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NO. CAAP-22-0000268

IN THE INTERMEDIATE COURT OF APPEAL

STATE OF HAWAI'I

PUALANI KANAKA'OLE KANAHELE,
EDWARD HALEALOHA AYAU,
KELI'I W. IOANE, JR.,

Plaintiffs-Appellants,

vs.

STATE OF HAWAI'I; DEPARTMENT OF
TRANSPORTATION; JADE BUTAY, in his
official capacity as director of the Department of
Transportation; DEPARTMENT OF LAND AND
NATURAL RESOURCES; SUZANNE CASE, in
her official capacity as the director of the
Department of Land and Natural Resources;
DEPARTMENT OF HAWAIIAN HOME
LANDS; HAWAIIAN HOMES COMMISSION;
WILLIAM J. AILĀ, JR., in his official capacity
as the director of the Department of Hawaiian
Home Lands and Chair of the Hawaiian Homes
Commission; PATRICIA A. KAHANAMOKU-
TERUYA, RANDY K. AWO, PAULINE N.
NAMU'O, ZACHARY Z. HELM, DENNIS L.
NEVES, MICHAEL L. KALEIKINI, RUSSELL
K. KAUPU, and DAVID B. KA'APU, in their
official capacities as members of the Hawaiian
Homes Commission,

Defendants-Appellees.

) CIVIL NO. 1CCV-20-0000235 (LWC)

) (Other Civil Action)

) APPEAL FROM THE:

) 1) FINAL JUDGMENT, Filed and entered herein
) on March 17, 2022

) 2) ORDER DENYING PLAINTIFFS' MOTION
) FOR PARTIAL SUMMARY JUDGMENT,
) FILED ON JULY 13, 2020, Filed herein on
) November 5, 2021

) 3) AMENDED ORDER DENYING
) PLAINTIFFS' MOTION FOR PARTIAL
) SUMMARY JUDGMENT, FILED ON JULY 13,
) 2020, FILED ON NOVEMBER 5, 2021, Filed
) herein on February 10, 2022

) FIRST CIRCUIT COURT

) JUDGE: HON. LISA W. CATALDO

PLAINTIFFS- APPELLANTS' OPENING BRIEF

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STATEMENT OF RELATED CASES

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PLAINTIFFS- APPELLANTS' OPENING BRIEF

I. INTRODUCTION

Beneficiaries must be able to sue to protect trust property when their trustees fail them.

The Hawaiian Homes Commission Act was passed in 1921 to provide a land base, in trust, for native Hawaiians in the pursuit of ensuring that the traditions, culture, and quality of life of native Hawaiians shall be forever self-sustaining. Historically, however, that trust has been mismanaged, and, among other breaches of trust, large amounts of Hawaiian home lands have been taken or used for purposes which do not directly benefit the beneficiaries of the trust and with little or no compensation paid for such uses. In many cases, legal actions brought by beneficiaries have been critical in the enforcement and protection of the trust.

This case concerns the recent taking of the Mauna Kea Access Road, a road that is located on Hawaiian home lands trust lands in Humu'ula, Hawai'i Island. Despite being in existence for decades, the road's continuing status as trust lands was never in doubt. However, in 2018, the State changed course and unilaterally took the road by designating it as a State highway even though there was no properly approved deed or other disposition transferring the road out of the trust and to the Department of Transportation. Egregiously, the State failed to compensate the trust for its taking. Even more egregious is that the Department of Hawaiian Home Lands failed to act to protect its precious trust assets or otherwise act in the best interest of its beneficiaries.

Plaintiffs-Appellants are native Hawaiian beneficiaries of the trust who are concerned about its management and are directly affected when trust lands are taken. When they notified their trustees about this uncompensated taking of trust lands, their concerns fell on deaf ears.

