United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

JAN 19 1993

M-36978

Memorandum

To: Counselor to the Secretary and Secretary's Designated Officer, Hawaiian Homes Commission Act

From: Solicitor

Subject: The Scope of Federal Responsibility for Native Hawaiians Under the Hawaiian Homes Commission Act

I. Introduction and Summary

Following your testimony before the Senate Committee on Energy and Natural Resources on February 6, 1992, in an oversight hearing concerning the Hawaiian Homes Commission Act, 1920, 42 Stat. 108, as amended (HHCA), formerly codified as 48 U.S.C. § 691, you requested our opinion on the scope of Federal responsibilities under that Act.[1/] At the time the HHCA was enacted on July 9, 1921, Hawaii was an incorporated territory of the United States. Hawaii became the fiftieth State of the Union on August 21, 1959, in accordance with the Hawaii Statehood Act (Statehood Act) of April 21, 1959, 73 Stat. 4, 48 U.S.C. Ch. 3. Section 4 of the Statehood Act transferred the Hawaiian Homes program from the Territory to the State of Hawaii.

The HHCA and the Statehood Act themselves are the firmest sources for understanding the responsibilities they create. Accordingly, in answering your question we have examined both these statutes with

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[1/] The Department has assumed the role of "lead Federal agency" with respect to the Hawaiian Homes program in accordance with the recommendations of a 1983 Federal-State Task Force on the HHCA. Under Part 514, section 1.3 of the Department of the Interior Manual, (514 DM 1.3), the Secretary of the Interior is required to appoint an officer or employee of the Department as the "Secretary's Designated Officer for the Hawaiian Homes Commission Act." The Designated Officer is to serve as "the point of contact within the Department of the Interior with respect to matters concerning the Hawaiian Homes program that are the responsibility of the United States." On April 17, 1989, the Secretary appointed to that position the Counselor to the Secretary.

care. We summarize their pertinent provisions and we advert to their legislative histories.

We use the results of our statutory analysis to consider whether the United States has assumed the responsibilities of a common law trustee for the Hawaiian Homes program. Our analysis focuses on the case law developing the nature of the responsibilities of the United States towards the Indian tribes which has been portrayed as analogous to the relationship between the United States and the native Hawaiians.[1] From our research, we conclude that the United States does not have a trust responsibility. This conclusion applies to the periods both before and after Hawaii's Statehood.

A few discussions of the scope of Federal responsibility have tended to rush towards the Indian analogy and to give short shrift to the statutes themselves.[2] For example, a former Deputy Solicitor of this Department, Mr. Frederick Ferguson, concluded in an August 27, 1979, letter to the Director, Regional Office, United States Commission on Civil Rights, that under the HHCA the United States was a trustee between 1920 and 1959 and that it retained this role after Statehood.

On every occasion other than the August 27, 1979 letter, the Department has taken the position that the United States is not a

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[1] This usage ("native Hawaiians") parallels that of the HHCA, the Hawaii Statehood Act and the Ninth Circuit cases cited in this opinion.

[2] In January 1992 the State of Hawaii prepared a lengthy "Report on the Hawaiian Home Lands Program" in response to a November 12, 1991, letter from the Senate Committee on Energy and Natural Resources. The Report argues that the United States has a trust responsibility for the Hawaiian Home Lands and criticizes the United States for alleged deficiencies in meeting this claimed responsibility. The Senate Report of the Committee on Indian Affairs on Pub. L. No. 100-579, 102 Stat. 2916, the Native Hawaiian Health Care Act of 1988, includes a legal opinion, "Analysis of the Legal Relationship between the Federal Government and the Native Hawaiians" which concludes that "[t]he federal government has a trust relationship to Native Hawaiians," S. Rep. No. 580, 100th Cong., 2d Sess. 26 (1988), reprinted in 1988 U.S.C.C.A.N. 3864, 3889 (1988). There are in addition two opinions from the Congressional Research Service, Library of Congress which address various components of the Federal-native Hawaiian legal relationship: a November 2, 1983, Memorandum, "Definition of Native Hawaiians," and a July 12, 1991, Memorandum "Questions Relating to Legislation Regarding Native Hawaiians and Native Alaskans."

trustee for the Hawaiian Homes program.[1] Deputy Solicitor Ferguson's opinion was rejected in the Department's October 17, 1989, letter to the Chairman, Senate Select Committee on Indian Affairs, written with the express concurrence of the then Solicitor, Mr. Martin L. Allday. The October 17, 1989, letter relied on the decision of the Ninth Circuit in Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission, 588 F.2d 1216 (9th Cir. 1978), which stated: "[t]he United States has only a somewhat tangential supervisory role under the Admission Act, rather than the role of trustee" Id. at 1224 n.7. Although that Ninth Circuit decision was cited in Mr. Ferguson's letter of August 27, 1979, he neither discussed nor distinguished it, and as we advised Senator Inouye, Mr. Ferguson's legal conclusion that followed was "at war"[2] with the words of the court's decision. We adopted the position of the Court of Appeals. The Department reaffirmed the position adopted in the October 17, 1989 letter in a subsequent letter from the Department to Senator Daniel K. Inouye (dated January 23, 1992.)

