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Analysis of amendments to the Hawaiian Homes  
Commission Act, 1959-June 30, 1985, in light  
of the consent requirement of the Hawaii  
Statehood Act.

To what extent must the United States be involved in the amendment of  
the Hawaiian Homes Commission Act, and has it been sufficiently  
involved, as a matter of law, to the present time?

Section 4 of the Hawaii Statehood Act provides as follows:

As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the Constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

The statutory requirement:

When section 4 is parsed, it permits the following amendments to the Hawaiian Homes Commission Act ("HHCA") without the consent of the United States:

- (1) Amendments to sections 202, 213, 219, 220, 222, 224, and 225, and to "other provisions relating to administration";

- (2) Amendments to paragraph 2 of section 204, to sections 206 and 212, and to "other provisions relating to the powers and duties of officers other than those charged with the administration of said Act"; and
- (3) Amendments to increase the benefits to lessees of Hawaiian home lands.

The consent of the United States would be required in the case of amendments or new legislation on the following subjects:

- (4) Provisions that permit an increase in the encumbrances that may be placed on Hawaiian home lands by officers other than those charged with the administration of the Act; and
- (5) Provisions that change the qualifications of lessees of Hawaiian home lands.

On two subjects, change is impermissible, with or without the consent of the United States:

- (6) The Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund may not be the subject of amendments that impair or reduce them; and
- (7) All proceeds and income from "available lands" may be used only in carrying out the provisions of the Act.

A residual provision is required, and the language of section 4 that precedes the proviso contains it. Subject to the exceptions that follow, section 4 states that the Hawaiian Homes Commission Act may be amended or repealed only with the consent of the United States. Hence,

- (8) any change in the Act not described in paragraphs (1) through (7) above would require the consent of the United States.

Since the date of Hawaii's admission to the Union, the United States has not consented (nor, so far as can be established, was it asked to consent, prior to January 1985 when H. J. Res. 17 was introduced) to any amendments to the Hawaiian Homes Commission Act. The question, then, is whether any amendments have been enacted that do not fall into categories (1) through (3) above.

The short answer is that there have been amendments that, under section 4 of the Statehood Act, require the consent of the United States as a condition precedent to their effectiveness. Under the provisions of State law enacted with some of those amendments, some are by their terms not effective until the U.S. consents; others are by their terms effective until they are held otherwise, because of the absence of U.S. consent. In the circumstances, all amendments

that are subject to the consent provision should be submitted forthwith to the United States Congress for approval.<sup>1/</sup>

It will be observed that the language of section 4, quoted above, contains an ambiguity. Exempt from the consent requirement are specified sections "and other provisions relating to the powers and duties" of certain officers. Are all amendments to the specified sections exempt from the consent requirement, or are amendments to those sections exempt only to the extent that they relate to "administration" or to "the powers and duties" of certain officers? The legislative history of section 4 is unhelpful. It too is ambiguous, hinting first at the former conclusion, and later at the latter.<sup>2/</sup>

<sup>1/</sup> Neither the Statehood Act itself nor its extensive legislative history sheds light on the question of how "the consent of the United States" is to be evidenced. While Federal consent is sometimes evidenced by the approval of the President or of some lesser Federal official, that level of consent is usually the product of language so stipulating. In the absence of any provision or suggestion to the contrary, it thus seems appropriate that Federal consent in the case of amendments to the HHCA be evidenced by an Act of Congress. That conclusion appears to have been accepted by the interested parties, including the Legislature of Hawaii, whose enactments on this subject have sometimes referred to "the consent of the United States Congress". (See, for example, Session Laws of Hawaii, 1981, Act 112, section 5.)

<sup>2/</sup> A legislative history paper, prepared for the Task Force, shows that from the 80th through the 84th Congresses, Congressional committee reports suggested that any amendment to the sections specified would be exempt from the consent requirement. For example, the Senate Interior Committee in the 83d Congress stated that "certain sections of the [Hawaiian Homes Commission] Act pertaining to its administration may be amended by the State without such consent." (S. Rept. No. 886, p. 19, 83d Cong.) But in the Congresses thereafter, through the 86th, the contrary suggestion appears. The House Interior Committee, for example, stated in its 1959 report that:

While the new State will be able to make changes in the administration of the Act without the consent of Congress, it will not be authorized, without such consent, . . . to disturb in other ways its substantive provisions to the detriment of the intended beneficiaries. (H. Rept. No. 32, p. 19, 86th Cong.)

The latter, being both more carefully stated and later in time, provides the more useful guidance, but it involves sufficient straining to be short of dispositive. It is however, consistent with the construction adopted for purposes of this Analysis.