Because of the Department of Hawaiian Homeland's unwillingness to protect trust property, Plaintiffs were forced to file this action against Defendants-Appellees¹ to restore the

¹ Defendants-Appellees are: (1) "State Defendants", including State of Hawai'i Department of Transportation and Jade Butay, in his official capacity as director of the Department of Transportation (collectively, "DOT Defendants") as well as Department of Land and Natural Resources ("DLNR") and Suzanne Case, in her official capacity as the director of the Department of Land and Natural Resources (collectively, "DLNR Defendants"); and (2) "DHHL Defendants", including the Department of Hawaiian Home Lands, Hawaiian Homes Commission, William Ailā, Jr., in his official capacity as the director of the Department of Hawaiian Home Lands and Chair of the Hawaiian Homes Commission, Patricia A.

trust. After filing a motion for summary judgment on their claims for breach of trust, and despite there being no disputed issues of fact, Plaintiffs had to wait for over a year and a half for a decision on their motion from the circuit court below. The court then declined to issue summary judgment in their favor and instead determined that their efforts to protect trust property were somehow precluded by a law that was enacted in 1995 with the intent to remedy only past breaches of trust while preserving future claims. Effectively, the court ruled that there is nothing that Plaintiffs can do to stop the taking of trust lands without compensation or to otherwise end the mismanagement of their trust.

The circuit court erred when it declined to grant summary judgment in Plaintiffs' favor and determined that Plaintiffs' claims were precluded. Well-settled law establishes that native Hawaiian beneficiaries are able to sue to enforce the provisions of the Hawaiian home lands trust in situations such as this. That ability is no more important than here, where breaches of trust are clearly evident and where the Department of Hawaiian Homelands itself has been complicit in the taking of trust lands and is now engaging in a joint defense with the State to perpetuate that taking.

Plaintiffs request that this Court uphold their ability to act to protect trust lands, vacate the circuit court's judgment below, and grant them summary judgment.

II. STATEMENT OF THE CASE

A. UNDISPUTED FACTUAL HISTORY

1. THE HAWAIIAN HOME LANDS TRUST

The United States' Congress passed the Hawaiian Homes Commission Act (the "Act" or the "HHCA") in 1921 to address the historical suffering and declining economic and social conditions of native Hawaiians that resulted from the impact of Western systems of governance on Hawaiian ways of life. Specifically,

[d]uring the early 1900s, concern about the plight of the Hawaiian people who had been displaced from rural to urban areas began to emerge as a result of the serious disruption in their traditional way of life. Out of concern for the declining numbers of full-blooded Hawaiians and the recognition that all previous systems of land distribution were ineffective, Congress entertained various homesteading proposals designed to rehabilitate the native Hawaiian people. Eventually, Congress enacted

Kahanamoku-Teruya, Randy K. Awo, Pauline N. Namu'o, Zachary Z. Helm, Dennis L. Neves, Michael L. Kaleikini, David B. Ka'apu, and Russell K. Kaupu, in their official capacities as members of the Hawaiian Homes Commission.

the HHCA, creating a land trust from ceded crown and public lands that was intended to rehabilitate the native Hawaiian people by, *inter alia*, making them eligible to receive the benefits of homesteading through leased land and related programs from the trust.

Kalima v. State, 111 Hawai‘i 84, 87, 137 P.3d 990, 993 (2006) (“*Kalima I*”). Title to the approximately 203,500 acres of Hawaiian home lands was vested in the United States until the Territory of Hawai‘i became a state in 1959, at which time the newly formed State of Hawai‘i entered into a “compact” with the U.S. government to assume the management and disposition of the trust lands. *See* Hawai‘i Admission Act of 1959, Pub. L. No. 86-3, §§ 4 & 5, 73 Stat. 4 (“Hawai‘i Admission Act”). Defendant-Appellee Department of Hawaiian Home Lands (“Department”), led by the Defendant-Appellee Hawaiian Homes Commission (“Commission”), is the agency charged with implementing the Act. *See* HHCA § 202. The “principal purposes” of the Act include “[e]stablishing a permanent land base for the benefit and use of native Hawaiians,” “[p]reventing alienation of the fee title . . . so that these lands will always be held in trust for continued use by native Hawaiians in perpetuity[.]” and “[p]roviding financial support and technical assistance . . . so that by pursuing strategies to enhance economic self-sufficiency and promote community-based development, the traditions, culture and quality of life of native Hawaiians shall be forever self-sustaining.” HHCA § 101(b).