Deputy Solicitor Ferguson's conclusion of August 27, 1979 is expressly overruled. We conclude that the United States had no trust responsibilities to the native Hawaiians either before Statehood or thereafter.[3]

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[1] Deputy Solicitor Ferguson's October 17, 1979 letter did not allude to any prior Departmental practices or opinions in support of his conclusion. To the contrary, the Department has stated on the record on numerous occassions that there is no trust responsibility to Native Hawaiians. We are unaware of any prior departmental opinion in support of Deputy Solicitor Ferguson's letter. Within the last three years alone the Department has denied any trust responsibility to native Hawaiians in letters of February 2, 1990 and October 15, 1990, to the Chairman, Senate Committee of Energy and Natural Resources. The Departmental representatives reiterated this position in testimony before the Senate Committee on Energy and Natural Resources on March 8, 1990, July 23, 1991, and February 6, 1992 as well as in testimony before the Senate Select Committee on Indian Affairs on August 8, 1989.

What about actions of Congress?

[2] See letter of October 17, 1992 at 2.

[3] By Title II of Pub. L. No. 96-565 of December 22, 1980, 94 Stat. 3324, Congress established the Native Hawaiians Study Commission and directed it to "conduct a study of the culture, needs and concerns of the Native Hawaiians." The Commission produced a two-volume report on June 23, 1983, which includes a comprehensive study of the demographics, history and current condition of the native Hawaiians. The Commission examined at length the Federal-Hawaiian relationship and the majority concluded that there was no trust relationship between the United States and the native Hawaiians and no sound basis for the claim that the United States owed compensation for the taking

(continued...)

Our nation is based in part upon a pluralism that allows the broadest scope for cultural, ethnic, traditional, and religious diversity. The United States has been enriched immeasurably by its openness to and ability to accommodate different cultures. This openness has allowed each group to make its own unique contribution to our national life.

This pluralism and the invigoration it brings to American life rest in no small degree upon our commitment to our Federal system and to a single rule of law. Thus, we do not lightly presume that one group of Americans is, simply by virtue of a shared background, subject to legal burdens or benefits that do not apply to all of us. The native Hawaiians are descendants of peoples who lived in the Hawaiian Islands before the arrival of Europeans. This important component of their cultural heritage does not place the native Hawaiians under a legal relationship to the Federal Government different from the relationship the government has with its other citizens.

II. The United States Had No Trust Responsibility Under the HHCA Prior to Hawaii's Statehood

A. Background

Prior to Hawaii's 1959 admission to the Union, the Hawaiian Homes Commission Act of 1920 (HHCA) was the only Federal legislation that identified native Hawaiians as a group to be treated separately from other inhabitants of the Territory of Hawaii.[7] 42 Stat. 108, formerly codified as 48 U.S.C. § 691. In the HHCA, Congress established a limited homesteading program available only to

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[6](...continued)
of Native aboriginal land rights (Report, Volume I at 333-79). These issues are critical to the discussion in this memorandum. The three members of the Study Commission from Hawaii dissented. Our analysis in this opinion is in basic agreement with the conclusions of the Study Commission majority.

[7] Congress annexed Hawaii to the United States by the Joint Resolution of July 7, 1898, 30 Stat. 50. The Joint Resolution makes no mention of native Hawaiians. Congress provided a government for the territory of Hawaii by the Hawaii Organic Act of April 30, 1900, 31 Stat. 141. The Organic Act granted United States citizenship to all citizens of the Republic of Hawaii. It established Hawaii as an "incorporated" territory in preparation for Statehood by extending to it the Constitution and laws of the United States. The Organic Act makes no mention of native Hawaiians.

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individual native Hawaiians[1] to be administered and funded by the Territory. The HHCA defined "native Hawaiian" as "any descendant of not less than one-half part blood of the races inhabiting the Hawaiian Islands previous to 1778." 42 Stat. 108.

Congress vested the administration of the HHCA in a five-member Commission composed of the Governor of Hawaii and four citizens of the Territory appointed by the Governor and confirmed by the Senate of the Territorial legislature. By Act of July 26, 1935, Congress amended the HHCA by removing the Governor from the Commission and by giving the Governor authority to appoint and to remove the members of the Commission with the advice and consent of the Senate of the Territory. 49 Stat. 504. By Act of July 9, 1952, Congress expanded the Commission to seven members. 66 Stat. 515.

In section 203 of the HHCA, Congress authorized the set-aside of various public lands, called "available lands," to be used for the purpose of native homesteading or for general leasing as authorized in the HHCA. 42 Stat. 109. Congress added to or deleted various acreage from the available lands by Acts of 1934, 1935, 1937, 1941, 1944, 1948 and 1952.[2] The description of the lands set aside as available lands was less than precise because section 203 excluded certain categories of lands within their boundaries from the program and because the areas to be set aside were loosely described in terms of location and of acreage. In some instances, Congress required the Commission, subject to the approval of the Secretary of the Interior, to set aside the available lands from a larger acreage described in the HHCA. 42 Stat. 110. Congress initially established the homesteading program on a trial basis by allowing the Commission to use only a small, specifically identified portion of the available lands for the first five years of the Commission's life. Congress removed this restriction by Act of March 7, 1928, but it continued to take a cautious approach. 45 Stat. 246. The legislative history of the 1921 Act, and of its pertinent amendments, is not helpful in providing a rationale for this caution. Section 204(3) of the HHCA, as amended, provided that the "commission shall not lease, use, nor dispose of more than twenty thousand (20,000) acres of the areas of Hawaiian home lands for settlement by native Hawaiians in any calendar five-year period." This restriction remained in the HHCA through the effective date of the Statehood Act.

