

# A Citizen of Hawaii in Opposition

Sent via DOI website Tuesday, August 19, 2014

U.S. Department of the Interior  
1849 C Street, NW August  
Washington, D.C. 20240

DOI Regulation Identification Number 1090-AB05.

Dear Secretary Jewell:

Thank you for specifying that you seek input “solely” on “five threshold questions.” I begin with Hawaii’s Ceded Lands Trust, the source of the law dispositive of the five questions

Hawaii’s Ceded Lands Trust originated in 1898 with the Annexation Act, also known as the Newlands Resolution. The Republic of Hawaii ceded to the United States all the Republic’s public lands (about 1.8 million acres formerly called the Crown lands and Government lands of the Kingdom of Hawaii). But the cession was not without conditions. It required that all revenue from or proceeds of the ceded lands except for those used for civil, military or naval purposes of the U.S. or assigned for the use of local government "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes".

As part of the Annexation Act, the public debt of the Republic was assumed by the United States up to four million dollars.

The Organic Act of April 30, 1900, reiterated that “All funds arising from the sale or lease or other disposal of public land shall be applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the Joint Resolution of Annexation approved July 7, 1898.”

On June 4, 2008, the State of Hawaii, publicly accounted, at least in part, for and acknowledged that the Ceded Lands Trust costs the State many times more annually than the 1.2 million acres bring in. The State also acknowledged that this disparity between trust expenses and receipts has occurred in every year since statehood; and that the State has never before disclosed this information to the court.

The State’s motion with the accompanying memorandum in support contain the facts and declarations of budget director Georgina Kawamoto and other financial officials and provided: “We show in this memorandum that every year the State has spent billions for at least two of section 5(f)’s purposes – ‘the support of the public schools and other public educational institutions’ and ‘the making of public improvements.’” The significance to these parties is that the State’s expenditures for the Ceded Lands

exceeded the income by almost four times. Therefore as the State argued since the State has spent far more than the total Trust receipts the court in effect provided substantial benefits to Native Hawaiian beneficiaries at the expense of the other beneficiaries.

The special Ceded Lands Trust. Such a special trust was recognized by the Attorney General of the United States in Op. Atty. Gen. 574 (1899). The special trust for the people of Hawaii has also been recognized several times by the Hawaii Supreme Court.

The federal government has always recognized the people of Hawaii as the equitable owners of all public lands; and while Hawaii was a territory, the federal government held such lands in 'special trust' for the benefit of the people of Hawaii. *State v. Zimring*, 58 Hawaii 106, 124, 566 P.2d 725 (1977).

Excepting lands set aside for federal purposes, the equitable ownership of the subject parcel and other public land in Hawaii has always been in its people. Upon admission, trusteeship to such lands was transferred to the State, and the subject land has remained in the public trust since that time. *Id* at 125.

*Yamasaki*, 69 Haw. 154. 159, 737 P.2d 446, 449 (1987); see also Hawaii Attorney General Opinion 95-03 July 17, 1995 to Governor Benjamin J. Cayetano from Margery S. Bronster, Attorney General,

Section 5 [Admission Act] essentially continues the trust which was first established by the Newlands Resolution in 1898, and continued by the Organic Act in 1900. Under the Newlands Resolution, Congress served as trustee; under the Organic Act, the Territory of Hawaii served as Trustee.

The insistence of the Republic of Hawaii in 1898 that the United States hold the ceded lands solely for the benefit of the inhabitants of Hawaii was based on historic precedent and had significant, long-reaching consequences for the future State of Hawaii. The United States had held a similar trust obligation as to the lands ceded to it by the original thirteen colonies. Other future states, Nevada for example, did not have such an arrangement. As the court held in *U.S. v. Gardner*, the United States still owns about 80% of the lands in Nevada and may sell or withhold them from sale or administer them any way it chooses.

That basic principle of trust law enforcing legitimate contractual obligations under which a state holds public lands of great value in a perpetual trust is now found in Restatement (Third) of Trusts § 64 (2003) Current through August 2009, § 64. Termination Or Modification By Trustee, Beneficiary, Or Third Party

**(A) Except as provided in §§ 65<sup>1</sup> and 68, the trustee or beneficiaries of**

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<sup>1</sup> § 65 covers termination or modification by consent of beneficiaries, inapplicable in the case of perpetual public trusts such as Dartmouth College or Hawaii's Ceded Lands Trust.

§ 68 covers dividing and combining trusts "if doing so does not adversely affect the rights of any beneficiary." Again, inapplicable because dividing the Ceded Lands Trust by giving native Hawaiians the exclusive benefit of 200,000 acres while still retaining their full rights in the remaining trust corpus would adversely affect the other beneficiaries.