2. THE MAUNA KEA ACCESS ROAD ON HAWAIIAN HOME LANDS

The Hawaiian home lands trust’s Humu‘ula lands, located on Hawai‘i Island and on the slopes of Mauna Kea, were selected by the Commission for inclusion into the trust on June 27, 1928. *See* Dkt. #92 at 9. At that time, and continuing for almost fifty years, the Board of Land and Natural Resources (or the Commission on Public Lands prior to statehood) controlled those lands and leased the same to Parker Ranch. *See id.* at 3-4.

The Mauna Kea Access Road (the “Access Road” or the “MKAR”), also sometimes referred to as the Mauna Kea Observatory Road, is an approximately 6.27 miles long road covering 65.142 acres of Hawaiian home lands’ Humu‘ula lands. *See* Dkt.² #92 at 3-4. The Access Road begins at the intersection with Saddle Road (also known as the Daniel K. Inouye Highway (Route 200)) and extends 125 feet past the Hale Pōhaku entrance (also known as the Onizuka Center for International Astronomy Visitor Information Station (“VIS”). *See* Dkt #80

² All citations to CAAP Dkt. #19, the Record on Appeal, shall be as follows: Dkt. #____.

at 8 ¶46; Dkt. #86 at 8-11, 16. After the Access Road reaches Hale Pōhaku, it continues as the “Summit Access Road” to the summit of Mauna Kea over land managed by the Board of Land and Natural Resources.³ See Dkt. #80 at 8 ¶47; Dkt. #86 at 8-11.

The Access Road was initially a bulldozed jeep road completed in 1964. See Dkt. #86 8-11, 16. Under the State’s direction, the road underwent several improvements as public funding was made available. See Dkt. #92 at 10; Dkt. #86 at 9-10. In 1976, DHHL requested those trust lands back, and the State relinquished the same, though now burdened with a road. See *id.*

Beginning in 1983, Hawaii County took over maintenance obligations for the Access Road through a resolution, which stated, in part:

WHEREAS Section 220 of the Hawaiian Homes Commission Act of 1920 provides that the roads through or over Hawaiian Home Lands shall be maintained by the County in which said particular roads to be maintained are located; and

WHEREAS, the Department of Hawaiian Home Lands, State of Hawaii, desires to convey to the County of Hawaii for maintenance purposes that certain section of Mauna kea Observatory Access Road, knowns as Parcels 2A, 3A, and 3C, situate on Hawaiian Home lands at Humuula, North Hilo, County and State of Hawaii, being more particularly described in Exhibit A attached hereto; and

WHEREAS, the Department of Hawaiian Home Lands has granted to the County of Hawaii the right to enter the roadway for the purpose of performing maintenance activities [sic]; and

WHEREAS, the Chief Engineer of the County of Hawaii has recommended that the roadway be accepted for maintenance purposes.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE COUNTY OF HAWAI‘I that the County of Hawaii accept and maintain that certain section of the Mauna kea Observatory Access Road, known as Parcels 2A, 3A, and 3C, situate on Hawaiian Home Lands, at Humuula, North Hilo, County and State of Hawaii, as described in Exhibit A attached hereto[.]

Dkt. #94 at 87; Dkt. #87 at 25-26. However, neither the County nor the State received a deed of conveyance or order of condemnation for the Access Road at any time. See Dkt. #87 at 16; Dkt. #106 (Tr. 57:14-23; 62:19-21; 63:1-3); Dkt. #104 at 11. To date, the trust has not been compensated for the use of trust lands for the access road. See Dkt. #87 at 16-21; Dkt. #95 at 105-109.

³ For the purposes of this brief, references to the “Access Road” shall exclude reference to the “Summit Access Road” which is not located on Hawaiian home lands trust lands.

