



# NATIVE HAWAIIAN LEGAL CORPORATION

1164 Bishop Street, Suite 1205 • Honolulu, Hawaii 96813 • Phone (808) 521-2302 • Fax (808) 537-4268

YEARS OF  
SERVICE TO  
THE COMMUNITY  
1974 - 1999

November 22, 1999

To: Assistant Secretary M. John Berry  
c/o Document Management Staff  
Department of the Interior  
1849 C Street, N.W., Mailstop 7229  
Washington, D.C. 20240 (Fax: 202-208-3230)

RE: RECONCILIATION WITH NATIVE HAWAIIANS

**PARTICIPANT DATA:**

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2. Will you be representing a Native Hawaiian organization: YES

a. Please provide the name and mission of your organization:

**NATIVE HAWAIIAN LEGAL CORPORATION**

Mission: To assert, protect and defend Native Hawaiian land, natural resources, customary and traditional practices, and related entitlements.

How large is your organization's membership:

Full time staff: 18  
Board members: 12  
Members & Volunteers: 2,000  
Organization's address: Same as above

3. Which topic(s) would you like to address:

December 10, 1999

December 11, 1999

Hawaiian Land  
& Natural Resources

Reconciliation Process  
Political Relationship

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## TESTIMONY BEFORE THE U.S. DEPARTMENTS OF JUSTICE AND THE INTERIOR REGARDING RECONCILIATION EFFORTS BETWEEN THE UNITED STATES GOVERNMENT AND NATIVE HAWAIIANS

By Alan T. Murakami  
November 22, 1999

Thank you for this opportunity to provide you testimony on the role the United States can play on achieving reconciliation with native Hawaiians in the wake of the passage of P.L. 103-150, 197 Stat. 1510. That resolution commits the U.S. to acknowledge the ramifications of the overthrow of the Hawaiian Nation in order to provide a proper foundation for reconciliation between the U.S. and native Hawaiians. Accordingly, I offer this information to support that commitment to understand and acknowledge the current plight of native Hawaiians, which is traceable to federal government actions over the past century.

In this process, I am not attempting to limit my concern to Native Hawaiians as it is strictly defined under the Hawaiian Homes Commission Act of 1921, since the blood quantum is an arbitrary limitation on the scope of the problem. My comments are not intended to support any side to that issue. Furthermore, I offer no definitive information on the history and background of the educational, health, and social problems that stem from much of the past century's experience dealings between the federal government and Hawaiians.

What I do present are areas of possible reconciliation between the U.S. and Native Hawaiians in the context of past promises that have not been fully fulfilled. Specifically, I address the public trusts that Congress created to benefit Native Hawaiians, in view of the past failure of the U.S. to provide proper oversight for the implementation of those trusts, currently being administered by the State of Hawai'i. Finally, I suggest that the U.S. can and should immediately begin paying for its uncompensated use of 400,000 acres of former kingdom land, while it formulates how to compensate Hawaiians for the past century's use of those lands.

**The Trusts.** Following the overthrow of the Hawaiian Kingdom, the United States accepted the transfer of purported title to 1.8 million acres of former kingdom lands for no compensation from the nascent Republic of Hawaii, at the time of the subsequent "annexation" of the kingdom by the United States government. Because supporters of the annexation could not muster 2/3 of the votes in the Senate of the United States, it settled for passage of the Newlands Resolution to supposedly authorize the annexation of Hawai'i to the United States.

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Nihoa. Upright, straight, stately, tall and straight as a tree without branches; sharply peaked, as mountains. Hg., righteous, correct.

Under the Hawai'i Organic Act, a new government under the Territory of Hawai'i was given the power to manage and dispose of these new public lands under the laws of the territory. The territory was under the control of the United States, which appointed its Governor and Supreme Court.

