

TESTIMONY BY WESLEY K. MACHIDA
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE SENATE COMMITTEE ON WAYS AND MEANS
ON
SENATE BILL NO. 248, S.D. 1

February 27, 2015

RELATING TO TRUST FUNDS

Senate Bill No. 248, S.D. 1, proposes to amend Sections 37-40, 302A-1122, and 304A-106, HRS, to require that the expenditures of trust funds for the compensation, including fringe benefits, of public employees and contracts for services, as defined under Section 103D-104, HRS, must be appropriated and allotted.

The Department of Budget and Finance has concerns regarding this bill. We are uncertain why it would be preferable to only appropriate the expenditures of trust funds for public employee compensation or contracts for services. This may not provide the true expenditure requirements of the trust fund. Ideally, if trust funds were required to be appropriated, the appropriation would reflect the full cost of the program.



SB248 SD1
RELATING TO TRUST FUNDS
Senate Committee on Ways and Means

February 27, 2015

9:00 a.m.

Room 211

The Office of Hawaiian Affairs (OHA) **OPPOSES** SB248 SD1. Please see attached the testimony from OHA Board Counsel Robert G. Klein, ESQ, which he wrote on our behalf.

OHA urges the Committee to either HOLD the bill or amend it to expressly exclude OHA. Mahalo for the opportunity to testify on this important measure.

FEBRUARY 27, 2015

SENATE COMMITTEE ON WAYS AND MEANS

TESTIMONY OF ROBERT G. KLEIN, ESQ.

OFFICE OF HAWAIIAN AFFAIRS BOARD COUNSEL RE: SB 248, SD1

Hon. Jill N. Tokuda, Chair

Hon. Ronald D. Kouchi, Vice-Chair

Aloha Chair Tokuda and Committee Members,

On behalf of the Office of Hawaiian Affairs (“OHA”), I offer testimony **OPPOSING** this measure as it impinges directly on the Trustees of Native Hawaiian Trust Fund’s sole discretion to utilize such funds for the benefit of their native Hawaiian and Hawaiian beneficiaries and is likely unconstitutional if applied to the Native Hawaiian Trust Fund.

This legislation states that:

(b) Expenditures of trust funds for the compensation, including fringe benefits, of public employees and contracts for services, as defined under section 103D-104, shall be subject to appropriation or allotment. If a conflict between this subsection and any other law occurs, this subsection shall control unless the other law expressly specifies otherwise.” HRS Section 37-40.

Courts can hold that a statute is unconstitutional because it is invalid “on its face” or “as applied.” See Women’s Med. Prof’l Corp. v. Voinovich, 130 F.3d 187, 193 (6th Cir. 1997). Where a facially unconstitutional law is invalid and lacks the force of law in all circumstances, a statute is unconstitutional as applied if its application would be unconstitutional as to discrete factual circumstances or entities. See id. We conclude that S.B. No. 248, if enacted, would likely be deemed unconstitutional as applied to OHA and the Native Hawaiian Trust Fund under Sections 5 and 6 of Article XII of the Hawai‘i Constitution.

The basis for our conclusion is deeply rooted in the history and origins of the public land trust, the Native Hawaiian Trust Fund, the State of Hawai‘i, and OHA itself. All the relevant legal history leading to the creation of OHA, the relevant constitutional provisions creating OHA as a unique state institution to represent the interests of native Hawaiians, and the subsequent relevant legislative enactments and case law, taken together with the standard for reviewing the constitutionality of statutes, inform our analysis for why S.B. No. 248, if enacted, would likely be deemed unconstitutional as applied to OHA and the Native Hawaiian Trust Fund.

A. Historical Background

The relevant historical background has been set forth in numerous cases at both the state and

federal levels. Perhaps the most thorough review of this history is found in the seminal case of Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987), which is summarized below.

1. Annexation and the Newlands Resolution

The history of the public land trust begins with the Newlands Resolution, formally known as the Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, adopted by Congress on July 7, 1898. Under the Newlands Resolution, the Republic of Hawai‘i “ceded and transferred to the United States the absolute fee 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 Newlands Resolution further provided that all revenue from or proceeded from the public lands, generally, “shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.” “The effect of the foregoing language was to subject the public lands in Hawaii to a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the Hawaiian Islands for educational or other purposes.” 69 Haw. at 159, 737 P.2d at 449.

