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The Honorable Neal Abercrombie
Governor, State of Hawaii

Via email and first class mail

The Honorable Trustees and Chief Executive Officer
Office of Hawaiian Affairs (collectively, "OHA")

Via email and first class mail

Dear Mr. Governor and OHA:

Re: Proposed giveaway of trust lands at Kaka'ako Makai valued at \$200 Million. S.B. 2783 enacted April 11, 2012 (the "Act").

The above Act would put the State of Hawaii, as trustee of the Ceded Lands Trust¹, even more deeply into the position where its interest in distributing trust funds and trust property to OHA for the betterment of native Hawaiian beneficiaries conflicts with its fiduciary duty to the rest of the beneficiaries.

The Uniform Trustees' Powers Act, HRS § 554A-5(b), and the common law it codifies, allow a trustee to exercise a trust power, such as the power to "to effect distributions of money and property," § 554A-3(c)(22), "only by court authorization" "if the duty of the trustee and the ... trustee's interest as trustee of another trust, conflict in the exercise of a trust power." The common law foundation of the UTPA is found in Restatement of Trusts, § 170.

The government as trustee has the same fiduciary duty as private trustees. *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 339, 640 P.2d 1161, 1189 (1982) (the conduct of the government as trustee is measured by the same strict standard applicable to private trustees, citing *United States v. Mason*, 412 U.S. 391 (1973)). See also *Price v. Akaka*, 928 F.2d 824, 827 (9th Cir. 1991) citing

¹ Hawaii's Ceded Lands Trust is sometimes referred to as the Public Land Trust and sometimes as the § 5(f) trust.

the Restatement 2d of the Law of Trusts as applicable to conduct of the State of Hawaii as trustee of Hawaii's Public Land Trust.

Yet, without court authorization, the State has distributed hundreds of millions in ceded lands trust funds and properties to OHA exclusively for native Hawaiian and/or Hawaiian beneficiaries but has distributed no ceded lands trust funds or properties to or exclusively for the rest of the beneficiaries. OHA still held over \$400 million of trust funds recently.

The same considerations apply to OHA and its trustees and officials. Under *Price v. Akaka*, 928 F.2d 824, 827 (9th Cir. 1991), so long as § 5(f) trust income remained in the hands of the state, as it did when transferred from the § 5(f) corpus to the OHA corpus, the § 5(f) obligations applied.

Since the § 5(f) trust funds continue to be held for *all* the people of Hawaii so long as the funds are in the hands of OHA, the OHA Trustees have a fiduciary duty to all the people that conflicts with their interest in bettering the conditions of native Hawaiian and Hawaiian beneficiaries at the expense of the other beneficiaries.

Please consider this as a demand that, before you, as Governor of the State of Hawaii, or any officer, employee, attorney, agent or agency of the State of Hawaii, exercise any powers to implement the above Act, you first submit to the Hawaii judiciary the Federal Question of whether the Act violates or its implementation would violate: The Equal Protection clause or other provisions of the Constitution or civil rights laws of the United States or the fiduciary duties of the trustee State of Hawaii and you and other State officials under the federally-created Ceded Lands Trust.²

² In *Kapiolani Park Preservation Society v. City & County*, 69 Haw. 569, 572 (1988), the Hawaii Supreme Court held that, where a governmental agency is the trustee of a charitable trust and

will not seek instructions of the court as to its duties, even though there is a genuine controversy as to its power to enter into a particular transaction and where the attorney general as *parens patriae* has actively joined in supporting the alleged breach of trust, the citizens of this State would be left without protection, or a remedy, unless we hold, as we do, that members of the public, as beneficiaries of the trust, have standing to bring the matter to the attention of the court.

The Hawaii Supreme Court later cited that ruling with approval in *Pele Defense Fund v. Paty*, 73 Haw. 578, 594, 837 P.2d 1247 (1992), a suit to enforce the State's compliance with the 5(f) trust provisions. "Additionally, unless members of the public and native Hawaiians, as

As to OHA, I demand that, before they take possession or exercise any management or control over the Kaka'ako Makai properties, the OHA Trustees and Chief Executive Officer first submit the same Federal Question to the Hawaii State judiciary.