**Hawaiian Homes Commission Act.** In 1921, the Congress passed the Hawaiian Homes Commission Act, setting aside approximately 200,000 acres to provide Native Hawaiians with opportunities to homestead, but without resources to accomplish this mission. Under the control of a Hawaiian Homes Commission, this trust languished for years beset with resource problems that restricted it from truly addressing the housing and economic development needs of Native Hawaiians for the next 8 decades.

**Hawai'i Admission Act.** In 1959, the Congress passed the Hawai'i Admission Act, making Hawai'i a new state, and simultaneously: (1) transferring daily administration of the HICA to the new state under a compact that required the state to assure that the spirit of the Act was faithfully carried out; (2) creating a ceded lands trust for 5 purposes, to be administered by the state, one of which was the betterment of conditions of Native Hawaiians. Despite incorporating the compact in its constitution, the new state of Hawai'i largely relegated the administration of the HHCA to last of its political priorities for the next 4 decades, giving it the least amount of resources to accomplish its mission than any other state agency. Similarly, despite the partial purpose of the ceded lands trust, none of the state's revenue from leases of those lands ever made its way into any program specifically to benefit native Hawaiians for the next two decades. In terms of both trusts, state officials began to engage in a series of systematic breaches of these trusts that lasted for decades.

Significantly, the United States retained an oversight role to assure that there was adherence to the terms of the trust, reserving a right to sue to enforce the trusts when necessary. The United States has never come close to exercising that function.

**1978 Constitutional Convention.** In 1978, the delegates of the Hawai'i state Constitutional Convention passed critical amendments, ultimately ratified by the voters, which:

- (1) created a new Office of Hawaiian Affairs, to be run by 9 trustees elected by people of Hawaiian descent, and which would administer the resources the Legislature was to allocate to it for the benefit of the Hawaiian people;
- (2) passed an amendment to require the Legislature to appropriate "sufficient sums" to the department of Hawaiian home lands for all of its homesteading programs and administration.

**State Attempts to Remedy Breaches of Trust.** In 1988, the state enacted Hawai'i Revised Statutes chapter 673, which waived the state's sovereign immunity from suit, allowing native Hawaiians the opportunity to directly sue the state for breaches of the ceded lands and Hawaiian home lands trusts. However, the statute waived immunity from suits for actual damages only prospectively. It waived immunity from lawsuits for actual damages occurring between statehood and June 30, 1988 only conditionally,

requiring administrative processing for those claims initially. The state handled claims for past breaches of the ceded lands trust from those of the Hawaiian home lands trust.

First, it began a series of negotiations with the OHA. Those negotiations resulted in a partial settlement that paid OHA \$149 million in the early 1990's. OHA followed those discussions with a subsequent lawsuit over further issues on revenues it believed the state owed. That case is currently before the Hawai'i Supreme Court with claims worth anywhere from \$300,000 to \$ 1 billion.

Secondly, the state engaged in separate tracks to resolve breach of trust claims involving the Hawaiian home lands trust: (1) negotiations with the DHHL over a variety of outstanding trust breach issues affecting the Hawaiian home lands trust as a whole; and (2) under Act 323 [SLH 1991], individual Native Hawaiians could make claims for actual damages resulting from breaches of the trust, which would be reviewed by an administrative panel, the Individual Claims Review Panel (ICRP), and paid for, hopefully, by legislative appropriations. Under both tracks, Native Hawaiians immediately had to engage in litigation to assure that these processes were fair.

For example, Native Hawaiians had to sue to get an independent representative of the beneficiaries at the table. Ka'ai'ai v. Drake. After two years of negotiations, the parties reached a memorandum of understanding to agree on a compensation package in which the state agreed to pay \$30 million per year for 20 years to reflect the damages to the Hawaiian home lands trust caused by the illegal sale of trust lands to private parties by, primarily, the federal government during the territorial period. The agreement was to limit the resolution of issues to those involving the title to trust lands now in the hands of private parties. There was an agreement to leave other issues to another day. In contrast, in enacting Act 395, Governor Cayetano and the 1995 legislature, arbitrarily flexing their political muscle, decreed that the payment was to compensate the trust for all claims affecting the trust as a whole. Moreover, any legal challenge to the settlement legislation would render it null and void. Nevertheless, despite that unilateral and draconian decree, there are other trust wide breaches that the state has never discussed nor recognized. Act 395 specifically exempted the claims of individual beneficiaries then still pending before the ICRP.