**a trust have only such power to terminate the trust or to change its terms as is granted by the terms of the trust.**

**(B) The terms of a trust may grant a third party a power with respect to termination or modification of the trust; such a third-party power is presumed to be held in a fiduciary capacity.**

Since the terms of the offer by the Republic and acceptance by the United States gave no trustee, beneficiary or third party any right to modify or change the terms of the Ceded Lands Trust, except in a fiduciary capacity, as a matter of law, neither the State of Hawaii, nor the counties, nor Congress, whether by the Apology resolution or any other law, has the power to impair the obligations to all the people of Hawaii undertaken by the United States in 1898 in the Annexation Act, and assumed by the State of Hawaii in 1959.

#### The five “threshold” questions

- Should the Secretary propose an administrative rule that would facilitate the reestablishment of a government-to-government relationship with the Native Hawaiian community?
- Should the Secretary assist the Native Hawaiian community in reorganizing its government, with which the United States could reestablish a government-to-government relationship?

- If so, what process should be established for drafting and ratifying a reorganized native Hawaiian government's constitution or other governing document?
- Should the Secretary instead rely on the reorganization of a Native Hawaiian government through a process established by the Native Hawaiian community and facilitated by the State of Hawaii, to the extent such a process is consistent with the Federal law?
- If so, what conditions should the Secretary establish as prerequisites to Federal acknowledgement of a government-to-government relationship with the reorganized Native Hawaiian government?

Hawaii has transferred \$1 Billion to OHA since 1978.

The undersigned tallied the total transfers to OHA from State and OHA publications back to the beginning in 1978. The total was just over 1 \$ Billion. Exhibit A. Amazing! That's way too much for this small state's economy. When will it end? This former U.S. Marine Corps peacetime fighter pilot loves the U.S.A. and the Aloha State. But, both are only trustees. The Ceded Lands are for all the people of Hawaii, not just for the natives. After all, the Hawaiians are immigrants to these islands too!

Semper Fi and Aloha for all,

H. William Burgess

## State of Hawaii transfers to OHA 1981 - 2015

(Per fiscal year as shown by OHA financial reports or by Legislative acts.)

FYE 6/30	General Fund	Public Land Trust	Interest/Dividends earned
1981	225,000	1,553,935	35,909
1982	415,466	1,117,005	252,572
1983	540,785	1,380,037	190,613
1984	535,861	1,493,209	167,526
1985	567,178	1,368,834	290,876
1986	589,310	1,452,541	210,219
1987	596,881	1,691,827	214,347
1988	1,297,395	1,188,960	249,635
1989	1,347,638	1,238,429	312,421
1990	2,080,692	1,616,181	363,996
1991	2,052,962	10,800,153	671,492
1992	3,590,887	8,993,725	842,856
1993	3,854,524	139,957,130 *	1,181,983
1994	4,026,704	18,747,890	5,216,977
1995	3,584,625	25,087,967	8,199,984
1996	3,496,698	12,329,159	8,802,574
1997	2,772,596	7,124,122	9,513,999
1998	2,808,201	15,106,347	10,857,620
1999	2,729,382	15,100,000	10,626,578
2000	2,550,922	8,238,109	10,798,857
2001	2,519,663	8,261,921	11,465,433
2002	2,619,663	6,535	9,909,545

EXHIBIT A

FYE	General Fund	Public Land Trust	Interest/Dividends
2003	2,532,663	17,543,804	8,444,469
2004	2,532,647	9,740,578	3,492,365
2005	2,498,960	10,798,706	6,339,076
2006	2,755,011	32,599,833	11,417,954
2007	2,828,459	15,100,000	59,721,358
2008	3,043,921	15,100,000	(23,093,322) loss
2009	2,965,721	15,100,000	(72,868,961) loss
2010	2,307,596	15,100,000	38,183,868
2011	2,311,873	15,100,000	68,249,761
2012	2,370,872	5,810,847	311,111,111 **
2013	2,370,872	5,810,847	613,613
2014	3,141,574 ***	6,580,277	
2015	<u>2,741,574</u>	<u>6,180,277</u>	
	\$79,204,776	\$454,419,185	\$501,987,304

\* includes \$134,584,489 pd in 1993 for period 6/16/80 - 6/30/91

\*\* includes \$200 Million value of Kakalako land given to OHA

\*\*\* Act 170 SLH 2013 for fiscal biennium beginning July 1, 2013 and ending June 30, 2015, appropriates or authorizes as the case may be to the OHA for the purposes and in the aggregate amount stated in the Act.

GRAND TOTAL: \$1,035,611,264

Note: Verify all amounts shown received by OHA for FYE, 1981-2013.