3. THE LEGISLATURE ADOPTS ACT 395 AND ACT 14 TO REDRESS BREACHES OF TRUST

Since the Act's passage, thousands of acres of Hawaiian home lands were used, disposed of, or withdrawn from the trust by the State "in contravention of the [Act]." *See* 1995 Haw. Sp. Sess. Laws Act 14 ("Act 14"), § 1 at 696; *Kalima I*, 111 Hawai'i at 88, 137 P.3d at 94. Among these lands were 346.203 acres of trust lands taken by the State for roads and highways for public use without authority from or compensation to the trust. *See* Dkt. #95 at 105-109. In reaction to complaints of breaches of trust, President Ronald Reagan and Governor George Ariyoshi jointly appointed a Federal-State Task Force on the Hawaiian Homes Commission Act ("Joint Task Force"). *See* Dkt. #86, 19-70. The resulting 1983 Joint Task Force Report addressed patterns of breaches of the trust by both federal and state governments and made findings and recommendations to address the identified breaches. *See id.* More specifically, the Task Force found that "large amounts of Hawaiian Home lands have been used for purposes which benefit the general public rather than the beneficiaries of the [Act]" and "[l]ittle or no compensation has been paid to the DHHL for such uses." *See id.* It also acknowledged "Other Unlawful Takings and Transfers" among the host of breaches claimed for uncompensated public uses of trust lands by non-beneficiaries, *see id.* at 72-75, concluding that the "misuse of Hawaiian Home lands [for general public projects] appears to be a breach of trust for which compensation is due and owing." *Id.* at 77.

In 1988, the Hawai'i State Legislature attempted to address the criticisms of the Hawaiian home lands program and provide redress to its beneficiaries through "The Native Hawaiian Judicial Trusts Relief Act." *See* 1988 Haw. Sess. L. Act 395, §§ 1-7 at 942-945 ("Act 395"), later codified as Hawai'i Revised Statute ("HRS") chapter 673 (Supp. 1988); *Kalima I*, 111 Hawai'i at 88, 137 P.3d at 994. Act 395 provided, among other things, a limited waiver of sovereign immunity for beneficiaries of the trust to bring suit for breaches of trust as well as an opportunity for the governor to present a proposal to resolve claims for past breaches of trust arising between August 21, 1959 and June 30, 1988. *See* Act 395, § 5 at 945; *Kalima I*, 111 Hawai'i at 88, 137 P.3d at 994. The governor's action plan included convening a state task force consisting of representatives from the Department, the DLNR, and other state departments to address compensation claims ("State Task Force"). *See id.* at 88-90, 137 P.3d at 994-96.

In 1995, the State Legislature enacted Act 14, which authorized a future land exchange to compensate for, among other things, the rent-free "use" of acreage underlying streets and

roadways improperly constructed on Hawaiian home lands trust lands by other State departments between August 21, 1959 and July 1, 1988, and resolved controversies arising within that time period. *See* Act 14 §§ 1, 2, 4, 12 at 696-99, 702; *Kalima I*, 111 Hawai‘i at 90, 109-11, 137 P.3d at 996, 1015-17. The Legislature specifically preserved future breach of trust claims asserting a “cause of action accruing after June 30, 1988 as may be permitted by chapter 673[.]” Act 14, § 12 at 702.

In the nearly three decades that have passed since the enactment of Act 14, none of the relevant parties have initiated, let alone completed, a land exchange to compensate for the trust lands upon which the Access Road is situated. *See* Dkt. #95 at 108 (confirming that “no lands have been conveyed to DHHL to satisfy the State’s commitment to compensate the trust for its use of Hawaiian home lands as state highways on various islands totaling a claimed amount of 346.203 acres,” including the 65.142 acres under the Access Road); Dkt. #108 (Defendant Ailā admitting that that “the completion of the land transfers have not occurred”); Dkt. #87 at 16-21; Dkt. #106 (Tr. 57:14-23; Tr. 62:19-21; Tr. 63:1-3). The DHHL Defendants also never exercised their right to seek compensation from the State Defendants for the continued use of the Hawaiian home lands trust lands under the Access Road or attempted to prevent other State agencies from continuing to control those lands. *See* Dkt. #87 at 16-2; Dkt. #108.

