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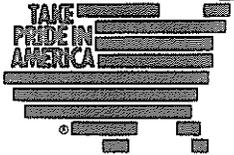
**U.S. Department of the Interior  
Office of Inspector General**

## **AUDIT REPORT**

**HAWAIIAN HOMES COMMISSION,  
OFFICE OF THE SECRETARY**

**REPORT NO. 92-I-641  
MARCH 1992**

This report may not be disclosed to anyone other than the auditee except by the Assistant Inspector General for Administration, Office of Inspector General, U.S. Department of the Interior, Washington, D.C. 20240


 TAKE  
PRIDE IN  
AMERICA


# United States Department of the Interior

OFFICE OF INSPECTOR GENERAL

Headquarters Audits  
1550 Wilson Boulevard  
Suite 401  
Arlington, VA 22209

March 31, 1992

The Honorable John Waihee  
Governor of Hawaii  
Honolulu, Hawaii 96813

Dear Governor Waihee:

**Subject: Final Audit Report on the Hawaiian Homes Commission, Office of the Secretary (No. 92-I-641)**

This report presents the results of our review of the Hawaiian Homes Commission. The objective of this review was to determine whether (1) the Department of the Interior had adequately carried out its oversight responsibilities with respect to the Hawaiian Homes Commission Act, (2) the Commission had adequately carried out its program responsibilities under the Act, (3) all of the lands provided by the Act had been properly accounted for, and (4) the procedures followed in leasing the lands were in the best interest of the Hawaiian people.

Our audit showed that successful implementation of the Hawaiian Homes Commission Act has not been accomplished. Seventy years after enactment of the Act, (1) only an estimated 5,800 homestead awards have been made (many of them for homesteads without adequate infrastructures) on 16 percent of the available lands, while thousands of applicants are on the current waiting list; (2) home lands have been made available for public use by Federal and State of Hawaii Government agencies in violation of the Act; and (3) many native Hawaiians have been waiting for as many as 30 years and some have died while awaiting homestead awards. Both Federal and State Governments contributed over the years to the current deficient condition of the Home Lands Program by not acting in the best interest of the native Hawaiians when administering the Program and through insufficient funding, inadequate planning and management, and inaction. Further, recommendations made in the 1983 Federal-State Task Force report to address and correct Program deficiencies and to accelerate the award of homesteads to native Hawaiians either have not been uniformly implemented or have not been fully effective. As a result, native Hawaiians continue to be denied basic benefits intended under the Act, and the overall goal of returning native Hawaiians to their lands is not being achieved. If homesteads continue to be awarded at the same level of activity as they have since Hawaii attained statehood in 1959, it would take 83 years to service just the applicants who were on the waiting list in June 1991.

Our audit further disclosed that the Hawaiian Homes Commission had embarked on a highly speculative, \$2.45 billion 10-year plan to construct 14,000 turn-key

housing units, primarily in master-planned communities, including single family dwellings, multifamily units, elderly housing, and rental units. The 10-year plan was undertaken because the Hawaiian Homes Commission had made little progress in its traditional approach of preparing and awarding homestead lots and providing financial assistance to the beneficiaries. However, the 10-year plan was not supported by identified Program needs or based on financial feasibility, and the plan imposed additional qualifying criteria on beneficiaries for receiving homestead awards. As a result, the plan (1) would eliminate from the Program native Hawaiians who may not qualify financially for mortgage loans and (2) would require families to relocate to less populated and less economically developed islands to receive their leases.

We recommended that the Secretary of the Interior (1) direct appropriate Department of the Interior officials to establish an oversight system for monitoring the State of Hawaii's activities in discharging State trust obligations in regard to the Hawaiian Homes Commission Act; (2) inform the State of Hawaii what assistance the Department of the Interior is willing to provide; and (3) determine and inform the Congress of any amendments to the Act, enacted by the State of Hawaii, which diminish the benefits to native Hawaiians or are contrary to the intent of the Act.

We also recommended that the Governor of the State of Hawaii (1) direct the Hawaiian Homes Commission to develop a comprehensive home lands infrastructure development plan that provides for the systematic preparation of lots for use and occupancy; (2) propose legislation, based on the results of the Homes Commission's infrastructure development plan, to sufficiently fund the Program in accordance with the State Constitution; and (3) propose legislation to provide adequate funding to the Hawaiian Homes Commission's Hawaiian home loan fund.

In addition, we recommended that the Hawaiian Homes Commission suspend implementation of the 10-year plan until (1) a viable needs assessment has been performed that accurately identifies the extent of the eligible native Hawaiian population and its associated needs and (2) it can be demonstrated that the plan is financially viable. We further recommended that the Hawaii Attorney General investigate preliminary dealings between the Department of Hawaiian Home Lands and the private investor and developer to determine whether contracting or other provisions of State law have been violated.

The Counselor to the Secretary's February 14, 1992, response (Appendix 2) to the draft report indicated general agreement with the actions recommended and indicated that the Secretary was already in compliance with Recommendations A.1 and A.3. Based on the Counselor's response, we have revised Recommendation A.3 and have requested a response to the new recommendation. However, Recommendations A.1 and A.2 are unresolved.

The Governor of Hawaii's February 18, 1992, response (Appendix 3) to the draft report indicated disagreement with the performance indicators used in the audit,

took exception to the audit's not addressing certain issues, and criticized the audit for not identifying the causes of the Program's failure. However, since the Governor's response did not address Recommendations A.4, A.5, and A.6, which were directed to the Governor, these recommendations are unresolved.

The Chairman of the Hawaiian Homes Commission's February 14, 1992, response (Appendix 4) to the draft report indicated disagreement with Recommendation B.1, and therefore the recommendation is unresolved.

The Hawaii Attorney General's February 14, 1992, response (Appendix 5) to the draft report concurred with Recommendation B.2 and was sufficient for us to consider the recommendation resolved and implemented. Accordingly, no further response from the Attorney General is required.

The information needed to resolve all the unresolved recommendations is in Appendix 6.

The Inspector General Act, Public Law 95-562, Section 5(a)(3), as amended, requires semiannual reporting to the U.S. Congress on all audit reports issued, actions taken to implement audit recommendations, and identification of each significant recommendation on which corrective action has not been taken.

In view of the above, please furnish a response to the report by June 5, 1992. The response should provide the information requested in Appendix 6. A copy of the response should also be provided to the Office of Inspector General; North Pacific Region; 238 Archbishop F.C. Flores Street; Suite 807, Pacific News Building; Agana, Guam 96910.

Sincerely,



Harold Bloom  
Assistant Inspector General  
for Audits



# United States Department of the Interior

OFFICE OF INSPECTOR GENERAL

Headquarters Audits  
1550 Wilson Boulevard  
Suite 401  
Arlington, VA 22209

March 31, 1992



Mrs. Hoaliku L. Drake  
Chairman  
Hawaiian Homes Commission  
P.O. Box 1879  
Honolulu, Hawaii 96805

Dear Mrs. Drake:

Subject: Final Audit Report on the Hawaiian Homes Commission, Office of the Secretary (No. 92-I-641)

This report presents the results of our review of the Hawaiian Homes Commission. The objective of this review was to determine whether (1) the Department of the Interior had adequately carried out its oversight responsibilities with respect to the Hawaiian Homes Commission Act, (2) the Commission had adequately carried out its program responsibilities under the Act, (3) all of the lands provided by the Act had been properly accounted for, and (4) the procedures followed in leasing the lands were in the best interest of the Hawaiian people.

Our audit showed that successful implementation of the Hawaiian Homes Commission Act has not been accomplished. Seventy years after enactment of the Act, (1) only an estimated 5,800 homestead awards have been made (many of them for homesteads without adequate infrastructures) on 16 percent of the available lands, while thousands of applicants are on the current waiting list; (2) home lands have been made available for public use by Federal and State of Hawaii Government agencies in violation of the Act; and (3) many native Hawaiians have been waiting for as many as 30 years and some have died while awaiting homestead awards. Both Federal and State Governments contributed over the years to the current deficient condition of the Home Lands Program by not acting in the best interest of the native Hawaiians when administering the Program and through insufficient funding, inadequate planning and management, and inaction. Further, recommendations made in the 1983 Federal-State Task Force report to address and correct Program deficiencies and to accelerate the award of homesteads to native Hawaiians either have not been uniformly implemented or have not been fully effective. As a result, native Hawaiians continue to be denied basic benefits intended under the Act, and the overall goal of returning native Hawaiians to their lands is not being achieved. If homesteads continue to be awarded at the same level of activity as they have since Hawaii attained statehood in 1959, it would take 83 years to service just the applicants who were on the waiting list in June 1991.

Our audit further disclosed that the Hawaiian Homes Commission had embarked on a highly speculative, \$2.45 billion 10-year plan to construct 14,000 turn-key housing units, primarily in master-planned communities, including single family dwellings, multifamily units, elderly housing, and rental units. The 10-year plan was undertaken because the Hawaiian Homes Commission had made little progress in its traditional approach of preparing and awarding homestead lots and providing financial assistance to the beneficiaries. However, the 10-year plan was not supported by identified Program needs or based on financial feasibility, and the plan imposed additional qualifying criteria on beneficiaries for receiving homestead awards. As a result, the plan (1) would eliminate from the Program native Hawaiians who may not qualify financially for mortgage loans and (2) would require families to relocate to less populated and less economically developed islands to receive their leases.

We recommended that the Secretary of the Interior (1) direct appropriate Department of the Interior officials to establish an oversight system for monitoring the State of Hawaii's activities in discharging State trust obligations in regard to the Hawaiian Homes Commission Act; (2) inform the State of Hawaii what assistance the Department of the Interior is willing to provide; and (3) determine and inform the Congress of any amendments to the Act, enacted by the State of Hawaii, which diminish the benefits to native Hawaiians or are contrary to the intent of the Act.

We also recommended that the Governor of the State of Hawaii (1) direct the Hawaiian Homes Commission to develop a comprehensive home lands infrastructure development plan that provides for the systematic preparation of lots for use and occupancy; (2) propose legislation, based on the results of the Homes Commission's infrastructure development plan, to sufficiently fund the Program in accordance with the State Constitution; and (3) propose legislation to provide adequate funding to the Hawaiian Homes Commission's Hawaiian home loan fund.

In addition, we recommended that the Hawaiian Homes Commission suspend implementation of the 10-year plan until (1) a viable needs assessment has been performed that accurately identifies the extent of the eligible native Hawaiian population and its associated needs and (2) it can be demonstrated that the plan is financially viable. We further recommended that the Hawaii Attorney General investigate preliminary dealings between the Department of Hawaiian Home Lands and the private investor and developer to determine whether contracting or other provisions of State law have been violated.

The Counselor to the Secretary's February 14, 1992, response (Appendix 2) to the draft report indicated general agreement with the actions recommended and indicated that the Secretary was already in compliance with Recommendations A.1 and A.3. Based on the Counselor's response, we have revised Recommendation A.3 and have requested a response to the new recommendation. However, Recommendations A.1 and A.2 are unresolved.

The Governor of Hawaii's February 18, 1992, response (Appendix 3) to the draft report indicated disagreement with the performance indicators used in the audit, took exception to the audit's not addressing certain issues, and criticized the audit for not identifying the causes of the Program's failure. However, since the Governor's response did not address Recommendations A.4, A.5, and A.6, which were directed to the Governor, these recommendations are unresolved.

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Sincerely,



Harold Bloom  
Assistant Inspector General  
for Audits



# United States Department of the Interior

OFFICE OF INSPECTOR GENERAL  
 Headquarters Audits  
 1550 Wilson Boulevard  
 Suite 401  
 Arlington, VA 22209



March 31, 1992

Mr. Warren Price III  
 Attorney General  
 Department of the Attorney General  
 State Capitol  
 Honolulu, Hawaii 96813

Dear Mr. Price:

Subject: Final Audit Report on the Hawaiian Homes Commission, Office of Secretary (No. 92-I-641)

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Harold Bloom  
Assistant Inspector General  
for Audits



# United States Department of the Interior

OFFICE OF INSPECTOR GENERAL

Headquarters Audits  
1550 Wilson Boulevard  
Suite 401  
Arlington, VA 22209

March 31, 1992



## Memorandum

**To:** Counselor to the Secretary

**From:** Assistant Inspector General for Audits

**Subject:** Final Audit Report on the Hawaiian Homes Commission, Office of the Secretary (No. 92-I-641)

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The information needed to resolve all the unresolved recommendations is in Appendix 6.

In accordance with the Departmental Manual (360 DM 5.3), we are requesting your written comments to this report by June 5, 1992. Your response should provide the information requested in Appendix 6. ||

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Harold Bloom

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# INTRODUCTION

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## BACKGROUND

On July 9, 1921, the U.S. Congress enacted the Hawaiian Homes Commission Act of 1920 to rehabilitate native Hawaiians on lands given the status of Hawaiian home lands under Section 204 of the Act. The Act had four principal objectives: (1) to place Hawaiians on the land, (2) to prevent the alienation of lands set aside by the Act, (3) to provide adequate amounts of water for homestead lands, and (4) to aid Hawaiians financially in establishing farming operations. The Act established a Hawaiian home loan fund and authorized the Commission to make loans for the erection of dwellings and the purchase of livestock and farm equipment and to otherwise assist in the development of tracts. No funds were to be appropriated by the Federal Government.

The Act set aside approximately 203,500 acres of public lands to be administered by the Hawaiian Homes Commission for homestead purposes. These lands are distributed among five islands as follows: Hawaii-107,300 acres, Molokai-33,700 acres, Maui-31,000 acres, Kauai-22,500 acres, and Oahu-9,000 acres. Some of the lands have limited usability for homesteading purposes because of their remote location, rugged terrain, insufficient water supply, or poor soil. However, the Act, as amended, authorizes the State of Hawaii, with the Secretary of the Interior's approval, to exchange such lands for privately or publicly owned lands of equal value to consolidate Hawaiian home lands and to better administer the Act. The Act originally was intended for rural homesteading, wherein native Hawaiians became subsistence or commercial farmers and ranchers.\* Eligibility for the Hawaiian Homes Land Program was restricted to Hawaiians of 50 percent or more Hawaiian blood. In 1923, the U.S. Congress amended the Act to permit the homesteading of residential lots.

The Hawaiian Homes Commission Act of 1920 was administered by the Hawaii territorial government until the Hawaiian Islands became a state in 1959. At that time, the State of Hawaii assumed administration of the Program through the Department of Hawaiian Home Lands, currently one of 18 executive agencies. The Department is headed by the Hawaiian Homes Commission, a policy-making board. The nine commissioners are appointed by the Governor with the advice and consent of the State Senate. The Chairman also serves as the Director of the Department.

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\* Subsistence farming provides all or almost all the goods required by the farm family, usually without any significant surplus for sale.

In a 1989 letter to a U.S. Senator from Hawaii, the Secretary of the Interior stated that the Department has very limited responsibilities with respect to the Hawaiian Homes Commission Act. One responsibility imposed on the Secretary of the Interior by Section 204(3) of the Act is to review proposed land exchanges and to approve those that meet the requirements of the law. The other responsibility, which was recommended in the 1983 Federal-State Task Force on the Hawaiian Homes Commission Act and agreed to by the Secretary of the Interior, is for the Department to serve as the lead Federal agency on matters concerning the Program.

Section 4 of the Hawaii Admission Act provides that as a compact with the United States relating to the management and disposition of the Hawaiian home lands, the State is to adopt the Hawaiian Homes Commission Act as part of the Hawaii State Constitution. The Act was adopted as a provision of the State Constitution in Article XII, Section 3. The State and its people reaffirmed the compact by adding another provision in Section 2 whereby they accepted specific trust obligations relating to the management and disposition of the Hawaiian home lands.

Section 4 of the Hawaii Admission Act and Article XII, Section 3, of the Hawaii State Constitution provide that (1) the qualifications of lessees are not to be changed except with the consent of the U.S. Congress and (2) all proceeds and income from the "available lands" are to be used only in carrying out the provisions of the Hawaiian Homes Commission Act. Article XII, Section 1, of the Hawaii State Constitution was amended in 1978 to require the State Legislature to make sufficient funds available for the following purposes: (1) home, agriculture, farm, and ranch lot developments; (2) home, agriculture, farm, and ranch loans; (3) rehabilitation projects; and (4) Department of Hawaiian Home Lands administration and operating budget.

Section 204(2) of the Act authorized the Homes Commission to lease to the public through general lease land that is not required for homesteads. These leases are subject to the same terms, conditions, restrictions, and uses applicable to the disposition of other public lands. Until 1989, general lease revenue was the main source of income available to the Homes Commission for operating expenses.

## **OBJECTIVE AND SCOPE**

This audit was performed as a part of the Office of Inspector General audit workplan for fiscal year 1991. The objective of the review was to determine whether (1) the Department of the Interior had adequately carried out its oversight responsibilities with respect to the Hawaiian Homes Commission Act, (2) the Homes Commission had adequately carried out its responsibilities under the Act, (3) all of

the lands provided by the Act had been properly accounted for, and (4) the procedures followed in leasing the lands were in the best interest of the Hawaiian people.

