

ACT 395

H.B. NO. 37

A Bill for an Act Relating to Right to Sue by Native Hawaiian and Hawaiian Individuals and Organizations.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Findings and purpose. (a) On July 9, 1921, the Congress of the United States enacted the Hawaiian Homes Commission Act, 1920, to provide for the social and economic self-sufficiency of native Hawaiians, defined under section 201(a)(7) of the Act.

The legislature finds that pursuant to section 4 of the Admission Act, the provisions of the Hawaiian Homes Commission Act, 1920, as amended, have been adopted and incorporated into the Constitution of the State of Hawaii.

(b) Section 5(f) of the Admission Act provides that certain "lands, proceeds, and income shall be managed . . . in such manner as the constitution and laws of said State may provide, . . ." thereby allowing for the establishment of the office of Hawaiian affairs.

(c) The legislature finds that in the creation of a public trust the right to enforce the public trust by the beneficiaries should be granted.

(d) The purpose of this Act is to provide native Hawaiian individuals and their successors to homestead leases (as provided in section 209 of the Act) the right to sue in the courts of the State of Hawaii to enforce the provisions of the Hawaiian Homes Commission Act, as amended.

(e) The purpose of this Act is also to provide native Hawaiians as defined in section 10-2 of the Hawaii Revised Statutes, the right to sue in the courts of the State of Hawaii to enforce the provisions of the public trust created by Article XII, sections 4, 5, and 6 of the State Constitution implementing section 5(f) of the Admission Act.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER
NATIVE HAWAIIAN TRUSTS JUDICIAL RELIEF ACT**

§ - Waiver of immunity. (a) The State waives its immunity for any breach of trust or fiduciary duty resulting from the acts or omissions of its agents, officers and employees in the management and disposition of trust funds and resources of:

- (1) The Hawaiian home lands trust under Article XII, sections 1, 2, and 3 of the Constitution of the State of Hawaii, implementing sections 4 and 5(f) of the Admissions Act (Act of March 18, 1959, Public Law 86-3, 73 Stat. 4); and
- (2) The native Hawaiian public trust under Article XII, sections 4, 5, and 6 of the Constitution of the State of Hawaii implementing section 5(f) of the Admission Act;

and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for punitive damages.

(b) This waiver shall not apply to the following:

- (1) The acts or omissions of the State's officers and employees, even though such acts or omissions may not realize maximum revenues to the Hawaiian home lands trust and native Hawaiian public trust, so long as each trust is administered in the sole interest of the beneficiaries; provided that nothing herein shall prevent the State from taking action which would provide a collateral benefit to non-beneficiaries, but only so long as the primary benefits are enjoyed by beneficiaries, and the collateral benefits do not detract from nor reduce the benefits enjoyed by the beneficiaries;
- (2) Any claim for which a remedy is provided elsewhere in the laws of the State; and
- (3) Any claim arising out of the acts or omissions of the members of the board of trustees, officers and employees of the office of Hawaiian affairs, except as provided in section 10-16.

§ - Right to sue. (a) Native Hawaiians as defined in section 201(a)(7) of the Hawaiian Homes Commission Act, native Hawaiian organizations, the office of Hawaiian affairs, and Hawaiians defined as any person who is qualified to succeed to a homestead lease under section 209 of the Hawaiian Homes Commission Act 1920, as amended, shall have the right to bring an action in the circuit courts of the State to resolve controversies relating to the Hawaiian home lands trust described in section - (a)(1).

(b) The office of Hawaiian affairs, native Hawaiians as defined in section 10-2, and native Hawaiian organizations shall have the right to bring an action in the circuit courts of the State to resolve controversies relating to the native Hawaiian public trust described in section - (a)(2).

(c) "Native Hawaiian organizations" as used in this chapter means a native Hawaiian homestead organization, or an unincorporated association, or corporation which is duly organized and thereby able to sue and be sued under the laws of this State and whose purpose is to protect and uphold the Hawaiian Homes Commission Act and the Admission Act section 5(f) relating to a public trust for the betterment of the conditions of native Hawaiians, or the social and economic self-sufficiency of native Hawaiians, and which organized body is controlled by native Hawaiians and a majority of its members receives or can receive benefits from the trust.