4. DOT ASSERTS JURISDICTION AND CONTROL OVER THE ACCESS ROAD FOR THE FIRST TIME

On March 15, 2018, the Department of Transportation (“DOT”) asserted control over the Access Road by approving the designation of 6.27 miles of the Access Road between the intersection of Daniel K. Inouye Highway to 125 feet past the VIS as State Highway Route 210. *See* Dkt. #87 at 23; Dkt. #80 at 10 ¶ 61. The vehicle for this “designation” was an internal DOT memo “requesting designation of Mauna Kea Observatory Access Road as a State Highway.” Dkt. #87 at 23. Defendant Butay and Edwin H. Sniffen, Deputy Director of the Highways Division, signed the memo. *See id.* It is on this basis that DOT Defendants claims the Access Road is a state highway, allowing DOT the authority to manage it. *See* Dkt. #80 at 10 ¶ 64. However, DOT Defendants did not have a deed of conveyance or order of condemnation dedicating the Access Road as a State or public highway as required by HRS chapter 264. *See infra*, Section IV.B.1 n.8.

On July 15, 2019, DOT Defendants, with the assistance of DLNR and its Division of Conservation and Resources Enforcement, closed the Access Road to the public to allow for the transport of equipment and materials for the construction of a private commercial project, allegedly pursuant to HRS Chapter 264. *See* Dkt. #87 at 25-26; Dkt. #80 at 10 ¶ 62. This closure led to a prolonged shutdown of the Access Road that interfered with the ability of the public—including Plaintiffs Pualani Kanakaole Kanahale, Edward Halealoha Ayau, and Keli‘i W. Ioane—to access Mauna Kea. *See* Dkt. #87 at 28; Dkt. #85 at 4 ¶¶ 25-30, 33; *id.* at 8 ¶¶ 18-19; *id.* at 15 ¶¶ 9-12.

5. DHHL PERMITS AND DEFENDS THE DOT’S TAKING OF TRUST LANDS

On August 30, 2019, the Department of the Attorney General, the Department, and the DOT issued a joint statement asserting:

[The Access Road] is under the control and jurisdiction of DOT. Pursuant to HRS §26-19 and HRS Ch. 264, DOT has control and jurisdiction over all state highways and [the Access Road] is designated to DOT’s State Highway System as Route 210. This includes any portions of the road that cross over DHHL land.

Dkt. #87 at 25-26; Dkt. #80 at 10 ¶63. The statement pronounced that DOT “has controlled and maintained [the Access Road] since it became part of our highways system in 2018,” and that “Act 14 . . . resolved all claims concerning the use of Hawaiian home lands for public roads and highways built before and after statehood.” Dkt. #87 at 25.

To date, the DHHL Defendants have not acted to (1) preserve trust assets taken from the trust without following proper procedures or (2) protect the interests of the trust beneficiaries by pursuing legal action to remedy trust lands improperly wrested from their control without their consent or authorization. *See* Dkt. #108⁴; Dkt. 87 at 16-21; Dkt. #95 at 105.

6. PLAINTIFFS ARE BENEFICIARIES OF THE HAWAIIAN HOME LANDS TRUST

Plaintiffs-Appellants Kanahale, Ayau, and Ioane (“Plaintiffs”) are beneficiaries of the Act

⁴ *See* Dkt. #108 at ~10:34 (admission by Defendant Ailā that “I don’t disagree with you that the completion of the land transfers [under Act 14] have not occurred.”); ~11:18 (“[question:] who owns the deed or who controls the deed for the [Access Road]? . . . [answer by Defendant Ailā:] we own the underlying property, however, via Act 14 operational control of the road has been transferred to DOT); 20:35 (admission by Defendant Ailā that “there is no evidence of any land exchange right now.”); *see id.* at 22:19 (same); 32:55 (counsel for Defendants stating that a land exchange “has not been initiated.”).

