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Chair Rowena M.N. Akana and OHA Trustees
Office of Hawaiian Affairs
711 Kapiolani Boulevard, Suite 500
Honolulu, Hawai`i 96813

Subject: Use of Public Trust Revenues for All Hawaiians, Regardless of Blood Quantum

Dear Chair Akana and OHA Trustees:

Executive Summary. This memorandum addresses the question whether the revenues that OHA receives from the Public Land Trust can be used to benefit all persons of Hawaiian ancestry, without regard to the amount of Hawaiian blood they have. At present, federal and state statutes limit such expenditures to the benefit of persons with 50% or more Hawaiian blood. But this restriction was imposed without the support of anybody from the Hawaiian community and must be revisited. The right to define one's membership is a central component of the right to self-determination, and other native groups have the right to determine who is eligible to share in their assets and revenues. The Native Hawaiian People are also entitled to make this determination for themselves and should press to change the statutes in order to vindicate their right to self-determination and self-governance.

Introduction. Since the establishment of OHA, its Trustees have struggled with the restraints on revenue expenditures included in the constitutional provisions and statutes that establish the Office. This memorandum provides background analysis of this issue, explains the rights of the Native Hawaiian People in defining their own membership and controlling their resources, and offers suggestions regarding the approach that can be taken to address this problem. In preparing this memorandum, I have been assisted by the research of Kevin Teruya, second year law student at the William S. Richardson School of Law, University of Hawai`i at Manoa, and by discussions with Sherry P. Broder, OHA's Board Attorney. I have also drawn from a memorandum prepared by Sherry Broder to Daniel J. Mollway of the Hawaii State Ethics Commission dated February 16, 1999, which addressed some of the issues relevant to this discussion.

Background -- The Governing Statutory and Constitutional Provisions. The first

reference to a 50% blood quantum appeared in Section 201(7) of the Hawaiian Homes Commission Act, 1920, 42 Stat. 108 (1921), which defined the term "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Section 207 of this statute then authorized leases of lands controlled by the Department of Hawaiian Home Lands to persons meeting this definition. (A later amendment to Section 209 allows leases to be conveyed to spouses or children who are "at least one-quarter Hawaiian," but original lessees must still meet the 50% blood quantum requirement.) **As is explained in more detail below**, no person of Hawaiian ancestry favored this 50% requirement at the time the Hawaiian Homes Commission Act was being enacted by Congress, but this limitation was included because of pressure from sugar interests in Hawai`i, which wanted to limit the number of persons who would be eligible for homesteads. Melody Kapilialoha MacKenzie, *Native Hawaiian Rights Handbook* 17 (1991)(citing H.R. Rep. No. 839, 66th Cong., 2nd Sess. (1920) and Marilyn M. Vause, *The Hawaiian Homes Commission Act, History and Analysis* (unpublished Master's thesis, June 1962)). The 1921 Legislature of the Territory of Hawai`i passed Senate Concurrent Resolution No. 8, which recommended changing the definition of "native Hawaiian" from 1/32 to ½ Hawaiian blood, and the U.S. Congress accepted this proposal. Alan Murakami, *The Hawaiian Homes Commission Act,* in *Native Hawaiian Rights Handbook, supra,* at 47.

The 1959 Admission Act states in Section 5(f) that the lands conveyed from the United States to the State of Hawai`i were to be held by the State "as a public trust" and should be used for five stated purposes, including "for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended." By referring to the Hawaiian Homes Commission Act, this language thus requires that the revenues be used for the Hawaiians with a 50% blood quantum. The other four stated purposes are purposes that all members of the public can share – supporting educational institutions, promoting farm and home ownership, making public improvements, and providing land for public use – and, therefore, it has always been clear that revenues from the public land trust can be used for Hawaiians with less than 50% blood quantum. And, in fact, the State Legislature has each year granted funds to OHA from the general fund to match OHA's trust funds and thus to enable OHA to support programs that benefit Hawaiians below the 50% blood quantum line.