If all amendments to those sections, regardless of their subject matter, are not exempt from the consent requirement, one might then ask why any section numbers are provided at all. It would, under that construction, be sufficient to exempt amendments "relating to administration." On the other hand, it is clear from the statutory language that the Congress' purpose was to guard against damage to the interests of native Hawaiians, inflicted by an unsympathetic State Legislature or Constitutional Convention. The Congress did this by requiring that most changes of substance could not be effective until those changes are the subject of approval by "the United States." An unsympathetic State Legislature could in fact inflict grave damage to the interests of native Hawaiians by amendment of the sections specified, by legislative legerdemain that is easy to imagine, and it is reasonable to suppose that the Congress meant to foreclose that possibility. In the circumstances, this paper assumes that the Congress intended that the consent requirement would apply to amendments to the sections specified, if such amendments do not concern "administration" or the "powers and duties" of certain officers.

One further matter deserves comment, before the analysis of post-Statehood amendments commences. It will be wondered why, with so clear a statutory requirement, amendments to the Act have not been transmitted routinely from Hawaii to the U.S. Congress for consideration and consent. While it has not been possible to discover the answer with certainty, it seems likely that a contributing consideration has been a concern on the part of some beneficiaries of the Act that the Congress might, if it turned to the statute, modify it so as to reduce the benefits available to native Hawaiians. There is, of course, substantial doubt as to whether the Congress has the authority now to amend the Act on its own initiative.<sup>3/</sup> But that

<sup>3/</sup> Under section 4 of the Statehood Act, the Hawaiian Homes Commission Act now constitutes a "compact" between the U.S. and the State, and by definition a compact is at least bilateral. Under the terms of that compact, set forth in section 4, the State may amend the Act in some particulars without U.S. consent. Beyond that, it seems sound to conclude that neither party may act to amend the HHCA without the concurrence of the other. As to the amendment of section 4 of the Statehood Act, it follows that the Congress could not act unilaterally on that subject either. Section 4 itself constitutes a compact; and given the requirements of the Statehood Act that the voters of Hawaii were to agree to the terms of the Act, and particularly its section 4, as a condition precedent to Hawaii's admission (sec. 7(b), 73 Stat. 4, 7), it seems clear that a popular referendum would be necessary in Hawaii to ratify any change in the section made by the United States. The two governments would be required to act in concert. The State cannot change the compact unilaterally, given the U.S. Constitutional prohibition in Article I, section 10, against the impairment of contracts. And while the law on the subject is slight (see Grad, Frank P., Federal-State Compact: A New Experiment in Co-operative Federalism, 63 Columbia L.R. 825, 848 (1963)), the United States would probably violate the due process clause of the

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issue aside, there is certainly no doubt that the Congress did in section 4 of the Statehood Act require consent to certain amendments--its motive clearly being the protection of the interests of the beneficiaries. Fears as to what the Congress might do while providing that protection cannot possibly overcome the statutory requirement for consent.

Amendments to the Homes Commission Act, 1959-June 30, 1985:

To reach the conclusion that U.S. consent should be sought, it seems sufficient for purposes of this paper to compare the language of the Homes Commission Act at the time of admission, August 21, 1959, with its language today.<sup>4/</sup> That comparison reveals the following:

Section 1, the title of the statute, has not been amended.

Section 2, a cross-reference, has not been amended.

Section 201, definitions, was amended in 1963 in a nonsubstantive, perfecting manner. The amendment (changing "Territory" to "State") relates to administration, and thus does not require U.S. consent.

Section 202 concerns the creation and composition of the Hawaiian Homes Commission and the Department of Hawaiian Homes Lands, and the employees of each. It was amended in 1963, 1965, 1977, 1984, and 1985, but because the subject of the section and all amendments to it relate directly to administration, the consent of the U.S. is not required. ✓

Section 203, the designation of "available lands," was also amended in 1963 in a nonsubstantive, perfecting manner, and does not require U.S. consent.

Section 204, pertaining to the Commission's relationship to the Board of Land and Natural Resources (but excluding section 204(2)), all the changes to which appear to relate either to administration or to the duties of officers other than those charged with the administration of the Homes Commission Act, or they increase bene-

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Fifth Amendment if it undertook to act alone. (Lynch v. U.S., 292 U.S. 571, 579 (1934).)