2. The Organic Act

In 1900, Congress passed the Organic Act, which established the Territory of Hawai‘i. In the Organic Act, Congress decreed:

That the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation . . . shall be and 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, unless otherwise provided for by Congress, or taken for the uses and purposes of the United States by the direction of the President or of the governor of Hawaii.

Id. at 159–60, 737 P.2d at 449–450.

3. Statehood and the Admissions Act

Under the Admissions Act of 1959, the State of Hawai‘i and its political subdivisions succeeded in title to the lands held by the Territory of Hawai‘i and granted the State title to the lands ceded to the United States upon annexation. Under Section 5(f) of the Admissions Land, Hawai‘i public lands were to be held in a special trust:

The lands granted to the State of Hawaii by subsection (b) and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.

Id. at 60–61, 737 P.2d at 450 (internal brackets and ellipsis omitted). Further,

[The] lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

Id. at 61, 737 P.2d at 450.

Several Hawai‘i constitutional provisions predating 1978 referenced the public land trust in general terms mirroring the Admissions Act, but no legislation of great substance was promulgated addressing the trust. Thus, prior to 1978, the State channeled proceeds and incomes from the public lands to the Department of Education. However, in 1978, the Hawai‘i Constitutional Convention proposed, and voters adopted, constitutional amendments pursuing other objectives and the creation of OHA. Id. at 161–62, 737 P.2d at 450–51.

B. The Key Constitutional Provisions

1. Constitutional Text

The following constitutional provisions, enacted pursuant to the 1978 Constitutional Convention, are found in Article XII of the Hawai‘i Constitution:

PUBLIC TRUST

Section 4. The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding 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.

OFFICE OF HAWAIIAN AFFAIRS; ESTABLISHMENT OF BOARD OF TRUSTEES

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

POWERS OF BOARD OF TRUSTEES

Section 6. The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: *to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from*

whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board.

Haw. const. art. XII, §§ 4–6 (emphasis added).

2. Standing Committee Report 59

The constitutional history of these articles is significant in explaining the purpose behind the creation of OHA and the exclusivity of its control over the Native Hawaiian Trust Fund. In a standing committee report, the framers stated that they intended to change the title of the article from “Hawaiian Home Lands” to “Hawaiian Affairs.” In making this change, and in adding new sections, the framers stated: “In looking to the future, your Committee decided that it is of *utmost importance* to establish a trust entity that would be for all individuals whose ancestors were natives of the area which consisted of the Hawaiian Islands prior to 1778” Stand. Comm. Rep. 59, in 1 *Proceedings of the Constitutional Convention of Hawaii of 1978*, at 643 (emphasis added). The Committee “determined that the time was ripe to establish a trust entity with an elected board of trustees *that would control and manage the assets and inheritance, and financial assistance belonging to all native Hawaiians*, and to formulate policy relating to their affairs. Id. (emphasis added).

With respect to Article XII, Section 5, the Committee stated:

Your Committee added this new Section 5 relating to the Office of Hawaiian Affairs and the establishment of an elected board of trustees in order *to provide a receptacle for any funds, lands or other resources earmarked for or belonging to native Hawaiians*, and to create a body that could formulate policy relating to all native Hawaiians *and make decisions on the allocation of those assets belonging to native Hawaiians. . . .*

Your Committee is unanimously and strongly of the opinion that people to whom the assets belong should have control over them. After much deliberation and attention to testimony from all parts of the state, *your Committee concluded that a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles. In order to insure accountability, it was felt that the board should be composed of elected members.* This amendment provides for direct participation in the selection process of the board of trustees by all native Hawaiians. . . . The election of the board will enhance representative governance and decision-making accountability and, as a result, *strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary. . . .*

Id. at 644–45 (emphasis added).