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[1] At the time of its annexation, Hawaii was not a homogenous society but was composed of native Hawaiians, Americans, English, Chinese, Japanese, and other ethnic groups. Inter-marriage was common. See Volume I of the Native Hawaiians Study Commission Report, Tables 3 and 4 at 68-69 and text at 35-44, 60-66.

[2] Respectively, 48 Stat. 777 (1934), 49 Stat. 966 (1935), 50 Stat. 497 (1937), 55 Stat. 782 (1941), 58 Stat. 260 (1944), 62 Stat. 295, 303 (1948) and 66 Stat. 511 (1952).

Section 206 of the HHCA provided that the powers and duties of the Governor, the Commissioner of Public Lands, and the Board of Public Lands "in respect to lands of the Territory" did not extend to the available lands. Section 207 of the HHCA retained title to the available lands in the United States and authorized the lease of the land to native Hawaiians for agricultural or pastoral purposes. Section 207 of the HHCA also gave the Commission discretion to determine whether an applicant was qualified to perform the conditions required under the lease.

Section 212 authorized the Commission to return any lands not leased to native Hawaiians to the Commissioner of Public Lands for disposition under a general lease. Under section 213 of the Act, the funds derived from these general leases, together with 30 percent of the receipts derived from the leasing of sugar cane lands and water licenses, were to be placed in an account known as the "Hawaiian home loan fund" to be used to assist lessees under conditions specified in sections 214 through 218 of the HHCA and to meet the expenses of the Commission under section 222 of the HHCA. 42 Stat. 115. The amount that could be covered into the fund, however, was limited by section 213 to $1,000,000. This amount was raised to $2,000,000 by Act of May 7, 1928, and to $5,000,000 by Act of July 9, 1952. 45 Stat. 246; 66 Stat. 514. Funds in excess of these sums were to be available for use by the Territory for other purposes.

Congress did not appropriate funds for the Hawaiian Homes program. The absence of federal appropriations was consistent with the original congressional expectation. The House Committee Report accompanying H.R. 13500 that became the HHCA stated, "Moreover, not a dollar is required to be appropriated by the Federal Government" H.R. Rep. No. 839, 66th Cong., 2d Sess. 7 (1920). Instead, it provided that the program would be funded through the Hawaiian home loan fund described above. Congress also authorized, in section 220 of the HHCA, the legislature of the Territory to appropriate out of the Treasury of the Territory such funds as it deemed necessary to provide the Commission with funds sufficient to execute water and other development projects on the Hawaiian Home Lands. In section 222, Congress made the Commission accountable to the Territorial legislature by requiring it to submit a biennial report as well as any special reports the legislature might require.

Although vesting the administration of the HHCA in a Territorial Commission under the general oversight of the Territorial legislature, Congress gave the Secretary of the Interior various discrete responsibilities in the administration of the Act. These responsibilities, described below, concerned details pertaining to the use of land for homesteading. They had nothing to do with the nature of the relationship between the United States and native Hawaiians.

Section 204(1) of the original Act required the consent of both Congress and the Secretary of the Interior before additional lands could be opened to homesteading after the initial five-year trial period. Secretarial approval was required under section 204(2) of the HHCA before available lands subject to a lease with a withdrawal clause were in fact withdrawn from the lease and made available for homesteading. Secretarial approval was required under section 204(3) for the Commission's selection of available lands from a larger area that Congress had designated. By Act of June 18, 1954, Congress added to section 204 of the HHCA by authorizing the Commission to engage in land exchanges in order to better effectuate the purposes of the HHCA or to consolidate its holdings. 62 Stat. 262. The approval of the Secretary, the Governor, the Commissioner of Public Lands, and two-thirds of the members of the Board of Public Lands were all required prior to an exchange. These lengthy approval requirements involving Territorial officials in addition to the Secretary suggest that the protection of the public lands of Hawaii not included within the available lands was at least as important to Congress as was making consolidated land holdings available to the Commission. Secretarial approval was required under section 212 of the HHCA before the Commission could secure the return of land, for homesteading purposes, that had been earlier transferred to the Commissioner of Public Lands and leased under a general lease. The statutory scheme appears to be directed toward protecting the interest of the Hawaii populace at large in the public lands, rather than in promoting the wholesale use of the available lands for homesteading.

The Secretary retained these basic responsibilities between the 1921 enactment of the HHCA and Statehood. The Secretary was given a small additional role by Act of July 26, 1935: to designate a sanitation and reclamation expert to reside in Hawaii and to work with the Commission at the Commission's expense in carrying out its duties. 49 Stat. 505. He did this during the mid-1930's.

The above discussion has summarized the major provisions of the HHCA. No provision of the HHCA makes explicit reference to a trust relationship, and in our opinion none can be read to do so implicitly. See the discussion in Section B, infra.