<sup>4/</sup> A purist would, rightly, insist that a full analysis requires examining each amendment as passed, instead of each section as it currently exists. Practical considerations, however, dictate the latter course, for it is only the current condition of the section (i.e., amended to date) that could warrant inviting the U.S. Congress to consider it.

fits to native Hawaiians),<sup>5/</sup> was amended by the Legislature in 1963, 1965, 1976, and 1985, and by the State Constitutional Convention in 1978. The amendments (1) eliminate the requirement for approval by the Secretary of the Interior when land that is under a lease that contains a withdrawal clause is restored to its former status as "available land" by action of the Commissioner of Public Lands (now the Board of Land and Natural Resources); (2) eliminate the provision that not more than 20,000 acres may be settled in a five-year period; (3) remove the Governor as one of the officers who must approve land exchanges; (4) permit the exchange of "available lands" for private, as well as public, lands; and (5) provide that general leases issued after June 30, 1985, must contain a provision permitting the termination of the lease if the land is needed for the purposes of the Act. (Other changes of a nonsubstantive, perfecting sort have also been made.) Of these changes, those numbered (1) and (3) relate to administration, as well as to the powers and duties of other than Homes Commission officers; and those numbered (2), (4), and (5) increase, at least potentially, the benefits available to native Hawaiians. Thus, the consent of the United States is not required.

Section 205, limiting sales and leases, has not been amended.

Section 206, concerning the powers and duties of certain officials with respect to public lands, has been amended only in a nonsubstantive, perfecting manner, and the amendments do not require the consent of the United States.

Section 207, pertaining to leases and licenses to native Hawaiians, was amended in 1963, 1976, 1981, 1983, and 1985. Except for the amendments of 1983 and 1985, all of the substantive amendments apply to subsection (a) only. The 1976 amendments are, according to the State statute (Laws 1976, Act 23), to become effective when the consent of the United States has been obtained. The 1981 amendments are, according to that State statute (Laws 1981, Act 90, sec. 11), subject to a severability clause, so that, in effect, the amendment becomes immediately effective and ceases to be so only when it is held to be ineffective for want of U.S. consent.<sup>6/</sup>

<sup>5/</sup> Because section 204(2) is expressly named in section 4 of the Statehood Act, and because section 4 describes as exempt from the consent requirement provisions that deal with the subject matter of section 204(2), it is reasonable to conclude that U.S. consent is not required for changes made in it. On the other hand, those changes have the effect of permitting the placing of encumbrances on Hawaiian home lands, under Hawaii's general land management laws, and as such they may run afoul of the provision of section 4 concerning encumbrances which "shall not be increased" without consent. To avoid such an argument, strained as it may appear, it would be wise to obtain U.S. consent to the section 204(2) changes.

<sup>6/</sup> The 1981 severability clause provides:

(footnote continued)

The 1976 amendments to section 207(a) are two in number, occur only in the proviso, and are extraordinarily limited in their application. The proviso pertains to the Kalaniana'ole Settlement on Molokai.

-- Without the first amendment, the lessee may choose where on his leased farm lot at the Kalaniana'ole Settlement his residential lot is to be located, but if the amendment were to become effective, the choice would be made by the Department of Hawaiian Home Lands; and

-- In general, under section 207, residence lots are not to exceed one acre, but in the Kalaniana'ole Settlement, they may exceed one acre but cannot exceed four acres. The second of the 1976 amendments states that the Department of Hawaiian Home Lands may, with respect to the Kalaniana'ole Settlement, designate residential lots of less than 10,000 square feet (i.e., under 1/4 acre).

Because the first of these 1976 amendments would diminish the authority of a lessee, U.S. consent is required, and the Legislature appears to have thought so in light of the qualified effective date that it attached, as noted above. The second amendment appears to be surplusage as a matter of law, inasmuch as the section without that addition contains a ceiling on residential lots, but no floor. U.S. consent is thus unnecessary.

The 1981 amendment adds "aquaculture" at appropriate points, as an addition to agricultural or pastoral purposes. Because that would

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The provisions of these legislative amendments are declared to be severable, and if any section, sentence, clause, or phrase of the legislative amendments or any of them, or the application thereof to any person or circumstances is held ineffective because there is a requirement of having the consent of the United States to take effect, then, that portion only shall take effect upon the granting of consent by the United States and the effectiveness of the remainder of these legislative amendments or the application thereof shall not be affected.

(The 1978 severability clause does not differ. Laws 1978, Act 229, § 11.)

As stated above, one of the effects of this clause is to permit amendments to become effective prior to the receipt of U.S. consent, and to remain effective without it, unless and until it is held that U.S. consent is required. In that event, the amendment under scrutiny falls until Federal consent is obtained. But other amendments carried in the same statute would be unaffected, unless or until they too are tested and held to require U.S. consent.

expand the possible benefits to native Hawaiians, the consent of the U.S. is not necessary. The point is academic here, because the section requires consent for other reasons, but the position is taken below that if a severability clause affects a section, then consent should be sought, this on the ground that the Legislature by using the severability clause has implied that it believes that consent might be required. The doubt thus raised should be eliminated by seeking the consent of the U.S.