To evaluate overall Program effectiveness, we reviewed the operations of the Homes Commission and the Department of Hawaiian Home Lands in four essential functional areas. Specifically, we determined whether the Homes Commission and the Department of Hawaiian Home Lands had (1) accounted for the available lands through survey and registration, (2) prepared the lands by completing basic infrastructures, (3) awarded homestead leases to eligible native Hawaiians, and (4) provided assistance to lessees. In addition, we reviewed the Department of the Interior's activities related to the Program to determine the adequacy of the Department's oversight.

This program results audit was conducted at the Hawaiian Homes Commission office in Honolulu, Hawaii, and at the Department of the Interior headquarters in Washington, D.C., from April through September 1991. The audit was made, as applicable, in accordance with the "Government Auditing Standards," issued by the Comptroller General of the United States. Accordingly, we included such tests of records and other auditing procedures that were considered necessary under the circumstances.

As part of our review, we evaluated the Department of the Interior's and the Commission's system of internal controls related to the Program to the extent we considered necessary to accomplish the objective. We found major internal control weaknesses in the areas of accounting for land, completing infrastructures, awarding leases, providing loans, and monitoring program results. The internal control weaknesses are discussed in the Findings and Recommendations section of this report. Our recommendations and suggestions, if implemented, should correct the internal control deficiencies in these areas.

## **PRIOR AUDIT COVERAGE**

During the past 5 years, the U.S. General Accounting Office and the Office of Inspector General issued no reports on the Hawaiian Homes Commission or the Department of Hawaiian Home Lands. However, the Office of Inspector General issued a report in September 1982 on selected aspects of the Program.

A Federal-State Task Force issued a 400-page report on the Program in 1983 that criticized the Hawaiian Homes Commission for not achieving the objectives of the Act because there was little progress in awarding homestead lots to eligible recipients. The report stated that after about 60 years, only 14 percent of the

available lands were being used for homestead purposes. The Task Force made 134 recommendations to improve program effectiveness and to resolve numerous legal issues related to land exchanges.

The Office of the Legislative Auditor, State of Hawaii, and an independent public accounting firm issued a financial audit report on the Department of Hawaiian Home Lands for the fiscal year ended June 30, 1985. Another independent public accounting firm issued a financial audit report for the year ended June 30, 1988, and financial and compliance audit reports for the years ended June 30, 1989, and 1990. All of the financial audit reports were issued with unqualified opinions, and no material weaknesses in internal controls were noted. The compliance report indicated that tests of compliance with certain provisions of law, regulations, contracts, and grants were limited to obtaining reasonable assurance that the combined financial statements were free of material misstatement. None of these reports included a program results review.

## FINDINGS AND RECOMMENDATIONS

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### A. THE HOME LANDS PROGRAM

Implementation of the Hawaiian Homes Commission Act of 1920 has not been effectively accomplished. Seventy years after enactment of the Act, (1) only 16 percent of available lands have been awarded to native Hawaiians for homesteading, (2) home lands have been made available for public use by Federal and State government agencies in violation of the Act, and (3) many native Hawaiians have been waiting as long as 30 years and some have died while awaiting homestead awards. The primary goal of the Act was to establish the Home Lands Program to return native Hawaiians to their lands in order to provide for their self-sufficiency and the preservation of their native culture. However, over the years both the Federal and the State Governments have not acted in the best interest of the native Hawaiians in the administration of the Home Lands Program. A lack of adequate funding, inadequate planning and management, and inaction by Federal and State agencies contributed to the current deficient condition of the Home Lands Program. Further, recommendations made in the 1983 Federal-State Task Force report to address and correct Program deficiencies and to accelerate the award of homesteads to native Hawaiians have not been uniformly implemented or have not been fully effective. For example, the Hawaiian Homes Commission (1) did not make any new awards of residential homestead lots in fiscal years 1988, 1989, and 1990; (2) did not provide the essential power, water, and sewage facilities for 82 percent of the almost 2,500 homesteads awarded in 1985, 1986, and 1987; and (3) denied homesteads to native Hawaiians who could not obtain a home loan through Federal loan programs. As a result, native Hawaiians continue to be denied basic benefits intended under the Act, and the overall goal of returning native Hawaiians to their lands is not being achieved.

The Hawaiian Homes Commission Act of 1920 established the Hawaiian Homes Commission and gave it responsibility for administering the Hawaiian home lands. The Hawaii territorial government, through the Hawaiian Homes Commission, maintained responsibility for implementation of the Act until the Hawaiian Islands became a state in 1959. However, during the period 1921 through 1959, the Territorial Commissioner of Public Lands, with authority limited by Section 212 of the Act, controlled all home lands not being used by the Hawaiian Homes Commission for homesteading purposes.

#### The Home Lands Program Under the Territorial Government

Contrary to the provisions of the Act, during the period of territorial government administration, numerous improper land transfers occurred, and relatively few homestead awards (an estimated 1,673) were made. For example, according to the

1983 Federal-State Task Force report, territorial governors improperly transferred 13,578 acres of Hawaiian home lands under 29 Executive orders to other public agencies to be used for purposes not intended by the Hawaiian Homes Commission Act, and 16,586 acres were withdrawn for forest reserves under nine proclamations. In addition, the 1983 Federal-State Task Force reported that approximately 650 acres of home lands were conveyed to private parties through 139 government land grants. This occurred because the U.S. Government allowed the lands that were designated by the Act as available lands and that were not made immediately available for homestead purposes to be managed by the Territorial Commissioner of Public Lands and not the Homes Commission. Consequently, the lands designated as Hawaiian home lands were managed and disposed of in the same manner as other public lands under the Commissioner's control.

### **The Home Lands Program 1959-1983**

During the period 1959 through 1983, some improper land transfers and improper land use occurred. Also, by 1983, 62 years after enactment of the Act, only an estimated 3,337 homestead awards had been made on 15 percent of the available land.

Upon admission into the Union in 1959, Hawaii accepted the trust obligation for the management and disposition of the home lands as a condition of statehood under a compact that the State would adopt the Hawaiian Homes Commission Act as a provision of the State Constitution. However, the Federal Government retained oversight responsibility for certain aspects of the administration of the Program through Sections 4 and 5 of the Admissions Act. Specifically, Section 4 provides that any amendments enacted by the Hawaii State Legislature which may change the qualifications or diminish the benefits to the native Hawaiians are subject to consent by the United States. Section 5(f) provides that Hawaiian home lands are to be held by the State of Hawaii as a public trust and that the use of such lands, proceeds, and income for reasons other than to better the conditions of native Hawaiians as defined in the Act will constitute a breach of trust for which the United States may bring suit. Section 204(3) of the Hawaiian Homes Commission Act requires the Secretary of the Interior to approve any land exchanges involving home lands.

The State assumed administrative responsibility for the Program through its Department of Hawaiian Home Lands, headed by the Hawaiian Homes Commission. The Homes Commission is the State's policy-making board and is required to fulfill the fiduciary duty under the Admissions Act on behalf of eligible native Hawaiians, the beneficiaries of the Hawaiian Homes Commission Act.

**Improper Land Transfers.** Improper transfers of Hawaiian home lands continued during the period after statehood, although not as extensively as during the pre-statehood era. The State, through five Executive orders, withdrew 2.4 acres

of home lands for various public uses such as a water pump station, incinerator and tank sites, road and pipeline easements, and a transportation base yard. The State also took 73.6 acres of land without documentation for use by the Department of Education for public schools. The Department of Health occupied 1,247 acres at Kalaupapa on Molokai without formal conveyance.

According to a December 1990 report on controversies relating to the Hawaiian home lands trust, in 1964 the State's Department of Land and Natural Resources entered into general leases which included 321 acres of home lands. Both leases are to the Federal Government for a term of 65 years. The rent being charged was set at \$1 for the term of each of the leases. Compensation of fair market value has not been made to the Homes Commission for these unauthorized takings.

### **Formation of the Federal-State Task Force**

In 1980 correspondence, the Departments of Justice and of the Interior concluded that the State of Hawaii had not complied with the provisions of the Hawaiian Homes Commission Act in several areas. The correspondence indicated that basic problems persisted in the State's administration of the Hawaiian Homes Commission Act. Specifically, Hawaiian home lands were being exchanged without the required approval of the Secretary of the Interior. For lands of lesser value, home lands were being withdrawn by Governors' Executive orders for other public purposes not related to the Program, and State regulations that limited eligibility for a home site on the basis of need for financial assistance but also required the financial ability to develop the home site unduly restricted the benefits of the Program to a certain class of native Hawaiians. Furthermore, the Secretary of the Interior expressed concern for allegations that home lands were being leased to nonnative Hawaiians at less than fair market value and that home lands were "lost" by the State. In addition, the Homes Commission had not been provided sufficient resources to operate its programs because neither Federal nor State Governments were committed to finance the Program. These problems frustrated the beneficiaries, left many beneficiaries on the waiting list for over 30 years, and deprived beneficiaries of Program benefits. The Secretary of the Interior then proposed the creation of the Federal-State Task Force, which was formed to provide recommendations to the Secretary and the Governor of Hawaii on how to better effect the purposes of the Hawaiian Homes Commission Act, primarily to accelerate the distribution of benefits to the native Hawaiians.

### **Federal-State Task Force Report**

On August 15, 1983, the Federal-State Task Force issued its report on the Hawaiian Homes Commission Act. The Task Force criticized the Homes Commission for not achieving the objectives of the Act because progress was minimal in awarding

homestead lots to eligible beneficiaries. The report concentrated on four major issues: Federal and State trust and/or legal responsibility, acceleration of homestead awards, land and other trust assets, and financial management. The report made 134 recommendations to improve the effectiveness of the Home Lands Program. However, the recommendations to address and correct Program deficiencies and to accelerate the award of homesteads to native Hawaiians either have not been implemented or have not been effective.

**Federal and State Trust and/or Legal Responsibilities.** The Task Force recommended that the Department of the Interior, within 2 years of the date of the Task Force's report, formally assess the progress made in correcting problems identified in the report. However, the Department of the Interior had not made a formal assessment of the progress made in correcting problems identified in the report.

**Acceleration of Homestead Awards.** The Task Force concluded, "There is no prospect that all eligible beneficiaries now on the waiting list can be accommodated unless some means can be found to accelerate substantially the award of homesteads." To this end, the Task Force recommended that the State of Hawaii and the United States each make matching contributions of \$25 million annually in appropriations or needed services for a period of 5 years. The funds were needed to (1) survey the lands to be awarded and (2) design and construct needed site improvements such as roads, water, utilities, and sewer systems. However, neither the State of Hawaii nor the United States made the required matching contributions. The Task Force also recommended that the Governor of Hawaii appoint an Advisory Committee on Funding Sources to identify sources of funding for the acceleration of homestead awards and that if within 6 months of establishment of the Advisory Committee adequate funding sources were not identified, then full Federal and State funding should be requested. According to Department of the Interior officials, the Advisory Committee was never formed; therefore, no funding from the United States was requested. The State did appropriate a total of \$25.4 million for capital improvement projects over the 5-year period of fiscal years 1984 through 1988 (the State's total financial contributions are summarized in Appendix 1). No contributions were made by the Federal Government during that period.

The Act does not require the Federal Government to make contributions of funds or needed services. However, the State is required under its Constitution to sufficiently fund the Home Lands Program. Recent Federal assistance provided to the Homes Commission has been minimal. In 1989, the Homes Commission received Community Development Block grants totaling \$1.2 million from the U.S. Department of Housing and Urban Development for the purpose of constructing road and drainage improvements on homestead lands.

**Land Transfers.** The State took action to correct most of the long-standing land transfer problems identified in the Task Force report. For example, the Governor of Hawaii in December 1984 canceled and withdrew 19 of the 34 Executive orders and withdrew 8 of the 9 proclamations. This action returned to the Homes Commission approximately 27,854 of the 30,166 total acres previously transferred to nonbeneficiaries. However, the Homes Commission never received compensation for the use of the transferred lands. As a result, the Homes Commission was deprived of significant revenues and the use of such lands for homestead purposes.

Since the Governor's 1984 cancellations or withdrawals, some of the Hawaiian home lands that were transferred under the Executive orders and proclamations have been leased or licensed to various government agencies or have been exchanged for other state lands. However, the 2,312 acres remaining (2,241 under 15 Executive orders and 71 acres under one Governor's proclamation) continue to be inappropriately possessed and used by other government agencies.

**Land Inventory Discrepancies.** The Task Force report recommended that the Kaeo Report, which is an inventory of Hawaiian home lands based on tracts, and the Blue Book, which contains property data based on tax map keys, be reconciled "as quickly as possible." However, Homes Commission officials stated that as of May 2, 1991, there was no correct inventory of Hawaiian home lands upon which definitive and finite plans can be developed. The officials further stated that there is no single authoritative or correct source which has the exact description, areas, and status of each parcel of land and that there are no land-use maps, facilities maps, structures maps and occupancy maps of the Hawaiian home lands.

## **Federal Oversight**

The U.S. Department of the Interior did not effectively fulfill its oversight responsibility to ensure that the State of Hawaii discharged its trust obligations for the Hawaiian Home Lands Program. The 1983 Federal-State Task Force recommended that in light of the responsibilities the United States has under the Hawaiian Homes Commission Act and the Hawaii Admission Act, the United States should (1) be aware of the manner in which the State manages or disposes of the lands that constitute the trust under Section 5(f), (2) satisfy itself that the State is not abusing its responsibilities as trustee, and (3) institute proceedings against the State for breach of trust if the State fails to properly discharge its responsibility under Section 5(f). At that time, the Secretary of the Interior responded by stating that the preceding 3-part statement of the responsibilities of the United States would be reflected in the Department's decision making as lead agency and in the duties assigned the official who is designated as the Department's point of contact. However, the Department of the Interior has never fully exercised this duty. Further, in a letter dated April 17, 1989, the Secretary reiterated that the Department had the role of lead agency. However, he stated that although Section

5(f) provided that suit could be brought by the United States, such action was not the responsibility of the Department because only the Department of Justice could bring a suit. Further, Departmental officials currently maintain that the Congress has never given the Department of the Interior authorization or resources to establish a proper oversight role. As a result, deficiencies in the Program such as the State's 31-year failure to adequately deliver homesteads to beneficiaries and its failure to adequately fund the Program continued to exist without correction and contributed to the current poor state of the Program.

### Current Status of the Home Lands Program

Current performance by the State of Hawaii as trustee for the Home Lands Program continues to be highly deficient in terms of meeting the needs of its beneficiaries. Specifically, the Homes Commission has not made significant progress in awarding homestead lots that have road access and utilities to native Hawaiians or in providing the needed financial assistance. For example, the amount of leased homestead lands increased from 14 percent of available lands as of June 30, 1981, to only 16 percent as of May 23, 1991. In response to the 1983 Federal-State Task Force, the Homes Commission implemented an acceleration program and awarded 2,463 homestead lots during fiscal years 1985, 1986, and 1987. However, as of June 18, 1991, only 416, or 18 percent, of the 2,332 lots still currently leased had the necessary infrastructure improvements that would allow the beneficiaries to occupy or use the land.

According to Homes Commission officials, the State of Hawaii did not provide the required funding for homestead development projects and operational expenses. Contrary to the Hawaii State Constitution, the State Legislature did not appropriate funds for the operations of the Department of Hawaiian Home Lands until fiscal year 1989. Accordingly, the Homes Commission then had to emphasize its general (commercial) leasing activity and to use the income generated to fund operational expenses, thereby limiting its ability to fund the needed infrastructures. However, the Homes Commission did not have a comprehensive land use or an infrastructure development plan. Accordingly, it was not possible to determine what constituted a "sufficient" amount of capital improvement funds that the State should have provided. Nevertheless, available lands were not developed, and consequently, homestead awards were not made.

**Homestead Awards.** When Hawaii became a state in 1959, an estimated 1,673 homestead awards had been made. However, as of June 30, 1990, after 31 years of State administration, that number had increased to only 5,778 (including 1,916 lots awarded during the acceleration program which are without adequate infrastructure). If the homestead award program was to operate at the same rate in the future, it would take 83 years to service just the estimated 11,000 applicants who were on the waiting list at June 17, 1991 ( $5,778 - 1,673 = 4,105/31 = 132$

awards annually, then  $11,000/132 = 83$  years). In addition, the Homes Commission did not award any new homestead leases during fiscal years 1988, 1989, and 1990 (206 unimproved pastoral lots and 50 lots with homes to new lessees were awarded in fiscal year 1991). In our opinion, this is not satisfactory progress in meeting the needs of the native Hawaiian population. The total native Hawaiian population was estimated at June 1986 by the Hawaii State Office of Hawaiian Affairs to be in excess of 75,000.

Furthermore, Homes Commission records indicate that between January 3, 1987, and March 11, 1991, at least 140 applicants died before receiving a homestead. Some of those who died had been waiting over 30 years for a homestead lot. In addition, an independent study funded by the Hawaii Housing Authority and the Homes Commission revealed that 450 of 1,331 homeless native Hawaiians surveyed had applied for homesteads and that many of them had been waiting years for their awards. Of the 450 applicants, 180 had been waiting 7 years or more, and 126 of these had been waiting over 10 years.

