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September 21, 2000

Assistant Secretary John Berry  
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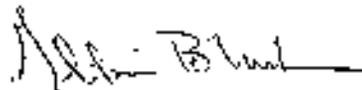
Re: From Mauka to Makai, the River of Justice must Flow Freely  
Response to Draft Report on Reconciliation Process between the U.S.  
and Native Hawaiians - August 23, 2000

Dear Sir:

Attached you will find my critique of the above Report. Please confirm receipt of this document in writing.

Please respond as to the next step in the process of Reconciliation. My position is summarized in comments under recommendation 5.

Sincerely,



Mililani B. Trask

EXECUTIVE SECRETARIAT  
OFFICE OF THE

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## I. Recommendation 1:

While it is true that Hawaiians should have the same right of self-governance as federally recognized tribes, the report should clearly state that Hawaiians are not Indians or Alaskan Natives. The Hawaiian governing body should have powers and authority which the Kingdom and peoples enjoyed prior to the overthrow. One example are the treaties of the Kingdom relating to trade and commerce. There is no example in Alaskan or among the Indian nations of the extensive trade agreements and treaties which Hawaiians achieved with Europeans, the U.S. and Japan. Hawaiians should have the right to trade, without federal or state tariffs or taxation with the U.S. Continent, European Nations and Japan. The trade benefits of NAFTA should be extended to the Hawaiian entity. Significant revenue for housing, education, and health is needed to address acute needs of Hawaiians in these areas. Will the burden be upon the State and Federal taxpayer? If Hawaiians can market Hawaii's products (blossoms, coffee, music, etc.) globally, revenues can be raised through economic development. The U.S. has the right to impose reasonable restrictions against trade in weaponry, toxic substances or radioactive materials and other such items, but this federal power should not unduly restrict or limit our peoples broad right to trade. Economic self-sufficiency is the goal of nationhood and it is part of the international legal definition of the right of self-determination.

## II. Recommendation 2:

I agree that there needs to be a special office/division within Interior to address Hawaiian issues. This is appropriate because Interior inserted the 5(f) trust language into the Admissions act and because Interior had the original jurisdiction over Hawaii when it was a U.N. Trust Territory.

I recommend the Native Hawaiian office should be under the division of Interior which deals with Policy and Budget.

### A. Re: Ceded Land Inventory

This section of the report needs to be expanded. The Ceded Lands Trust is what needs to be inventoried. There are several inventories of fast land that have been done by the State (DOT, OHA, DLNR) and the U.S. - none of these inventories conforms to any other.

The Ceded Land Trust does not consist solely of fast land currently under control of the State and U.S. Pursuant to Section 5(g) of the Admissions Act (Pub. L. 86-3, 73 Stat 4), the trust includes "public lands and public property", "ceded to the U.S. by the Republic of Hawaii under the Joint Resolution of Annexation approved July 7, 1898....or that have been acquired in exchange for lands or properties so ceded." Under Section 5(i) of the Act, submerged lands are also included. Under Section 2 of the Revised Conveyance Act of 12-23, 1963, Pub. L. 88-233, lands acquired after August 21, 1964 shall also be included in the Trust. Section 5(f) of the Act clearly includes "proceeds" and "income" of the lands. Section 2 of the Act includes "reefs". Also included were "territorial waters" 235 F. Supp 990, in addition, Section 2 includes all the "territory of Hawaii" with certain exceptions - Midway, Johnston, Sand, Palmyra Islands and Kingman Reef. The rest of the islands identified in Section 2 of the Organic Act (339.31 Stat 141) are part of the Ceded Land Trust. Section 2 of the Organic Act includes "all lands in the Territory of Hawaii classed as government or crown lands previous to August 15, 1895". Also included in the trust are subsurface mineral estates - specifically minerals and metallic mines, reserved to the government in all Royal Patents.

An inventory of the entire trust would include fast lands, submerged lands, reefs on all Hawaiian Islands (not just the 7 major islands), natural resources, including water and marine fisheries.

The help of USGS will be needed here. USGS is not included in the current draft report.

- B. With regards to surplus Federal land, I recommend that the Federal Surplus Land Act be amended to provide transfer of surplus lands to the native governing entity.

### III. Recommendation 3:

Section 5(f) of the Admissions Act provides that the U.S. may sue the state for breach of trust. This means that the U.S. Department of Justice may have to sue the State of Hawaii to

compel the inventory and accounting of the Ceded Land trust.

Since 1959 the State has refused to provide an accurate inventory of the 5(f) trust res, including revenues. If commingling of the trust is to be avoided in the future, and the Native Hawaiian governing entity is to have an equitable share of the trust, the trust res will have to be inventoried and segregated.

The report ignores this critical problem. The Office of Tribal Justice may maintain a dialogue with Hawaiians but the U.S. Attorney General should also be included for litigation.

This omission underscores a second issue which the report ignores. This is the inability of the Native beneficiary to sue the State for breach of trust. This is a long standing issue with Hawaiians. The obvious solution is to amend the U.S. Code provisions governing the original jurisdiction of federal district court to allow the Native Hawaiian beneficiaries and governing entity to sue the State for breach of trust. This issue is not fairly addressed in the Report (pg. 38). The Sansonetti Opinion and the Decision in Han v U.S. DOJ means there is a federal trust responsibility, but it doesn't include litigation to protect the trust! This is a third party beneficiary trust.