The 1983 amendment, apart from changing the form of subsection (a) of section 207, effects a substantive change. Under that subsection prior to 1983, the Department of Hawaiian Home Lands was authorized to grant easements for telephone lines, electric power lines, gas mains, and the like "for terms of not to exceed twenty-one years . . . to public utility companies and corporations". The 1983 amendment eliminated the quoted words. While the amendment concerns administration, it also, potentially, reduces benefits to the beneficiaries -- to the extent that it permits easements to more recipients for longer periods, inferentially permitting greater withdrawals from lands otherwise available for homesteads -- and on that basis, U.S. consent ought to be obtained.

← Section 207 was also twice amended in 1984, first to permit the development and construction by the Department of multifamily units, the second to require that commercial establishments that are the subject of leases be to "native Hawaiians" instead of to "lessees of the Department". While these changes probably increase benefits to lessees, thereby escaping the consent requirement, at least arguably they also decrease them, so U.S. consent ought to be obtained.

The 1985 amendments modify the provisions concerning licenses to the United States, arguably a matter of administration and thus free of the consent requirement; but they also modify the minimum and maximum acreage limitations on leases to native Hawaiians, some of which might be viewed as reducing benefits. Consent, thus, is required.

Section 208, concerning lease conditions, has often been amended: in 1963, 1967, 1973, 1974, 1978, 1981, and 1985. Except for amendments that are nonsubstantive and perfecting only, all of the amendments except one--the last set out below--either increase lessees' benefits or relate to administration:

- Paragraph (1) was amended with respect to the disposition of a lease (adding "quitclaim"), and relates to administration.
- Paragraph (3) adds "aquaculture" to approved uses, and eliminates a tree-planting requirement for lessees, both of which in effect expand benefits.
- Paragraph (5), a general bar to alienation, provides that a lessee's interest in a tract is not subject to attachment for debts arising from loans by "agencies,"



even if the Department of Hawaiian Home Lands approves the loan. The term "agencies" was "governmental agencies" for some years following Statehood, but each change appears to expand benefits potentially, and thus does not require U.S. consent.

-- Paragraph (6), added in 1985, permits a lessee to mortgage his tract and the improvements thereon, provided the mortgage is insured by the FHA, VA, or another Federal agency and is approved by the Hawaiian Homes Commission.

However, a paragraph (8) was added following Statehood, and this paragraph was repealed in 1978. Paragraph (8) had permitted the Department of Hawaiian Home Lands to give loan guarantees. Its addition would increase benefits, and thus not require approval; its repeal, equally, diminishes benefits and does require approval, so U.S. consent is necessary. A severability clause (see footnote 6), suggests that the Legislature may have shared that view.

Section 209 pertains to lease succession, an unusually controversial subject in the Hawaiian Homes context. Amendments to the section can be divided into those dating from 1982, those from 1981, and all others (1959-80). In reverse order:

-- The pre-1981 amendments were perfecting and do not require U.S. consent.

-- The 1981 amendments were contained in two legislative enactments. Amendments carried in the first of these, Act 90, approved June 2, 1981, were minor: some nonsubstantive, perfecting changes and two additions concerning aquaculture. U.S. consent would not be required to any of these changes, but for the fact that the amendments to section 209 that were contained in Act 90 were subject to a severability clause, thereby suggesting that the State Legislature believed that they might be subject to the consent requirement. Such a suggestion from the Legislature should probably be viewed as sufficient to raise an informed doubt, and thus to trigger a request for U.S. approval so as to eliminate any doubt as to the status of the amendment. But the question need not be answered here because the later amendments very clearly require U.S. consent.

-- The later 1981 amendments, contained in Act 112, approved June 8, 1981, explicitly require U.S. consent. Those amendments are "to take effect upon the approval of the Governor of the State of Hawaii and with the consent of the United States Congress" (Laws 1981, Act 112, sec. 5). The Governor has approved. Some of those amendments are minor, but a major change relates to the valuation of a lessee's improvements in case he dies without qualified heirs, or his lease is cancelled, or

he gives it up. Under current law, the Department is to conduct an appraisal of the improvements on his leasehold, and is to pay that amount, less taxes due and certain debts, to the decedent's legal representative. The new standard for payment contained in Act 112 is more complex, represents a diminution of benefits at least in some cases, and is set out in a new section 210.5, discussed at that designation below.

-- The 1982 amendments change the blood quantum requirements for certain successors to a lessee (Act 272). A spouse or children need be only 1/4 Hawaiian; other relatives, in order to be designated successors, must continue to be of least 1/2 Hawaiian blood. If a lessee dies without a spouse or children, or without designating another qualified successor, then the value of his leasehold is to be appraised in the pre-1981 manner referred to above. (Whether the Legislature in Act 272 intended to repeal the new valuation provisions that had been added, subject to U.S. consent, by the second 1981 amendment (Act 112, discussed above) is not clear. That would seem, however, to be the effect of this latest amendment to section 209.) The 1982 amendments provide that they are to be effective "upon the approval of the Governor of the State of Hawaii with the consent of the United States."<sup>1/</sup> The Governor has approved.