**Financial Assistance.** The Homes Commission did not provide adequate financial assistance to lessees who were awarded homesteads during the acceleration program. Also, lessees who were selected to receive homesteads after the acceleration period did not receive a homestead award unless they qualified for a Federal Housing Administration or a Farmers Home Administration loan guaranteed by the Department of Hawaiian Home Lands. This occurred because the Homes Commission changed its policy from distributing usable land and providing financial assistance to constructing turn-key houses for sale only to beneficiaries who qualified for Federal Housing Administration or Farmers Home loans. As a result, of the 1,731 beneficiaries who were awarded residential lots during the acceleration program, only 105 have built homes, and native Hawaiians were being denied homestead awards unless they qualified for home loans from sources external to the Homes Commission. In our opinion, these policy changes subject beneficiaries to additional qualifying criteria in order to receive or retain a residential homestead lease and diminish the benefits intended by the Act.

At an exit conference conducted on November 13, 1991, Homes Commission officials generally agreed with our conclusions that Program effectiveness has been less than acceptable. These officials reiterated that the failures of the Program are directly related to a lack of sufficient resources. In an exit briefing with the Governor of Hawaii on December 11, 1991, the Governor acknowledged that shortcomings existed in the Program. However, the Governor indicated that the deficiencies were primarily attributable to the many constraints inherent in the Program, including the lack of Federal funding and the unsuitability and inappropriate location of much of the land. For example, more than half of the available acreage is on the island of Hawaii, which is generally underpopulated and offers far less employment and economic opportunities to potential residents. In

addition, the Governor's staff indicated that implementation of some of the Federal-State Task Force recommendations was counterproductive. The Governor did agree to consider the feasibility of exchanging some home lands for other more suitable lands.

## Recommendations

We recommend that the Secretary of the Interior:

1. Direct appropriate Department of the Interior officials to establish an oversight system for monitoring the State of Hawaii's activities in discharging State trust obligations in regard to the Hawaiian Homes Commission Act.
2. Inform the State of Hawaii of the types of assistance that the Department is willing to provide and identify the circumstances which will or will not require reimbursement.
3. Determine and inform the Congress of any amendments to the Act, enacted by the State of Hawaii, which diminish the benefits to native Hawaiians or are otherwise contrary to the intent of the Act.

We recommend that the Governor of the State of Hawaii:

4. Direct the Hawaiian Homes Commission to develop a comprehensive home lands infrastructure development plan that provides for the systematic preparation of lots for use and occupancy.
5. Propose legislation, based on the results of the Homes Commission's infrastructure development plan, to sufficiently fund the Home Lands Program in accordance with the State Constitution.
6. Propose legislation to provide adequate funding to the Hawaiian Homes Commission's Hawaiian home loan fund.

## Office of the Secretary Response

The February 14, 1992, response from the Counselor to the Secretary (Appendix 2) indicated acceptance of the three recommendations addressed to the Secretary of the Interior. The response stated that the Secretary was already in compliance with Recommendations 1 and 3 and that implementation of Recommendation 2 was predicated upon first receiving a request from the State of Hawaii. The response also suggested changes to the report which were incorporated as appropriate. The Counselor's specific comments to the recommendations are as follows:

**Recommendation 1.** The response stated that the recommendation had already been implemented in that the Secretary had appointed a Designated Officer for the Hawaiian Homes Commission Act. The response further stated that the Officer monitors the State of Hawaii's activities in discharging its trust obligations with support from the Solicitor and ad hoc assistance from other offices within the Department, including the Inspector General. The response stated, "The quantity of the work involved within the Department on Hawaiian Homes matters would not warrant the establishment of a Departmental Office devoted solely to that subject."

**Recommendation 2.** The response indicated that the Department is "prepared" to provide technical assistance if requested and justified by the State of Hawaii. The response emphasized that the Department has no general authority to provide assistance to the State without reimbursement.

**Recommendation 3.** The response indicated that the Office of the Secretary had complied with this recommendation "to date."

### **Office of Inspector General Comments**

While the Office of the Secretary's response indicated acceptance of Recommendations 1 through 3, it was not sufficient for us to resolve these recommendations. However, based on the response, we have revised Recommendation 2. The information needed to resolve these recommendations is in Appendix 6. Our specific comments to the recommendations are presented as follows:

**Recommendation 1.** The response indicated that the current manner of oversight was sufficient. Given the poor performance of the Home Lands Program, we disagree with this conclusion. Our report demonstrates a need for the Office of the Secretary to take a proactive oversight role in Hawaiian Homes matters. We believe this would be best accomplished through regular program reviews of the State's administration of the Home Lands Program and of the State's discharge of its trust responsibilities. We therefore request that the Office of the Secretary reconsider its response.

**Recommendation 2.** The response indicated that unless the State of Hawaii identified the requested assistance needed, the Department of the Interior would not know what kind of services to provide. In addition, the response stated that the Department had no general authority to provide assistance without reimbursement. However, the response also stated that it has been possible for the Department to provide nonreimbursable assistance in the past. Based on the response, we have revised our recommendation and now recommend that the Department inform the State of the type of assistance that it is willing to provide and identify the circumstances which will and will not require reimbursement for services provided.

Accordingly, the Office of the Secretary is being asked to respond to the new recommendation.

**Recommendation 3.** We disagree with the Designated Officer's statement that this recommendation has been discharged fully to date. Historically, the Department has not provided substantive comments on the relative merits of individual Hawaiian Homes Act amendments in testimony to the U.S. Congress. For example, in a July 22, 1991, letter to the Chairman, Committee on Energy and Natural Resources, regarding consent of the United States to certain Hawaiian Homes Act amendments enacted by the State from 1986 through 1990, the Designated Officer stated:

It has generally been our position in connection with State amendments to the Homes Commission Act that we would largely refrain from second-guessing the Hawaii legislature and the Governor of Hawaii with respect to the substance of their amendments. The Legislature and the Governor are clearly better informed than we as to the problems to which their amendments are directed.

Based on this statement, we conclude that the Department of the Interior continues to perceive its duty in commenting on consent legislation as ministerial rather than discretionary and as such is not acting in the best interest of the native Hawaiians. We therefore request that the Office of the Secretary reconsider its response.

### **Governor of the State of Hawaii Response**

The February 18, 1992, response from the Governor of Hawaii (Appendix 3) did not indicate concurrence or nonconcurrence with Recommendations 4 through 6. Although the response agreed that the Home Lands Program has not been effective, it disagreed with our statements on the small percentage of land awarded for homesteading, on the amount of land withdrawn from use for homesteading, and on the long periods of time that Hawaiians are required to wait for homestead awards as representative of recent State efforts to correct past deficiencies. Further, the response indicated that the report did not fairly distinguish between the Federal Government and State Government roles in past and current administration of the Program. Last, the response criticized the report for not recognizing efforts by the State to correct improper land transfers and for not recognizing that "thousands of acres [of Hawaiian home lands] are remote, arid, on cliffs, and have other features which make homesteading difficult and expensive, if not impossible."

## Office of Inspector General Comments

Since the response did not address Recommendations 4 through 6, they are unresolved. The information needed to resolve the recommendations is in Appendix 6.

Even though the response took exception to the performance indicators presented in the report, it did not offer any different statistics which would support a different conclusion. The response, however, did not recognize that the draft report acknowledged (page 16) that the State had taken action to resolve long-standing improper land transfers. As a result of the Governor's comments concerning the unsuitability of the Hawaiian home lands, we have inserted additional language to the final report regarding land transfer authority.

## B. HAWAIIAN HOMES COMMISSION'S 10-YEAR PLAN

A highly speculative 10-year plan by the Hawaiian Homes Commission to construct 14,000 turn-key housing units, primarily in master-planned communities, including single family dwellings, multifamily units, elderly housing, and rental units does not appear to be realistic. The mission of the Homes Commission is (1) to lease Hawaiian home lands to native Hawaiians for their use and occupancy and (2) to make loans for the purpose of erecting dwellings and to undertake other permanent improvements on leased homestead lands. The Homes Commission has made little progress in preparing homestead lots for occupancy, in awarding homesteads, and in providing financial assistance to the beneficiaries in accordance with the Act. Accordingly, the Homes Commission decided that this long-standing problem could be corrected by implementation of the above 10-year plan. However, the 10-year plan was highly speculative because it was not based on identified Home Lands Program needs or financial feasibility, and it imposed additional criteria for receiving homestead awards. In addition, because the Homes Commission did not make effective use of its land exchange authority to consolidate Hawaiian Home lands, most of the homes to be built under the 10-year plan will be on islands where few homestead applicants live. The 10-year plan would also require the lessees to absorb a portion of the land development cost, an added cost burden for the homesteader. As a result, the plan (1) eliminates from the Program native Hawaiians who may not qualify for mortgage loans and (2) requires families to relocate to less desirable locations to receive their leases.

### Needs Assessment

The Homes Commission's perceived need to build 14,000 homes was not based on viable data. The Homes Commission based this need on its applicant waiting list, the number of current lessees with vacant lots, and the estimated net increase in the number of applicants on the waiting list. However, the Homes Commission did not determine how many applicants on the waiting list qualify by having at least 50 percent Hawaiian blood or how many qualify under the new loan policy. Specifically, a realistic market analysis that details the housing needs of eligible native Hawaiians was not prepared.

The current applicant waiting list, which the Homes Commission relied on for its estimate of future housing needs, was not accurate. For example, in awarding 57 completed houses, the Homes Commission reviewed 649 applicants and excluded 287 applicants. The 287 applicants were excluded because 209 had not adequately proven that their bloodlines were native Hawaiian and 78 either were not interested in the parcels or were deferred by the Commission for declining lots offered to them on two previous occasions. Of the 362 applicants remaining who were invited for lot selection meetings held in December 1990 and April 1991, only 124 attended the meetings. Subsequently, 11 of the 57 selectees withdrew from the award process.

If this example is representative of the applicants on the waiting list, at least 5,060 of the 11,000 applicants would not qualify as native Hawaiians or are not actually interested in obtaining homesteads. The 5,060 applicants do not include those who would not qualify financially for loans to purchase the turn-key houses because none of the 362 invited applicants were screened for financial qualification. In addition, the Homes Commission does not know how many of the native Hawaiians not currently on its waiting list would apply for benefits if the wait for a homestead award decreased significantly. The waiting list does represent a demand, albeit of unknown proportion, for homesteads. However, the demand for homesteads does not automatically translate into a desire for or the ability to purchase a subdivision home.

### **Financial Feasibility**

The Homes Commission has not identified resources to provide the estimated \$2.45 billion needed to accomplish the 10-year plan. The Homes Commission estimated that \$1.43 billion will come from outside lending sources (mortgages on the turn-key houses), resulting in a shortfall of \$1.02 billion, or \$102 million per year over 10 years.

As of June 30, 1990, the Homes Commission had available financial resources of about \$9 million annually from Program revenues. For fiscal years 1992 and 1993, the State Legislature appropriated a total of \$28 million for capital improvement projects. In addition, as of March 31, 1991, the Homes Commission retained Program income of at least \$19 million to establish a positive financial picture to enable it to undertake a \$25 million bond issue. However, even if the Homes Commission were to obtain the \$25 million and State appropriations and Program income remained constant over the next 10 years, the amount would still be \$746 million (\$74.6 million annually) less than the amount needed. In testimony before the U.S. Senate Committee on Energy and Natural Resources on July 23, 1991, the Chairman of the Homes Commission, in reference to the 10-year plan, stated, "The State of Hawaii alone cannot underwrite these costs and it will be necessary to ask the Federal government to assist in this endeavor."

### **Land Use**

The viability of the 10-year plan is further complicated by the fact that the Homes Commission did not have a current general plan to establish specific land-use policies for each of the 34 tracts it is responsible for managing. Section 10-4-2 of the Department of Hawaiian Home Lands administrative rules requires the development and adoption of a general plan which should (1) provide overall land management goals, objectives, and policies and (2) establish a system of priorities to accomplish these goals. Furthermore, the Homes Commission did not know how

much of the land in its inventory was unsuitable for future homestead, general lease, or other uses because it had not identified through survey and inventoried all of the lands it is responsible for managing. Specifically, the Homes Commission (1) did not have an accurate comprehensive inventory of its estimated 200,000 acres of land and (2) could not accurately identify all of the boundaries.

These conditions existed because the State did not allocate the financial and personnel resources necessary to survey and inventory the lands or emphasize a need for a survey and inventory of the lands. Also, the State did not establish an accurate centralized system for maintaining inventory data for the tracts or parcels which consist of existing homestead areas, general lease areas, and areas not used for homestead or general lease. As a result, the Homes Commission has been unable to plan effectively for the future needs of the Program or to manage the inventory of all homestead properties to ensure that (1) lands are made available for homestead leases, (2) all lots designated as homestead lots have current homestead leases, and (3) the lands are not encroached upon.

### **Developer Contracting Provisions of State Law**

The Homes Commission may not have complied with the free and open competition requirements of State law with respect to the Kawaihae development project. The Kawaihae project (a part of the 10-year plan) is a proposed 3,500 home master-planned community on the island of Hawaii. The Homes Commission said that it intends to develop the Kawaihae community by inviting a private investor and developer to finance the project and develop the site. In exchange, according to the Homes Commission, the investor would receive a lease on the commercial/industrial property within the site.

Hawaii State development law requires that the Homes Commission (1) give notice in a newspaper of general circulation of a proposed contract, inviting applications and sealed bids for the development of the lands, and (2) establish reasonable criteria for the selection of the private developer. State law allows the Department of Hawaiian Home Lands to negotiate with the developer after the applicant who submitted the best proposal has been selected. However, prior to any publicly announced requests for proposals, two senior-level Homes Commission officials met with a private investor and developer to discuss the Kawaihae development project. A Homes Commission official advised us that the Commission received a proposal from the private investor. Also, the Homes Commission furnished project financial information to the developer. As a result, the Homes Commission may have violated Hawaii State development law by seeking private financing for the Kawaihae development project.

## Recent Management Actions

At an exit conference conducted on November 13, 1991, Homes Commission officials acknowledged that accomplishment of the 10-year plan is questionable and that accordingly they are contemplating a 4-year plan to determine feasibility of the larger plan. The 4-year plan requires the construction of 1,400 homes, completion of infrastructures to 1,800 lots, and "near completion" of an additional 1,400 lots. The Homes Commission estimates the shortfall in funding for the 4-year plan to be approximately \$187 million. We have not evaluated the feasibility of the 4-year plan.

In an exit briefing with the Governor of Hawaii on December 11, 1991, the Governor commented that the 10-year plan was not an operational plan but was just a planning document developed to show the housing needs of the native Hawaiians and the funding requirements to meet those needs. Nevertheless, the 10-year plan was used in operating decisions by the Homes Commission. The Homes Commission significantly revised its approach in administering the Program in areas such as improving lots, awarding homesteads, and providing housing financial assistance to the beneficiaries based on provisions of the 10-year Plan. The Governor agreed that additional analyses were needed to determine more precisely actual housing requirements for the Program.

## Recommendations

We recommend that the Hawaiian Homes Commission:

1. Suspend implementation of the 10-year plan until (a) a viable needs assessment has been performed that accurately identifies the extent of the eligible native Hawaiian population and of its associated needs and (b) it can be demonstrated that the plan is financially viable.

We recommend that the Hawaii Attorney General:

2. Investigate the preliminary dealings between the Department of Hawaiian Home Lands and the private investor and developer to determine whether contracting or other provisions of State law have been violated.

## Hawaiian Homes Commission Response

The February 14, 1992, response from the Chairman, Hawaiian Homes Commission (Appendix 4), disagreed with Recommendation 1. The response stated that the 10-year plan was not so much a plan as a goal to provide 14,000 housing units by the year 2000 and that the financial requirements were preliminary estimates assuming

that all units were to be built by the Department of Hawaiian Home Lands. The response indicated that the 4-year plan, the first increment of the 10-year goal, is essentially an infrastructure development plan to provide 4,124 completed or substantially completed lots by December 1994. The response added that the requirement for beneficiaries to be financially capable of assuming the cost of building is not viewed as "diminishing benefits to our beneficiaries."

### Office of Inspector General Comments

Based on the Chairman's response, we consider Recommendation 1 unresolved. We therefore request that the Hawaiian Homes Commission reconsider its response. The information needed to resolve the recommendation is in Appendix 6.

We disagree with the Chairman's response, since the report clearly demonstrated the speculative nature of the 10-year plan because it was not based on identified Program needs or financial feasibility. The response is inconsistent with the Chairman's January 9, 1991, testimony to the State Legislature on the Hawaiian Homes budget request for fiscal biennium 1991-1993, which stated, "A housing plan to provide 13,833 units over a 10-13 year period was developed together with financial requirements." [Emphasis added.] The response further indicates that the Homes Commission is implementing the 10-year plan by proceeding with the development of infrastructure and construction of houses on 4,124 lots to be completed by 1994. Preliminary documents provided to us during the exit conference on November 13, 1991, named specific projects on the islands of Oahu, Hawaii, Maui, Kauai, and Molokai but did not include a needs assessment. In these preliminary documents, the Homes Commission projected that \$285 million is needed for infrastructure development and house construction through the end of 1994 and identified a shortfall of \$187 million over the 3-year period. However, the Homes Commission did not address how it would meet this shortfall. In addition, documentation supporting the 10-year plan indicated that Homes Commission policies state that (1) beneficiaries are required to be capable of obtaining a mortgage loan from sources external to the Homes Commission and (2) beneficiaries will have to absorb a portion of the land development costs. We believe that these policies diminish benefits and discriminate against a certain class of native Hawaiians by excluding them from participation in the Program.