Despite this legislative exemption, the state promptly attempted to subvert the ICRP process through legal maneuvering when the claimants were forced to sue to stop an unconstitutional attempt to reinterpret Act 323 and foreclose major classes of claims. The Plaintiffs in that lawsuit succeeded in convincing a state circuit court judge that a legislative attempt to reformulate the decision criteria of the ICRP was a violation of due process. The controversy erupted after the Legislature enacted legislation to authorize a group of state officials to restrict the type of claims the ICRP could consider. After 8 years of delay largely caused by state foot-dragging, the ICRP was able to process only 53% of the pending nearly 2800 individual claims that had been timely filed. Despite legislation in 1999 to extend the life of the ICRP and certain filing deadlines, the Governor Cayetano arbitrarily vetoed the bill.

The veto forced native Hawaiian claimants to once again file a federal lawsuit to have the deadline to file suit declared invalid and void because of the legal conundrum caused by the failure to timely process claims and the refusal of the Governor to fund the ICRP beyond December 31, 1999. That suit asks the federal court to declare that the state officials have violated the due process, equal protection, and impairment of contracts clauses of the U.S. constitution. Judge Helen Gillmor heard oral arguments on Plaintiffs' Motion for Preliminary Injunction on November 15, 1999. A decision is pending.

In recognition of various breaches of trust in Rice v. Cayetano, the plaintiff now challenges voter qualifications to participate in OHA elections. Currently before the Supreme Court, this case could alter the manner in which OHA trustees are elected. If the ruling goes further, much of what is currently devoted to helping Hawaiians will be affected if not terminated. I provide the remainder of my testimony on the assumption that the ruling will not go beyond overruling the restriction against Mr. Rice's participation in OHA elections.

**Adequate Funding:**

Despite the passage of the 1978 constitutional amendment requiring that the DHHL receive "sufficient sums" to financially support its programs, its record of performance has continued to be largely abysmal. The only saving grace has been the passage of Act 14S [SLIJ 1995, Special Session]. This act provides the DHHL \$30 million per year in stable funding for 20 years. However, this source of funding is purely remedial and literally does not substitute for the state's on-going financial obligation to support the trust under Article XII, § 1.

In fact, the state never provided general funds<sup>1</sup> to the DHHL between 1959-87. During this period, the DHHL was forced to raise its operating budget by leasing its trust lands, primarily to non-Hawaiians, to generate revenue. Nine years after the constitutional amendment requiring it, the Legislature funded the DHHL for the first time with general funds, paying only one half of the salaries for the staff then authorized for the DHHL. Legislative funding continued to increase for the next 5 years, peaking at just under \$4.5 million in 1993. However, since then, the annual appropriation for the DHHL has sunk to \$1.2 million, less than a third of the peak. See, Attachment 1. No other major state department has suffered such a decline. In the meantime, the waiting list for homesteading has grown from less than 8,000 in the early 1980's to over 19,000 today. While homesteads are being built, the pace of building is being far outstripped by the demand for housing. In view of the fact that housing conditions for Native Hawaiians are the worst in the nation, this situation is especially egregious. Accordingly, the relief the federal government is providing under the Native Hawaiian Housing Act, S. 225, is critical to meeting the housing needs of these trust beneficiaries.

<sup>1</sup> General funds are revenues derived from the state's income taxes, general excise taxes and the like. Special funds are revenues derived from the lease of public lands or fees charged for licenses and concessions on state land.