Section 210, on the cancellation of leases, has been amended only in a nonsuostantive, perfecting manner and requires no U.S. consent.

Section 210.5, pertaining to the valuation of improvements, has been accorded what appears to be unusual treatment by both the Legislature and the codifiers, so that its status is obscure. Confusion arises because:

-- Under section 209, at least until 1981, if a lease was cancelled or surrendered, or if the lessee died without leaving a relative qualified to succeed him, the Department of Hawaiian Home Lands was required to appraise the value of the improvements and growing crops and to pay that amount to the legal representatives of the deceased, less taxes due and certain debts owed.

-- In 1981, Act 112 amended section 209 to strike out much of the foregoing and to provide instead that in the circumstances referred to, the amount to be paid to the legal representative would be the amount determined under the formula set out in the new section 210.5. Reduced to essentials, that formula provides that for ten years after the commencement of the lease,

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<sup>1/</sup> This provision should probably be read as though there were an "and" after "Hawaii". That is the form the provision took a year earlier in Act 112. Without that small article, the Governor would surely be unacceptably constrained.

the value to be paid would be the original cost of improvements, plus interest at 7%; after ten years, appraised value would be paid, less the value of improvements that are "luxurious in nature." Clearly, the change induced by section 210.5 could reduce benefits to lessees, so Federal consent would be required. The Hawaii Legislature obviously agreed, for it provided that section 210.5 would not become effective until the Governor approved it and the U.S. Congress consented. The Governor did approve. Interestingly (but whether significantly or not is hard to determine), section 210.5 was set out in the Revised Laws of Hawaii, in the pocket part for use in 1982, as though it were a law already in effect -- but codifiers' notes following it reflected accurately the Congressional consent requirement. (In the later pocket parts, section 210.5 appears as a note -- and not as a law already in effect).

-- In 1982, in enacting the new succession language in section 209 that is discussed above at that designation, the Legislature reenacted the language of section 209 as it pertains to valuations substantially as it existed prior to the major amendment in 1981, wholly ignoring the amendments made by Act 112 of that year. To compound what seems to be confused treatment, the law codifiers, in the pocket part for use in 1983, set out as notes both section 209 and 210.5. Section 209 is displayed without the 1981 amendments that referred to the new section 210.5 (even though source notes indicated that that 1981 law is reflected) but section 210.5 is then set out in full, as derived from those same 1981 amendments. The treatment is at a minimum confusing, and it appears to be inconsistent.

Section 210.5 unquestionably requires U.S. consent -- assuming that the section has any current validity. Because it is in conflict with the later-amended section 209, however, it may be preferable to exclude it from a consent vehicle.

Section 211, on community pastures, has been amended only in a nonsubstantive, perfecting manner and does not require U.S. consent.

Section 212 relates to home lands returned to the control of the Board of Land and Natural Resources. The section was amended in a variety of particulars by the Constitutional Convention in 1978, but all such amendments relate either to administration or to the powers and duties of officers other than those charged with the administration of the Act, so consent is not required. The principal changes are these:

-- The section provides basically that home lands may be returned to the Board, and may be the subject of general leases by the Board, but such leases must contain (or be construed as containing) withdrawal provisions under which they can be returned to the Department of Hawaiian Home Lands if that Department needs them. Originally, the Department could not seek to have the lands returned under a withdrawal provision unless

the Secretary of the Interior approved. The need for Secretarial approval was eliminated in 1978.

-- Originally, the return of home lands to the Department was to occur "whenever" the Department sought them. As amended in 1978, a new but additional provision says that the withdrawal clause must stipulate at least one year's notice, but not more than five. Since both provisions remain, there is an apparent internal inconsistency, but it should be resolved by construing the stipulated notice as being overcome in the event of DHHL's immediate need for the land in question. In any event, the amendment falls within either of the exemptions to the consent requirement.

-- Originally, a withdrawal clause was imputed to all leases, "whether or not stipulated therein," but an additional requirement starting in 1978 is that each lease "shall contain a withdrawal clause." Both provisions now stand in the same section, and are apparently of equal weight.

-- A new provision, and thus no inconsistency, is to the effect that home lands may be leased by the Board of Land and Natural Resources to public agencies or public utilities for a nominal rental, if the Department of Hawaiian Home Lands will benefit from their use. Another new (1978) provision states that any general lease by the Board of Land and Natural Resources is void in the absence of approval from the Department of Hawaiian Home Lands.