The major argument advanced by those who contend that the United States served as a trustee for native Hawaiians under the HHCA from 1921 to 1959 stems from a single sentence of testimony delivered in 1920 before the House Territories Committee by then-Secretary of the Interior Franklin Lane. In urging enactment of the HHCA, Secretary Lane stated that:

> . . . the natives of the islands . . . are our wards . . . for whom in a sense we are trustees . . .

H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920).

That sentence is, in our view, too weak a read on which to construct a fiduciary relationship. There is nothing to suggest that Secretary Lane intended to offer a legal conclusion. In its report, the Committee itself did not interpret Secretary Lane's statement as suggesting a trust relationship nor did it hint at a trust relationship. Nothing on the point appears in the Congressional Record debates on the legislation. Although we find the statute to be clear on this point, we have also examined the history of the legislation that became the Hawaiian Homes Commission Act, 1920, and there is no suggestion from any source, other than Secretary Lane's off-hand remark, that the United States would serve as a trustee for the beneficiaries of the Act. We have, further, examined the legislative history of amendments to the HHCA enacted between 1921 and 1959, and we find no hint or suggestion that the United States would serve as trustee.

The only case law on point is a decision of the Supreme Court of Hawaii in 1982, Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327 (1982); 640 P.2d 1161 (1982), in which the court by way of dictum stated a contrary view. It stated that before Statehood the United States had a "trust obligation" to native Hawaiians, basing its statement almost entirely on the sentence of Secretary Lane quoted above. The United States was not a party to the Ahuna litigation. In the circumstances, we do not find the decision helpful on this subject.

B. Analysis

In the following discussion, we conclude (1) the HHCA did not create a trust and (2) the United States did not have a trust responsibility in the administration of the Hawaiian Homes program during Hawaii's territorial period.

Those who argue in favor of a trusteeship role for the United States under the HHCA point to decisions pertaining to the Indians for support; therefore, we turn first to an examination of the law on that subject. We conclude Indian law is inapposite. As explained more fully below, native Hawaiians do not constitute a "tribe." See Price v. State of Hawaii, 764 F.2d 623, 627 (9th Cir. 1985), cert. denied, 474 U.S. 1055 (1986). Neither the Bureau of Indian Affairs nor any other agency or department of the United States Government has accorded them tribal recognition. Id. at 626. Congress excluded native Hawaiians from organizing as Indian tribes by section 13 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. § 473 (IRA). The IRA does not apply to the territories or insular possessions of the United States, with the exception of Alaska. Price, supra at 626.

As to the Indian analogy, in United States v. Mitchell, 463 U.S. 206 (1983), (Mitchell II), the Supreme Court explained the circumstances under which the United States would be held to the duties of a common

law trustee.[10] In that decision, the Court found that various timber management statutes gave the Bureau of Indian Affairs "comprehensive" and "pervasive" management authority and required the BIA to exercise "literally daily supervision over the harvesting of Indian timber." Id. at 222. The Court concluded that the statutory scheme created a fiduciary relationship and conferred jurisdiction in the Court of Claims to hear the claims of the Quinault Tribe and Quinault allottees for money damages for the mismanagement of their forest by the BIA. It held:

> [A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottee), and a trust corpus (the timber, lands, and funds). [W]here the Federal Government takes or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

Id. at 225. (Citations and footnotes omitted) (emphasis added).

The HHCA bears none of the earmarks that the Court identified in Mitchell as creating fiduciary responsibilities in the United States. In Mitchell, the Court relied in major part upon the "undisputed existence of a general trust relationship between the United States and the Indian people," in concluding that the United States had assumed a trust responsibility in managing the Quinault forest. Id. at 225. There is, however, no such relationship between the United States and the native Hawaiians under the HHCA, the Hawaii Organic Act of 1900, the Joint Resolution of July 7, 1898, or any other legal source. 31 Stat. 141; 30 Stat. 50. There is no special relationship between the United States and the native Hawaiians because, as the Ninth Circuit has held, the native Hawaiians do not constitute "a distinct sovereignty set apart by historical and ethnological boundaries." Price v. State of Hawaii, 764 F.2d 623, 627 (9th Cir. 1985), cert. denied, 474 U.S. 1055 (1986). This is at the heart of the unique government-to-government relationship between the United States and the Indian tribes that is the basis of the United States responsibilities towards Indians. See e.g.

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[10] This case earlier reached the Court in United States v. Mitchell, 435 U.S. 535 (1980) (Mitchell I).

Morton v. Mancari, 417 U.S. 535 (1971). The United States has no relationship to the native Hawaiians different from the relationship pertaining between the United States and other United States citizens.

In addition to a lack of any general form of trust responsibility, the United States did not assume any of the "pervasive" and "comprehensive" responsibilities towards the Hawaiian Homes program that the Mitchell II Court found to be "necessary elements of a common-law trust" with respect to the government's management of Indian timber. 463 U.S. 206, 225. As we have seen, the Secretary of the Interior had certain limited administrative responsibilities under the HHCA related to the interest of the general public in the available lands. The responsibilities vested in the Secretary under the HHCA did not differ in character from his administrative responsibilities under any other statute. They are not the responsibilities of a trustee, as delineated by the Ninth Circuit. See Price v. Hawaii, 921 F.2d 950, 955.

