamine, and Hemmings,

As a resident of Hawai□i, I would like to express my **strong support** for SCR 40 and SCR 25. I am also a graduate of the University of Hawai□i and currently a student at the William S. Richardson School of Law. The issue of Native Hawaiian claims to "ceded" lands is critical to the future of all of Hawai□i. The Lingle Administration's most recent actions regarding this matter are alarming, as it threatens the future of these lands. This is an issue that must be addressed by the State legislature

In the case of *OHA v. HCDCH*, on January 31, 2008, the Hawaii Supreme Court offered a unanimous decision, in which it upheld and reaffirmed state policy that is to recognize the unrelinquished claims of Native Hawaiians to "ceded" lands. This decision was founded on numerous state laws that also recognized the claims of Native Hawaiians.

Dating back to the 1959 admission act, it has been the policy of the State to acknowledge the claims and rights of the Native Hawaiian people. Section 5(f) of the Hawaii State Constitution expressly recognizes native Hawaiians as a beneficiary of the public land trust (a.k.a. "ceded" lands trust). In 1978, Hawai□i's people overwhelmingly approved amendments to the State Constitution that created OHA in order to address the interests of Native Hawaiians as beneficiaries of the "ceded" lands trust.

Acts 340, 354, and 359 of 1993 and Act 329 of 1997, all recognized the claims Native Hawaiians have to "ceded" lands in some fashion. These laws were enacted in recognition of the wrongs that had taken place, and the lasting effects of those wrongs committed, against Native Hawaiian people. In 1993, Rep. Okamura stated "[t]he injustice perpetrated on the Hawaiian people a century ago has been a cancer that insidiously and all too silently has been destroying the fabric of our community." These laws were to officially set in motion the long overdue process of reconciliation.

The Japanese American Citizens League (JACL) and the Equal Justice Society recently argued in an amicus brief submitted in support of OHA and the other plaintiffs in this case, that the claims of Native Hawaiians and the State's commitment to reconciliation are interlaid within every realm of State law. This includes the state Constitution, multiple statutes and legislative acts, the pronouncement of the Hawai□i Supreme Court, and executive action (Gov. Lingle had previously committed to a reconciliation process).

LATE TESTIMONY

This commitment by the State is a means to serve justice. The Gov. has gone back on her word and threatens to alter the very fabric of the Hawaiian community. JACL also stated that, "As recognized by the Hawaii Supreme Court, the State's unilateral attempt to sell ceded lands undercuts the heart of the State's reconciliation commitment. It undermines the will of the Hawaii citizenry, the policies and dictates of the legislature and the governors' affirmations."

By making the argument that Native Hawaiians have "no legal claim" to the "ceded" lands, the Lingle administration threatens to drastically alter State policy that has been in place for decades. In fact, the trust purposes of these lands go back even further and are tied to the original purposes designated by Kamehameha III at the time of the Māhele. By taking this matter to the U.S. Supreme Court, Gov. Lingle is putting the future of Hawai□i into the hands of nine people who have no clue as to the unique history of Hawai□i and do not care to for that matter.

It is the kuleana of the legislature to speak out on this matter and reaffirm the Hawai□i Supreme Court's decision. The legislature can send a clear message to the U.S. Supreme Court that this is a matter the State has long been committed to and will address locally. By passing SCR 40 and/or SCR 25, the legislature will be making a clear statement that the State has specific policy recognizing the land claims of Native Hawaiians and reconciliation, therefore the U.S. Supreme Court should not be the venue in which to address this matter.

It is the kuleana of the people and thus, the legislature, to protect these lands for the future of Hawai□i. The sale of such an invaluable resource is not consistent with State policy therefore should be addressed by you, the policy makers. I very humbly request the committee[s]' support in moving SCR 40 and/or SCR 25 forward.