The framers further declared the inherent independent nature and uniqueness of OHA and its duties:

The committee intends that the Office of Hawaiian Affairs ***will be independent from the executive branch and all other branches of government although it will assume the status of a state agency.*** The chairman may be an ex officio member of the governor's cabinet. *The status of the office of Hawaiian Affairs is to be unique and special. The establishment by the Constitution of the Office of Hawaiian Affairs, with power to govern itself through a board of trustees (see Section 6, following), results in the creation of a separate entity independent of the executive branch of government.* Moreover, the office shall have the power to hold title to all the real and personal property now or hereafter set aside or conveyed to it. The committee developed this office based on the model of the University of Hawaii. In particular, the committee desired to use this model ***so that the office could have maximum control over its budget, assets and personnel.*** *The committee felt that it was important to arrange a method whereby the assets of Hawaiians could be kept separate from the rest of the state treasury.* The committee learned in that in the past there has been commingling of funds intended for native Hawaiians of on-half blood with other moneys in the state treasury. The committee felt it imperative that this practice stop.

Id. at 45 (emphasis added).

With respect to Article XII, Section 6, relating to the powers of the OHA Board, the framers stated:

Your Committee decided to grant native Hawaiians ***the right*** to determine the priorities which will effectuate the betterment of their condition and welfare by granting to the board of trustees powers to “formulate policy relating to affairs of native Hawaiians.” ***Your Committee created the board of trustees of the Office of Hawaiian Affairs in the Constitution to insure that it would handle the assets and financial affairs of native Hawaiians.***

....

Furthermore, this section empowers the board to administer and manage the pro rata share of assets derived from the public lands granted to those native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended or may be amended, under Section 5(f) of the Admission Act.

Id. at 644–45 (emphasis added).

In summing up the significance of Sections 5 and 6, the framers clearly stated the fundamental importance of the Office of Hawaiian Affairs in the role of our democratic system of governance:

Your Committee concluded that these Sections 5 and 6, taken together, ***are of utmost importance for they provide for accountability, self-determination, methods for self-sufficiency through assets and a land base, and the unification of all native***

Hawaiian people.

Unlike the Act and the Section 5(f) trust, this trust is established for the benefit of all native Hawaiians, including those defined as native Hawaiians under the Hawaiian Homes Commission Act, 1920, as amended, and the restoration of their culture. ***The committee recognizes the right of native Hawaiians to govern themselves and their assets by their assumption of the trust responsibility imposed on the State to better their condition.***

Id. at 646 (emphasis added).

3. Committee of the Whole Report No. 13

In the Committee of the Whole Report No. 13, the framers further declared the significance of OHA and its independence within the context of the native Hawaiian peoples of the State:

Members were impressed by the concept of the Office of Hawaiian Affairs which establishes a public trust entity for the benefit of the people of Hawaiian ancestry. Members foresaw that it *will provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare* and promote the protection and preservation of the Hawaiian race, and that it will unite Hawaiians as a people. . . .

. . . .

Your Committee found that the Office of Hawaiian Affairs is appropriately modelled after that of the University of Hawaii *so as to give it maximum independence. The most important aspect of this model is the power to govern itself. The public trust entity provides a democratic process for the beneficiaries in order to insure accountability and opportunity for scrutiny of the trustees by the beneficiaries.* It is an umbrella organization that is designed to embrace native Hawaiians and Hawaiians, the management of their assets and resources, the receipt of any future benefits, and possibly the administration of the department of Hawaiian home lands.

. . . .

Moreover, it appears that the Committee on Hawaiian Affairs closely examined this issue. If one looks to the precedent of other native peoples, one finds that they have traditionally enjoyed self-determination and self-government. They have power to make their own substantive rules in internal matters. Although no longer possessed of the full attributes of sovereignty, *they remain a separate people with the power of regulation over their internal and social problems. The establishment of the Office of Hawaiian Affairs is intended to grant similar rights to Hawaiians.*

Committee of the Whole Report No. 13, in 1 *Proceedings of the Constitutional Convention of Hawaii of 1978*, at 1018–19.

C. Subsequent Legislative Enactments and Case Law

1. Statutory Structure of OHA

The statutory purposes of OHA are well-known. Pursuant to HRS § 10-3, the purposes of OHA include

- (1) The betterment of conditions of native Hawaiians. A pro rata portion of all funds derived from the public land trust shall be funded in an amount to be determined by the legislature for this purpose, *and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians . . .* ;
- (2) The betterment of conditions of Hawaiians;
- (3) Serving as the principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians . . . ;
- (4) Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians;
- (5) Applying for, receiving, and disbursing grants and donations from all sources for native Hawaiian and Hawaiian programs and services; and
- (6) Serving as a receptacle for reparations.