OHA was created by the 1978 Constitutional Convention in order to facilitate the process whereby persons of Hawaiian ancestry would gain the rights that other native people have, in particular the rights to "self-determination and self-government." *See* Committee of the Whole Rpt. No. 13, 1 *Proceedings of the 1978 Constitutional Convention* at .

Also in 1978, Article XII, Section 4 was added to Hawai`i's Constitution, which states that lands received by the State from the federal government in 1959 "shall be held by the State as a public trust for native Hawaiians and the general public." The intent in using the term "native Hawaiian" was to use those words in the same way they are used in the Hawaiian Home Lands Act, 1920, but the proposal defining the terms was not deemed to have been adopted by the voters, because of the manner in which the ballot was constructed. *See Kahalakai v. Doi*, 60 Hawai`i 324, 590 P.2d 543 (1979). That glitch leaves the constitutional provision somewhat ambiguous.

Although the proposals offered to the voters by the 1978 Constitutional Convention left

the governing definitions unchanged, the delegates understood that the definitions were controversial and wanted them to be reexamined. *See, e.g.,* Stand. Comm. Rep. No. 59, *in* 1 *Proceedings of the Constitutional Convention of Hawaii of 1978* at 644 ("Although your Committee was tempted to change this outmoded [blood quantum[rule from the 1920s, your Committee concluded tht this responsibility should be assumed by the Office of Hawaiian Affairs"), *quoted in Price v. Akaka*, 3 F.3d 1220, (9th Cir. 1993). *See also* Committee of the Whole Report No. 13 (Sept. 5, 1978), 1 *Proceedings of the Constitutional Convention of Hawaii of 1978* at 1018-19 ("Members foresaw that [the creation of OHA] will unite Hawaiians as a people.")

Section 10-3(1) and (2) of the Hawai`i Revised Statutes, which were enacted in 1980, states that the purposes of OHA include "[t]he betterment of conditions of native Hawaiians" and "the betterment of conditions of Hawaiians," and Section 10-1 includes long definitions of these terms:

> "Hawaiian" means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.
>
> "Native Hawaiian" means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

Most of the provisions in H.R.S. Chapter 10 instruct OHA to act for the betterment of both "native Hawaiians" and "Hawaiians," but Sections 10-1(a) and 10-5(4) restate the special obligation to protect the rights of "native Hawaiians," and Sections 10-13.3 and 10-13.5 state explicitly that the revenues used from the public land trust are to be expended "for the betterment of the conditions of native Hawaiians." H.R.S. Chapter 673 states that OHA must administer its ceded land trust "in the sole interests of its beneficiaries" **[check, cite]**, but adds that OHA may provide collateral benefits to others "so long as the primary benefits are enjoyed by beneficiaries, and the collateral benefits do not detract from nor reduce the benefits enjoyed by the beneficiaries." H.R.S. sec. 673-1(b)(1)

In summary, both federal and state statutes now state explicitly that the revenues OHA receives from the public land trust are to be used "for the betterment of the conditions" of persons with 50% or more Hawaiian blood.

But initiatives to amend these statutes have been frequent, and numerous court decisions have recognized the legitimacy in making such a change.

In 1988 and 1990, OHA conducted two mail referenda to determine the position of its beneficiaries on the blood quantum issue. In 1988, the OHA Trustees adopted the Resolution Relating to Ho`okani No Mana E`we, which included the finding that "the arbitrary requirement of 50% blood quantum is contrary to Native Hawaiian culture and tradition and was a requirement develolped and approved by those with no Native Hawaiian blood." Quoted in paragraph 10, Findings of Fact, *Kepo`o v. Burgess*, No. 88-2987-09 (Haw. 1st Cir. 1988), *aff'd, memo opinion,* Haw. Sup. Ct., No. 88-2987 (1991).