Mahalo me ka ha□aha□a,
Davis A. Kahōkūho□omālamalamaikalani Price

LATE TESTIMONY

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 17, 2009 11:26 AM
To: WTLTestimony
Cc: ailaw001@hawaii.rr.com
Subject: Testimony for SCR40 on 2/17/2009 3:15:00 PM

Testimony for WTL/JGO 2/17/2009 3:15:00 PM SCR40

Conference room: 211
Testifier position: support
Testifier will be present: No
Submitted by: William J. Aila Jr. & Melva Aila
Organization: Individual
Address: 86-630 Lualualei Homestead Road Waianae, Hawaii
Phone: 808.330.0376
E-mail: ailaw001@hawaii.rr.com
Submitted on: 2/17/2009

Comments:
We support passage of SCR 40.

LATE TESTIMONY

From: Davianna McGregor [davianna@hawaii.edu]
Sent: Tuesday, February 17, 2009 12:38 PM
To: WTLTestimony
Subject: Testimony Re: SCR 40 and SCR 25

Testimony Re: SCR 40 and SCR 25
Hawai'i State Senate
Committee on Water, Land, Agriculture, and Hawaiian Affairs
Hearing: 2/17/09, 3:15 pm

Aloha Chair Senator Clayton Hee, Vice Chair Senator Jill N. Tokuda, and Senators Bunda, Fukunaga, Kokubun, Takamine, and Hemmings,

Aloha. My name is Davianna Pomaika'i McGregor. I am a professor of Ethnic Studies at the University of Hawai'i Manoa and was an expert witness in the case of OHA v HCDCH.

The issue of Native Hawaiian claims to "ceded" lands is critical to the future of all of Hawai□i. The Lingle Administration's most recent actions regarding this matter are alarming, as it threatens the future of these lands.

In the case of *OHA v. HCDCH*, on January 31, 2008, the Hawaii Supreme Court offered a unanimous decision, in which it upheld and reaffirmed state policy that is to recognize the unrelinquished claims of Native Hawaiians to "ceded" lands. This decision was founded on numerous state laws that also recognized the claims of Native Hawaiians.

By making the argument that Native Hawaiians have "no legal claim" to the "ceded" lands, the Lingle administration threatens to drastically alter State policy that has been in place for decades. In fact, the trust purposes of these lands go back even further and are tied to the original purposes designated by Kamehameha III at the time of the Māhele. By taking this matter to the U.S. Supreme Court, Gov. Lingle is putting the future of Hawai□i into the hands of nine people who are uninformed about the unique history of Hawai□i.

The legislature can send a clear message to the U.S. Supreme Court that this is a matter the State has long been committed to and will address locally. By passing SCR 40 and/or SCR 25, the legislature will be making a clear statement that the State has specific policy recognizing the land claims of Native Hawaiians and reconciliation, therefore the U.S. Supreme Court should not be the venue in which to address this matter.

It is the kuleana of the people and thus, the legislature, to protect these lands for the future of Hawai□i. The sale of such an invaluable resource is not consistent with State policy therefore should be addressed by you, the policy makers. I very humbly urge legislators to support SCR 40 and/or SCR 25, as well as other legislation aimed at protecting the "ceded" lands. I also request that you address these measures with great urgency as the future of these lands is in grave danger.

Mahalo Nui,
Davianna Pomaika'i McGregor
Professor, Ethnic Studies Department
University of Hawai'i Manoa

February 17, 2009

LATE TESTIMONY

To: Senator Clayton Hee, Chair
Senator Jill Tokuda, Vice Chair
Members of Senate Committee on Water, Land, Agriculture, and Hawaiian Affairs

From: Cindy Nguyen, CD(DONA), CCE, MSW Student
University of Hawaii

Re: SCR 40 & SCR 25

Position: Support for SCR 40 & SCR 25

Dear Members of the Senate Committee on Water, Land, Agriculture, and Hawaiian Affairs:

As a resident of Hawai□i, I would like to express my **strong support** for SCR 40 and SCR 25. I am from the mainland and have lived in Hawai'i for almost two years. Like most mainlanders, I was not aware of the Hawaiian issues prior to my residence here. After learning about Hawaii's history, even a newcomer like myself can see the injustices of selling Hawai'i ceded lands. The issue of Native Hawaiian claims to "ceded" lands is critical to the future of all of Hawai□i. The Lingle Administration's most recent actions regarding this matter are alarming, as it threatens the future of these lands. This is an issue that must be addressed by the State legislature.

