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HAWAIIAN AFFAIRS Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EARL F. ARAKAKI, et al,	) **CIVIL NO. 02-00139 SOM-KSC**
	) (Declaratory Judgment)
Plaintiffs,	)
	) SUPPLEMENTAL MEMORANDUM
	) PER REQUEST OF THE HONORABLE
	) SUSAN OKI MOLLWAY RE
	) OFFICE OF HAWAIIAN AFFAIRS
vs.	) DEFENDANTS' MOTION FILED 04/14/03;
	) CERTIFICATE OF COMPLIANCE;
LINDA LINGLE, et al.,	) CERTIFICATE OF SERVICE

) **DATE: June 16, 2003**
Defendants.) **TIME: 9:00 a.m.**
) **JUDGE: Susan Oki Mollway**

SUPPLEMENTAL MEMORANDUM RE
OFFICE OF HAWAIIAN AFFAIRS DEFENDANTS' MOTION FILED 04/14/03

Pursuant to this Honorable Court's prior rulings, Plaintiffs do not have standing as trust beneficiaries to challenge the State's administration of the public land trust or to have "this court...declare unconstitutional one of the state purposes in section 5(f)" of the Admissions Act, *id.*, slip op. at 26, because Plaintiffs' claims in this regard "are nothing more than a 'generalized grievance' under the Equal Protection Clause for which Plaintiffs lack standing." *Id.* at 27.

OHA submits that the State's expenditures of tax revenues for OHA and DHHL are fully justified as part of the State's general budget. OHA's mandate is "the betterment of conditions of native Hawaiians . . . and Hawaiians" (H.R.S. 10-3(1) and (2)) and "the needs of the aboriginal class of people of Hawaii." (H.R.S. 10-1(a)) Nonetheless, in order to respond to the arguments presented by Plaintiffs and ensure that the record is adequate to withstand any possible appeal, OHA seeks partial summary judgment Motion on several basic issues that should be resolved before determining the applicable level of scrutiny.

In order to have the authority to treat Native Hawaiians the same as Indian

tribes, Native Hawaiians must first be found to be indigenous people. See S. Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537, 560 (claiming that one must establish that Native Hawaiians are "Indians" before arguing that the "special relationship" extends to them). It is OHA's position that this issue should not be subject to dispute. *Nali`ielua v. Hawaii*, 795 F. Supp. 1009, 1013 (D. Haw. 1990) ("Native Hawaiians are people indigenous to the State of Hawaii, just as American Indians are indigenous to the mainland United States."). However, in the Plaintiffs' Memorandum in Opposition to Motion for Judicial Notice or in the Alternative for Partial Summary Judgment filed April 11, 2002, p. 3, Plaintiffs argued that: "No one can trace his or her ancestry back to the first canoe of immigrants. This long story of immigration – longer than the entire post-colonial history of immigration to America – refutes the claim that the class of Hawaiians and native Hawaiians as defined be ancestry in H.R.S. Sec. 10-2 and HHCA of 1920 ("HHCA") Sec 201 (7) are 'indigenous' to Hawaii. All groups came from outside and did not originate here."

As this Honorable Court has explained in its May 8, 2002 Order at 31, the governing Ninth Circuit decision in *Alaska Chapter, Assoc. Gen Contractors of Amer., Inc. v. Pierce*, 694 F.2d 162 (9 th Cir. 1982), "indicates [1] that a court may decide the applicability of the *Morton* [*v. Mancari*] analysis without deciding the

alleged political question of whether a group is an 'Indian tribe,'" and [2] that the rational-basis level of judicial scrutiny is applicable to "indigenous people [that] had not been recognized by the Bureau of Indian Affairs as being 'Indian tribes.'" The important question under *Pierce* is thus whether a person or group has been recognized as being indigenous by "the Government, or any state." May 8, 2002 Order at 31 (*citing Pierce* 694 F.2d at 1168 n.8). OHA's Motion seeks to establish that the Federal and State governments have long recognized Native Hawaiians to be the indigenous people of Hawaii, and that this conclusion is also accepted by scholars and other indigenous people in the United States and around the world.

There is no currently existing federally recognized Native Hawaiian tribe. Most legislation benefitting Native Americans is tied to membership in a tribe or a Native Alaskan corporation. All legislation for Native Hawaiians is dependent on their identification as descendants of the indigenous peoples of Hawaii. As Judge Ezra pointed out, "Native Hawaiians have never been formally recognized as an Indian Tribe because of Native Hawaiians were incorporated into the United States twenty years after the treaty making era with Native Americans was finished . . . . Native Hawaiians were omitted from the acknowledgment system, perhaps in part because Native Hawaiians had already developed their own trust relationship with the Federal Government as demonstrated by the passage of the HHCA and because Native

Hawaiians were not being excluded from beneficial legislation in the same manner as unacknowledged mainland United States Indian tribes." *Rice v. Cayetano*, 963 F. Supp. 1547, 1553 (D. Haw. 1997), rev. on other grounds, 120 S.Ct. 1044 (2000). "Presumably the United States can also fulfill its trust obligations to Native Hawaiians by delegating duties to the state of Hawaii to the same extent that it can delegate its duties towards Indians to mainland states." F. Cohen, *Handbook of Federal Indian Law*, 1982 Ed. At 803-804. Accordingly, OHA seeks to clarify that the Federal Government has treated Native Hawaiians as it does Native Americans pursuant to its trust responsibility, which it has delegated in part to the State of Hawaii.

This Honorable Court explained in its May 8, 2002 Order at 18 that "[t]he settlement of past claims is not an improper purpose that Plaintiffs have taxpayer standing to assert." Pursuant to this ruling, the OHA Defendants seek a partial summary judgment reconfirming the nature of the settlement agreement codified in the Admission Act and a further ruling that the State's expenditures of some tax revenues to assist programs designed to benefit Native Hawaiians are a proper and continuing part of that settlement agreement. This agreement settled part of the claims Native Hawaiians have for the events of January 1893 when "the United States overthrew the Kingdom of Hawaii," *Arakaki v. Cayetano*, 198 F.Supp. 2d 1165, 1170 (D. Hawaii 2002), which Congress later "acknowledged" to be "illegal." *Id.* (*citing*

1993 Apology Resolution). This settlement was formalized in Section 5 of the 1959 Admission Act, which imposed obligations on the State that were accepted by the State as a condition of statehood. This issue is thus another one that should be addressed and decided "before this case ends" which does "not turn on whether strict scrutiny or some other level of scrutiny applies to this case." February 19, 2003 Order at 6.

DATED: Honolulu, Hawaii, _____.

_____
SHERRY P. BRODER
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EARL F. ARAKAKI, et al,	)	**CIVIL NO. 02-00139 SOM-KSC**
	)	(Declaratory Judgment)
Plaintiffs,	)	
	)	CERTIFICATE OF COMPLIANCE
vs.	)	
	)	
LINDA LINGLE, et al.,	)	
	)	
Defendants.	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the Honorable Susan Oki Mollway's instructions, the undersigned hereby certifies that the foregoing memorandum does not exceed 1,000 words.

DATED: Honolulu, Hawaii, _____.

_____

SHERRY P. BRODER
JON M. VAN DYKE
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Attorneys for OHA Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EARL F. ARAKAKI, et al, Plaintiffs, vs. LINDA LINGLE, et al., Defendants.	**CIVIL NO. 02-00139 SOM-KSC** (Declaratory Judgment) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was duly served upon the following parties at their last known addresses this 5th day of May 2003:

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DATED: Honolulu, Hawaii, _____.

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