[Refer to Single Definition Mail Referenda here]

In *Hoohuli v. Ariyoshi,* 631 F.Supp. 1153, 1161 (D.Haw. 1986),

Similarly, in *Price v. Akaka*, 3 F.3d 1220, 1225-26 (9th Cir. 1993)(citing *Hoohuli)*, the federal appellate court stated that "established law suggests that amending the blood quantum requirement would benefit native Hawaiians."

How Restrictive Are These Statutory Requirements? Although the language in the governing statutes requires that the public trust revenues be used "for the betterment of the conditions" of the Hawaiians with a 50% blood quantum, these statutes do not say the funding must exclusively benefit these individuals. Cultural, spiritual, economic, and political programs that benefit Hawaiians with a lower blood quantum in addition to benefitting the 50% Hawaiians can be funded with these revenues. The phrase "betterment of the conditions of native Hawaiians" is not as strict as the language governing the Hawaiian Home Lands, which grants exclusive rights to the 50% Hawaiians.

The courts have held that the betterment of the conditions of Native Hawaiians can be achieved in many ways. Programs that promote the Hawaiian language, Hawaiian culture and historical traditions, pride in the successes of members of the Hawaiian community, and self-determination are examples of activities that promote "the betterment of the conditions of native Hawaiians," even though all persons of Hawaiian ancestry would also benefit.

In a case involving a challenge to one of OHA's mail referendum seeking beneficiary input on the blood quantum issue, Judge Marie Milks specifically found that a variety of programs can better "the conditions of native Hawaiians," and that courts should generally defer to the decisions of the elected Trustees:

> 19. The Trustees have the discretion to act where a reasonable person believes an undertaking will better the conditions of native Hawaiians, which may or may not be pecuniary benefit....
>
> 21. The betterment of the conditions of native Hawaiians can be achieved in many ways. Programs such as the Single Definition Referendum that promote self-determination is one of the many ways the achieve the betterment of the conditions of native Hawaiians even though all Hawaiians would benefit.

Kepo`o v. Burgess, No. 88-2987-09 (Haw. 1st Cir. 1988), *aff'd, memo opinion,* Haw. Sup. Ct., No. 88-2987 (1991).

In *Price v. Akaka*, 3 F.3d 1220, 1225 (9th Cir. 1993), the U.S. Court of Appeals for the Ninth Circuit rejected the claim that the OHA Trustees had violated their fiduciary duties by expending Trust Funds on a nonbinding referendum regarding the blood-quantum issue, and the federal appellate court approved of Judge Milks's analysis and repeated her findings:

> (In an order denying a motion for preliminary injunction, Judge Milks found that there was no evidence that the Single Definition Requirement would not be for the betterment of conditions of native Hawaiians and that such referendum is 'one of many ways to achieve the betterment of the conditions of native Hawaiians even though all Hawaiians would benefit.')

Another judicial decision recognizing the discretion that OHA Trustees have to determine how the public trust revenues should be spent is *Rice v. Cayetano,* 963 F.Supp.1547, 1554 (D.Haw. 1997)(emphasis added), *aff'd* 146 F.3d 1075 (9th Cir. 1998), where Judge David Ezra said:

The State of Hawaii, to comply with its obligation [under Section 5(f) of the 1959 Admission Act] to perform one of these five purposes, the betterment of Native Hawaiians, created OHA. OHA is given a 1/5 protion of the proceeds from the Section 5(b) lands. OHA has authority to spend this money, as well as money received by legislative allocation and other sources, *as it believes will fulfill the purpose.*

The Right of Native People to Determine Their Membership Under U.S. Law. The central U.S. Supreme Court case recognizing the right of native people to determine their own membership is *Santa Clara Pueblo v. Martinez*, 436 U.S. ~~39~~, 54 (1978), where the Court recognized the necessity of allowing native peoples to "determine which traditional values will promote cultural survival and should therefore be preserved," and stated that care must be taken not "to destroy cultural identity under the guise of saving it." **[give facts]**

The Right of Native People to Determine Their Membership Under International Law.