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Dear Linda:

This letter is written in response to your request for an evaluation of the "Action Plan" prepared by the Governor's Office of State Planning "To Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust." Your request asks in particular for comments on the Action Plan's "scope (missing controversies?), proposed actions, and whether this 'action plan' is sufficient to justify extinction of retroactive judicial relief."

This Action Plan was prepared in response to Act 395, passed during the 1988 legislative session, entitled the "Native Hawaiian Trusts Judicial Relief Act." Section 5 of this act requires the Governor to "present a proposal to the legislature to resolve controversies which arose" after Hawaii became a state "relating to the Hawaiian home lands trust...and the native Hawaiian public trust under Article XII, sections 4,5, and 6 of the Constitution of the State of Hawaii implementing section 5(f) of the Admission Act." The initial question is therefore whether the Action Plan responds to its legislative mandate.

Several important controversies are omitted from discussion in the Action Plan. In addition, it falls short of presenting a proposal to resolve some of the controversies it does identify and address. Among the controversies omitted are:

(1) the claim of Hawaiians with less than 50 percent Hawaiian blood for a share of the ceded lands and the revenue it generates,

(2) the claim by the half-blood Hawaiians for a share of the ceded lands,

(3) claims by all persons of Hawaiian ancestry related to the loss of sovereignty against the federal government (and the state as its successor-in-interest regarding most of the ceded lands) resulting from the U.S. participation in the illegal overthrow of 1893,<sup>1</sup> and

(4) claims by the State of Hawaii and OHA against the federal government for the ceded lands retained after statehood.<sup>2</sup>

The Governor's staff apparently viewed the mandate of Act 395 as a narrow one, that their assignment was limited to an

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<sup>1</sup>The Action Plan states on page 2 that "the State should be held liable only for those actions which happened in a time period over which the State had control." Similarly on page 111, the Plan says:

Not included are any controversies or proposed remedies that address the overthrow of the kingdom of Hawaii. It is not the intention of Act 395, or this proposal, to replace or affect the claims of native Hawaiians and Hawaiians to reparations from the Federal government.

If, however, the State has benefitted from wrongs that occurred before statehood, by receiving the ceded lands which were seized illegally and without compensation, then the State must participate in correcting these wrongs.

<sup>2</sup>Although the Action Plan acknowledges on page 3 that "[t]he State must pursue action in federal arenas to address these controversies," it does not provide any detail on how this important task is to be undertaken.

examination of the Hawaiian Home Lands and the rights of the half-blood Native Hawaiians in the public land trust. The language "relating to" would certainly seem to envision a broader scope, however, and it is awkward and inappropriate to segment certain claims without seeing the full range of problems facing the Hawaiian community. It would appear therefore that the Legislature expected to receive a set of proposals that examined all the controversies related to the Hawaiians and their trust resources.<sup>3</sup>

With regard to the claims that are addressed, the most significant problem is the absence of a mechanism for pursuing individual claims regarding the public land trust. Another important problem that pervades the whole document is a failure to recognize the central role of OHA and its Trustees in representing all persons of Hawaiian ancestry regarding all questions concerning their resources and policies. Although many of the specific

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<sup>3</sup>Indeed, the Action Plan itself appears to recognize that its scope is too narrow by including the following paragraph at the end of the Introduction (at pages 3-4):

Just as it was necessary to expand the original parameters of Act 395 in order to address controversies in the spirit of making things right, so must there also be a discussion of the larger issues that affect both trusts. Some of these issues have a place in the future, and so are not included in this action plan. But the time has come for the community and decisionmakers alike to wrestle with the possibilities of self-determination and governance as they affect the trusts. Should there be an elected Hawaiian Home Lands Commission? Should the two trusts be combined? Should there be a starting over, with a new entity created to administer the two trusts?

These questions present controversies that are "relating to" the trusts, and it is unclear why the Action Plan ignores them after identifying them so clearly. Why is it that they are relegated to the future instead of being included in the current discussion?

proposals included in the Action Plan are sensible and long-overdue, the document is incomplete in a number of respects.

Part I. The Hawaiian Home Lands Trust.

OHA and its Trustees are not given any particular recognition in this section of the Action Plan. Although it is true that H.R.S. section 10-3 (3) states that the Hawaiian Home Lands shall be administered by the Hawaiian Homes Commission rather than by OHA, the OHA Trustees are the only democratically elected representatives of the Hawaiian people, OHA has general power over all Hawaiian matters and resources under Article XII, section 6 of Hawaii's Constitution, and many decisions of the Hawaiian Homes Commission necessarily impact on other Hawaiian matters.<sup>4</sup> OHA and its Trustees must, therefore, be involved in the broad policy questions facing the Hawaiian Homes Commission in order to coordinate their own policies and facilitate the process of restoring the strength and viability of the Hawaiian Home Lands program. The task forces to be established under sections A and B

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<sup>4</sup>On page 76, the Action Plan states that "[s]upporters of the current [blood quantum] definition...question the efforts of the Office of Hawaiian Affairs in promoting a single non-quantum definition, since they challenge the Office's legitimacy as an independent, self determining organization." OHA of course receives its legitimacy not only from the Constitution and laws of Hawaii but also from the tens of thousands of votes cast at each election for OHA Trustees. On the blood-quantum issue, OHA has held two referenda to determine the wishes of the Hawaiian community and both have indicated a strong wish to change the current blood quantum so that it will not continue to divide the Hawaiian community. OHA has also, however, said that it does not advocate any change in blood quantum for the Hawaiian Home Lands at the present time, because of the long waitlist of half-blood Hawaiians.

