

To: JVD

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FILED IN THE  
UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII

JUN 28 2002

WALTER A. Y. H. CHIN, Clerk

Attorneys for State Defendants  
and HHCA/DHHL Defendants

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

EARL F. ARAKAKI, EVELYN C.  
ARAKAKI, EDWARD U. BUGARIN,  
SANDRA PUANANI BURGESS,  
PATRICIA A. CARROLL, ROBERT M.  
CHAPMAN, BRIAN L. CLARKE,  
MICHAEL Y. GARCIA, ROGER  
GRANTHAM, TOBY M. KRAVET,  
JAMES I. KUROIWA, JR., FRANCES M.  
NICHOLS, DONNA MALIA SCAFF,  
JACK H. SCAFF, ALLEN H. TESHIMA,  
THURSTON TWIGG-SMITH,

Plaintiffs,

v.

BENJAMIN J. CAYETANO, in his  
official capacity as GOVERNOR OF  
THE STATE OF HAWAII, NEAL  
MIYAHIRA, in his official capacity as  
DIRECTOR OF THE DEPARTMENT OF  
BUDGET AND FINANCE, GLENN  
OKIMOTO, in his official capacity as  
STATE COMPTROLLER, and DIRECTOR  
OF THE DEPARTMENT OF  
ACCOUNTING AND GENERAL  
SERVICES, GILBERT COLOMA-  
AGARAN, in his official capacity as  
CHAIRMAN OF THE BOARD OF LAND  
AND NATURAL RESOURCES, JAMES  
J. NAKATANI, in his official capacity  
as DIRECTOR OF THE DEPARTMENT  
OF AGRICULTURE, SEIJI F. NAYA,  
in his official capacity as DIRECTOR  
OF THE DEPARTMENT OF BUSINESS,  
ECONOMIC DEVELOPMENT AND

) CIVIL NO. 02-00139 SOM/KSC  
) NOTICE OF MOTION;  
) STATE DEFENDANTS' AND  
) HHCA/DHHL DEFENDANTS'  
) MOTION TO BIFURCATE  
) PROCEEDINGS;  
) MEMORANDUM IN SUPPORT  
) OF STATE DEFENDANTS' AND  
) HHCA/DHHL DEFENDANTS'  
) MOTION TO BIFURCATE  
) PROCEEDINGS;  
) CERTIFICATE OF SERVICE

HEARING

) DATE: August 19, 2002  
) TIME: 11:15 a.m.  
) JUDGE: The Honorable Susan Oki  
Mollway, United States  
District Judge

TOURISM, BRIAN MINAAI, in his )  
official capacity as DIRECTOR OF THE )  
DEPARTMENT OF TRANSPORTATION, )  
)

State Defendants, )  
)

HAUNANI APOLIONA, Chairman, and )  
ROWENA AKANA, DONALD B. )  
CATALUNA, LINDA DELA CRUZ, )  
CLAYTON HEE, COLETTE Y.P. )  
MACHADO, CHARLES OTA, OSWALD )  
STENDER, and JOHN D. WAIHE'E, IV, )  
in their official capacities as trustees )  
of the Office of Hawaiian Affairs, )  
)

OHA Defendants, )  
)

RAYNARD C. SOON, Chairman, and )  
WONDA MAE AGPALSA, HENRY CHO, )  
THOMAS P. CONTRADES, ROCKNE C. )  
FREITAS, HERRING K. KALUA, )  
MILTON PA, and JOHN A.H. TOMOSO, )  
in their official capacities as members )  
of the Hawaiian Homes Commission, )  
)

HHCA/DHHL Defendants, )  
)

THE UNITED STATES OF AMERICA, )  
and JOHN DOES 1 through 10, )  
)

Defendants. )  
----- )

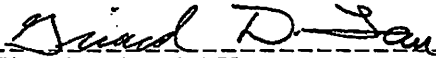
#### NOTICE OF MOTION

TO ALL PARTIES IN THIS CASE:

Please take notice that State Defendants and HHCA/DHHL Defendants move this court before the Honorable Susan Oki Mollway, in her courtroom in the U.S. District Court, 300 Ala Moana Blvd., Honolulu, Hawaii, on the 19th day of August, 2002, at 11:15 a.m., or as soon thereafter as counsel may be heard, to bifurcate the proceedings in this case.