#### IV. Recommendation 4:

The NHAC should be elected by Hawaiians with Native voters on each island voting for Hawaiians to represent the interests of Hawaiians by island. The OHA method, whereby the majority on Oahu vote for neighbor Island Trustees, should not be used. The NHAC should be advisory to all federal agencies and bureaus within the federal system whether they are part of Interior or not. Upon the creation of the governing entity, the NHAC should be phased out.

#### V. Recommendation 5:

Interior and Justice need to return to Hawaii to begin a process of consultation with Hawaiians which focuses on a procedure and process for reconciliation. The procedure should include defining the goals and objectives of reconciliation as well as a process to negotiate and resolve historical claims and current claims relating to the public land trusts.

## VI. Disclaimers:

Paragraph #1 - Native Hawaiians have a long standing unwritten agreement with the Indian Natives and Alaska Natives not to impinge upon federal funding for their programs. This agreement must be honored. Inclusion of Hawaiians in NAGPRA and the Native American Freedom of Religion Act are examples of inclusive congressional bills which do not have any fiscal impact on the Indian budget.

## VII. Comments to Section entitled: A Brief History of Hawaii

This section is too vague and general. I recommend the report utilize and reference the testimony of Dr. Haunani-Kay Trask, Nov. 23, 1982 to the Native Hawaiian Study Commission Report (pg. 709-713 and 713-733) Volume 1, Native Hawaiian Study Commission June 23, 1983.

The Subsection entitled Native Hawaiian Cultural Renaissance and Self Determination Movement (pg. 39) of the draft report presents a biased and inaccurate view of the topic. Under cultural renaissance the focus is on Hawaiian language, Kahoolawe and the Hokulea - all pet projects funded by the Congress for Senator Inouye. The Kahoolawe settlement was a thinly veiled attempt to segregate the 5(f) trust giving 32,000 acres of a bombed out island with no water to the Hawaiian nation. Hearings were never held in Hawaii on the measure. The 400 million dollars went for military contractors, not for planting or to restore the cultural and religious sites destroyed by the bombing. The funds have run out and the work to clean up the bombs is not complete.

The self-determination section deserves separate treatment. Mention should be made of the numerous groups in the sovereignty movement and of the existence of pro-independence groups.

The draft report clearly endorses the Democratic Party initiative of the State Legislature created in May, 1993. The HSA, HSEC, Ha, Na OIwi movement was not endorsed by the people in the January 1999 election. The report fails to note that the Ha election was opposed by 77 Hawaiian organizations who called for a boycott of the process because it violated the peoples' right to self-determination. The report fails to note that the Ha plebiscite was discredited by an international report filed by UNPO and that Ha Hawaii itself filed an intervention at the United

Nations admitting that their procedure did not meet the standard of self-determination. See exhibit A hereto.

By including the paragraphs on HSEC-Ha (pg. 42-43), the report creates the impression that Hawaiians rejected self-governance. We did not - we rejected a State initiative which violated our peoples right to self-governance and self-determination.

These sections should be deleted from the report and a separate new section on the self-determination movement should be included which focuses on the peoples initiatives (Ka Lahui Hawaii, the Nation of Hawaii, etc.) rather than State initiatives.

### VIII. Current Status and Major Issues

#### A. Self Determination

The quote in Hawaiian is inappropriate and should be deleted. The appropriate quote is:

E iho ana o luna  
E pii ana o lalo  
E hui ana na moku  
E ku an ka paia

That which is above shall be brought down.  
That which is below shall be lifted up.  
The islands shall be united.  
The walls of the nation shall be raised.

This is the prophecy from time immemorial on the raising of our nation, as recorded by David Malo.

The discussion on the Rice decision (pg. 50) misses one important point. Rice underscores the fact that a State agency cannot provide for self-determination. The State agency structure (OHA and DHHL) maintains wardship - the only answer is a self-governing entity. In native nations, natives elect natives. In State government, this can not be done - evidence Rice.

B. Ceded Lands & Hawaiian Home Lands

These two trusts should not be included in one section. They are not the same. The Ceded Lands section does not include Interior's role in creation of the Ceded Land trust. The research on this section is poor. I recommend you use The Hawaii Ceded Land Trusts, Their use and Misuse, by Mitsuo Uyebara. This reference book is in the Library of Congress. If you can't find it - contact me - it is now out of print.

Hawaiian Home Lands: This section deserves separate treatment. The section on the blood quantum (pg. 52) should note that OHA held a referendum on this issue and the overwhelming majority of Hawaiians rejected the 50% limit.

The central problem with the DHHL settlement was that it did nothing for the beneficiaries. The U.S. gave land back under the Recovery Act, but it didn't go to the people. The State worked out a "settlement" - but nothing went to the people. The Hawaiian Homes Claims Commission was a 10 year sham - the State legislature refused to pay the claims, the Commission was terminated and the people got nothing. Settlements under the wardship policy don't work. Self-determination means the policy of wardship is repudiated and claims are settled with the native nation.

The OHA section (pg. 53) is wrong. Under Governor Waihee, Act 304 was supposed to provide OHA with revenues. Act 329 shelved Act 304 for 2 years. Act 304 is still law and is still in force but the State is not paying the revenues. This error is significant. OHA does not get 15.1 million per year. In addition, the State Supreme Court has refused to rule on the Heely case for 2 years. The State legislature, State Supreme Court and the State Executive refuse to administer the trust. The state is in a conflict of interest. This is very clear from the Broken Trust Report of 1991.

IX. Comments to Section on Congressional Legislation

This section should discuss the Akaka Bill and the testimony of Kevin Gover as well as AFN, NCAI and the majority of Hawaiians.