(see pages 7, 8, 38, and 43), for instance, should contain representatives from OHA. Similarly, OHA should be involved in decisions regarding the blood-quantum eligibility for the Hawaiian Home Lands (see pages 14 and 74-76) and self-determination for the Home Lands (see pages 17 and 93), because these decisions are so intimately linked to activities OHA is pursuing more generally to benefit the Hawaiian community. The Action Plan mentions at several points (see pages 10-11, 58-59, 120, and 159-60) that Hawaiian Home Lands should be exchanged for other state lands in order to provide more appropriate lands for the homesteaders. Because such exchanges could diminish the revenue base for OHA (which is acknowledged at page 159), the OHA Trustees clearly need to be involved in any decision of this sort. The task force that will be created to identify and inventory lands to be exchanged (see pages 120 and 160) should certainly include a representative of OHA.

The Action Plan quite properly identifies many instances where Hawaiian Home Lands have been used by or transferred to other state or federal agencies without compensation (see, e.g., pages 34-37). The remedy proposed, however, seems somewhat modest, and a more aggressive stance would appear to be warranted. Instead of simply recommending the creation of a task force to determine the lands involved and moneys due (see pages 38-39), the recommendations should contain a more specific commitment to correct these problems and should include a pledge to pursue claims against the federal

government.<sup>5</sup> Indeed, the recommendation on page 39 that a report be prepared for the 1993 Legislature seems to put off for two years what was supposed to have been prepared for the 1991 Legislature pursuant to Act 395. Finally, the estimated cost for this task force (\$400,000 for two years) appears to be quite low, because staff and consultants with expertise in this field will have to be hired.

### Part II--The Public Land Trust.

As mentioned in the introductory remarks above, this section does not refer to the claims of the less-than-50-percent Hawaiians to share in the resources of the ceded lands nor does it create any mechanism for individual claimants comparable to the "Board of Individual Claims Resolution" which is to be established for claims concerning the Hawaiian Home Lands (page 109).

This Part begins by focusing on the ceded lands that remain in federal hands. It advocates creating a complete inventory of federally controlled lands in Hawaii and states that all previous attempts to create such an inventory have been inadequate (see pages 112 and 126-130). It should be noted that OHA sponsored the development of such an inventory during the summer of 1989 in connection with the Blueprint for Native Hawaiian Entitlements which was developed during that period. This document, which was

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<sup>5</sup>The Action Plan states on pages 9 and 47 that "[i]t is the State's responsibility to pursue title disputes with the Federal government," but it provides no details on how this assignment is to be undertaken nor does it allocate any costs to this task.

circulated to all the OHA offices at the time of the Blueprint Community Meetings, was prepared by several law students who carefully traced the titles and status of the federal lands. Although it is almost inevitable that this document is also incomplete and inadequate in some respects, because of the difficulty in mastering all the details on this type of project, the OHA inventory should be relatively complete and should be considered at least be an excellent starting point for this inquiry.

OHA is mentioned much more frequently in this Part, but occasionally is ignored when it should be mentioned. The list of agencies that should have access to the inventory of state lands (see pages 115 and 144) does not, for instance, include OHA. Another important omission is in the "Submerged Lands" section, where it says that "[t]he State Attorney General should determine the advisability of seeking a judicial interpretation of the inclusion or exclusion of the water column as subject to the public land trust and revenue provisions of Chapter 10" (see pages 116 and 147). The OHA Trustees and their attorneys should also participate in this decision.

The Action Plan concludes with a discussion of the negotiations with OHA regarding the revenues due for the half-blood Hawaiians from the public land trust. This section outlines the problems involved in this matter, but contains no specific recommendations or proposals, saying simply that discussions should continue to resolve this matter.

Conclusion. This Action Plan contains a number of useful ideas that would provide greater rights and resources for the Hawaiian community if implemented. But, as mentioned above, it fails to address several of the central "controversies" that concern the relationship between the State and persons of Hawaiian ancestry. Even when it does properly identify a problem, it frequently puts off resolution by suggesting the creation of a task force or tribunal rather than presenting a specific proposal. In my judgment, this Action Plan is not sufficient to justify extinction of retroactive judicial relief. Please let me know if you would like me to put any of these ideas into testimony format or if I can be of assistance in any other fashion.

Best wishes,



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