DATED: Honolulu, Hawaii, June 28, 2002.

EARL I. ANZAI  
Attorney General of Hawaii

  
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GIRARD D. LAU  
CHARLEEN M. AINA  
Deputy Attorneys General  
Attorneys for State Defendants and  
HHCA/DHHL Defendants

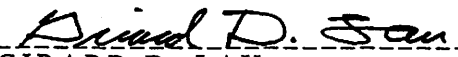
STATE DEFENDANTS' AND HHCA/DHHL DEFENDANTS'  
MOTION TO BIFURCATE THE PROCEEDINGS

State Defendants and HHCA/DHHL Defendants hereby move this Honorable Court to bifurcate the proceedings in this case such that the Mancari defense is considered first, and the Croson/Adarand issues considered only if the Mancari defense is rejected.

This motion is based upon FRCP 7, Local Rules 7.1, 7.2, the attached Memorandum in Support of State Defendants' and HHCA/DHHL Defendants' Motion to Bifurcate the Proceedings, and the entire records and files in this case.

DATED: Honolulu, Hawaii, June 28, 2002.

EARL I. ANZAI  
Attorney General of Hawaii

  
GIRARD D. LAU  
CHARLEEN M. AINA  
Deputy Attorneys General  
State of Hawaii  
Attorneys for State Defendants and  
HHCA/DHHL Defendants

MEMORANDUM IN SUPPORT OF STATE DEFENDANTS' AND HHCA/DHHL  
DEFENDANTS' MOTION TO BIFURCATE THE PROCEEDINGS

Because of the complexity and extensive nature of the showing that may be required under Croson/Adarand to establish that the Hawaiian-only and native-Hawaiian-only programs or benefits are narrowly tailored to serve a compelling state interest, a long and extended trial could be required on such issues. However, if this Court were to agree with defendants that Morton v Mancari controls, i.e., that Hawaiians should be afforded the same sort of special status that other native Americans or Indian tribes receive under the Mancari doctrine, then the State would need to show only that the "special treatment" provided Hawaiians and native Hawaiians by the State through OHA or DHHL "can be tied rationally to the fulfillment of Congress' unique obligation toward the [Hawaiians]," Mancari, 417 U.S. at 555, a far less factual and complex showing than that required under Croson/Adarand.

Accordingly, State and HHCA/DHHL Defendants move that the issues in this case be sequenced or bifurcated, such that the Mancari defense is considered separately and before the Croson/Adarand issues are considered, with the latter considered only if the Mancari defense is rejected. This proposed bifurcation would, if the Mancari defense is accepted, eliminate the need for the parties to expend substantial time and money investigating, preparing for, and conducting trial upon, the Croson/Adarand issues, and eliminate the significant burden upon this Court of having to manage, conduct trial upon, and resolve those same issues.

In accordance with such a bifurcation scheme, at this first stage, any motion for summary judgment filed by plaintiffs would be a partial summary judgment limited to the issue of Mancari's applicability or non-applicability only. In short, the parties and this Court should not be required to address the complicated and fact-intensive situation presented by an Adarand/Croson analysis at this stage of the case, or at any time prior to this Court's

resolution of the applicability of Mancari. It would be an utter waste of substantial time and resources -- both the Court's and the parties' -- to require consideration of the Adarand/Croson matters when resolution of the Mancari issue could make such an expensive inquiry entirely irrelevant and unnecessary.