who are entitled to derive multiple benefits from the programs of the Department. *See* Dkt. #85 at 1 ¶¶ 2-3; *id.* at 6 ¶¶ 2-4; *id.* at 15 ¶¶ 2, 4. They look to the DHHL Defendants to fulfill their trust duties to oversee the implementation and administration of the trust, to responsibly manage trust lands and resources in a manner consistent with the interests of beneficiaries, and to engage in meaningful dialogue with beneficiaries. *See id.* at 42-45 ¶¶ 32-35; *id.* at 7 ¶¶ 12-13; *id.* at 13 ¶ 50; *id.* at 16-17 ¶¶ 17-20. Plaintiffs also exercise native Hawaiian traditional and cultural practices at Mauna Kea and consider its lands to be among the most sacred lands in all of Hawai‘i. *See id.* at 3-4 ¶¶ 17, 29-30; *id.* at 7 ¶¶ 6-10; *id.* at 15 ¶¶ 5-8. All are concerned about the mismanagement of trust resources and were personally impacted by the DOT Defendants’ improper control and closure of the Access Road. *See id.* at 3 ¶¶ 21-23; *id.* at 6-7 ¶¶ 5, 8, 14-15; *id.* at 14 ¶ 54; *id.* at 16 -17 ¶¶ 8, 13-15, 20.

In 2019, Plaintiffs gathered on the Access Road to protect Mauna Kea and the trust lands in and around the Access Road, calling for Defendants to fulfill their duties as trustees to preserve trust assets and protect the interests of beneficiaries. *See id.* at 4 ¶¶ 25-28, 31; *id.* at 6-8 ¶¶ 5, 8, 18; *id.* at 15-16 ¶¶ 9-10.

7. PLAINTIFFS PROVIDED NOTICE OF THEIR CLAIMS TO DEFENDANTS

On various occasions, Ayau, a former employee of the DHHL, approached Chair Ailā and Commissioners Helm and Awo, urged them to resume management and control over the Access Road consistent with their trust duties, and asked them to place the issue of their authority over the Access Road before the full Commission at a public meeting so beneficiaries could be consulted on what appropriate actions could be taken on their behalf. *See id.* at 10-12 ¶¶ 31-32, 38, 40, 41-45. In each instance, they either refrained from acting or refused to do so. *See id.* at 12-13 ¶¶ 39, 46, 48-49. On September 7, 2019, Plaintiffs sent a letter to DHHL Defendants requesting that they take action to correct their breaches of trust related to the management and disposition of lands underlying the Access Road. *See* Dkt. #87 at 48-50; Dkt. #85 at 12 ¶¶ 41-45; Dkt. #80 at 10 ¶ 65. Plaintiffs never received a formal response since the service of that letter three years ago. *See* Dkt. #85 at 14 ¶ The53.

B. PROCEDURAL HISTORY

1. PLAINTIFFS’ COMPLAINTS

On February 13, 2020, Plaintiffs filed their initial complaint with the Circuit Court of the

First Circuit, naming as defendants the State of Hawai‘i Department of Transportation, Jade Butay, in his official capacity as director of the Department of Transportation, Department of Land and Natural Resources, Suzanne Case, in her official capacity as the director of the Department of Land and Natural Resources, Department of Hawaiian Home Lands, Hawaiian Homes Commission, William Ailā, Jr., in his official capacity as the director of the Department of Hawaiian Home Lands and Chair of the Hawaiian Homes Commission, Patricia A. Kahanamoku-Teruya, Randy K. Awo, Pauline N. Namu‘o, Zachary Z. Helm, Dennis L. Neves, Michael L. Kaleikini, and David B. Ka‘apu, in their official capacities as members of the Hawaiian Homes Commission. *See* Dkt. #1. On February 20, 2020, Plaintiffs filed their First Amended Complaint, adding Defendant Russell K. Kaupu in his official capacity as the then-newest member of the Commission. *See* Dkt. #12.

In their First Amended Complaint, Plaintiffs seek declaratory and injunctive relief based on “State Defendants’ Breach of Trust” (Count 2) and “DHHL Defendants’ Breach of Trust” (Count 1) related to the 2018 designation of the Access Road and the resulting breaches of trust. Specifically, Plaintiffs sought to stop (1) State Defendants’ ongoing violations of their trust duties as well as provisions of the Act and state law and (2) the DHHL Defendants’ ongoing violations of their trust duties to act in the exclusive interest of its beneficiaries. *See* Dkt. #12 at 8-11 ¶¶ 74-115. Plaintiffs also seek damages on behalf of the trust pursuant to HRS chapter 673 to restore the trust for the State’s uncompensated taking of the Access Road.⁵ *See id.* at 2, 9, 11-12 ¶¶ 3, 6, 89, *Prayer for Relief* ¶¶ H, K.