### Hawaii Attorney General Response

The February 14, 1992, response from the Hawaii Attorney General (Appendix 5) stated that the conduct of Homes Commission officials regarding the Kawaihae development had been investigated and that no violations of State law had occurred.

Furthermore, in the Attorney General's opinion, the Commission had "acted appropriately and in keeping with its responsibilities when the Commission made further inquiries of the prospective developer after it received the developer's proposal."

We believe that the Homes Commission, to preclude a recurrence of the adverse results of the acceleration program of 1985-1987, should reconsider taking further action on the 10-year plan until an adequate needs assessment is prepared.

#### **Office of Inspector General Comments**

The response from the Hawaii Attorney General was sufficient for us to consider Recommendation 2 resolved and implemented.

## APPENDIX 1

**SCHEDULE OF STATE APPROPRIATIONS  
TO THE DEPARTMENT OF HAWAIIAN HOME LANDS  
FOR FISCAL YEARS 1981 THROUGH 1991**

<u>Fiscal Year June 30,</u>	<u>Operations</u>	<u>Capital Improvement Projects*</u>	<u>Total</u>
1981	0	\$10,695,000	\$10,695,000
1982	0	6,220,000	6,220,000
1983	0	6,000,000	6,000,000
1984	0	870,000	870,000
1985	0	3,145,000	3,145,000
1986	0	210,000	210,000
1987	0	9,515,000	9,515,000
1988	0	11,660,000	11,660,000
1989	\$ 972,803	7,920,000	8,892,803
1990	3,052,436	6,965,000	10,017,436
1991	3,281,827	853,000	4,134,827

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\*Excludes funds that are reimbursable to the State or funds that were authorized to be obtained by the Department of Hawaiian Home Lands through issuance of revenue bonds.



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240



FEB 14 1992

Memorandum

To: Assistant Inspector General for Audits

From: Counselor to the Secretary and Secretary's  
Designated Officer, Hawaiian Homes Commission Act

Subject: Draft Audit Report on the Hawaiian Homes  
Commission, Office of the Secretary  
(Assignment No. N-IN-OSS-017-91)

I very much appreciate having an opportunity to comment on your draft report on the Hawaiian Homes Commission. But before offering my comments, I want first to express my appreciation, and that of the Secretary, to you and your office for performing the audit. When I originally made the request that the audit be undertaken, we were aware that, because of the peculiarities of the Secretary's role in connection with the Hawaiian Homes Commission Act, the audit in question did not fall within the typical responsibilities of the Inspector General. We believed, nevertheless, that an audit would be of value to us in discharging such responsibilities as we do have with respect to the Act, and your draft report vindicates our judgment. The draft report is and will be of value to us, and we thank you for conducting it.

You are I know aware that your office conducted an audit of certain aspects of the Hawaiian Homes program in 1982. The 1982 audit report proved to be very useful to both this Department and the Department of Hawaiian Home Lands in the State of Hawaii, and it was useful additionally to the Federal-State Task Force on the Hawaiian Homes Commission Act, which reported to the Secretary and the Governor on August 15, 1983. It was in light of that earlier audit that we were interested in having you look into the Hawaiian Homes program again, to report on and make recommendations concerning further developments. We very much appreciate your having done so.

You have offered three particular recommendations to the Secretary, and I shall speak to each of those below. Before doing so, however, I should like to summarize our position in general with respect to our responsibilities under the Hawaiian Homes Commission Act. (Your very brief summary on

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pages 2 and 3 of the audit report is accurate, but an elaboration may help you in understanding our position.) I am also attaching two documents to this memorandum, the first of which is a series of comments on particular details in the draft report, and the second of which is a statement entitled "Status of Recommendations concerning the Department of the Interior or the United States Government contained in the 1983 Report of the Federal-State Task Force on the Hawaiian Homes Commission Act". The latter attachment, which I have signed and which is dated January 23, 1992, was prepared in response to a recent request from the Senate Committee on Energy and Natural Resources. In both this memorandum and in the first attachment, I will from time to time refer to particular points discussed in that second attachment.

You will note that in our comment in response to Task Force Recommendation No. (3), we refer to your current audit and state that "the audit report is not yet available". When it appears timely to do so, we will confer with your office with the hope of then arranging for the transmittal of the report to the Senate Committee.

#### Interior Responsibilities in General

With respect to our responsibilities in general under the Hawaiian Homes Commission Act, we see these responsibilities as essentially two. First, one section of the Act continues to require action by the Secretary of the Interior on the subject of land exchanges. (Several other sections had earlier required the Interior Secretary's approval of particular acts, but these have all been amended to eliminate his involvement.) Specifically, section 204(3) of the Act permits the exchange of Hawaiian Home lands under certain circumstances, but only if "the approval of the Secretary of the Interior" is obtained. Three proposed land exchanges have been submitted to the Secretary for approval in the last 10 years, and following careful examination of the proposed exchange, in light of statutory requirements, including pertinent Federal environmental laws, plus supporting land appraisals, the Secretary has approved all three. So long as the approval requirement remains in the Act, we expect to continue to review proposed exchanges that are submitted to us by the State of Hawaii, and to approve those that meet the requirements of the law.

Our second responsibility with respect to the Hawaiian Homes program is to serve as "lead Federal agency" with respect to matters of concern to the Federal Executive Branch arising under the Act. We are not required by law to serve in this

role, but the Secretary of the Interior in 1983 agreed administratively to the Department's doing so, following a Task Force recommendation that there be some focal point within the Executive Branch on Hawaiian Homes matters. In the interest of orderly government, and because of our historic responsibility for the Territory of Hawaii, it was logical for the Interior Department to serve in that role.

From the foregoing, however, you will understand that the Department of the Interior is not the administrator of the Hawaiian Homes program, nor do we oversee the program in the way that we oversee Federal programs that are the responsibility of this Department. The Hawaiian Homes Commission Act is now a law of the State of Hawaii, subject to amendment there (albeit subject to the unique "consent of the United States" requirement imposed by the Statehood Act), and the program is entirely within the administrative responsibility of the State of Hawaii. Title to the land involved is in the State, and not in the United States. The program is not funded from Interior Department appropriations, and indeed it was not so funded during the Territorial period either. It is not administered by Federal officers or employees. In sum, it is a State program, with respect to which we have the single legal responsibility cited above, and with respect to which we have undertaken to serve as Executive Branch coordinator on matters touching the Federal Government.

In connection with our role as "lead Federal agency", I should also advert to section 5(f) of the Hawaii Statehood Act. That section creates a public lands trust, and it names the State of Hawaii as the trustee. The section further provides that if the State breaches the trust, "suit may be brought by the United States". If a breach of trust action were to be brought by the United States--and to date, none has been instituted--it could be brought only by the Department of Justice. That Department could act on its own initiative. But we also believe that as lead Federal agency, the Department of the Interior could recommend to the Department of Justice that it institute such a proceeding. (We have not done so, to date.) The Department of Justice need not, of course, follow our recommendation, but we are certain that it would give our recommendation serious consideration. We mention this matter because there appears to be a view in Hawaii that the Department of the Interior has responsibility for litigation on this subject. It does not.

Recommendations to the Secretary of the Interior

I turn now to the three recommendations made to the Secretary, appearing at pages 22 and 23 of the draft report. I shall repeat each, and then comment upon it.

"1. Direct appropriate Department of the Interior officials to establish an oversight system for monitoring the State of Hawaii's activities in discharging State trust obligations in regard to the Hawaiian Homes Commission Act."

We accept this recommendation, but we believe the Secretary has already done so. He has appointed me, pursuant to provisions of the Departmental Manual (514 DM 1.3), to serve as the Secretary's Designated Officer for the Hawaiian Homes Commission Act. In that capacity, it is my responsibility to monitor "the State of Hawaii's activities in discharging State trust obligations", and I do so with ample and consistently available assistance from the Division of General Law of the Solicitor's Office. I am also in a position to obtain assistance from whatever other Departmental bureaus and offices may, given the particular circumstances involved, be relevant to the trust responsibility in question. Further, I did of course request that this particular audit be performed by the Interior Inspector General, in furtherance of our monitoring role. This constitutes, in our view, an adequate "oversight system". As currently constituted, my role, with support from the Solicitor's Office, necessarily relies upon ad hoc assistance from elsewhere in the Department, but that in my view is appropriate. The quantity of the work involved within the Department on Hawaiian Homes matters would not, in my judgment, warrant the establishment of a Departmental Office devoted solely to that subject, and the varying nature of the demands upon us concerning Hawaiian Homes matters are best met by our from-time-to-time use, for brief periods, of Departmental experts who normally engage in other work. I do not believe that a more elaborate Departmental system is needed to discharge the responsibility in question.

"2. Form an interdisciplinary team from Departmental agencies such as the Bureau of Land Management, the U.S. Geological Survey, and the National Park Service to provide assistance to the Homes Commission in the areas of land surveys, land inventory, land-use plans, and development plans."

Again, we accept this recommendation, and we are prepared to do precisely what is recommended, if the State of Hawaii outlines to us a need for the assistance that such a team might provide.

We have often made known to the Department of Hawaiian Homes Lands our willingness to provide technical assistance from Interior's resources on such matters as your Recommendation 2 mentions. (The matter appears often in the 1983 Task Force Report, and it is mentioned in connection with Recommendation Nos. (5), (50), (56), (57), (60), (67), (76), (78), (87), (88), and (102), in our second attachment.) We have, further, responded positively to all requests that we have received from the Department of Hawaiian Homes Lands for particular expert assistance. For example, following a request of the Chairman of the Homes Commission, we arranged to have the Bureau of Land Management conduct a study of what would be required to survey fully all Homes Commission Lands, and the BLM study report was issued in July 1991. (See the comment in response to Recommendation No. (3) in the second attachment.)

Because the administration of the Act is the responsibility of the State, and not of the United States, we must necessarily look to the State for an identification of the need that should be met, and of the assistance that would be useful. Until that need is identified, we cannot be sure what experts could be helpful. Our position has therefore been that we stand ready to help, but the areas in which our help could be of value must first be brought to our attention.

I should here make clear what is probably obvious to you: We have no general authority to provide assistance, without reimbursement, to the Department of Hawaiian Home Lands. In connection with certain requests, it has been possible for us to provide nonreimbursable assistance in the past (as in the case of the BLM July 1991 study), but whether we can do that depends upon the services to be performed, the legal authority of the performer, and the fiscal resources of the performer. If it is possible in light of these considerations for us to provide help without reimbursement, we are of course glad to do so.

"3. Determine and inform the Congress of any amendments to the Act, enacted by the State of Hawaii, which diminish the benefits to native Hawaiians or are otherwise contrary to the intent of the Act."

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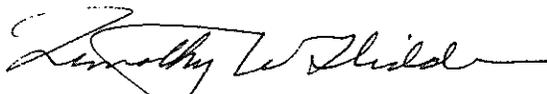
We accept this recommendation, and have discharged it fully to date. All amendments to the Homes Commission Act, enacted in Hawaii since Statehood in 1959, have been made known to the Congress during its 99th, 101st, and 102d Sessions. Many such amendments have been the subject of "the consent of the United States" under section 4 of the Hawaii Statehood Act (Public Law 99-557 (1986)). Some have not been approved (see Senate Report 101-364 of the 101st Congress (1990), and some are now pending (S. J. Res. 23). We have played a very active role in connection with obtaining Federal consent to Hawaii's amendments, believing it to be a part of our "lead Federal agency" responsibility. (See the Comment in response to Recommendation Nos. (2), (9), and (12) in the second attachment).

The wording of your Recommendation 3 to the Secretary does not parallel the statutory requirement pertaining to "the consent of the United States" under the Statehood Act. Because that statutory requirement is lengthy and detailed, and hard to paraphrase accurately, you may wish to consider substituting for the language in the recommendation that follows the last comma, the words "that require 'the consent of the United States' under section 4 of the Hawaii Statehood Act."

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In the first attachment that follows, I offer comments with respect to particular statements in the draft report, other than the recommendations to the Secretary, that we believe you may wish to consider.

Attachments



Timothy W. Glidden

Further Comments on the Draft Audit Report  
on the Hawaiian Homes Commission

1. On page 1 at the end of the paragraph, the Report states, "No funds were to be appropriated by the Federal Government." Through the good offices of your colleagues, we have learned that that sentence is based upon a statement in a House Committee Report in 1920 that accompanied the Hawaiian Homes Commission bill (H. Rept. No. 839, 66th Cong., p. 7). As there stated, after summarizing the objectives of the Homes Commission bill, the Committee said, "Moreover, not a dollar is required to be appropriated by the Federal Government." The paraphrase in the draft audit report is not inaccurate, particularly since the legislation contained no authorization of appropriations, but it may be misleading. The audit report sentence suggests that the Federal Government was in some way barred from appropriating funds for the Hawaiian Homes program, whereas the actual 1920 sentence could reasonably be read as stating that the Committee believed that the program would be self-sustaining and would not require Federal funds for its support. It might be well to modify that sentence on page 1 to reflect this larger construction.

2. On page 3, the first sentence in the first full paragraph undertakes to summarize the provisions of section 4 of the Statehood Act and Article XII, section 3 of the Hawaii Constitution. (The two are not precisely parallel in all details, but they are parallel in substance.) Section 4 of the Statehood Act is long and detailed, and it is probably not necessary here to summarize it in full, but it would be well to qualify the statement, perhaps by adding something after "provide" along the lines of "in pertinent part, and in substance".

3. On page 8, in the sentence referring to the 1983 Task Force Report, it is stated that "recommendations...have not been implemented or have not been effective". This sentence, too, we think needs qualification. This Department has implemented recommendations directed to it (see the second attachment), as a result of which we believe that the Federal role in connection with the Hawaiian Homes program has been effectively tightened--and better understood. Additions to the sentence along the lines of "have not been uniformly implemented or have not been fully effective" would meet my point.

4. On page 9, there appears the statement, "During the 38-year period from 1921 through 1959, the U.S. Government served as trustee of the Hawaiian home lands for the benefit of native Hawaiians." The Department of the Interior's

position is that the United States did not serve as a trustee for native Hawaiians under the Hawaiian Homes Commission Act during the period from enactment of the Act in 1921 until Statehood in 1959. A copy of our letter to Senator Inouye, dated January 23, 1992, which states the basis for this conclusion, is attached.

5. On page 10 it is stated that the 1983 Task Force "found that approximately 650 acres of home lands were conveyed to private parties through 139 government land grants", and that this occurred "because the U.S. Government allowed the lands...to be managed by the Territorial Commissioner of Public Lands...". As to the first quote, the point is a minor one, but because the comments on 650 acres and 139 grants are in an appendix to the Task Force Report, and not in the Report itself, there was no Task Force "finding" to that effect. (The appendices consist largely of back-up papers, created for the information of the Task Force but not necessarily embraced by it. In fact some Task Force members would almost certainly not have agreed to several of the back-up papers.) It would thus be more accurate to attribute the statement to that source, and thus have the sentence begin along the line of "In addition, an appendix to the 1983 Task Force Report states that approximately 350 acres...". As to the second quote, the phrase "U.S. Government allowed", while accurate, suggests, that a conscious decision was made to permit erroneous land withdrawals and disposals. It was Federal law that permitted management by the Territorial Commissioner of Public Lands. It would thus be clearer if the sentence were to begin along the lines of "These mishandlings of home lands occurred because the pertinent Federal laws, including the Hawaii Organic Act and the Homes Commission Act, allowed the lands that were designated as "available lands" and that were not...".

6. On page 11, the first full paragraph presents three problems to us:

--The first sentence states that upon Hawaii's admission to the Union, "the United States transferred its trust obligation" to the new State. It is our position that, as a matter of law, the United States did not have the responsibility of a trustee under the Hawaiian Homes Commission Act before Statehood (nor has it since). The Statehood Act did transfer title to the "available lands" to the State, and it did place administration squarely in the State. In our view the sentence would therefore be more accurate if it were to say that "...the United States granted

to the State title to all of the lands defined as 'available lands' by the Homes Commission Act, and placed the management and disposition of such lands in the State, subject to the requirement that the State, as a compact with the United States, adopt the Hawaiian Homes Commission Act as a provision of the State Constitution."

--In the third sentence, the problem mentioned in our comment number 2 above reappears, so that we suggest that after "provides" a qualifier be inserted, along the lines of "in effect, and among other things"; and instead of the words "are to be consented to by the United States" (which implies that the United States has no choice), there might better be substituted something like "are subject to the consent of the United States".