In the case of *OHA v. HCDCH*, on January 31, 2008, the Hawaii Supreme Court offered a unanimous decision, in which it upheld and reaffirmed state policy to recognize the unrelinquished claims of Native Hawaiians to "ceded" lands. This decision was founded on numerous state laws that also recognized the claims of Native Hawaiians. By making the argument that Native Hawaiians have "no legal claim" to the "ceded" lands, the Lingle administration threatens to drastically alter State policy that has been in place for decades. By taking this matter to the U.S. Supreme Court, Gov. Lingle is putting the future of Hawai□i into the hands of nine people who have no clue as to the unique history of Hawai□i and do not care to for that matter.

It is the kuleana of the legislature to speak out on this matter and reaffirm the Hawai□i Supreme Court's decision. The legislature can send a clear message to the U.S. Supreme Court that this is a matter the State has long been committed to and will address locally. By passing SCR 40 and/or SCR 25, the legislature will be making a clear statement that the State has specific policy recognizing the land claims of Native Hawaiians and reconciliation, therefore the U.S. Supreme Court should not be the venue in which to address this matter.

It is the kuleana of the people and thus, the legislature, to protect these lands for the future of Hawai□i. The sale of such an invaluable resource is not consistent with State policy therefore should be addressed by you, the policy makers. I very humbly urge legislators to support SCR 40 and/or SCR 25, as well as other legislation aimed at protecting the "ceded" lands. I also request that you address these measures with great urgency as the future of these lands is in grave danger.

Thank you,
Cindy Nguyen

LATE TESTIMONY

From: lkalama1@aol.com
Sent: Tuesday, February 17, 2009 1:46 PM
To: WTLTestimony
Subject: Stop selling ceded lands

Follow Up Flag: Follow up
Flag Status: Flagged

Testimony Re: SCR 40 and SCR 25
Hawai'i State Senate
Committee on Water, Land, Agriculture, and Hawaiian Affairs
Hearing: 2/17/09, 3:15 pm

Aloha Chair Senator Clayton Hee, Vice Chair Senator Jill N. Tokuda, and Senators Bunda, Fukunaga, Kokubun, Takamine, and Hemmings,

As a resident of Hawai□i, I, **Melita Miller-Kalama of 1024 Hoolea Place, Kailua HI 96734** would like to express my **strong support** for SCR 40 and SCR 25. The issue of Native Hawaiian claims to "ceded" lands is critical to the future of all of Hawai□i. The Lingle Administration's most recent actions regarding this matter are alarming, as it threatens the future of these lands. This is an issue that must be addressed by the State legislature.

In the case of *OHA v. HCDCH*, on January 31, 2008, the Hawaii Supreme Court offered a unanimous decision, in which it upheld and reaffirmed state policy that is to recognize the unrelinquished claims of Native Hawaiians to "ceded" lands. This decision was founded on numerous state laws that also recognized the claims of Native Hawaiians.

By making the argument that Native Hawaiians have "no legal claim" to the "ceded" lands, the Lingle administration threatens to drastically alter State policy that has been in place for decades. In fact, the trust purposes of these lands go back even further and are tied to the original purposes designated by Kamehameha III at the time of the Māhele. By taking this matter to the U.S. Supreme Court, Gov. Lingle is putting the future of Hawai□i into the hands of nine people who have no clue as to the unique history of Hawai□i and do not care to for that matter.