The responsibilities of the Territory of Hawaii in administering the HHCA were likewise neither "comprehensive" nor "pervasive" within the terms of Mitchell II. In fact, the HHCA put severe limitations on the use of the available lands for homesteading, and these limitations by themselves negate any possible fiduciary responsibility in the Territory. Even extending into Statehood, the HHCA prohibited the Commission from leasing more than 20,000 acres for homesteading in any five-year period and, as discussed above, required the approval of the Secretary of the Interior before the Commission could make certain lands available for homesteading. Perhaps most importantly, the 1921 Act established a $1,000,000 limitation on Commission funding from a revolving fund that included three sources of income, including the income derived from the general leasing of the available lands. This fund was increased to $2,000,000 in 1928 and remained at that level until 1952 when it was raised to $5,000,000. The funds in excess of this amount were to be made available to the Territory for other purposes. The HHCA left to the Territorial legislature the discretion to appropriate additional funding.

With the exception of the five-year, 20,000-acre maximum homestead limitation, the HHCA gave the Commission broad discretion in implementing the homesteading program. There was no affirmative requirement on the Commission to grant a minimum, or any, number of homesteads, and nothing approaching a commitment to provide a significant proportion of the native Hawaiian population with a homestead lease. Congress directed the Commission to develop qualification standards for lessees to govern its issuance of homestead leases. As discussed earlier, the Commission was to return to the Public Lands Commission the lands it was unable to use so that general leases could be awarded. The Territory of Hawaii thus was not a trustee under the HHCA. Rather, the Commission and thus the Territory was simply the same as any other government agency,

performing its statutory function. Without more, such duties cannot, by themselves, transform the government into a trustee.

In addition to the lack of a trustee, there is under the HHCA no beneficiary with equitable ownership of the property alleged to be subject to a trust. Trusteeship responsibilities require a beneficiary with equitable title to the property, see, Mitchell II supra, 463 U.S. 206, 225. In Mitchell II, the Court found the 1855 Treaty of Olympia, an 1873 Executive Order, and the General Allotment Act, 25 U.S.C. 348, established a trust corpus by giving to the Indians title in the Quinault Reservation. In 1924, the Supreme Court had ordered the BIA to allot the Reservation. United States v. Payne, 262 U.S. 446 (1924). The HHCA, in contrast, established neither a trust corpus nor beneficial owners. There was, and is, no title to the available lands in the native Hawaiians.[11/]

The fee title to the available lands under the HHCA remained in the United States. Congress retained the power to remove lands from the Hawaiian Homes program without violating any rights of the native Hawaiians. The United States also reserved the right under section 91 of the Hawaii Organic Act to take any of the public lands of Hawaii "for the uses and purposes of the United States".[12/] The Organic Act, specifically authorized Congress, the President or the Governor of Hawaii to exercise this authority. The provision applied to the public lands of Hawaii, including those set aside as available lands under the HHCA. Section 91 was not repealed by the HHCA or by any other law prior to Statehood.

[11/] The lands that became the available lands were included in the lands taken from the Republic of Hawaii by the 1898 Joint Resolution, and they were to be used for the benefit of all of the inhabitants of Hawaii, Joint Res. No. 5, 30 Stat. 750-51 (1898). Sections 73 and 91 of the Hawaii Organic Act returned the beneficial use of these lands to the Territory of Hawaii. Thus, at the time the United States annexed Hawaii, it took legal title to lands held by the Republic. It did not take lands belonging to individuals.

[12/] Section 91 of the Hawaii Organic Act, as amended, formerly codified at 48 U.S.C. § 511, provided in pertinent part:

> [T]he public property ceded and transferred to the United States by the Republic of Hawaii, under the joint resolution of annexation, . . . shall remain in the possession, use and control of the government of the Territory of Hawaii and shall be maintained, managed, and cared for by it at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii.

The HHCA gave the Territory of Hawaii the right to use the available lands for the purposes set forth in the Act. These purposes included, subject to the acreage limitation, homestead leases; but the HHCA authorized general leases as well. The lands remained subject to the right of Congress to provide for their use for other purposes, and they also remained subject to the right of the President or the Governor to take them for purposes of the United States. In addition, the Attorney General of the Territory of Hawaii issued a series of opinions during the Territorial period giving a rather broad scope to permissible land withdrawals from the HHCA program. These opinions were not overturned until well after Statehood by the Attorney General of the State of Hawaii.

It would be inconsistent with the rights reserved to both the United States and the Territory, to use the available lands for a variety of purposes, to conclude that the HHCA created an equitable ownership interest in these lands in the native Hawaiians. The HHCA makes no provision for such an interest. Instead, it simply made qualified native Hawaiians eligible to apply for a homestead lease. The Territory was not required to award any homesteads, and its discretion was limited by the ceiling set on homestead leases in section 204(3) of the HHCA. Thus, an individual native Hawaiian could only receive a property interest in a lease that he in fact applied for and was granted. The HHCA did not create a beneficial interest in the available lands, a critical element in establishing a trust relationship. Mitchell II, 463 U.S. 206, 225.