--The fourth sentence, concerning section 5(f) of the Statehood Act, should recognize that public lands in general in Hawaii are subject to the trust, and that "the betterment of the conditions of native Hawaiians" is but one of several objects that can benefit from the trust. That point could be met by having the sentence begin, "Section 5(f) provides that certain lands granted to the State are to be held by the State..."; and by inserting ", or for other purposes not listed in section 5 (f)," after "the Act".

The State may choose to comment on the last sentence on that page, and we would defer to it. For our part, however, we believe it would be clearer if the "Act" first referred to were amended to read the "Statehood Act" (or the "Admissions Act", which appears to be the State's preferred usage), and if the second "Act" were amended to read the "Hawaiian Homes Commission Act".

7. Page 13, at the top, refers to land exchanges "without the required approval of the Secretary of the Interior" and "for lands of lesser value". We know of no land exchange (other than those effected by Act of Congress) that occurred without the Secretary's approval. And while some approved exchanges may not have been for lands "of an equal value", as the law requires, that has not, so far as we know, been proved. (It seems probable in the case of acre-for-acre exchanges, but we do not know that for a fact.) We therefore believe that it would be more accurate to say that "...lands may have been exchanged for lands of lesser value".

8. On page 13, in the last sentence on the page, reference is made to the origin of the Federal-State Task Force. In order to provide a fuller explanation of its origin, it could be helpful if the following were substituted for that last sentence:

"Later in 1980, following the institution of a lawsuit by native Hawaiians to force corrective action by the United States, the Secretary of the Interior wrote to the Governor of Hawaii to call his attention to numerous, serious shortcomings in the Hawaiian Homes program. The Secretary suggested that, in order to avoid piecemeal litigation on the subject of the Hawaiian Homes Commission Act, there might better be a Federal-State Task Force to explore these difficulties and recommend solutions".

9. On page 14, in the last sentence of the second paragraph, it is stated that "the Department of the Interior had not made a formal assessment" of progress in correcting problems identified by the Task Force. Perhaps it is a mere quibble with the word "formal", but we did attend a Task Force meeting about a year following the report (see Recommendation (134) in the second attachment); we have monitored developments in the Hawaiian Homes program through a variety of means since then--through, for example, frequent face-to-face meetings with Homes Commission personnel, a continual flow of correspondence, and our careful scrutiny of many and various reports on Homes Commission matters that come to our attention; and we have been mindful throughout of our particular responsibilities (see all of the second attachment).

10. On page 15, in the incomplete paragraph at the top of the page, reference is made to a Task Force recommendation for an annual contribution of \$25 million from the United States. It is later in the paragraph made clear that that recommendation was, in our view, subject to a condition that was not met. (See the comment following Recommendations (27) and (37) in the second attachment.) We would, however, suggest that the point might more clearly be made if there were added in the first full sentence on that page the words, "subject to a condition," after "the Task Force recommended".

11. Also on page 15, the first sentence of the new paragraph might appropriately have added to it at the end "nor does it contain any authorization for Federal appropriations".

12. On page 18, the paragraph that concludes on that page presents in our view three difficulties:

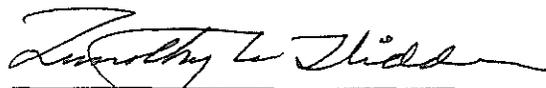
-- We believe that the statement that the Department "has never exercised this duty" contemplated by Task Force Recommendation (3) is in error. Our comment as to that recommendation in the second attachment states that we believe we have done those things stated in Recommendation (3), so far as appropriate.

-- The statement that we "maintain that the Congress has never given the Department of the Interior authorization or resources to establish a proper oversight role" could benefit from elaboration, because we have not sought any "authorization or resources" from the Congress concerning the Hawaiian Homes program. We are in fact satisfied that we are now equipped to perform, and have been performing, an "adequate oversight role", but we recognize that that phrase could be differently defined by others. If "oversight" means "supervision", and thus the capacity to give direction, then we think we should not have supervisory power over officers of and a program of a sovereign State. In any event, of course we would perform any duties that the Congress might by law place upon us, and we would do so to the best of our ability. At this time, however, we believe we are discharging our limited responsibilities under this unique program in a manner that is consistent with the spirit and the letter of the Homes Commission Act and the Statehood Act.

-- Finally, the last sentence of that paragraph seems to us to constitute a non sequitur. It states that "[a]s a result" of Interior's failure to establish a "proper oversight role", deficiencies in the Hawaiian Homes program "have not been corrected". There is, we think, no cause-and-effect here. The Hawaiian Homes program is the responsibility of the State of Hawaii, and while the Interior Department can be of limited assistance (and has been, and stands ready to continue to be), we do not believe that more Federal "oversight" is appropriate or likely to be of value.

FEB 14 1992

Date

  
Timothy W. Glidden

Status of Recommendations concerning the  
Department of the Interior or the United  
States Government contained in the 1983  
Report of the Federal-State Task Force on  
the Hawaiian Homes Commission Act

The recommendations contained in the Task Force Report that concern the Department of the Interior or the Government of the United States are set forth below, with the numbers corresponding to those contained in the Report. Of the 134 recommendations in the Report, 36 may be viewed as bearing upon the responsibilities of the Interior Department or the United States. Each is quoted as it appears in the Report, followed by a comment as to its current status.

The following terms and abbreviations from time to time appear:

HHCA - The reference is to the Hawaiian Homes Commission Act, 1920, as amended. The Act appears in the Hawaii Revised Statutes.

DHHL - The Department of Hawaiian Home Lands, an agency of the State of Hawaii. DHHL is managed by the Hawaiian Homes Commission, whose Chairman serves as Director of the Department.

The "Hawaii Statehood Act" and the "Hawaii Admission Act" are synonymous. The reference is to Public Law 86-3 (1959), which is set out as a note preceding 48 U.S.C. 491.

(1) "The Department of the Interior should serve as the lead agency within the Federal establishment with respect to matters touching the Hawaiian Homes program that are the responsibility of the United States. For this purpose, there should always be designated by the Secretary of the Interior an officer or employee of the Department of the Interior in Washington, D.C., and an officer or employee in Hawaii to contact on matters relating to the program. Such persons should be available and knowledgeable sources to whom questions can be put and to whom information on the Hawaiian Homes program may be supplied by beneficiaries of the Act, other concerned citizens of Hawaii, and interested officers and agencies in Hawaii and Washington, D.C. [See Note 1]"

Note 1 states:

"The Federal members agree that the efficient conduct of Hawaiian Homes Commission business requires the designation of an officer or employee of the Department of the Interior as a point of contact in the United States government, but they believe that the Secretary of the Interior should be permitted

to decide whether it is necessary and appropriate that the designee or designees serve in Washington, D.C., or in Hawaii or both."

Comment: By letter to the Governor of Hawaii on September 27, 1983, the Secretary of the Interior stated his agreement that the Department should serve as lead agency within the Federal establishment on those matters touching the Hawaiian Homes program that are a Federal responsibility. He stated that such a role was appropriate, in light of Interior's historic and current responsibilities. The Secretary also, within a month of the issuance of the Task Force Report, appointed a Department employee to serve as the "Secretary's Designated Officer - Hawaiian Homes Commission Act", and at all times since there has been an officially designated officer within the Department for this purpose. The current designee is Mr. Timothy W. Glidden, Counselor to the Secretary. The Departmental Manual of the Interior Department now contains a requirement for the appointment of such a Designated Officer (cited as 514 DM 1.3).

There is not now and there has not ever been a Department employee in Hawaii with Homes Commission responsibilities. The Department of the Interior representatives on the Task Force (who were three in number, and who constituted all of the "Federal members") joined in expressing the reservation on this point contained in the note, quoted above. Since 1983 it has not appeared to be "necessary and appropriate" that there be a Hawaii-based Departmental designee for this purpose. Budgetary constraints represent one reason for this conclusion.

(2) "The United States should give conscientious and expeditious consideration to amendments from the State of Hawaii that modify the HHCA if such amendments require the consent of the United States." [See Note 2]

Note 2 expressed the dissent of Kamuela Price, a State-appointed member of the Task Force:

"On behalf of the Hou Hawaiians and other native Hawaiian beneficiaries whom I represent, I must dissent from any and all recommendations that the United States Congress be requested to change or modify the HHCA at this time.

"Congressional action on amendments to the HHCA or new Federal legislation pertaining to the HHCA should be deferred until all eligible beneficiaries currently on DHHL waiting lists are awarded leases to their homestead land. Once these beneficiaries have their leases, the native Hawaiian homesteaders and leaseholders should vote on whether any new HHCA legislation or amendment is desired. The results of this vote should be presented to Congress with any proposed Federal legislation or amendment changing the HHCA.

"I fear at this time Congress might inadvertently or otherwise abort the HHCA or change it in a manner detrimental to the best interest of the beneficiaries."

Comment: The Department of the Interior has examined amendments to the Homes Commission Act enacted in Hawaii, in an effort to assist in achieving, when necessary, the "consent of the United States". We have done so, notwithstanding Mr. Price's dissent quoted above, because of the statutory requirement--contained in section 4 of the Hawaii Statehood Act--that the consent of the United States is required for the effectiveness of certain State-enacted amendments to the Homes Commission Act. (We note that, as stated in our July 22, 1991 letter to the Senate Energy Committee on S. J. Res. 23-34, the Administration "continues to have concerns with the consent requirement.")

More particularly, we provided information in connection with then Congressman Akaka's H.J. Res. 17, 99th Congress, which as amended, became Public Law 99-557, approved October 27, 1986. In the 101st Congress, we initiated a proposed bill that became S. J. Res. 154 and we presented testimony on it to the Senate Committee on Energy and Natural Resources. The Committee expressed misgivings concerning the bill in its Report No. 101-364, and the bill was not enacted. In the current Congress, we have presented a report and testimony on several Joint Resolutions, Nos. 23 through 34, concerning State-enacted amendments to the Homes Commission Act, and that legislation is now pending. On November 26, 1991, the Senate passed S. J. Res. 23, providing consent to most of the amendments cited in S. J. Resolutions 23 through 34.

(3) "In light of the responsibilities lodged with the United States under the HHCA and the Hawaii Admission Act, the United States should undertake to: (a) be aware of the manner in which the State manages or disposes of the lands that constitute the trust under Section 5(f); (b) satisfy itself that the State is not abusing its responsibilities as trustee; and, (c) if the State is failing to discharge properly its responsibility under Section 5(f), then to institute proceedings against it for breach of trust. Either the Department of Justice or the Department of the Interior, or both, should be prepared to discharge this responsibility. These steps could include the designation of personnel of either department already stationed in Hawaii to review pertinent portions of the Hawaiian Homes Commission program. Other steps could include a follow-up audit of the Hawaiian Homes Commission program and of other aspects of the trust under Section 5(f) by Federal auditing personnel; the designation of Federal personnel to work with State personnel on a short-term basis on matters touching the Hawaiian Homes Commission program; and a lawsuit against the State for breach of trust."

Comment: The Department of the Interior has assumed the responsibilities stated in (a) and (b) above, and is currently satisfied that no conditions exist that would warrant the proceedings contemplated in (c). It should be noted that if a breach of trust action were to be instituted under section 5(f), only the Department of Justice could do so. The Department of the Interior could, however, offer a recommendation that such action be instituted. We have made no such recommendation to the Department of Justice, and that Department has not instituted any breach of trust proceeding.

With respect to the last sentence of Recommendation (3), we did request the Inspector General of the Department of the Interior to conduct an audit to follow-up on that conducted by the Inspector General in 1982. The field work has, we understand, been completed, but at this writing the audit report is not yet available. We have, further, arranged to have the Bureau of Land Management study the problem of a full survey of all Homes Commission lands, and the BLM report, entitled "Survey Needs for the Hawaiian Homes Lands", was issued in July 1991. For your information, the report concludes that if the project were to be completed in a single year, the cost would be about \$1.6 million; if it were conducted over 4 1/2 years, the cost would be about \$1.7 million.

(4) "In light of its other findings, the Task Force recommends that within two years of the date of submission of this report the Department of the Interior should formally assess progress made in correcting problems identified in this Task Force report, using one or more of the methods described herein."

Comment: We can offer no written, formal 1985 assessment, but we have in all of the years since the 1983 Task Force Report been in frequent touch with the Hawaiian Homes Commission, both in person and in writing, and have satisfied ourselves that progress is being made toward the correction of problems identified in the 1983 Report.

(5) "While the statutory language on Federal responsibilities for the Hawaiian Homes program may be subject to varying interpretations, the Task Force agrees that the United States must bear responsibility for its past and/or present misuses of Hawaiian Home lands as discussed in this report."

Comment: As the Task Force Report makes clear, the "varying interpretations" referred to relate to whether the United States has or had a fiduciary responsibility toward the beneficiaries of the Hawaiian Homes Commission Act. The Federal representatives on the Task Force doubted that it does or did; some of the State-appointed representatives expressed the view that the United States served as a trustee for native Hawaiians, both before and after Statehood. The Interior Department has since stated its position to be that the United States does not have, and did not have prior to Statehood, a trusteeship responsibility.

Nevertheless, the Interior Department stands ready, and has made known its willingness during Task Force deliberations and since, to use its good offices to assist the State in correcting instances of misuse by agencies of the United States of Homes Commission lands. (So far as we have been able to establish, there are no Homes Commission lands now within the administrative responsibility of the Department of the Interior except for a road easement granted in 1986 to the Fish and Wildlife Service, for a consideration.) In the single instance in which we were called upon to assist in resolving a matter of alleged Federal misuse, that of the extensive land holdings of the U.S. Navy at Lualualei on Oahu, we did strive to find a solution to the Navy-Homes Commission conflict. The State, acting on behalf of the Department of Hawaiian Home Lands, later instituted a quiet title action, but it was unsuccessful (State of Hawaii v. United States, 676 F. Supp. 1024 (1988) AFF'D. 866 F.2d 313 (1989)).

(9) "As soon as reasonably possible, the State of Hawaii should seek to obtain the consent of the United States to all amendments to the HHCA that are required to have such consent under the Hawaii Admission Act. [See Note 3]"

Note 3 contains the same "Dissent by Kamuela Price" as appears in full above under Recommendation (2).

Comment: With the cooperation of the Hawaiian Homes Commission, the Department of the Interior has participated in achieving the "consent of the United States" to State-enacted amendments to the Homes Commission Act, as outlined in some detail above in response to Recommendation (2).

(11) "Congress should enact legislation granting beneficiaries the right to sue for breach of trust in Federal court." [See Note 5]"

Note 5 contains the same "Dissent by Kamuela Price" as appears in full under Recommendation (2).

Comment: At the time of the Task Force Report, the Court of Appeals for the 9th Circuit had held that beneficiaries under the Homes Commission Act did not have the right to sue for breach of trust in Federal court, because that right was confined to the United States under section 5(f) of the Statehood Act. Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 588 F.2d 1216 (1978), cert. denied 444 U.S. 826 (1979) ("Kaeukaha I"). Accordingly, we prepared Federal legislation to implement this recommendation. Before the proposed bill emerged from the Executive Branch clearance process, however, the 9th Circuit, in a further decision ("Keaukaha II", 739 F.2d 1467 (1984)), held that beneficiaries did have the right to sue in Federal court under the old civil rights statute generally referred to as 42 U.S.C. 1983. Our conclusion was then that our proposed legislation was unnecessary and that the pertinent Task Force recommendation had become moot. That remains our position.

(12) "As soon as possible, the State of Hawaii and the United States should seek congressional approval for the amendment to the HHCA passed by the Hawaii State Legislature in 1982 which lowers the blood quantum for successorship. [See note 6]"

Note 6 contains the same "Dissent by Kamuela Price" as appears in full under Recommendation (2).

Comment: The 1982 State amendment referred to received "the consent of the United States" by Public Law 99-557, approved October 27, 1986.

(27) "To implement the acceleration strategy, the State of Hawaii and the United States should each make matching contributions of \$25 million per year in appropriations or needed services for a period of five years." This recommendation should be considered in conjunction with recommendation (37).

(37) "The Advisory Committee on Funding Sources should identify sources of funding to cover the various elements of the acceleration strategy within the time frames set out in this strategy. If within six months of its establishment the Advisory Committee is not successful in identifying all sources of funding needed to finance the acceleration strategy, including construction and farm and ranch development, then the recommendations for full Federal and State funding should be implemented. Further, if financing to implement the acceleration strategy is not secured in time to meet the deadlines established herein, then the recommendations for Federal and State funding should be implemented."

Comment: The rationale for the \$25 million figure in Recommendation (27) appears in Appendix 10 to the Task Force Report (pages 247-248), which contains estimates in 1983 by DHHL of the cost of constructing site improvements. The reference in Recommendation (37) to the Advisory Committee on Funding Sources in turn refers to Recommendation (23), which stated that the Governor of Hawaii "should appoint within thirty days of the date of submission of this report [August 15, 1983] a committee to advise him on financing the acceleration strategy".

As the language of Recommendation (37) makes clear, the implementation of the "full Federal and State funding" contained in Recommendation (27) was contingent upon a lack of success on the part of the proposed Advisory Committee on Funding Sources. Such a Committee was not appointed, and accordingly the obligation set forth in Recommendation (27) was not triggered. The Department of the Interior has not sought funds from the Congress for the Hawaiian Homes program and has not felt obligated to do so. Some Federal funds have been appropriated for the program, however, but not to the Interior Department.