The complexity and substantial investment of time and money required in a presentation of a Croson/Adarand defense is brought to immediate attention by the plaintiffs' most recent set of discovery requests, wherein plaintiffs seek to force the defendants to set forth their compelling state interests and narrow tailoring defense. See, e.g., "Plaintiffs' First Request to State Defendants, OHA Defendants, HHCA/DHHL Defendants and Defendant/Intervenors for Production of Documents and Things," Document Requests 9 & 10 (asking the defendants to produce all documents the defendants rely upon to show that the State or United States had or has a compelling governmental interest in adopting or continuing to implement both the OHA laws and the HHCA/DHHL laws, and that those laws are narrowly tailored to serve any such interests. (requests 14 and 16 also include such issues).

The extensive investment of time and money needed to present a full Adarand/Croson defense, and the burden imposed upon this Court in devoting resources to hearing and resolving that defense, should not be incurred until this Court determines that it is necessary to reach that defense. Accordingly, State Defendants and HHCA/DHHL Defendants respectfully request that this Court bifurcate the proceedings in this case such that the Mancari defense is considered first, and the Croson/Adarand issues considered if and only if the Mancari defense is rejected.

In their letter to this Court, dated June 17, 2002, plaintiffs make a number of arguments against bifurcation which are, frankly, completely

inaccurate, and do nothing to undercut the need for bifurcation.

Plaintiffs first argue that Rice v Cayetano has already resolved the issue of Mancari's non-applicability to this case. There cannot be a more patently false statement than that. The Rice Court expressly stated that it would "stay far off that difficult terrain." Rice, 528 U.S. at 518-19.

If Hawaii's restriction were to be sustained under Mancari, we would be required to accept some beginning premises not yet established in our case law. Among other postulates; it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State -- and in other enactments such as the Hawaiian Homes Commission Act and the [Apology] Resolution of 1993 -- has determined that native Hawaiians have a status like that of Indians in organized tribes and that it may, and has, delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. (citing opposing viewpoints). We can stay far off that difficult terrain, however.

Id. Thus, Rice expressly left open the question of Mancari's applicability to Hawaiians. Instead, Rice ruled that in the limited context of the Fifteenth Amendment and voting rights, the Mancari doctrine could not be used to save voting restrictions favoring Hawaiians or tribal Indians.

Even were we to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort.

....  
... It does not follow from Mancari ... that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens.

Rice, 528 U.S. at 519, 520. Because the case at bar does not involve voting restrictions, Rice's rejection of Mancari's applicability to Fifteenth Amendment voting restrictions is wholly irrelevant to this case.

In short, the case at bar, by not involving voting rights, is precisely the sort of case the Rice Court believed would require resolution of the issue of Mancari's applicability to Hawaiians or native Hawaiians. There is simply no way to avoid the "difficult terrain" in this case. Plaintiffs state that "as

with the Rice and Arakaki I cases, it is unnecessary for this Court to venture out onto the "difficult terrain." Of course, plaintiffs are flat wrong in analogizing those two cases with the case at bar, because Rice and Arakaki I were voting rights cases, involving the Fifteenth Amendment. The case at bar is not, and so this Court has no choice but to wade into, and resolve, the "difficult terrain."

Plaintiffs also wrongly try to argue that Rice foreclosed Mancari's applicability to this case because OHA and HHC/DHHL are "not separate quasi-sovereigns," but "State agencies to which the Constitution applies." Letter at 1. Like their other argument, this argument, too, is patently wrong. The only significance of Rice's finding OHA to be a state public agency is that OHA elections would therefore be subject to the Fifteenth Amendment. 528 U.S. at 522 ("Nonetheless, the elections for OHA trustees are elections of the State, not of a separate quasi-sovereign, and [thus] they are elections to which the Fifteenth Amendment applies."). In short, Rice held that OHA elections involved "state action," subjecting them to the Fifteenth Amendment, whereas internal Indian tribal elections were elections of a quasi-sovereign not involving state action. Internal Indian tribal elections can be limited to Indians, therefore, not because of the Mancari doctrine, but because the Fourteenth and Fifteenth Amendments do not even apply, given the lack of state action.