As stated above, the changes in section 212 relate to administration or to powers and duties of officers, and as such are exempt from the consent requirement.

Section 213 concerns revolving funds and special funds. Although the section has grown many-fold since Statehood, it does not appear that the three funds expressly named in section 4 of the Statehood Act have been impaired or reduced (and accordingly, that provision of the Statehood Act has not been violated); and the other changes (largely the addition of new funds) can reasonably be construed as both relating to administration, and increasing the benefits to lessees. Accordingly, U.S. consent to section 213 as it now stands is not required.

The Homes Commission Act at the time of Statehood provided for two revolving funds and two special funds: (1) the Hawaiian home-loan fund, (2) the Hawaiian home-operating fund, (3) the Hawaiian home-development fund, and (4) the Hawaiian home-administration account. The first three of these are the ones named in section 4.

An examination of the much-amended section 213 as it stands today shows that:

- (1) The home-loan fund, now section 213(a)(1), has been entirely rewritten, but it does not differ materially in substance

from its predecessor (48 U.S.C., 1958 ed., sec. 707(b)), except that money from it can no longer be used to pay for the improvements of lessees who die leaving no qualified successor (pursuant to section 209). But those payments can now be made from the home-development fund, so there is no loss, and in fact a possible gain in benefits.

- (2) The home-operating fund (now section 213(a)(7), formerly 48 U.S.C., 1958 ed., sec. 707(d)), although wholly rewritten does not contain modifications of substance.
- (3) The home-development fund (now section 213(b)(1), formerly 48 U.S.C., 1958 ed., sec. 707 (c)), also has not been modified in matters of substance, except that some of its proceeds may now be used for the section 209 payments referred to above.
- (4) The home-administration account (now section 231(b)(2), formerly 48 U.S.C., 1958 ed., sec. 707 (E)), concerning the use of proceeds from general leases by the Board of Land and Natural Resources, contains one material change, but the change does not decrease potential benefits. Formerly, the section stated that if the Legislature failed to appropriate funds for the administration of the Hawaiian Homes program, \$200,000 would be automatically appropriated. That has now been eliminated, but the current requirement is that in the absence of an appropriation, funds in this account cannot be diverted to other purposes and will remain available for future use. The beneficiaries are thereby protected.

Otherwise, the section has been much expanded: instead of the two revolving funds referred to above, section 213 now provides for a total of seven; instead of the two special funds referred to above, the section now requires eight. It is unnecessary to examine each of these provisions, for none of the funds appears to run afoul of the consent provisions of the Statehood Act. Other funds are not impaired or reduced, and benefits to lessees, at least arguably, are increased.

Section 214, concerning loans to lessees, has been amended with great frequency between 1962 and 1981, but always to expand the objects for which loans can be made, to increase the possible recipients, or to grant additional authority to the Department of Hawaiian Home Lands. Notwithstanding the application of the severability clause to this section (see footnote 6), U.S. consent is not required for these changes. But, as discussed above in relation to section 209, the mere presence of a severability clause may argue for seeking consent, so as to eliminate doubt.

Section 215, which concerns conditions of loans made by the Hawaiian Homes Commission to lessees, has often been amended (1962, 1963, 1968, 1972, 1974, 1976, 1981 and 1982), but all of the amendments either expand benefits (by, for example, increasing the categories of loan recipients, or raising the loan ceilings), relate to administration (by substituting "Department" for the required con-

currence of three out of five Commission members), or are perfecting in nature. As such, they ought not to require U.S. consent. Thus, the inclusion in the 1978 amendments and some of the 1981 amendments of a severability clause (see footnote 6) probably could be safely ignored. But other 1981 amendments are subject to the explicit consent-of-the-U.S. clause (discussed above at section 209). The amendments are apparently nonsubstantive, and the consent requirement unnecessary, except that a cross-reference to the new section 210.5 pertaining to appraisal (which clearly does require U.S. consent) may have been regarded as sufficient to invoke the consent requirement. In any event, the inclusion in the State law of an express requirement for U.S. consent compels putting the request to the U.S. Congress.

Section 216 concerns insurance required by borrowers from the Department of Hawaiian Home Lands, and it has been amended in 1962, 1963, 1978, and 1981. In addition to perfecting changes, the section has been changed since Statehood to increase the objects for which the borrower must obtain insurance, and to increase the objects upon which the Department has a first lien. With respect to the former, in August 1959, a borrower was required to insure "all livestock and dwellings and other permanent improvements." He must today insure "any livestock, aquaculture stock, swine, poultry, fowl, machinery, equipment, dwellings, and permanent improvements . . ." While "livestock" may (or arguably, may not) include "poultry," etc., there is no 1959 term that could be stretched to include machinery or equipment. And the borrower thus has a larger burden today than in 1959. The objects that are subject to the Department's lien have been expanded in a somewhat comparable way. Amendments to section 216 have sometimes been made subject to a severability clause (see footnote 6), but there is little room to question that they require U.S. consent. (They might be said to relate to "administration," and that is so, but they also relate directly to--and increase--the responsibilities of lessees.)