In sum, the HHCA differs markedly from the comprehensive statutory scheme governing the BIA's management of Indian timber which, the Court held in Mitchell II, charged the United States with the duties of a common law trustee. Unlike the situation with the Indian tribes, the United States has never assumed a trust relationship of any kind with the native Hawaiians. The duties the HHCA placed in the Secretary of the Interior and in the Territory of Hawaii are not those of a trustee. Price v. Hawaii, 921 F.2d 950, 955. They are, rather, those of a government administrator. They differ in purpose from the statutes at issue in Mitchell II because they are not directed exclusively toward advancing the interests of the native Hawaiians. They differ both in the nature and the scope of the duties they required the Secretary or the Territory to perform. Further, the HHCA established neither a trust corpus nor a beneficial owner, both of which are essential elements of a common law trust. It simply made lands available for homesteading on a limited basis. The United States clearly was not a trustee for the Hawaiian Homes program.

III. The United States Did Not Assume a Trust Responsibility For the Hawaiian Homes Program Upon Statehood

A. Background

Congress provided for the admission of Hawaii into the Union by the Hawaii Statehood Act of March 18, 1959. 73 Stat. 4.[11] Sections 4 and 5 of the Statehood Act include provisions that specifically address native Hawaiians.

1. Section 4

Section 4 of the Statehood Act transferred administration of the HHCA from the Territory to the State of Hawaii. 73 Stat. 5. It provides "[a]s a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, as amended, shall be adopted as a provision of the constitution of said State" and further requires that "all proceeds and income from the 'available lands,' as defined by . . . [the HHCA] shall be used only in carrying out the provisions of said Act."

The sole responsibility that the United States reserved in section 4 is consent to certain amendments to the Hawaiian Homes Commission Act proposed by the State of Hawaii.[12] Although section 4 of the Statehood Act allows the State to eliminate the remaining Secretarial responsibility, to approve land exchanges under section 204 of the HHCA, without seeking the consent of the United States, the State has not undertaken to do so. All other responsibilities of the Secretary of the Interior in the HHCA, as discussed above, were eliminated by the Hawaii Constitutional Convention of 1978.

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[11] Hawaii was actually admitted to the Union on August 21, 1959, upon issuance of Presidential Proclamation 3309, 24 Fed. Reg. 6868 (1959).

[12] Under section 4 of the Statehood Act, the State is entitled to amend sections 202, 213, 219, 220, 222, 224, and 225 of the HHCA and other provisions related to administration. The State is also entitled unilaterally to amend those provisions of the HHCA regarding the powers and duties of officers other than those charged with the administration of the Act including, specifically, section 204, paragraph 2, section 206 and section 212.

Section 4 prohibits the State from impairing or reducing the Hawaiian home-loan fund, the Hawaiian home-operating fund, or the Hawaiian home-development fund. It precludes the State from increasing, without the consent of the United States, the "encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration" of the Act.

Section 4 also forbids the State from changing the "qualifications of lessees" without the consent of the United States; and it requires the State to use the proceeds and income from the available lands under the Hawaiian Homes Commission Act only for purposes of carrying out the provisions of that Act.

2. Section 5

The other relevant section of the Statehood Act, section 5, addresses the transfer of Federal lands to the new State. 73 Stat. 5-6. Section 5(b) grants the State title to the public lands and property held by the United States at the time of Hawaii's admission to the Union, with the exception of Federal reservations. Later, in the Hawaii Omnibus Act of July 12, 1960, Congress amended section 5(b) to make explicit that the grant of title to the State included the Hawaiian Home Lands. 74 Stat. 411, 422.

Congress carried forward the requirement that Hawaii use these former Federal lands for public purposes in section 5(f) of the Statehood Act which, for the first time, impressed all the public lands (granted to the State under section 5(b)) with a public trust.

Section 5(f) of the Statehood Act reads in relevant part:

> The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust [1] for the support of the public schools and of the public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible [4] for the making of improvements, and [5] for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said state may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

(Emphasis added.) Congress is abundantly capable of making its intention known through clear statutory directives. As the Courts have noted, in the vast majority of legislation Congress does mean what it says; thus the statutory language is normally the best evidence of Congress' intent. United States v. Missouri Pacific R.R., 278 U.S. 269 (1929). If clarity does not exist from the text of the statute, it should not be discerned from extrinsic evidence. Pittston Coal Co. v. Sebben, 488 U.S. 105 (1988).

Had Congress wished to establish a trust relationship between the United States and the Hawaiian people, it would have done so with unambiguous language. The absence of any such language in either the Statehood Act or the HHCA can only be interpreted to mean that Congress rejected such a result. Indeed, in section 5(f) of the Statehood Act, Congress explicitly established a public trust responsibility between the State and the people of Hawaii. Congress' use of explicit language in section 5(f) of the statute supports the view that the absence of specific language vis-a-vis the United States was intentional.

We also note the absence of anything in the long legislative history of Hawaii Statehood (or Admission) legislation to suggest that the United States was to serve after Statehood in the role of trustee. We have examined that legislative history with care, and it is entirely silent as to a trusteeship role for the United States under the Hawaiian Homes Commission Act, either before or after Statehood.