Plaintiffs, through their complaint, do not seek the closure of the Access Road nor the exclusion of the public from it. This action was instead brought to enforce Defendants’ legal and trust duties to native Hawaiian beneficiaries of the Hawaiian home lands trust.

2. MOTION TO DISMISS

On March 12, 2020, Defendants, all represented by the same counsel and undertaking a joint defense, filed a Motion to Dismiss Plaintiffs’ Complaint based on Hawai‘i Rules of Civil Procedure (“HRCP”) Rule 12(b)(6), asserting that the State has not waived its sovereign immunity with respect to the Access Road, Act 14 barred all actions against the State and its officials “on any decision related to the resolution” of claims covered by the Act, including any

⁵ Plaintiffs do not seek damages personally but instead seek damages pursuant to Chapter 673 to remediate the trust for the damages caused by Defendants’ breach.

“uncompensated use of Hawaiian home lands for state road claims and highways[,]” and Plaintiffs lack standing to challenge the designation of the Access Road as a state highway under HRS chapter 264 because they fail to allege any redressable injury-in-fact from the designation. *See* Dkt. #54. The Circuit Court of the First Circuit, the Honorable Judge Lisa Cataldo, presiding, denied the Motion at the hearing held May 8, 2020. Dkt. #82. Defendants filed their Answer to the First Amended Complaint on May 18, 2020 and the First Amended Answer on May 28, 2020. Dkt. #76, 80. On May 29, 2020, this Court entered the Order Denying Defendants’ Motion to Dismiss. Dkt. #82.

3. PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT

On July 13, 2020, Plaintiffs filed their Motion for Partial Summary Judgment (the “Motion”). Dkt. #84-87. In their Motion, Plaintiffs sought declaratory and injunctive relief to remedy the ongoing breaches of trust regarding the operation and control of the Access Road:

Plaintiffs ask that this Court grant appropriate declaratory relief establishing Defendants’ liability by declaring that: (1) State Defendants have breached their trust obligations and violated the HHCA by asserting control over the Hawaiian home lands underlying the MKAR and using the same without compensation; (2) State Defendants are liable for breach of the Hawaiian home lands trust pursuant to Hawai‘i Revised Statutes chapter 673; (3) control of the Hawaiian home lands underlying the MKAR rests solely with DHHL Defendants; (4) the MKAR is not a state or public highway; and (5) DHHL Defendants have breached their trust obligations and violated the HHCA by failing to address and redress State Defendants’ interference with DHHL Defendants’ exclusive control and their rent free use of the MKAR.

Should Plaintiffs prevail on the instant motion, they reserve the right to seek appropriate remedies, including injunctive relief and damages.

Dkt. #84 at 1-2. In support of the Motion, Plaintiffs provided admissible evidence, including multiple admissions by Defendants in self-authenticating documents, that Defendants breached their trust duties under the Act. Dkts. #84-87. In summary, Plaintiffs provided admissible evidence of the following material facts:

State Defendants’ Breach of Trust

- The properties underlying the MKAR are Hawaiian home lands.
- State Defendants have asserted control over the trust lands underlying MKAR.
- State Defendants did not obtain a lease, license, easement, or other land disposition, approved by the Commission, for the trust lands underlying the MKAR.

- There is no deed of conveyance for the lands underlying the MKAR to the director of transportation or the County Council and no order of condemnation for the same issued by a court.
- State Defendants have not compensated the Hawaiian home lands trust for their control and use of the trust lands underlying the MKAR.

State Defendants' Liability Under HRS Chapter 673

- Plaintiffs are native Hawaiians as defined under the Act.
- Plaintiffs issued an intent to sue letter more than 60 days prior to the filing of the Complaint.