Section 217, pertaining to ejectment, was amended in 1963 in a nonsubstantive perfecting manner and does not require U.S. consent.

Section 218, now repealed, had made lessees of the Hawaiian Homes Commission ineligible for aid under the Farm Loan Act of Hawaii, enacted in 1919. Section 218 was repealed in 1967, and the repeal does not require U.S. consent inasmuch as the effect is to increase benefits to lessees.

Section 219 concerns the hiring by the Department of Hawaiian Home Lands of agricultural and aquaculture experts, so that lessees may obtain their advice. A 1981 amendment added aquaculture; a 1982 amendment eliminated a \$6,000 ceiling on annual expenditures for compensation for experts. On various bases, it would appear that the amendments to this section do not require U.S. consent, yet the 1981 amendment was made subject to a severability clause. That being so, it would be unwise not to request U.S. consent to the amendments to the section, because without that consent there is doubt as to the status of the section and that amendment.

Section 219.1 is a new (1962) enactment by the State Legislature, authorizing the Department of Hawaiian Home Lands to render certain kinds of assistance to lessees. A 1981 amendment adds "aquaculture," and that amendment is subject to a severability clause. Because, as a matter of form, this section is not a part of nor an amendment to the Hawaiian Homes Commission Act, it probably for that reason does not require U.S. consent, but it might be wise to request U.S. consent so as to eliminate doubt as to its status.

Section 220, pertaining to development projects, to appropriations of the Legislature, and to bonds issued by the Legislature, has not been amended in a substantive manner since 1959.

Section 221 concerns water rights. It has three times been the subject of substantive amendment: in 1981 when references to aquaculture were inserted in two places; in 1978 when the Constitutional Convention added a subsection stating that water systems that are in the exclusive control of the Department of Hawaiian Home Lands must so remain; and in 1984, when the Department was authorized to negotiate agreements providing for the maintenance of water systems and for user fees. The 1981 amendments are subject to a severability clause, and as such, as explained earlier in this paper, the section as amended ought to be the subject of a request for U.S. consent, even though it would appear otherwise to be free of the consent requirement.

Section 222 is titled "Administration," and its content is consistent with that title--dealing with the adoption of rules and regulations, the payment of vouchers, reports to the Legislature, and sureties. Consent to the amendments (in 1972 and 1977) is thus not necessary, except that the 1977 amendment (concerning the surety provision) carried a severability clause. Consistent with the comments made elsewhere in this paper on amendments that are subject to a severability clause, this section as amended should also be the subject of a consent request, so as to eliminate any question as to the status of the section and its amendments.

Section 223 prior to Statehood provided in its entirety:

The Congress of the United States reserves the right to alter, amend, or repeal the provisions of this [Hawaiian Homes Commission] Act.

This section does not appear in the Hawaii Revised Statutes, the codifiers having apparently concluded that the section was superseded by section 4 of the Statehood Act. That conclusion seems inescapable, and the repeal (by implication) of the section surely need not be submitted to the Congress.

Section 224 provides that the Secretary of the Interior is to designate an expert from his Department in sanitation, rehabilitation, and reclamation work, to reside in the State, to cooperate with the Department of Hawaiian Home Lands in carrying out its program, and to be paid by the Department of Hawaiian Home Lands. The section was not part of the Hawaiian Homes Commission Act when it was originally

enacted, but when added in 1935, it was designated a new section of the Act. A 1976 amendment (the only one of substance) eliminated an earlier provision that the Interior expert be paid no more than \$6,000 per year. The amendment relates to administration, and as such need not be the subject of U.S. consent.

Section 225 concerns the investment of Homes Commission funds. It too was added after the Act was passed, but was then (1941) formally made a part of the basic statute. It was materially amended in 1978 by adding a new subsection that deals with the receipt, accounting for, and disposition of gifts. While the subject would seem to constitute "administration," and thus be exempt from the consent requirement, the Legislature in 1978 made the new gift subsection subject to a severability clause. Therefore, in the interest of eliminating uncertainty, that section should be the subject of a consent request. A 1983 amendment deletes a sentence pertaining to the accounting treatment to be accorded to interest arising from the investment of funds. But it relates to administration and thus does not require U.S. consent.