The Mancari case, on the other hand, just like the case at bar (and in contrast to internal Indian tribal elections), also involved "state action" by a public agency that was not a quasi-sovereign. The BIA, after all, was certainly not a quasi-sovereign, but a federal public agency, just as OHA and HHC/DHHL are state public agencies. Yet the Mancari doctrine did apply to save the BIA hiring preference from violating the Equal Protection component of the Fifth Amendment. Thus, plaintiffs' argument that OHA and



HHC/DHHL cannot take advantage of the Mancari doctrine because OHA was declared by Rice to be a public agency/non-quasi-sovereign is obviously wrong, for that logic would mean the Mancari doctrine would be inapplicable in Mancari itself! (as the BIA was, like OHA and the HHC/DHHL, a public agency non-quasi-sovereign, too).

In short, plaintiffs' statement that "*Morton v. Mancari* does not 'save' racial restrictions by [governmental/public] agencies," Letter at 1, is obviously false. Mancari itself saved a "racial" restriction by a governmental/public agency, namely, the BIA.<sup>1</sup>

Plaintiffs then go on to wrongly suggest that Rice definitively determined the definitions of "Hawaiian" and "native Hawaiian" to be racial classifications subject to strict scrutiny, regardless of the Mancari doctrine. See Letter at 1-2. Nothing could be further from the truth. Rice's statement that the "Hawaiian" electoral restriction was "race-based" was made only as a rejection of the State's separate non-Mancari argument (that took up less than 3 pages of its Supreme Court brief) that the restriction was based on "time and place," not race.<sup>2</sup> Id. at 514-17. Rice, however, specifically held out the possibility that the Mancari doctrine would convert this otherwise race-based classification into a political one subject to deferential Mancari

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<sup>1</sup> While OHA and DHHL are state governmental agencies, and the BIA is a federal governmental agency, that distinction is not determinative as state legislation, too, falls within the Mancari doctrine as long as the state legislation is "enacted in response to a federal measure explicitly designed to [deal with a related Indian matter]." Washington v. Yakima Indian Nation, 439 U.S. 463, 501 (1979). In any event, the point here is that plaintiffs are certainly wrong in suggesting that Rice precluded the Mancari doctrine's applicability to governmental agencies (as opposed to quasi-sovereigns), given that Mancari itself applied the Mancari doctrine to a governmental agency, the BIA, which was not a quasi-sovereign.

<sup>2</sup> The State had argued (unsuccessfully) that the restriction was both racially underinclusive and overinclusive, excluding many Polynesians who did not inhabit the islands in 1778, and including possibly multiple races from different parts of the world, including the Marquesas Islands and the Pacific Northwest. This argument was and is separate and distinct from the Mancari argument.

review. Id. at 518-22 (despite finding classification "racial," majority then addresses State's Mancari claim). Rice went on to conclude, however, that when it comes to the Fifteenth Amendment, the Mancari doctrine could not be used to save voting restrictions (whether limiting the franchise to Hawaiians or tribal Indians) for public office. Id. at 520-22 ("It does not follow from Mancari, however, that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens."). But Rice certainly did not hold that the Mancari doctrine, outside the Fifteenth Amendment voting context, could not turn otherwise race-based Hawaiian-only classifications into political ones. The case at bar, however, does require this Court to consider that very issue.

Plaintiffs then express puzzlement as to how putting on an Adarand/Croson defense would present complex issues of fact when Judge Gillmor in Arakaki I did not have to deal with any such complex issues. Letter at 2. The simple reason for that is that the State in Arakaki I did NOT present an Adarand/Croson defense! The State in the case at bar, however, will present a full Adarand/Croson defense, with all of its complexities, in the event this Court rejects the Mancari doctrine's applicability.