I make these demands on behalf of my clients, including those in *Corboy v. Louie* and also on behalf of all similarly situated Hawaii citizens, who are beneficiaries and equitable owners of the Ceded Lands Trust.

The landmark *Rice v. Cayetano*, a dozen years ago, rejected Hawaii's efforts to provide racially discriminatory benefits to its 'Native Hawaiian' citizens. Yet that discrimination continues undeterred.

The ceded lands trust is for all the people of Hawaii, not just for natives; and you have sworn to uphold the Constitution and laws of the United States. Yet, since 1980, the Trustee State of Hawaii has distributed to OHA over \$400 million of receipts from the ceded lands trust for the betterment of the conditions of native Hawaiians as defined in the HHCA but made no such distributions for the other beneficiaries. Nor has OHA ever explained how its activities can be justified after the U.S. Supreme Court decisions in *Rice* and *Hawaii v. OHA*.

On June 4, 2008, the State of Hawaii, in Civil No. CV05-00649SOM/BMK in *Day v. Apoliona* in the U.S. District Court for the District of Hawaii revealed documentation showing the Ceded Lands Trust costs the State many times more each year than the 1.2 million acres bring in; that such a disparity between trust expenditures and receipts has occurred in every year since Statehood in 1959.

The Declaration of State Director of Budget and Finance Georgina K. Kawamura with exhibits A – H and the Declaration of Arthur Buto, State Land Systems Information Manager shows interest paid on bonds for various capital improvement projects for the five then most recent fiscal years. For example, the interest paid for FYE 2007 was \$237,494,513; total receipts from the § 5(f) lands for that year were \$128,480,574. From that he deducted: Airports receipts of \$41.8 million (which under federal law must be used for airport improvements); Affordable housing developments receipts of \$4.8 million; and reimbursements

beneficiaries of the trust, have standing, the State would be free to dispose of the trust res without the citizens of the State having any recourse.”

and pass-throughs of \$21.6 million; for the adjusted total receipts in FYE 2007 from the ceded lands of \$60,280,573. Thus, the interest expense of \$237.49M paid by the State for capital improvement bonds alone for FYE 2007 was almost four times the \$60.28M adjusted total ceded lands receipts that year. The State in its accompanying memo in support argued that “every year the State has spent billions for at least two of section 5(f)’s purposes:” (support of public schools and making of public improvements).

Because the State itself has proved the Ceded Lands Trust never generated any net annual income, (indeed never came close), no distribution of trust money or property exclusively to OHA for the betterment of native Hawaiian beneficiaries, while making no distributions to or exclusively for the other beneficiaries, could have ever been legal. This means nothing can be legally owed to OHA because of the past distributions. Rather, OHA should return all past distributions it still holds, with earnings, to the State for the benefit of all the people of Hawaii.

To recap: This is a demand that, before implementing the Act, you seek instructions of the Supreme Court of Hawaii as to the State’s conflicting fiduciary duties and interests in administering the Ceded Lands Trust.³ Specifically, the federal question to be presented should be:

When a State holds public lands in trust for all its citizens, does the Equal Protection Clause preclude the State from giving away trust lands worth \$200 Million to a State agency whose purpose and effect is to better the conditions of beneficiaries of a certain race at the expense of the other beneficiaries.

Until final judgment of the Supreme Court of Hawaii, and of the Supreme Court of the United States if certiorari is granted, the Act should not be implemented or take effect in any respect whatsoever.

By copy of this letter to the OHA Trustees and Chief Executive Officer, I hereby make the equivalent demand to them and OHA, i.e., that before implementing the Act or further expending trust funds or disposing of trust lands now in their hands, they first seek instructions of the Supreme Court of Hawaii and maintain the status quo as to the trust assets until final judgment.

³ Hawaii Rules of Appellate Procedure 18 provides for submission by the parties on agreed facts.

If I do not hear from you and the OHA Trustees, by the close of business June 22, 2012, I will proceed with steps necessary to protect the interests of my clients and other Hawaii citizens similarly situated.

Very truly yours,

/s/ H. William Burgess
H. William Burgess

CC via email:
David M. Louie, Esq.
Attorney General, State of Hawaii