Section 226 permits the Department of Hawaiian Home Lands to participate in Federal programs. It is not a part of the Homes Commission Act (having been enacted by the State Legislature in 1978), and that being so, it should be exempt from the consent requirement. The Legislature has, however, made it subject to a severability clause, and for that reason it should be the subject of a consent request.

#### The need for action:

The preceding discussion is intended to demonstrate the certain amendments that have been enacted by the State Legislature to the Hawaiian Homes Commission Act are, under section 4 of the Statehood Act, subject to the requirement that the United States' consent be obtained. Consent has not been obtained, nor in fact sought before January 1985. If that consent is not obtained, the potential for mischief is considerable: uncertainty prevails, for it is not clear whether amendments, duly enacted by the Legislature of the State, are or are not effective. Litigation is thereby invited, and given the subject matter involved, as a practical matter it would not be surprising if it were instituted; and litigation is always expensive in terms of dollars, time, and state of mind. Moreover, given the application of a severability clause to many amendments that appear not to require it, as discussed above, sections of the Act are made vulnerable that ought not to be, because concerned parties could be expected to infer from the Legislature's action that U.S. consent should be obtained. In sum, the current situation is both uncertain and untidy, and it ought to be corrected.

#### Conclusions:

(1) The consent of the United States should be sought to all amendments to the Hawaiian Home Commission Act that are subject to such consent under the Statehood Act. Either a Member or Members of



the Congress or an officer of the Executive Branch could properly be invited to initiate the consent legislation. Obtaining the consent of the United States, or seeking to obtain that consent and failing to do so, would, either way, assist in clarifying a currently cloudy situation as to what the effective provisions of the Act actually are; and by inducing better order than now prevails, litigation is likely to be avoided, and a more secure administration is likely to be achieved.

The above analysis indicates that the following sections have been amended in a manner that warrants a request for the consent or the United States: sections 207, 208, 209, 210.5, 215, and 216.

(2) Amendments to several of the sections discussed in this paper do not appear to be subject to the consent requirement, except that the pertinent State law has made them subject to a severability clause, thereby implying that the Legislature considers that the amendments may be subject to the consent requirement. To eliminate uncertainty, those sections should also be submitted for consent. (They are sections 214, 219, 219.1, 221, 222, 225, and 226).

Henceforth, however, the severability clause should be applied with care, so as not to create doubt where none should exist.

(3) As a rule, if there is a genuine question as to whether an amendment requires U.S. consent or not under section 4 of the Statehood Act, it would be wise to err toward the more conservative judgment, thereby seeking consent and eliminating as much uncertainty as possible. On that basis, it would be well to request U.S. consent to the amended section 204(2).

(4) The Governor ought to designate one of his subordinates, perhaps the Director of the Department of Hawaiian Home Lands, as the officer responsible for transmitting amendments to Washington for attention. Good order requires that they be submitted reasonably soon after the Legislature has passed them and the Governor has approved them.

November 1985

Amendments to which the United States would consent if the Interior graft resolution were enacted:

The joint resolution proposed by the Department of the Interior would provide the consent of the United States to the amendments of the Hawaiian Homes Commission Act, 1920, as amended, that were adopted by the Constitutional Convention of Hawaii, 1978, and the election of November 7, 1978, and to the amendments of the Hawaiian Homes Commission Act, 1920, as amended, contained in the following acts of the Hawaii Legislature and approved by the Governor:

Session Laws of Hawaii, 1959, Act 13  
 Session Laws of Hawaii, 1961, Act 183  
 Session Laws of Hawaii, 1962, Acts 14, 18  
 Session Laws of Hawaii, 1963, Act 114, 207  
 Session Laws of Hawaii, 1965, Acts 4, 30, 223, 271  
 Session Laws of Hawaii, 1967, Act 146  
 Session Laws of Hawaii, 1968, Act 29  
 Session Laws of Hawaii, 1969, Acts 114, 259  
 Session Laws of Hawaii, 1972, Act 76  
 Session Laws of Hawaii, 1973, Acts 66, 130, 173, 220  
 Session Laws of Hawaii, 1974, Acts 170, 172, 173, 174, 175, 176  
 Session Laws of Hawaii, 1976, Acts 23, 24, 72, 120  
 Session Laws of Hawaii, 1977, Act 174  
 Session Laws of Hawaii, 1978, Act 229  
 Session Laws of Hawaii, 1979, Act 209  
 Session Laws of Hawaii, 1981, Acts 90, 158, 192, 203  
 Session Laws of Hawaii, 1982, Acts 272, 274, 275  
 Session Laws of Hawaii, 1983, Acts 125, 143, 147  
 Session Laws of Hawaii, 1984, Acts 27, 36, 37, 199, 260  
 Session Law of Hawaii, 1985, Acts 60, 69, 137, 159, 284, 295