(40) "The United States Department of the Interior should immediately undertake a study of all existing Federal laws and pending legislative proposals to determine the extent to which any may facilitate the implementation and/or financing of the strategy for acceleration, giving particular attention to the existing Federal programs for housing for native Americans administered by the Department of Housing and Urban Development."

Comment: The Solicitor of the Interior Department provided advice in 1983 on the salient points of then current and proposed Federal housing programs for Native Americans. We transmitted the information to the Director of the Department of Hawaiian Home lands and the members of the Federal-State Task Force.

(50) "While these unauthorized land transfers [of Hawaiian Home lands for uses or by means not sanctioned by the Act] no longer occur, the State of Hawaii with Federal assistance must intensify its efforts to secure the return of lands wrongfully taken or recover compensation, in dollars, land, services, or treasury credits, for the use of those lands."

Comment: As stated above in response to Recommendation (5), we stand ready to assist in resolving disputes between the State and Federal agencies concerning improper Federal use of Hawaiian Home Lands.

(51) "When the land exchange mechanism is utilized, priority should be given to restoring lands to the Hawaiian Homes trust for those Hawaiian Home lands unlawfully conveyed to the Federal and state governments."

Comment: The Interior Department takes particular note of this recommendation, inasmuch as the Secretary is required under the Homes Commission Act to approve land exchanges involving Hawaiian home lands. The initiative for exchanges occurs in Hawaii, and none of the three exchanges that have been submitted to the Secretary for approval since the Task Force reported caused this recommendation to become relevant.

(56) "The DHHL should notify all agencies using Hawaiian Home lands that were transferred to them under executive orders that such orders were not authorized. The DHHL should recover the possession of those lands or the DHHL should advise the agency how it can secure lawful possession. The DHHL should take possession of its lands if other agencies fail to make appropriate arrangements to continue present uses."

Comment: When a Federal agency is the subject of any such DHHL notice, this Department is prepared to assist DHHL in its negotiations with the Federal agency. Our assistance has not yet been sought.

(57) "The United States and the DHHL should immediately commence negotiations to resolve the issues surrounding the extremely valuable lands of Lualualei, Oahu. Such issues include questions of ownership, possession, and compensation. If meaningful progress has not been made within one year of the date of submission of this report, the DHHL should initiate litigation to resolve the status of these lands."

Comment: As we stated above in response to Recommendation (5), the Interior Department attempted to assist in the resolution of the Lualualei controversy. The matter was ultimately decided through litigation, in which the position of DHHL did not prevail.

(58) "The Governor and the DHHL should establish a deadline of two years from the date of submission of this report to resolve other executive order uses by public agencies. If reasonable progress in resolving this problem has not been achieved within one year, the Department of the Interior should request the Department of Justice to initiate appropriate litigation."

Comment: In December 1984, Governor Ariyoshi cancelled or withdrew numerous Executive Orders and Governor's Proclamations, with the result that almost 28,000 acres of Hawaiian home lands were restored to the Department of Hawaiian Home Lands for use in the Homes Commission program. The recommendation to the Interior Department thus became moot.

(60) "Within one year of the date of submission of this report the DHHL should complete an assessment of its forest reserve lands on a tract by tract basis to determine whether the lands are suitable for beneficiary use, such as homesteading, income production or traditional native rights activities, or whether the lands have valuable surface or subsurface resources."

Comment: This recommendation is not directed to the Department of the Interior, but we made known to DHHL that the assessment of forest reserve lands involves the kind of expertise that the Department of the Interior might be able to provide.

(62) "If Hawaiian Home lands in forest reserve status are of little value to the beneficiaries or are assessed to have little revenue-producing potential, such lands should be exchanged for other public or private lands which could be put to use for the beneficiaries. [See note 8]"

Note 8 refers to the following "Dissent and Concurring Opinion of Kamuela Price":

"My constituency, the Hou Hawaiians, and other native Hawaiians take the position that there should be no new land exchanges until all past unlawful Federal and State conveyance problems have been resolved and the DHHL has make an in-depth study of the mineral, cultural and other Hawaiian Homestead land resources."

Comment: As noted in our response to Recommendation (51), land exchanges are initiated and negotiated in Hawaii, and the Secretary of the Interior becomes involved only when an exchange is submitted to him for approval, pursuant to section 204(3) of the Hawaiian Homes Commission Act. While he would probably view with special sympathy a proposed land exchange of the kind contemplated in this recommendation, none has been submitted to him that involve forest reserve lands.

(63) "If reasonable progress in resolving this problem (of governor's proclamations for forest reserves on Hawaiian Home lands) has not been achieved within one year of the date of submission of this report, the Department of the Interior should request the Department of Justice to initiate appropriate litigation."

Comment: As in the case of Recommendation (58), the Governor's action in December 1984 has effectively mooted this recommendation.

(64) "The Department of the Interior should establish procedures for reviewing DHHL land exchanges to ensure that such land exchanges receive prompt and careful scrutiny and that all of the requirements of the HHCA are satisfied before such exchanges are approved."

Comment: We have done so, and our procedures are contained in the Departmental Manual (514 DM 1.4). Each land exchange that is submitted to the Secretary pursuant to section 204(3) of the Homes Commission Act is required to be reviewed by both the Solicitor and the Assistant Secretary--Policy, Management and Budget. They are to conduct their reviews "as promptly as possible, consistent with the careful scrutiny that is required", following which they are to make recommendations to the Secretary, who is required to "approve or disapprove the proposed exchange as expeditiously as possible".

(65) "The Department of the Interior should assign to one of its offices the responsibility for monitoring and reviewing DHHL land exchanges."

Comment: This result has been accomplished by the Department Manual provision cited in connection with the preceding recommendation.

(67) "The United States and the State of Hawaii should jointly rescind all general leases issued for nominal consideration within six months of the date of submission of this report. Within one year the United States and the DHHL should negotiate new leases for the use of these lands for fair compensation or the DHHL should seek possession of these lands."

Comment: Because the Department of the Interior was not and is not a party to any of these leases, we cannot act to rescind them, but our good offices are available to both the State and the pertinent Federal agencies to assist in resolving this problem.

(71) "If reasonable progress in resolving this problem [of the cancellation of licenses which have been issued for a nominal consideration and which do not primarily benefit the DHHL or the beneficiaries] has not been achieved within one year of the date of submission of this report, the Department of the Interior should request the Department of Justice to initiate appropriate litigation."

Comment: Information that we have sought and received from DHHL has persuaded us that "reasonable progress" is being made in resolving this issue. Most DHHL licenses for a nominal consideration provide benefits to DHHL or to the beneficiaries of the Homes Commission program, and the law permits only a nominal consideration in those cases. We understand that the licenses that do not meet this test are few, probably under one dozen, and that DHHL is moving toward the correction of them.

(75) "If reasonable progress in resolving this problem [of unlawful takings and transfers of Hawaiian Home lands] has not been achieved within one year, the Department of the Interior should request the Department of Justice to initiate appropriate litigation."

Comment: In the case of this recommendation also, the Department of the Interior concluded that "reasonable progress" had been made. Reportedly there were only four "unlawful takings" of the sort contemplated by the recommendation, of which we understand at least three have been corrected.

(76) "The United States and the State of Hawaii should assure that the DHHL resolves these questionable withdrawals and uses [that directly benefit the general public rather than the beneficiaries] and should assist the DHHL in all possible ways to resolve this problem promptly."

Comment: While the Department of the Interior is not, so far as now known, the beneficiary of any of these questionable withdrawals, our good offices as a broker or lead agency are available to both Federal agency users and to the State, as in the case of other recommendations.

(77) "The majority of the Task Force recommends that the United States should not proceed to dispose of surplus federal lands in Hawaii until its responsibilities for questionable land withdrawals and land uses are resolved. [See note 11]"

Note 11 contains the following dissent by the Federal members of the Task Force:

"The Federal members must dissent from this recommendation because (1) there is a Federal law and series of well-defined procedures for the disposition of Federal surplus property wherever located [i.e., the Federal Property and Administrative Services Act of 1949, as amended], and (2) there has been court action on a directly relevant case in Hawaii recently. Thus, other authorities and other forums than the Federal-State Task Force exist for the appropriate resolution of specific surplus property issues with respect to Hawaiian Homes land."

Comment: Because implementation of this recommendation would in effect require amendment to the Federal Property and Administrative Services Act to exclude particular property in Hawaii, thereby violating long-standing Executive Branch policy against patchwork disposal statutes, the Secretary of the Interior announced in September 1983 that he could not support this recommendation. That remains the position of the Department of the Interior.

(78) "The Department of the Interior should assist the DHHL by channeling and monitoring all claims against Federal agencies for questionable withdrawals, renegotiation of contractual agreements, and compensation for past uses of land in a conscientious and prompt manner."

Comment: The Department of the Interior has been and is willing and anxious to provide the assistance described.

(82) "If Federal law permits, the DHHL should consider land exchanges with the United States for Hawaiian Home lands in use by Federal agencies for little or no compensation."

Comment: A land exchange involving lands in use by Federal agencies might be legally permissible, but we have reached no definitive conclusion on the point because no such exchange has been outlined to us as a possibility. Because, so far as we are aware, there are very few tracts of Hawaiian Home lands in use by Federal agencies for "little or no compensation"--fewer than half a dozen, we believe--and because that land is probably needed for Federal purposes, we question whether this recommendation has practical application.

(87) "Notices should be issued to all unauthorized users [of Hawaiian Home lands] requesting fair compensation or possession of the parcels involved unless the Hawaiian Homes Commission makes express findings that a particular use primarily benefits the beneficiaries. In such cases the DHHL should issue a license or other form of conveyance for a limited term to allow the use to continue under a proper authority. [See note 13]"

Note 13 contains the following "Dissent and Concurring Opinion of Kamuela Price":

"The Hou Hawaiians and constituency contend that leases issued to the United States government for military purposes for one dollar per year should remain in effect if the United States government agrees to give 25 million dollars annually for the next five years to accelerate the Hawaiian Homestead program."

Comment: Although this recommendation does not refer either to the Department of the Interior or directly to the United States, other parts of the report indicate that some Federal agencies may constitute "unauthorized users," and Federal agencies may thus be among those comprehended by the recommendation. As we have advised the State, we would be pleased to be of assistance to the Department of Hawaiian Home Lands, if any Federal agency is the subject of such a notice.

(88) "The DHHL should seek possession or compensation, in money, land, services, treasury credits or other appropriate methods, as soon as possible for all lands which it claims are unlawfully used by other agencies or individuals."

Comment: Again, the Department of the Interior has made known its willingness to assist in the resolution of cases of unlawful use, if the user is a Federal agency.

(91) "Questions of compensation for improper past use of Hawaiian Home lands by the State and Federal governments could be resolved through funding of the 'Strategies for the Acceleration of Homestead Awards' described elsewhere in this report."

Comment: As our response above to recommendations (27) and (37) states, the condition precedent for the referenced funding was not met.

(102) "The State of Hawaii should identify mineral and other natural resources on Hawaiian Home lands, with the priority of identification being given to lands to be exchanged. The United States should assist the state in identifying and assessing these resources."

Comment: As we have advised the State, the Department of the Interior stands ready to explore possibilities for providing technical assistance in the assessment of mineral and other natural resources on Hawaiian Home lands. As stated above in response to Recommendation (3), we have provided expert assistance from the Bureau of Land Management in the survey of Hawaiian Home lands.

(121) "The DHHL should establish a Financial Review Advisory Committee which would be convened annually for the purpose of reviewing the financial efforts of the DHHL in the fiscal and accounting areas. This advisory committee would have representatives from the DHHL, the Department of Budget and Finance, the Department of Accounting and General Services, the Legislative Auditor, the Office of the Inspector General of the Department of the Interior, and the private sector."

Comment: We understand that this committee has fallen into disuse.

(132) "The Task Force urges the Secretary and the Governor to sustain the momentum toward better implementation of the HHCA which was begun when they established the Task Force. The Task Force recommends that the Secretary and the Governor continue to exercise strong leadership and offer incentives so that the ideas contained in the findings, as well as the steps set out in the recommendations, become agenda items of action for the many public and private offices, organizations, and individuals who have responsibilities and interests affecting the native Hawaiian people as beneficiaries of the Hawaiian Homes Commission Act."

Comment: I believe that the Department of the Interior has, since the Task Force Report of 1983, carried out its responsibilities with respect to the Hawaiian Homes program with diligence. In the limited areas where the initiative has been ours, we have taken steps necessary to implement the recommendations. In all areas where we have been called upon to provide assistance, we have undertaken to do so as fully as we have been able, and with reasonable promptness.

(133) "Both the Governor and the Secretary of the Interior should issue a written response to the findings and recommendations of the Task Force specifying how recommendations will be implemented."

Comment: The Secretary of the Interior did so in a document dated September 27, 1983, which was sent to the Governor of Hawaii. Therein he repeated all of the recommendations quoted above, and he offered a comment on each.

(134) "The Task Force further recommends that the Department of the Interior and the Governor convene a Federal-State Task Force to meet approximately one year from the date of submission of this report in order to assess and to report back to them upon progress in the implementation of these recommendations."

Comment: Certain members of the Task Force met in Hawaii in May 1984, with one Federal member present. That member was the person then appointed by the Secretary of the Interior as

the Designated Officer for the Hawaiian Homes Commission Act. The Task Force members heard reports of actions being taken by the Department of Hawaiian Homes Lands, and reported that progress toward implementing the recommendations was well underway. No further meetings have been held.



Timothy W. Glidden  
Counselor to the Secretary and  
Secretary's Designated Officer  
Hawaiian Homes Commission Act

Date: JAN 23 1992



# United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240



JAN 23 1992

Honorable Daniel K. Inouye  
United States Senate  
Washington, D.C. 20510-1101

Dear Senator Inouye:

At a hearing before the Senate Committee on Energy and Natural Resources on July 23 on several Senate joint resolutions pertaining to the Hawaiian Homes Commission Act (S.J. Res. 23-34), you asked me a question to which I agreed later to respond. You asked whether the Executive Branch "would be in favor of legislation that would authorize native Hawaiians or the State of Hawaii to bring suit (against the United States) for a breach of trust (of the Hawaiian Homes Commission Act) that occurred before 1959".

I regret my delay in responding, but I can now advise you that the Administration could not support such legislation.

Our fundamental difficulty with legislation of the sort you suggest is that it is based on the premise that, for the period from enactment of the Hawaiian Homes Commission Act in 1921 until Hawaii's admission to the Union in 1959, the United States served as a trustee for native Hawaiians under that Act. In our opinion it did not.

I know you are aware of the position we have expressed during hearings on Homes Commission matters, as well as in correspondence with you, that under section 5(f) of the Statehood Act, the State of Hawaii and not the United States serves as trustee under the land trust created by that section. My letter to you of October 17, 1989, states that position and our reasons for it. We have not had an occasion before this to state in writing a position on the question whether the United States had a fiduciary responsibility toward native Hawaiians under the Hawaiian Homes Commission Act prior to Statehood in 1959.

We do not believe it did. No language in the Homes Commission Act itself suggests there was a trust created by it or that the United States had a trust relationship to the beneficiaries of the Act. So far as we have been able to establish, nothing in the legislative history of the Act, nor in the many amendments to it over the years coupled with their legislative histories, in any way supports the notion that the Congress intended to create a trust--or that the United States would serve as trustee for native Hawaiians under the Homes Commission Act, or that it would bear any kind of fiduciary responsibility toward them under the Act.

The only case law on the subject is a decision of the Supreme Court of Hawaii in 1982 (Ahuna v. Dept. of Hawaiian Home Lands, 64 Haw. 327, 640 P. 2d 1161). The Hawaii court stated squarely a contrary view. Speaking through Chief Justice Richardson, the court offered three statements relating to its conclusion that the United States had before Statehood a "trust obligation" to native Hawaiians under the Homes Commission Act. We do not find these statements either persuasive or even very helpful.

First, they are without question dicta. The case involved the trusteeship responsibilities of the State of Hawaii, and the United States was in no way involved.

Second, the three statements of the court are without effective support:

1. The court said that the "legislative history at the inception of the HHCA strongly suggests that the federal government stood in a trusteeship capacity to the aboriginal people" (at 642 P. 2d 1167). But that conclusion is supported solely by a single sentence of testimony--a sentence delivered in a 1920 hearing before the House Territories Committee by then Secretary of the Interior Franklin Lane. Secretary Lane, testifying in favor of Hawaiian Homes Commission legislation, commented that

...the natives of the islands...are our wards...for whom in a sense we are trustees...  
(Reprinted in House Report No. 839, 66th Cong., 2d Sess. (1920).)

That single statement seems to us inadequate as a basis for constructing a fiduciary relationship. There is nothing to suggest that Secretary Lane intended to offer a legal conclusion. Nor did the Committee that heard the testimony offer, in its later report, any observation concerning a Federal trust responsibility.