HRS § 10-3 (emphasis added). Pursuant to HRS § 10-13.5, OHA shall expend 20% of all funds derived from the public land trust.

Among the general powers provided to OHA include the powers “[t]o determine the character of and necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid, subject to provisions of law specifically applicable to the office” and “[t]o enter into and perform such contracts, leases, cooperative agreements, or other transactions with any agency or instrumentality of the United States, or with the State, or with any political subdivision thereof, or with any person, firm, association, or corporation, as may be necessary in the conduct of its business and on such terms as it may deem appropriate.” HRS § 10-4(3), (4) (emphasis added).

OHA has the authority, “notwithstanding any other law to the contrary,” to “have and exercise the power to make all necessary and appropriate disbursements of its moneys by issuing checks in its own name and by any other means.” HRS § 10-4.5(a).

The Board of OHA has, among other powers, the power in accordance with law to “[m]anage, invest, and administer the proceeds from the sale or other disposition of 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 10-3.” HRS § 10-5.

2. Relevant Case Law

The Ninth Circuit has recognized that OHA “was charged with the responsibility of administering and managing the trust proceeds.” Price v. Akaka, 3 F.3d 1220, 1222 (9th Cir. 1993); see also Day v. Apoliona, Civ. No. 05-00649 SOM/BMK, 2008 U.S. Dist. LEXIS 48211, at *5 (D. Haw. June 20, 2008) (“There is no dispute that Hawaii has *delegated* its public trust duties arising under the Admission Act to OHA or that the restrictions on the uses of the public trust apply to OHA.” (emphasis added)).

The Board’s wide discretion with the use of trust funds is well established under both federal and state law. See Day v. Apoliona, 616 F.3d 918, 926–27 (9th Cir. 2010); Kealoha v. Machado, 131 Hawai‘i 62, 76–77, 315 P.3d 213, 228–29 (2013).

3. Attorney General Op. No. 03-04

On May 30, 2003, the Department of the Attorney General (“AG”) promulgated Opinion No. 03-04. In Opinion No. 03-04, the AG responded to requests concerning whether the legislature could transfer ceded land receipts to OHA without a current, specific appropriation. The AG stated its opinion that the receipts derived from the ceded lands apportioned for native Hawaiians pursuant to the Hawai‘i Constitution and HRS § 10-13.5 “may be transmitted directly to OHA by the agencies that collect them, without legislative appropriation.” Id. at 1–2.

The AG stated:

The State Constitution expressly makes native Hawaiians the beneficiaries of the § 5(f) trust lands, directs the Legislature to quantify the extent of the native Hawaiians’ interest in ceded land receipts, and makes the elected trustees of OHA, not the Legislature, responsible for determining how the native Hawaiians’ portion of ceded land receipts are spent to further § 5(f)’s purpose.

Id. at 2 (emphasis added; internal citations omitted). The AG further opined that “[t]he plain language of article XII, section 6 . . . demonstrates an intent *that OHA have exclusive authority to decide how much of, when, and in what specific way, the native Hawaiians’ share of the ceded land receipts is to be used to better the conditions of native Hawaiians.*” Id. at 10. The AG concluded:

Article XII, sections 4, 5, and 6 were adopted to affect the Admission Act’s purpose of using a portion of the ceded lands’ receipts to better the conditions of native Hawaiians. OHA, not the Legislature, is principally and almost exclusively responsible for implementing those provisions. Transferring the native Hawaiians’ share of ceded land receipts directly to OHA without subjecting it to article VII, section 5’s legislative appropriation is consistent with the plain language of the Constitution and its intent, and clearly permitted, if not necessary.

Id. at 14 (emphasis added).

D. Standard of Reviewing the Constitutionality of Statutes

When interpreting the constitution,

The fundamental principle in construing a constitutional provision is to give effect to the intention of the framers and the people adopting it. This intent is to be found in

the instrument itself. When the text of a constitutional provision is not ambiguous, the court, in construing it, is not at liberty to search for its meaning beyond the instrument. However, if the text is ambiguous, extrinsic aids may be examined to determine the intent of the framers and the people adopting the proposed amendment.