B. Analysis

The public trust doctrine is a derivative of the equal footing doctrine under which a State takes title to lands underlying navigable waters upon Statehood. It imposes a duty upon the State to use the lands formerly held by the Federal government for the benefit of its citizens. The doctrine derives from the decision of the Supreme Court in Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892), which held that Illinois held title to lands underlying Lake Michigan "in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties" id. at 452-53. The public trust differs from a fiduciary trust in that there is no individual or separate group with equitable ownership of the property. There is thus no duty in the State to manage the public trust assets for the sole benefit of one group; such a duty is, indeed, at odds with the concept of a public trust for all the inhabitants of a State. See, Price v. State of Hawaii, for the difference between a public trust and a fiduciary trust. 921 F.2d 950, 955-56 (9th Cir. 1990).

The Ninth Circuit has held that section 5(f) of the Statehood Act does not create a common law, or fiduciary trust and that Hawaii's management of the ceded lands is, therefore, not subject to the same strictures imposed upon private trustees. Price v. State of Hawaii, 921 F.2d 950 (9th Cir. 1990), (allegation that State failed to keep ceded lands and income from these lands separate from other State assets and income did not state a claim under section 5(f)). The Hawaii State courts have likewise been reluctant to second-guess the State's management of the public trust assets, at least where the section 4 Hawaiian homelands are not involved. See, e.g., Trustees of the Office of Hawaiian Affairs v. Yamasaki, 737 F.2d 446, cert. denied, 484 U.S. 698 (1987) (court will not set aside legislative apportionment of public trust assets to the Office of Hawaiian

Affairs because there are no judicially-discoverable and -manageable standards under section 5(f) to determine the claims OHA may make to the revenues generated by the public trust corpus.)

Section 5(f) allows the State to use the public trust assets for five stated purposes: (1) support of public schools and public educational institutions, (2) the betterment of the condition of native Hawaiians, as defined in the HHCA, (3) the widespread development of farm and home ownership, (4) public improvements, and (5) the provision of land for public use. The choice among the five public trust purposes was reserved exclusively for Hawaii to make, with section 5(f) stating that "[s]uch lands, proceeds and income shall be managed and disposed of for one or more of the foregoing purposes as the constitution and laws of said State may provide."[12/]

Section 5(f) establishes a public trust between Hawaii and all the people of Hawaii. It also authorizes the United States to bring an enforcement action against the State if the State uses the public trust assets for purposes outside the scope of the statute. This right to sue the State is not exclusive to the United States and is similar to other enforcement actions brought by the United States to enforce myriad statutes. The enforcement power of the Federal Government does not by itself establish any special trust relationship. In Price v. State of Hawaii, the Ninth Circuit characterized this Federal responsibility as a "federal barrier beyond which the State cannot go in its administration of the ceded lands." 921 F.2d 950, 955. The court went on to note this "federal barrier" did not confer a common law trust responsibility on either the Federal Government or the State:

> . . . it would be error to read the words "public trust" to require that the State adopt any particular method and form of management for the ceded lands. All property held by a state is held upon a "public trust." Those words alone do not demand that a state deal with its property in any particular manner even if, as a matter of prudence, the people usually require

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[12/] These section 5(f) provisions allowing the use of the section 5(b) lands for five specified purposes do not apply to the Hawaiian Home Lands reserved for purposes of the HHCA in section 4 of the Statehood Act. Price v. Akaka, 928 F.2d 824, 826 n.1 (9th Cir. 1990). Instead, section 5(f) allows the State to use other public lands for the variety of public purposes set forth in the Act. The State chose to implement the public trust in connection with the section 5(f) purpose of "the betterment of the condition of native Hawaiians" by establishing, during its constitutional convention of 1978, the Office of Hawaiian Affairs.

> a close accounting by their officials. Those words betoken the State's duty to avoid deviating from section 5(f)'s purpose. They betoken nothing more.

921 F.2d 950, 955.[16]

Since attaining Statehood in 1959, Hawaii has had full control of the Hawaiian Homes program under section 4 of the Statehood Act, leaving the United States with what the Ninth Circuit has described as "only a somewhat tangential supervisory role under the Admission Act rather than the role of trustee," Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission, 588 F.2d 1216, 1224 n.7 (9th Cir. 1978), cert. denied, 444 U.S. 826 (1979). The court distinguished cases involving lands held in trust by the United States for Indian tribes:

> The factual circumstances underlying the line of cases establishing this doctrine generally involve native Americans, as plaintiffs, suing a state or other entity to protect their rights in trust property, where the United States is trustee of the lands. In this case, however, the state is the trustee. The native Hawaiians are attempting to sue the state for breach of the state's trust obligations, and the United States has the opportunity to sue the state only on the basis of a right reserved by Congress in the state's Admission Act. The United States has only a somewhat tangential supervisory role under the Admission Act, rather than the role of trustee.

588 F.2d 1216, 1224 n.7.

Until Hawaii decides otherwise, the Secretary will continue to review land exchanges under section 204 of the HHCA. This is the only remaining statutory duty of the Secretary of the Interior.

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[16] In recent decisions, the Ninth Circuit has rejected jurisdictional arguments made by Hawaii in suits brought by native Hawaiians to secure prospective relief in the enforcement of section 5(f). See, e.g., Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission, 739 F.2d 1467 (9th Cir., 1984) (native Hawaiians may maintain an action under 42 U.S.C. § 1983 to enforce the Statehood Act); Nanahi v. Paty, 921 F.2d 827 (9th Cir., 1990), cert. denied, 60 U.S.L.W. 3265 (October 8, 1991) (native Hawaiians, as potential beneficiaries of the public trust, have standing to enforce section 5(f).)