Finally, plaintiffs argue that presentation of an Adarand/Croson defense will not require more than the same legal argument the State presented in Rice and Arakaki I, regarding promotion of Hawaiian self-governance. Letter at 2. Not only did the State not present an Adarand/Croson defense in Rice or Arakaki I, but the notion of promotion of Hawaiian self-governance, while central to the Mancari argument presented in Rice and Arakaki I, is certainly not the be all and end all for justifying the Hawaiian and native-Hawaiian programs attacked in this case. Unlike Rice and Arakaki I, in which only voting restrictions and trustee restrictions (designed to promote Hawaiian

self-governance) were attacked, the case at bar attacks the dozens of benefit programs provided to Hawaiians and native Hawaiians by OHA and DHHL. Justifying each of those benefit programs under Croson/Adarand, and showing that they remedy the current effects of past discriminatory events, requires an in-depth and highly complex historical, factual, and sociological analysis and presentation.<sup>3</sup>

Plaintiffs have thus failed to provide any valid reason for forcing this Court and the defendants to go through the time-consuming, and extremely expensive process of investigating, presenting, and resolving the numerous highly complicated issues of historical fact, and sociological analysis, involved in a full-on Adarand/Croson defense. Accordingly, defendants respectfully request that this Court bifurcate the proceedings such that the Mancari defense is considered separately and fully before the Croson/Adarand issues are considered, and that the latter are considered if and only if the Mancari defense is rejected.

DATED: Honolulu, Hawaii, June 28, 2002.

EARL I. ANZAI  
Attorney General of Hawaii

  
GIRARD D. LAU  
CHARLEEN M. AINA  
Deputy Attorneys General  
State of Hawaii  
Attorneys for State Defendants and  
HHCA/DHHL Defendants

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<sup>3</sup> Contrary to plaintiffs' assertion, the State has never denied that OHA is intended to be a remedial program remedying the present effects of past discrimination. Although the State has argued that OHA fulfills historically-rooted trust obligations to native peoples, and thus falls within the Mancari doctrine, the State has never suggested that OHA could not also be justified as a constitutionally permissible affirmative action program under Adarand/Croson. Nor is there any inherent inconsistency between raising a Mancari defense, and raising an Adarand/Croson defense as well, when dealing with programs assisting indigenous peoples.

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing was duly served on each of the following persons at the specified address by first class mail, postage prepaid, on June 28, 2002:

Patrick W. Hanifin  
IM HANIFIN PARSONS  
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Honolulu, Hawaii 96813

Sherry P. Broder  
Attorney at Law  
Davies Pacific Center  
841 Bishop Street, Suite 800  
Honolulu, Hawaii 96813

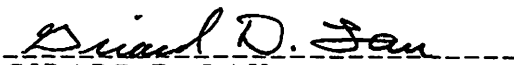
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Honolulu, Hawaii 96809

DATED: Honolulu, Hawaii, June 28, 2002.

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Attorney General of Hawaii

  
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July 9, 2002

**For Services Rendered to the Office of Hawaiian Affairs re *Arakaki* Case**

		<b><u>Hours</u></b>
6/8/02	Work on drafts re judicial notice, affidavits, and response to expected motion for preliminary injunction	1.50
6/10/02	Prepare for hearing; participate in hearing on motion for judicial notice; organizing material; discussions with opposing counsel	2.00
6/11/02	Research and drafting of response to motion for preliminary injunction	3.00
6/12/02	Research and writing of response to motion for preliminary injunction	5.00
6/13/02	Research and writing of response to motion for preliminary injunction; discussions with Sherry Broder	4.25
6/14/02	Research and writing of response to motion for preliminary injunction; meeting with other attorneys to discuss plaintiffs' requests for admissions	7.25
6/15/02	Preparation of draft stipulation of facts and related historical research	7.50
6/16/02	Further work on draft stipulated facts	2.00
6/19/02	Meeting with counsel re stipulated facts	0.75
6/20/02	Review of Judge Mollow's opinions; review of draft on stipulated facts and preparation of revisions	2.75
6/21/02	Telephone conferences with Patrick Hanifin and	

	Girard Lau and Sherry Broder re stipulated facts and plaintiffs' decision to withdraw motion for preliminary injunction	0.75
7/1/02	Further work on stipulated facts, with Melody MacKenzie and Sherry Broder	<u>1.50</u>
	TOTAL HOURS =	38.25
	38.25 hours @ \$175/hour =	\$6,693.75
	General Excise Tax (0.5%) =	<u>33.47</u>
	TOTAL DUE =	\$6,727.22