2. The court quoted a passage from the 1920 House Committee report and then concluded that the "tenor of the foregoing statement by the Committee also implies an intent to establish a trust relationship" (at p. 1167). But the quoted Committee statement uses neither any words of trust, nor any other language hinting at the creation of any kind of fiduciary relationship. There is no trust "intent" implied. Other contemporaneous legislative records that we have examined, including the Congressional Record for 1920-1921, are also free of any suggestion that a trust relationship was intended to be created.

3. The court concluded, without adding further support for its view, that under the Hawaiian Homes Commission Act, "the federal government set aside certain public lands to be considered Hawaiian home lands to be utilized in the rehabilitation of native Hawaiians, thereby undertaking a trust obligation benefiting the aboriginal people". The set aside of public lands for the benefit of native Hawaiians is unarguable, but the conclusion that this action resulted in a "trust obligation" is without foundation.

In the circumstances, we cannot view the Ahuna decision as providing useful guidance on this question.

Finally, the United States was not a party to the Ahuna litigation and, hence, the United States is not bound by it.

In light of the foregoing, we do not believe the United States served as a trustee for native Hawaiians under the Hawaiian Homes Commission Act during the period prior to Statehood, and we would be required to oppose legislation conferring upon the United States such an ex post facto role now.

I am sending a copy of this letter to the Chairman of the Senate Committee on Energy and Natural Resources to complete this part of the record of the hearing before his committee.

The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,



Timothy W. Glidden  
Counselor to the Secretary and  
Secretary's Designated Officer  
Hawaiian Homes Commission Act



EXECUTIVE CHAMBERS  
HONOLULU

JOHN WAIHEE  
GOVERNOR

February 18, 1992

Mr. Harold Bloom  
Assistant Inspector General for Audits  
Office of Inspector General  
United States Department of the Interior  
Washington, D.C. 20240

Dear Mr. Bloom:

I appreciate the opportunity to respond to the Draft Audit Report on the Hawaiian Homes Commission, Office of the Secretary (Assignment No. N-IN-OSS-017-91). This subject matter is of the utmost importance to beneficiaries of the Hawaiian home lands trust, the citizens of Hawaii, and the federal government. Unfortunately, it is extremely difficult to respond to the findings and recommendations of this report because of its peculiar nature. In order to be the most constructive, the attached paper first lists those findings which are inconclusive; secondly, findings to which the State strongly agrees; and thirdly, points raised by your audit that are not applicable because of actions taken by the State.

The one question that remains throughout our review of this draft audit is: what is the purpose of this report? This audit makes no attempt to be comprehensive. It offers what are considered failed measures of activity, but the starting and end points of the activity seem arbitrary and floating. On some issues the report belabors the obvious. On other issues, there seems to be deliberate avoidance of fact, particularly when it comes to the efforts of the citizens of Hawaii to rectify the wrongs committed against Hawaiian Home Lands Trust assets.

A true, comprehensive look at the Hawaiian Home Lands Trust and its programs will indicate that from the program's inception there was insufficient funding; hobbling regulations within the Act itself; and a corpus of land that by its physical nature simply can not be expected to nurture liveable, sustaining communities, without massive infrastructure improvements. In an ironic twist, the audit paints a picture of a program in trouble without describing the roots of problems, and identifying causes behind effects that if corrected, would further the mission of the trust.

Mr. Harold Bloom  
February 18, 1992  
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But who benefits from yet another retelling of the sad history of the Hawaiian home lands program? Is it possible that no one considers the bearer of bad news in any way responsible?

The State's responses to this audit have been officially submitted by my office, the Office of the Attorney General, and the Department of Hawaiian Home Lands. It is truly regrettable that, because of the construction of this audit, these responses have but taken time and efforts away from furthering the program and repairing the trust.

With respect,

Sincerely,



JOHN WAIHEE



EXECUTIVE CHAMBERS  
HONOLULU

JOHN WAIHEE  
GOVERNOR

RESPONSES TO THE DRAFT AUDIT REPORT  
ON THE HAWAIIAN HOMES COMMISSION

1. Responses to the findings and recommendations section, subsection (A) The Home Lands Program:

In this section, three findings are stated as indicators that the implementation of the Hawaiian Homes Commission Act has not been effectively accomplished.

(a) The audit's first finding is that only 16 percent of available lands have been awarded to native Hawaiians for homesteading.

The audit makes no finding on what percentage of the trust is suitable for homesteading, feasible for homesteading, or geographically proximate to areas that can be readily homesteaded. It is unknown as to whether auditors had made any physical inspection of the Hawaiian home lands, whether they were aware that thousands of acres are remote, arid, on cliffs, and have other features which make homesteading difficult and expensive, if not impossible.

The draft audit finds that if the program were to continue to make homestead awards at the annual average rate of awards made from 1959 to 1991 then it would take 83 more years to serve all estimated applicants on the waiting list. (There is, for some unknown reason, an arbitrary exclusion of awards made in the fall of 1990 in this calculation.) It is the opinion of the auditors that this is not satisfactory progress in meeting the needs of the native Hawaiian population.

We agree that 83 years would be too long. The State, however, would not presume, as the auditors have, to measure the future with the pitiful yardstick of the past. If the State chose the same logic, we could take the number of awards made during the territorial years and calculate that it would take 250 years to serve the waiting list beneficiaries based on the federal government's level of activity in the program (1,637 awards/38 years = 44 awards per year, then 11,000 waiting applicants/44 awards per year = 250 years). We would submit that both calculations are of greater interest to academics than to serious policy makers and planners.

Until there are no longer any beneficiaries on the waiting list, the State must remain dissatisfied with whatever the number of homestead awards to native Hawaiians. The State's record indicates there is a commitment to continuously improve quality and performance. Over time, the efforts and resources increased as it became clearer what was required to meet the Trust's obligations.

(b) The audit finds that Home lands have been made available for public use by Federal and State government agencies in violation of the Act.

In fact, over 29,000 acres were withdrawn for public use during the federal period prior to statehood, and 3 acres after statehood. These findings are enumerated in the 1983 Federal State Task Force Report.

The audit seems to ignore that the State has undertaken significant steps to resolve issues related to improper transfers of land out of the home lands trust. One year prior to the release of this draft audit, the Governor presented the state legislature with an Action Plan to Address Controversies under the Hawaiian Home Lands Trust and the Public Land Trust, an implementation instrument of the 1983 Federal State Task Force Report. Prominent in the recommendations made in the Action Plan was the convening of the Task Force on Department of Hawaiian Home Lands (DHHL) Land Title and Related Claims. As stated in the Governor's State of the State address in January 1991, the Task Force was to "accelerate the process of clearing title and compensating the trust for illegal or improper withdrawals, transfers, takings or uses".

Preliminary findings of the Task Force were available at the time of the audit.

The Hawaii legislature is currently acting on the first package of resolutions recommended by the land claims Task Force, which include documented confirmation that lands were taken from the home lands trust by executive order and proclamation issued by territorial and state governors. The package includes compensation, including interest, to the Department of Hawaiian Home Lands for back rent for public use of those parcels during the period from statehood to June 1992, based on valuations by independent appraisals.

The Task Force intends to seek back rent for use of Hawaiian home lands during the territorial period from the Federal government, as well as the return of DHHL lands under federal control. It should be noted that the 1983 Federal State Task Force Report recommended return of all lands under government executive orders and proclamations. The State complied, and is now taking the necessary steps to further compensate the trust. The Federal government has not complied, depriving the trust of valuable lands and revenue.

A second and final package of recommended resolutions is expected to go to the state legislature in 1993. The package will address title claims, questionable land exchanges, improper or unauthorized uses of trust lands, and other claims submitted by the Hawaiian Homes Commission.

The draft audit made only one brief reference to the Action Plan ("a December 1990 report") as the source for a description of trust lands leased to the military at nominal rates. The State's Department of Land and Natural Resources issued two leases to the military in 1964 which include about 321 acres of trust land. The terms of both leases are \$1 for 65 years. The Task Force recommendations now before the legislature include a calculation of what is owed to the trust in back rent compensation.

(c) The audit recounts that many native Hawaiians have been waiting as long as 30 years and some have died while awaiting homestead awards.

The State believes it is a tragedy that a waiting list exists at all. We do not forget it was the sight of homeless Hawaiians at the turn of the century that motivated civic minded Hawaiians and members of Congress to pass the Hawaiian Home Commission Act. However, we question the appropriateness of the other yardsticks the audit uses to measure program success.

The audit found that within a four year period between 1987 and 1991, 140 applicants died before receiving an award. The audit says "some" of those who died had been waiting over 30 years. Those who died while waiting more than thirty years became applicants during the territorial period. There are no numbers of how many other beneficiaries died while waiting on the list during the territorial period, when awards averaged 44 a year.

The most recent study of the waiting list indicates that 1.4% of all applicants have waited 30 years or more. A large number of that group of 275 people were on the Waimea pastoral list in the early 1950's that was dissolved after awards had been made and before a new list was formed. The early 1950's applicants were restored to the top of the list in 1984 after they claimed they were never properly notified of the first list's discontinuation. Many of the early applicants subsequently received lots in 1990. Other long term applicants have chosen to defer acceptance of awards more than once because, for example, they are hopeful of awards in different locations.

The audit also includes the findings of a study on homeless population that found that roughly a third of the native Hawaiians surveyed were on the waiting list. The study does point to the urgent need for housing for the homeless. However, the use of this study in the audit demonstrates the auditors' lack of knowledge of the Hawaiian Homes Commission Act and its program. As enacted by Congress in 1921, the Hawaiian home lands program is not a needs based program. Under the Act, beneficiaries, irrespective of their income or social need, are entitled to homesteads on the basis of their

Hawaiian blood quantum, and are served in the order of their place on the waiting list. Further, the burden of the homeless is a responsibility of the greater community, irrespective of who the homeless are.

In fact, the Hawaiian homes program is often the least capable to care for native Hawaiian homeless. A homestead land award may be leased for \$1 a year for 99 years, but building the structure on that land has never been free to either the Department or the beneficiary. Shelter for the homeless is a massively subsidized program. But since federal funds are denied to Hawaiian home lands generally as a result of the federal administration's characterization of the program as a racially-discriminatory program, federal money that would be available to subsidize homeless shelter and programs cannot be used on Hawaiian home lands.

2. Comments with respect to the federal government's role in the program:

The audit says the Hawaiian Homes Commission Act was "administered by the Hawaii territorial government" with no reference to the fact that territorial governors (who served as Commission chairmen), the attorney generals, and judges were federal appointees and served at the pleasure of the President. Just as the State cannot deny its responsibility, although policies are independently set by the Commission, neither can there be a reference of administration by the territorial government without acknowledging direct federal responsibility.

It is highly significant that the background section of the draft audit lists only those federal responsibilities currently acknowledged by the Department of the Interior. The audit quotes a 1989 letter from the Secretary of the Interior stating two responsibilities Interior has with respect to the Act. The first is the responsibility to review proposed land exchanges. The second responsibility, generated by the 1983 Federal-State Task Force, is for Interior to serve as the lead federal agency on matters concerning the Hawaiian home lands program.

The audit does not acknowledge that the 1989 letter reverses the Department's position in 1979, as stated in an opinion issued by the Office of the Solicitor for the Department of the Interior to the U.S. Commission on Civil Rights. The 1979 opinion states that Interior's position is "essentially that of a trustee" and that the U.S. held title to the lands "in trust for native Hawaiians." The opinion further states "the responsibilities of the Federal government are more than merely supervisory and the United States can be said to have retained its role as trustee under the act while making the State its instrument for carrying out the trust."

There is also no acknowledgement of federal oversight responsibilities including Section 5(f) of the Admission Act which states that any use of lands, including land under the Hawaiian Homes Commission Act, other than uses stated would be considered a breach of trust "for which suit may be brought by the United States."

Only much later in the audit is there a section on oversight in which it plainly states the Department of the Interior has not fulfilled its responsibility. The audit includes the Secretary of the Interior's claims that Interior has no responsibility for bringing suit since only the Department of Justice could take such action. In addition, the audit says current Interior officials state they were never given the authorization or resources to establish a proper oversight role.

While the audit overlooks a major federal responsibility in its background section, in the very next section of the report, the Findings and Recommendations section, the audit states that over the years "both the Federal and the State Governments have not acted in the best interest of the native Hawaiians in the administration of the Home Lands Program." The audit continues, "A lack of adequate funding, inadequate planning and management, and inaction by Federal and State agencies contributed to the current deficient condition of the Home Lands Program." We agree that conditions of the program are the result of both Federal and State government actions.

The audit outlines the improper land transfers, withdrawals, and conveyances that occurred during the territorial period, and squarely states that this came about because, "the U.S. Government allowed the lands designated by the Act as 'available lands' and that were not made immediately available for homestead purposes to be managed by the Territorial Commissioner of Public Lands and not the Home Commission." The State would agree this was one of the contributing factors, but not the sole contributor. The trust was established without any regular funding, requiring the program to become totally dependent on sources of revenue which the Commission was not allowed to manage on its own. In addition, the Federal government diverted revenues earned from the trust's own assets by placing ceilings on the amount of revenue that could be collected in the trust's own accounts, giving the surplus to the general fund of the Territory. Finally, even if the Home Commission had sole jurisdiction over its assets, the Home Commission and the Territorial Commissioner of Public Lands, as well as the Territorial Governor, were federal appointees. Therefore, there remains the possibility that actions may still have been taken to benefit the Federal government by any of those agents.

An important inquiry that is not included in this audit is the means and extent of repair of the trust for any actions taken. Wrongful land transfers, withdrawals, conveyances and takings during the territorial period constitute

federal breaches of the trust for which there is no remedy. Under State laws, beneficiaries may sue for breach of trust in state courts (Act 395, Session Laws of Hawaii 1988); file claims to seek retroactive remedies for actions occurring from statehood to 1988 (Act 323, Session Laws of Hawaii 1991); have the trust corpus restored through compensation and land with administrative and legislative actions. No such judicial or administrative remedy exists at the federal level. In fact, the Federal government, through the Departments of Interior and Justice, seek to deny federal responsibility for any wrongful actions taken prior to, or continuing since, statehood.

The draft audit steps very gingerly around the recommendations of the 1983 Federal State Task Force. In laying out the factors leading to the Secretary of the Interior's proposing the Task Force, the audit again states the shared responsibility of the Federal and State governments by stating neither governments were committed to financing the program. If lack of funding was a motivation, then it should be noted for the record that there has been no federal funding since the Task Force report, save Congressional appropriations questioned and blocked by the federal administration. The State, on the other hand, has increased its funding since 1983.

The audit concludes that the 134 recommendations issued by the Task Force have not been implemented or have not been effective. The State disagrees with such a quick dismissal of the Task Force's work, and wonders whether the assessment is an indication of how serious the Department of the Interior has taken the implementation of the Task Force's findings. The State considers Task Force recommendations a first major impetus for reform and remedial action. Congressional and state legislative committees have required three status reports in the last five years, the most recent submitted to the U.S. Senate Committee on Energy and Natural Resources in January, 1992. The report indicates that the State has completed, or is more than half way towards completing two-thirds of the recommendations identified as State responsibilities. Not all the recommendations will be implemented as some recommendations are duplicative and others are no longer relevant; however, the State has shown that the recommendations served as important guide posts over the past nine years. In numerous community meetings, beneficiaries have made it clear that they still consider the Task Force's findings to be the measure of success, or lack of success, of the program.

While the Department of the Interior points to its sole act of compliance with one Task Force recommendation, to serve as a lead federal agency on matters concerning the Hawaiian home lands program, the audit makes no attempt to be comprehensive on the status of all the federal recommendations.

The audit does note that Interior did not follow the Task Force recommendation to Interior to make a formal assessment of progress in correcting the problems in the two years following the release of the Task Force report.

The audit report points out that although the Task Force's recommendation to make matching state and federal contributions of \$25 million each year for five years was never followed, the State did appropriate \$25.4 million for capital improvements during the succeeding five years. The audit failed to report that the State made appropriations to the program from general funds, bond funds and other sources each year since statehood with the exception of one year shortly after statehood. Since fiscal year 1985, State has made available \$114 million for Hawaiian home land capital improvements. (This total is exclusive of funding for operations and administration, and \$25 million requested for fiscal year 1993.)

While the audit noted the federal government has failed to make contributions to the program as recommended by the Federal State Task Force, it correctly states that the Act does not require such contributions. It should also be noted that the Act makes no such requirement of the State either. Hawaii's constitutional mandate to fund the program was initiated by Hawaii's citizens in a 1978 constitutional convention, almost 20 years after statehood.

The audit mentions that the Hawaiian Homes Commission has received Federal Community Development Block grants totaling \$1.2 million, but fails to note that until only a few months ago, the Federal government prohibited the use of the funds, since they interpret the home lands funding as federal dollars being used to benefit a "racial class." Further, only through "corrective" legislative language have funds been released, though the federal government is still restricting these monies from being used directly on Hawaiian home lands.

The audit states the State legislature did not appropriate operating funds for DHHL until fiscal year 1989, however it overlooks the fact that appropriations have been made for loan programs, education programs, capital improvements and other purposes continuously since statehood. After taking into account supplemental appropriations currently before the 1992 legislature, total appropriations from the State of Hawaii to the Hawaiian home lands program is close to \$270 million dollars.