### **Increased Federal Oversight**

For years, the Hawai'i Advisory Committee of the U.S. Civil Rights Commission has studied and reported on the various breaches of the Hawaiian home lands trust. In 1980, it conducted its first preliminary review of the chronic abuses of the trust and reported its findings in the report entitled, "Breach of Trust? Native Hawaiian Homelands (1980)." By 1991, after a thorough examination of the program, the HAC had no doubt that systematic and serious breaches of trust plagued the program, issuing a blistering report of these abuses entitled, "A Broken Trust, The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians (1991)."

The state has demonstrated that it lacks the political will to meet its trust obligations which were required under the statehood act. As concluded in the "Broken Trust" report, the U.S. has failed to exercise its trust obligations to Native Hawaiian beneficiaries of the HHCA. "A Broken Trust" 43. Federal oversight needs to be increased as well as funding to supplement the meager resources the state has historically provided the DHHL. *Id.* at 46.

### **Waiver of sovereign immunity/Office of Trust Counsel**

In 1991, U.S. Senator Dan Inouye opened up dialogue to enact legislation waiving the federal government's sovereign immunity and establishing an Office of Trust Counsel, in order to give the Native Hawaiian community access to the federal courts and the means to prosecute claims against the federal government. That idea should be revived. Judicial remedies are most often the only really effective means of forcing corrective action and paying for past damages to the trusts. The U.S. should investigate whether the state's violations are cause for exercising the federal prerogative to sue for the state's breach of trust and bring the considerable weight of the U.S. to correct these harms.

The Hawai'i Advisory Committee agreed with this approach in 1991. "A Broken Trust" 43, 45.

### **Equal Treatment**

Hawaiians are the only group of indigenous people who have not received formal Congressional recognition for their unique political relationship with the United States. *Id.* at 44. While the U.S. Solicitor General has recently acknowledged this relationship in its amicus brief to the U.S. Supreme Court in Rice v. Cayetano, congressional action is necessary. Pending the outcome of the Rice case, Justice and Interior officials should move toward taking this step as soon as practicable so Hawaiians have comparable recourse to a procedure to obtain federal recognition of their aboriginal and political status.

### **Greater Self-determination for Hawaiian Homestead Beneficiaries**

Native Hawaiian beneficiaries do not have the benefits of the rights afforded their Indian counterparts under the Indian Self-Determination and Education Assistance Act of 1975, 25 USCA §§ 450a-450n. Under that act, the Secretaries of Interior and Health and

Human Services are authorized to contract with Indian organizations for the delivery of federal services and programs in Indian country that promise a chance to enhance the self-determination of Indians. Similar legislation to grant Native Hawaiians benefits on Hawaiian homelands would help empower them to fashion programs that best suit their needs. It would also minimize the dependency of Native Hawaiians on non-Native bureaucrats who too often exercise stifling control over trust assets being managed on their behalf.

#### **Continuing Dialoguc with non-Hawaiian groups**

The federal government can play a key role in fostering an atmosphere of continuing dialogue and cooperation amongst different ethnic groups in Hawai'i who are not Hawaiian. Many non-Hawaiians share the goal of self-determination for this indigenous group. Others don't understand the issues involved. In either case, there needs to be a concerted education campaign to bring all residents of Hawai'i together to understand the history and status of Hawaiians to insure continuing harmony amongst the populace.

#### **Payment of Rent for Use of Former Kingdom Land**

Despite its improper role in the overthrow of Queen Liliu'okalani in 1893 and obtaining the uncompensated benefit over the next five years of 400,000 acres of land once under the control of the kingdom, the U.S. pays no one for this use. This free use of land is unconscionable and a wound in the relations between the federal government and Hawaiians. The U.S. should initiate a process to engage in serious negotiations with the proper representatives of the Hawaiian people to begin paying rent immediately for the use of these lands. While it is problematic who should be negotiating for Hawaiians, the U.S. should least commit to engage in such discussions so Hawaiians can then have the opportunity to begin negotiations when prepared. I leave that process open for future discussion. Perhaps models utilized for selection of an independent representative of the Hawaiians to engage in this discussion. Any tentative arrangement could be subject to ultimate ratification once the Hawaiian sovereign entity is established.