§ - Exhaustion of administrative remedies. Before an action may be filed in circuit court under this chapter, the party filing suit shall have exhausted

ACT 395

all administrative remedies available, and shall have given not less than sixty days written notice prior to filing of the suit that unless appropriate remedial action is taken suit shall be filed. All executive branch departments shall adopt in accordance with chapter 91, such rules as may be necessary to specify the procedures for exhausting any remedies available.

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

(b) "Actual damages", as used in this section, means direct, monetary, out of pocket loss, excluding noneconomic damages as defined in section 663-8.5 and any consequential damages, sustained by a native Hawaiian or Hawaiian individually rather than the class generally.

§ - **Attorney's fees and costs.** (a) In any action under this chapter, the court shall, upon a specific finding that a non-prevailing party's claim or defense was frivolous, assess against such party and award to the prevailing party, and enter as part of its order or judgment, a reasonable sum for costs and expenses incurred, including reasonable attorney's fee.

(b) In any action brought under this chapter in which there is no finding by the court that the claims pled were frivolous the court may, as it deems just, award to a prevailing plaintiff and enter as a part of its order or judgment, a reasonable sum for costs and expenses incurred, including reasonable attorney's fees.

§ - **Award or judgment as bar.** An award or judgment in an action under this chapter shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the agent, officer, or employee of the State whose act or omission gave rise to the claim.

§ - **Limited remedy.** This chapter shall not be construed to limit or enlarge the scope of rights available under any other claims, proceedings or other actions against the State, its officers and employees, arising under chapter 662 or other provisions of law.

§ - **Proof of liability.** In no action under this chapter shall any liability be implied against the State, and no award shall be made against the State except upon such legal evidence as would establish liability against an individual or corporation.

§ - **Inapplicability to share of office of Hawaiian affairs.** This chapter shall not apply to suits in equity or law brought by or on behalf of the office of Hawaiian affairs in which the matters in controversy involve the proportionate share of ceded land or special fund revenues allocated to the office of Hawaiian affairs by the legislature.

§ - **Limitation on actions; native Hawaiians.** Every claim arising under this chapter shall forever be barred unless the action is commenced within two years after the cause of action first accrues; provided that this statute of limitations shall be tolled until July 1, 1990; provided further that the filing of the claim in an administrative proceeding pursuant to this Act shall toll any applicable statute of limitations, and any such statute of limitations shall remain tolled until ninety days after the date the decision is rendered in the administrative proceeding.

SECTION 3. This Act shall not apply to any cause of action which accrued, rights and duties that matured, penalties that were incurred, or proceedings that were begun, prior to July 1, 1988.

SECTION 4. No action shall be maintained under this Act for any existing projects, programs, or any other governmental activities which are continuing, and which were begun, completed, or established prior to July 1, 1988.

SECTION 5. The governor shall present a proposal to the legislature to resolve controversies which arose between August 21, 1959 and the date of this Act, relating to the Hawaiian home lands trust under Article XII, sections 1, 2, and 3 of the Constitution of the State of Hawaii implementing sections 4 and 5(f) of the Admission Act (Act of March 18, 1959, Public Law 86-3, 73 Stat. 4), and the native Hawaiian public trust under Article XII, sections 4, 5, and 6 of the Constitution of the State of Hawaii implementing section 5(f) of the Admission Act.

If, (1) both of the following occur:

- (a) The governor fails to present a proposal to the legislature prior to the convening of the 1991 legislature in regular session; and
- (b) No other means of resolving such controversies is otherwise provided by law by July 1, 1991, or

(2) All three of the following occur:

- (a) The governor presents a proposal;
- (b) A resolution calling for the rejection of the governor's proposal is adopted by two-thirds vote of the house introducing such resolution; and
- (c) No other means of resolving such controversies is otherwise provided by law, by July 1, 1991,

then in the event of the occurrence of either (1)(a) and (b) or (2)(a), (b) and (c), notwithstanding sections 3 and 4 of this Act, a claim for actual damages under this Act which accrued between August 21, 1959, and the date of this Act may be instituted no later than June 30, 1993, provided that the filing of a claim for actual damages in an administrative proceeding before June 30, 1993, shall toll the statute of limitations until ninety days after the date the decision is rendered in the administrative proceeding.

SECTION 6. **Severability.** If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 7. This Act shall take effect on July 1, 1988.

(Approved June 17, 1988.)