In addition to the Secretary's one duty, the United States remains authorized under section 5(f) of the Statehood Act to bring an enforcement action against the State for breach of trust. In Price v. State of Hawaii, the Ninth Circuit held that Hawaii was not a fiduciary for the public land trust under section 5(f), and that the State had wide discretion in implementing the public land trust, 921 F.2d 950, 955-56 (9th Cir. 1991).[17]

> Under the Act, the ceded lands are to be held upon a public trust, and under section 5(f) the United States can bring an action if that trust is violated. However, nothing in that statement indicates that the parties to the compact agreed that all provisions of the common law of trusts would manacle the State as it attempted to deal with the vast quantity of land conveyed to it for the rather broad, although not all-encompassing, list of public purposes set forth in section 5(f).

921 F.2d 950, 955.

Hawaii has made marked changes to the HHCA since achieving Statehood. As a result, the HHCA has assumed, as a matter of State law, a broader character than had been the case under the pre-statehood legislation.

Among other things, the State eliminated the funding ceilings and limitations on acreage to be opened to homesteading that were included in the Federal law. It adopted an accelerated leasing program and provided State appropriations to meet the administrative expenses of the Commission. The State has issued legal opinions with more restrictive conclusions regarding the permissible use of the available lands than had been the case in the opinions of the Attorney General of the Territory of Hawaii. The State Supreme Court has held that as a matter of State law, Hawaii has accepted a trust responsibility for the Hawaiian Homes program. See Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161 (Haw. 1982).

With these changes, Hawaii has done more than the United States required it to do under its compact with the United States in section 4 of the Statehood Act. The changes the State chose to make to the HHCA cannot retroactively change the character of that statute or create responsibilities in the United States that Congress did not create in either the United States or the Territory of Hawaii. They

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[17] Although the Hawaiian Home Lands are not within the scope of the section 5(f) public trust, section 5(f) does not foreclose the United States from bringing suit against the State to implement section 4. Price v. Akaka, 928 F.2d 824, 826 n.1 (9th Cir. 1990).

are, instead, requirements created under State law which are within the sole responsibility of the State. For this reason, the State would not be in violation of a Federal obligation for purposes of section 5(f) unless it violated a responsibility imposed upon the Territory in the HHCA as that Act stood at the time of Statehood. The nature of these responsibilities has been discussed in earlier sections of this memorandum.

Possible Federal legal action against the State would also need to take into account the enforcement remedies that are available to individuals. These remedies are important because the potential beneficiaries under the HHCA and the Statehood Act ordinarily would be in a better position to ascertain and evaluate the facts underlying a dispute than would the Federal Government. There is in fact significant legal recourse available in both Federal and State forums to individuals alleging a violation of section 5(f) of the Statehood Act.

Although the Ninth Circuit initially held that native Hawaiians could not bring suit directly to enforce section 5(f) of the Statehood Act, it has subsequently allowed native Hawaiians to bring suit to enforce the Act under the Civil Rights Act, 42 U.S.C. § 1983. See, respectively, Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission, 588 F.2d 1216 (9th Cir. 1978), cert. denied, 444 U.S. 826 (1979); ("Keaukaha I"); 739 F.2d 1467 (9th Cir. 1984) ("Keaukaha II"); Price v. Hawaii, 939 F.2d 702 (9th Cir. 1990), cert. denied, 60 U.S.L.W. 3265 (October 8, 1991). The Ninth Circuit has noted however, that while it has jurisdiction to hear prospective claims under the Statehood Act by native Hawaiians, it does not have jurisdiction to hear claims for retroactive relief. Such claims are barred by the Eleventh Amendment, Ulaleo v. Paty, 902 F.2d 1395 (9th Cir. 1990).

In addition to the Federal remedy provided by 42 U.S.C. § 1983, the Hawaii legislature has enacted legislation authorizing the award of both prospective and retroactive relief to native Hawaiians for claimed violations of the HHCA and the section 5(f) trust.[14] These claims and the State processes under which they are heard are predicated upon State law and State implementation of the HHCA. They implicate no Federal responsibility either before Statehood or thereafter. Although Federal action remains available to enforce the HHCA, the increasing availability of Federal and State remedies to individuals, as well as the changed character the HHCA has assumed since Statehood, suggests that Federal action to enforce sections

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[14] Act 395, SLH 1988, authorizes native Hawaiians to sue in State court for prospective relief effective July 1, 1988. Act 323, SLH 1991, establishes a claims panel and process in State court for native Hawaiians to secure monetary damages for alleged breaches of trust that occurred between Statehood and the effective date of Act 395.

4 and 5(f) of the Statehood Act would be appropriate only in rare instances.

IV. Conclusion

For the reasons discussed above, we conclude that the United States is not a trustee for native Hawaiians. We further conclude that the HHCA did not create a fiduciary responsibility in any party, the United States, the Territory of Hawaii, or the State of Hawaii. Deputy Solicitor Ferguson's opinion of August 27, 1979, is superseded and overruled to the extent that it is inconsistent with this memorandum.

Tom Sansonetti

Thomas L. Sansonetti
Solicitor

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Findings