It is the kuleana of the legislature to speak out on this matter and reaffirm the Hawai□i Supreme Court's decision. The legislature can send a clear message to the U.S. Supreme Court that this is a matter the20State has long been committed to and will address locally. By passing SCR 40 and/or SCR 25, the legislature will be making a clear statement that the State has specific policy recognizing the land claims of Native Hawaiians and reconciliation, therefore the U.S. Supreme Court should not be the venue in which to address this matter.

It is the kuleana of the people and thus, the legislature, to protect these lands for the future of Hawai□i. The sale of such an invaluable resource is not consistent with State policy therefore should be addressed by you, the policy makers. I very humbly urge legislators to support SCR 40 and/or SCR 25, as well as other legislation aimed at protecting the "ceded" lands. I also request that you address these measures with great urgency as the future of these lands is in grave danger.

How can theState sell something they do not own? These lands are "crown" lands and are protected lands, that cannot be owned by the State. ;

Mahalo Nui,
Melita Miller-Kalama

LATE TESTIMONY

Looking for work? Get job alerts, employment information, career advice and job-seeking tools at AOL Find a Job.

WITHDRAW THE APPEAL TO THE UNITED STATES TO

SUPREME COURT OF THE HAWAII STATE SUPREME COURT

DECISION, OFFICE OF HAWAIIAN AFFAIRS V. HOUSING

AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAII,

117 HAWAII 174 (2008).

Testimony

Status

LATE TESTIMONY

Dear Senators:

I support these Bills because they are decisions to be worked out within the state's internal sovereign kuleana and doesn't involve the federal decision. What the Governor and Attorney General is asking is a loaded question pertaining to Hawai'i's unique status that would have to bear down on an international issue of U.S. belligerent occupation and violations of such international laws. The governor's intent forces the international issue to come to the fore and basing it on the Newlands Resolution will, in fact, question the validity of such an act making it null and void.

Contesting the mechanics and voting process of statehood will again put that status in jeopardy by making it null and void. Under national and international laws, these are internal acts of the United States of America; actions illicit under U.S. constitution laws which does not apply to Hawai'i as a foreign country. October 4, 1988, the Opinions of the Office of Legal Counsel of U.S. Depatment of Justice, determined there is no authority Congress can point to that authorizes legislation for native Hawaiians, let alone the Hawaiian Islands as a whole.

They concluded: " It is therefore unclear which constitutional powr Congress exercised when it acquire Hawai'i by joint-resolution. Accordingly, it is doubtful that the acquisition of Hawai'i can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea."

U.S. Representative Ball thus characterized the effort to annex Hawai'i by jiont resolution after the defeat of the treaty as " a deliberate attempt to do unlawfully that which cannot be lawfully done." Mahalo in all you do,

Pono Kealoha
Pono Kealoha
107 Acacia Road #113

Pearl City, HI 96782-2581

808) 456-5772

lwayz_aloha@msn.com

The House of Representatives of the United States:

I, Liliuokalani of Hawaii, named heir apparent on the 10th day of April, 1877, and proclaimed Queen of the Hawaiian Islands on the 20th day of January, 1891, do hereby protest against the assertion of ownership by the United States of America of the so-called Hawaiian Crown Lands amounting to about one million acres and which are my property, and I especially protest against such assertion of ownership as a taking of property without due process of law and without just or other compensation.

reasonably & respectfully

Therefore, supplementing my protest of June 17, 1897, I call upon the President and the National Legislature and the People of the United States to do justice in this matter and to restore to me this property, the enjoyment of which is being withheld from me by your Government under what must be a misapprehension of my right and title.

Done at Washington, District of Columbia, United States of America, this fifth day of December, in the year one thousand eight hundred and ninety-eight.

1898

Witness

John Lee

Liliuokalani

TESTIMONY
SCR 40/SR 25
LATE
(END)