JOHN WAIHEE  
GOVERNOR  
STATE OF HAWAII

HOALIKU L. DRAKE  
CHAIRMAN  
HAWAIIAN HOMES COMMISSION

STATE OF HAWAII  
DEPARTMENT OF HAWAIIAN HOME LANDS

P. O. BOX 1879  
HONOLULU, HAWAII 96805

February 14, 1992

Mr. Harold Bloom  
Assistant Inspector General  
for Audits  
Office of Inspector General  
Department of the Interior  
Washington, D. C. 20240

Dear Mr. Bloom:

Thank you for your letter of December 24, 1991, which transmitted a copy of the draft audit report on the Hawaiian Homes Commission and asked for our comments by February 17, 1992.

The audit recommends that the Hawaiian Homes Commission suspend implementation of the 10-year plan until (a) a viable needs assessment has been performed that accurately identifies the extent of the eligible native Hawaiian population and of its associated needs and (b) it can be demonstrated that the plan is financially viable.

We do not concur in the recommendation for a number of reasons. First, there apparently is a misunderstanding as to the "10-year plan." In our view the department has set a goal to provide 14,000 housing units by the year 2000. The financial requirements to reach that goal, assuming that all units were to be built by the department, were preliminarily estimated. In working on the first increment of that target, the department has developed a plan (referred to in the audit as the "four-year plan") to provide approximately 4,000 completed lots, or substantially-completed lots by December 31, 1994. Housing units to be built on those lots include multi-family units, homes built by lessees themselves through their own contractors or through self-help construction, as well as turn-key houses. Home financing will be provided through loan guarantees and through departmental funds.

Mr. Harold Bloom  
Page 2  
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Secondly, we do not view providing affordable housing as diminishing benefits to our beneficiaries. The need for affordable housing has been voiced strongly by beneficiaries. A survey made of lessees and applicants to obtain demographic and economic data provided information on housing needs, although the survey was not a market analysis. The median price of a home in Hawaii is \$315,000; we strongly believe that our providing a home priced at \$75,000 directly helps our beneficiaries.

Finally, it is difficult for us to accept your recommendation that our housing effort be suspended, particularly after your audit has found that the State has not "adequately delivered homesteads to beneficiaries," "has not made significant progress in awarding homestead lots," "of the 1,731 beneficiaries who were awarded residential lots...only 105 have built homes," and that if the program is to operate at the same rate in the future, "it would take 83 years to service just the estimated 11,000 applicants..." We concur in these findings and we strongly believe that positive actions must be taken to put beneficiaries on the land. Suspending our housing effort will be taking a step backwards.

Enclosed are comments on findings that relate to your recommendation. The discussion includes information on what has been done and is being done since the time of the audit.

We appreciate very much the opportunity given us to review the draft audit report and to offer these comments. If your office would like further information or clarification of our concerns, please do not hesitate to let us know.

Warmest aloha,



Hoaliku L. Drake, Chairman  
Hawaiian Homes Commission

Enclosure

cc: Mr Sam W. Gillentine  
Regional Audit Manager  
North Pacific Region  
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PDN Building, Suite 807  
Agana, Guam 96910

DEPARTMENT OF HAWAIIAN HOME LANDS  
COMMENTS ON THE DRAFT AUDIT REPORT

The draft audit report of the U. S. Department of the Interior, Office of Inspector General, dated December 1991, recommends that the Hawaiian Homes Commission suspend implementation of the 10-year housing plan until (a) a viable needs assessment has been performed that accurately identifies the extent of the eligible native Hawaiian population and of its associated needs and (b) it can be demonstrated that the plan is financially viable.

At the outset, it is necessary to point out that it is inappropriate to characterize the DHHL's long-range housing goal as a plan. It is equally inappropriate to characterize the four-year plan as a means of determining the "feasibility of the larger plan."

In August 1989, the U. S. Senate Select Committee on Indian Affairs and the U. S. House Committee on Interior and Insular Affairs held hearings throughout the State on the administration of the Hawaiian Home Lands Program. During those hearings beneficiaries strongly conveyed a need for affordable housing. The provision of homestead leases under the Act was seen as a way to meet the needs of native Hawaiians for affordable housing.

In October 1989, DHHL and the State Housing Finance and Development Corporation met as a Housing Sub-Task Force to determine (1) current housing needs of native Hawaiian families; (2) how much of that need is being addressed by DHHL and other state programs; and (3) if there is a short-fall between current needs and available programs to address those needs and what additional resources would be necessary to address any short-fall.

The Housing Sub-Task Force determined a reliable assessment of current and projected needs could be made from analyzing and evaluating DHHL's existing waiting lists for homestead leases. On October 28, 1989, a housing needs assessment was completed and resulted in an estimated short-fall of 13,870 DHHL housing units by the year 2000.

The 1989 "plan" covering a 13-year period was a very preliminary assessment of current and projected housing needs, with approximate financial requirements. It estimated the number of housing units that could be provided through master-planned communities as well as existing subdivisions.

Based on estimated unit costs, total infrastructure and house construction costs were determined. In addition the projected external mortgage funding and interim loan funds required were calculated, over the first three-year period and over the last 10-year period. The "plan" did not commit the department to specific project locations, nor did it identify specific resource requirements, such as additional staffing, consultant help, or types of infrastructure that needed to be provided in certain locations. The data compiled was used primarily to determine a housing goal to meet the needs of applicants on the waiting lists.

Following a departmental retreat held June 28-30, 1991 attended by all members of the Hawaiian Homes Commission and key departmental staff, the department set as a long-range goal, the provision of 14,000 housing units for beneficiaries.

Immediately following the retreat, a task force comprised of planning, development, homestead services, legal, fiscal and administrative staff, was convened by the Chairman to develop a strategic plan to identify actions to be taken during the period July 1, 1991 through December 31, 1994. This planning effort has resulted in the identification of the following targets to be accomplished: 4,124 lots completed or substantially completed for building.

It is important to note that the lots to be completed include nearly all of the lots that have already been awarded, agricultural and pastoral lots as well as residential lots, developments for multi-family units, and that many lots will be built upon by the lessee rather than the department. This plan also includes developments for which funds have already been appropriated as well as developments for which funding will be requested.

This plan is in effect an infrastructure development plan (as recommended by the auditors) and not a plan "...to determine the feasibility of the larger plan."

#### Land Inventory and Land Use

The auditors found that there was no "correct inventory" of Hawaiian home lands and commented on the lack of maps of Hawaiian home lands. (Page 17) The auditors also found that the administrative rules require the development and adoption of a general plan, and commented on the need to survey and inventory all 34 tracts of Hawaiian home lands. (Page 27)

The auditors' findings need to be corrected. There are thirty-four locations on the islands of Hawaii, Maui, Molokai, Oahu and Kauai in which Hawaiian home lands are located. The

department has maps for every known parcel of Hawaiian home lands. In fourteen of the thirty-four locations, metes and bounds descriptions and maps detailing the exact boundaries and acreages of Hawaiian home lands are available. In twelve locations, the department has claims to lands in addition to those already known by metes and bounds description and maps. As to the remaining eight locations, maps reflecting the outer boundaries are available. However, no survey has been conducted detailing the specific metes and bounds descriptions and acreages contained therein.

The lack of an accurate land inventory can be traced to the original Act because it did not specify exact acreage or provide specific boundary descriptions. At DHHL's request the Bureau of Land Management, Department of the Interior, completed an assessment of survey needs in June 1991. The report estimates that \$1.75 million will be needed to survey all 34 tracts.

A general plan was developed and adopted in 1976, and does provide guidance on land use although portions need to be updated. DHHL has retained consultants to examine certain large tracts of land to recommend appropriate uses of the land in consideration of physical and environmental conditions, requirements for infrastructure and utilities, land use, water and natural resources, and other factors. These assessments, some of which have been completed, will provide the department with needed information on how best to use the lands for homesteading and other objectives.

#### Illegal Takings and Improper Land Transfers.

The auditors note that, at page 9, "During the 38-year period from 1921 through 1959, the U. S. Government served as trustee of the Hawaiian home lands for the benefit of native Hawaiians. However, the Territorial Commissioner of Public Lands continued, with authority limited by Section 212 of the Act, to control all home lands not being used by the Hawaiian Homes Commission for homesteading purposes." At page 10 the auditors cited the 1983 Federal-State Task Force findings of improper transfers under executive orders and the conveyance of Hawaiian home lands to private parties. The auditors, however, do not note actions being taken to address DHHL land claims, unlawful takings, and the use of trust lands without compensation.

In 1988 the Native Hawaiian Judicial Relief Act was enacted (Act 395, SLH 1988) granting beneficiaries the right to sue for breach of trust for actions that occurred from July 1, 1988. The 1988 legislation also required the Governor to submit an action plan to resolve controversies that had occurred prior to that date. The State Legislature has

accepted the Governor's Action Plan with amendments, is highly supportive, and has assumed oversight of the plan's implementation.

One of the recommendations of the Governor's Action Plan provided for the formation of a Land Claims Task Force made up of the Office of State Planning, DHHL, the Department of Land and Natural Resources, and the Attorney General. The Task Force has been working since February 1991 to verify and accelerate resolution of this department's claims. A first settlement proposal has been developed to address compensation for the past use of 29,700 acres of Hawaiian home lands that had been set aside for public purposes by Executive Orders and Governor Proclamations.

The settlement proposal has been taken to the beneficiaries through public meetings that DHHL held last month to obtain their input. The Commission met February 10 to consider the beneficiaries' comments and recommendations and to decide on the proposed settlement, which includes cash, lands, or a combination of both cash and land. The settlement package is now before the State Legislature. Other settlement packages are scheduled for presentation next year.

#### Criteria for Selection and Waiting Lists

The auditors state the opinion that requiring beneficiaries to qualify for FHA or FmHA mortgage loans "subject beneficiaries to additional qualifying criteria in order to receive or retain a residential homestead lease and diminish the benefits intended by the Act." (Page 21) The auditors also concluded that the 10-year housing "plan" requires families to relocate to less desirable locations to receive their leases.

The auditors found the current applicant waiting list inaccurate. In awarding 57 completed houses, the department excluded 209 because they had not proven their bloodlines. Many others were excluded because they were not interested. Based on declinations and rejections, the auditors concluded that "at least 5,060 of the 11,000 applicants would not qualify as native Hawaiians or are not actually interested in obtaining homesteads." (Page 25)

The department does not believe that awarding residential lots with a house on it diminishes the benefits intended by the Act. Section 207(b) of the Act states in part: "The department shall, whenever tracts are available, enter into such a lease with any applicant who, in the opinion of the department, is qualified to perform the conditions of such lease."

Section 208(3) of the Act provides: "The lessee may be required to occupy and commence to use or cultivate the tract as the person's home or farm or occupy and commence to use the tract for aquacultural purposes, as the case may be, within one year after the commencement of the term of the lease." Section 10-3-39 of DHHL Administrative Rules provides: "The time period by which a lessee is required to occupy a residential lot or to commence use of an agricultural or pastoral lot shall be stipulated in the lease."

In the case of fully improved residential lots, the department has required the lessee to build a home within one year from the commencement date of the lease. In most instances, as confirmed by the audit, lessees have not built on their lots.

Providing a house and lot is viewed by the department as a direct means of ensuring that a residential lot will be put to the use for which it is intended. More important is the consideration that a department-built home, because it is constructed at the same time as others in the same subdivision and construction contracts are awarded through competitive bidding, results in lower building costs. (The lessee does not pay for any of the land development costs.)

The department's authority to build houses for beneficiaries and to require that beneficiaries be financially able to assume the cost of building does not diminish benefits. It is no different from the express authority given the department by Section 207 of the Act to develop and construct multifamily housing units. When multifamily units are awarded lessees occupying such units will need to qualify for mortgage loans if they do not have the cash to purchase the units.

The auditors' comments on the waiting lists are well taken. The department recognizes the need to purge the lists of persons who do not meet bloodline requirements, are no longer interested in the program, as well as deceased applicants. There is also a need to reconcile applicant records with computerized data and the department has begun a project to correct the lists.

It should be noted that the reason there are persons who are not native Hawaiian on waiting lists is due to the fact that those on the list in the earlier years were not required to produce documented proof of native Hawaiian blood qualification. Prior to the documentation requirement applicants merely filed affidavits attesting to their blood quantum.

Throughout the audit report reference is made to 11,000 applicants on the waiting list. This number may have been cited with reference to residential waiting lists. As of December 31, 1991, there were 21,816 applications on file. Of this number 12,712 were applications for residential lots.

The number of applications does not represent individuals because a person may apply for two types of leases and inactive applications have not been purged from the list. Members of the same family applying for homestead lots also tend to overstate demand. However, it would be erroneous to estimate that 50% "would not qualify as native Hawaiians or are not actually interested in obtaining homesteads."

The department has the least lands on Oahu, 6,612 acres, less than 4% of total holdings. Yet this is the island with the highest demand for residential homesteads. It is estimated that about 67% of our applicants would prefer a residential homestead on Oahu if more lands were available.



JOHN WAIHEE  
GOVERNOR

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ATTORNEY GENERAL

CORINNE K. A. WATANABE  
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February 14, 1992

Mr. Harold Bloom  
Assistant Inspector General for Audits  
United States Department of the Interior  
Office of the Inspector General  
Washington, D.C. 20240

Dear Mr. Bloom:

Re: Draft Audit Report on the Hawaiian Homes Commission,  
Office of the Secretary (Assignment No. .  
N-IN-OSS017-91)

This responds to your letter of December 24, 1991, by which you transmitted a copy of the above-referenced draft audit report presenting the results of your review of the Hawaiian Homes Commission.

Referring to the draft audit report, your letter pointed out the specific finding that the Hawaiian Homes Commission may not have complied with the free and open competition requirements of State law when it conducted preliminary discussions with a private developer regarding the (10-year plan's) Kawaihae project. You recommended that the Hawaii Attorney General investigate preliminary dealings between the Department of Hawaiian Home Lands and the private investor and developer to determine whether contracting or other provisions of State law were violated.

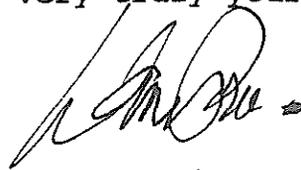
We have investigated the matter and have concluded that no violations of State law occurred. Under section 220.5(a) of the Hawaiian Homes Commission Act, 1920, as amended, the Hawaiian Homes Commission is expressly authorized to enter into contracts to develop available lands for homestead, commercial, and multipurpose projects, and it is not subject to competitive bidding requirements if no state funds are to be used in the development of the project.

Mr. Harold Bloom  
February 14, 1992  
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Further, it is our opinion that the Hawaiian Homes Commission acted appropriately and in keeping with its responsibilities when the Commission made further inquiries of the prospective developer after it received the developer's proposal.

We therefore, urge you to amend your findings and recommendation.

Very truly yours,

A handwritten signature in black ink, appearing to read "Warren Price III", with a stylized flourish at the end.

Warren Price III  
Attorney General

WP/GKKK:csa  
9089R

STATUS OF AUDIT REPORT RECOMMENDATIONS

<u>Findings/ Recommendation Reference</u>	<u>Status</u>	<u>Action Required</u>
A.1	Unresolved.	Reconsider the recommendation, and provide a response stating a target date for directing Interior officials to establish an oversight system for monitoring Hawaii's activities in discharging its trust obligations with respect to the Hawaiian Homes Commission Act.
A.2	Unresolved.	Consider the new recommendation, and provide a response stating a target date for informing the State of Hawaii of the types of assistance the Department is willing to provide.
A.3	Unresolved.	Reconsider the recommendation, and provide a response stating a target date for determining and informing the Congress of any amendments to the Act, enacted by the State, which diminish benefits to native Hawaiians or are otherwise contrary to the intent of the Act.
A.4	Unresolved.	Reconsider the recommendation, and provide a response stating concurrence or nonconcurrence with the recommendation. If concurrence is indicated, provide a target date for

<u>Findings/ Recommendation Reference</u>	<u>Status</u>	<u>Action Required</u>
		developing a comprehensive home lands infrastructure development plan. If nonconcurrency is indicated, provide specific reasons for the nonconcurrency.
A.5	Unresolved.	Reconsider the recommendation, and provide a response stating concurrence or nonconcurrency with the recommendation. If concurrence is indicated, provide a target date for proposing legislation to sufficiently fund the Home Lands Program. If nonconcurrency is indicated, provide specific reasons for the nonconcurrency.
A.6	Unresolved.	Reconsider the recommendation, and provide a response stating concurrence or nonconcurrency with the recommendation. If concurrence is indicated, provide a target date for proposing legislation to provide adequate funding to the home loan fund. If nonconcurrency is indicated, provide specific reasons for the nonconcurrency.

<u>Findings/ Recommendation Reference</u>	<u>Status</u>	<u>Action Required</u>
B.1	Unresolved.	Reconsider the recommendation. If concurrence is indicated, provide the target date and the title of the official responsible for (1) performing the needs assessment and (2) demonstrating the financial viability of the plan.
B.2	Implemented.	No further action is necessary.