State ex rel. Anazai v. City & Cnty. of Honolulu, 99 Hawai‘i 508, 519, 57 P.3d 433, 444 (2002).

E. S.B. No. 248, if Enacted, is Likely Unconstitutional as Applied to OHA and the Native Hawaiian Trust Fund

If S.B. No. 248 is enacted and the legislature subjects funds from the Native Hawaiian Trust Fund for the compensation, including fringe benefits, of public employees and/or contracts for services, to appropriation or allotment, this legislative action would be unconstitutional as applied.

This determination is based on the structure and purpose behind the creation of OHA itself. The record of the Constitutional Convention speaks over and over again in terms of OHA representing the interests of the native Hawaiian beneficiaries of the Native Hawaiian Trust Fund, the importance of removing the legislature from decisions regarding the use and expenditure of said funds, the role OHA plays in the self-governance and self-determination of native Hawaiians, the need to keep trust funds separate from the general funds of the State Treasury, and strengthening the fiduciary relationship between the board member as trustee and the native Hawaiian as beneficiary. The framers embodied these principles in the constitution for the purposes of making OHA “independent from the executive branch and all other branches of government,” so that OHA could “have maximum control over its budgets, assets, and personnel.” The Native Hawaiian Trust Fund’s fundamental importance to native Hawaiians, and OHA’s complete control over said funds as the representatives of the native Hawaiians, are principles enshrined in the Hawai‘i Constitution.

Constitutional mandates and directives are not subject to legislative revision. Simply, it does not appear that the legislature has any authority to direct OHA to set aside trust-fund money for a specific use. Furthermore, if trust fund money was subject to appropriation and allotment, conceivably, under HRS, Chapter 37, Part II, HRS § 37-31 *et seq.*, OHA would be limited in its expenditures as to the use of trust funds for the compensation, including fringe benefits, of public employees and contracts for services to the appropriated amount and, conceivably, if trust fund money was unused, could lapse into the *general fund*. A court would very likely hold that such results would be unconstitutional.

We note that this conclusion is consistent with Attorney General Op. No. 03-04.

E. Conclusion

Based on the foregoing, we conclude that if S.B. No. 248 is enacted and the legislature subjects funds from the Native Hawaiian Trust Fund for the compensation, including fringe benefits, of public employees and/or contracts for services, to appropriation or allotment, this legislative action would be unconstitutional as applied.

Therefore, I request that S.B. 248 SD1 be amended to expressly exclude OHA.



UNIVERSITY OF HAWAII SYSTEM

Legislative Testimony

Testimony Presented Before the
Senate Committee on Ways and Means
February 27, 2015 at 9:00 am Room 211

by
Kalbert Young
Vice President – Budget & Finance & Chief Financial Officer
University of Hawai'i

SB 248 SD1 – RELATING TO TRUST FUNDS

Chair Tokuda, Vice Chair Kouchi, and members of the Ways and Means committee:

Thank you for this opportunity to testify. Senate Bill 248 Senate Draft 1, Relating to Trust Funds, proposes to require that expenditures from trust funds for employee compensation, including fringe benefits, and some contracts for services under Section 103D-104, HRS, are to be appropriated and allotted. The University of Hawai'i (UH) has serious concerns regarding the practicality of this bill.

UH does have a number of trust funds that are subject to periodic review by the Legislative Auditor. As recently as December 2014, the Auditor conducted a review of the appropriateness of trust funds within UH.

Trust funds provide a specific operational feature. Section 37-62, HRS, defines the purpose of trust funds to be a fiduciary responsibility of state government in which the assets are held only for those designated to benefit from the funds. While trust funds at UH don't generally pay for normal payroll per se, there are trust funds that do pay for compensation. For example, Section 304A-2352, HRS, created the University of Hawaii Workers' Compensation and Unemployment Insurance Compensation Trust Fund. The fund pays employees' claims for workers compensation and unemployment insurance benefits. It would be difficult to pre-determine a rate of payout in the budget process that would satisfy future year's claims for compensation.

The practical impact of SB248 SD1 on trust fund objectives and operations could be significant. In this regards, I do not believe that the University would be able to practically deliver the operations of government, and responsibilities of an employer (related around Section 304A-2352, HRS) due to the requirements of this proposed bill.

The University of Hawai'i appreciates the opportunity to express its concerns.