DHHL Defendants' Breach of Trust

- DHHL Defendants were aware of the State's seizure of trust lands.
- DHHL Defendants failed to challenge the State's control of the trust lands underlying MKAR.
- DHHL Defendants never sought fair market value compensation for State Defendants' use and control of trust lands.

Id.; Dkt. #104 at 1-2.

On July 27, 2020, Defendants filed their Memorandum in Opposition to Plaintiffs' motion, Dkt. #92, and Plaintiffs filed their reply on July 30, 2020. Dkt. #97.

4. THE HEARING ON PLAINTIFFS' MOTION

The hearing on Plaintiffs' Motion for Partial Summary Judgment was held on August 4, 2020. Dkt. #101. At the hearing, Defendants' counsel admitted that "the [Act 14] land exchange [has not been] completed." Dkt. #106 (Tr. 57:14-23); *see id.* (Tr. 62:19-21 (same)). Defendants also raised, for the first time, objections to the admissibility of certain exhibits and testimony submitted by Plaintiffs in support of their Motion. However, when asked by the circuit court at the hearing to identify which material facts Defendants dispute, Defendants failed to identify any of the material facts as set forth in Plaintiffs' reply and reproduced in section II.B.3., *supra*. *See* Dkt. #97 at 2-3; Dkt. #106 (Tr. 40:16-41:25).

In light of the surprise objections raised by Defendants, the circuit court provided Plaintiffs the opportunity to file a written response to those objections. *See* Dkt. #101.

5. PLAINTIFFS' SUPPLEMENTAL MEMORANDUM

On August 21, 2020, Plaintiffs filed their Supplemental Memorandum in Support of their Motion for Summary Judgment. *See* Dkts. #105-09. Therein, Plaintiffs addressed Defendants' objections to the admissibility of Plaintiffs' exhibits and testimony, submitted offers of proof

regarding the evidence and admissions, responding to Defendants’ remaining objections, and ultimately established the material facts entitling Plaintiffs to summary judgment. *See* Dkt. #104 at 8-15.⁶

6. THE CIRCUIT COURT’S DENIAL OF PLAINTIFFS’ MOTION AND ENTRY OF JUDGMENT

On November 5, 2021, nearly a year and a half after Plaintiffs’ motion was filed, the circuit court entered its Order Denying Plaintiffs’ Motion for Partial Summary Judgment. Dkt. #126. In its Order, the circuit court denied Plaintiffs’ Motion, concluding that Act 14 “forecloses” Plaintiffs’ claims and the requested relief. *Id.* The court held in relevant part:

Act 14 is dispositive of the Motion. . . .

Based on the plain and unambiguous language of Act 14, the Court finds the intent of the Legislature clear: upon enactment, Act 14 fully and finally resolved the claims referenced therein, including the “uncompensated use of Hawaiian home lands for state roads claims and highways,” which arose between August 21, 1959 and July 1, 1988. . . .

Had the Legislature intended to create a “middle” as Plaintiffs describe, the Legislature could have included a provision regarding the status of trust lands pending a land exchange, making clear, for example (and as Plaintiffs suggest), that the subject home lands remained in the trust with the attendant trust obligations until the land exchange was completed. The Legislature did not do so. In fact, consistent with the intent to resolve all claims and controversies related to the subject trust lands upon passage of the Act, Section 17 of the Act prohibits suits against the State and others “on any decision relating to the resolution of these claims, except for actions to enforce the provisions.” 1995 Haw. Sp. Sess. L. Act 14 § 17 at 703 (underscore added).

Moreover, the State’s designation of MKAR as a State Highway in March 2018 does not take Plaintiffs’ claims outside Act 14 and give them the right to the requested relief pursuant to HRS ch. 673.

Claims and controversies related to the “management, administration . . . or disposition” of the trust lands underlying MKAR arose before July 1, 1988. Efforts to pave and improve MKAR began in the mid to late 1960s and continued through the early 1970s. When completed in 1974, pursuant to an agreement with DHHL, the County maintained MKAR, and the public has used the road for more than 50 years. No compensation has ever been paid for use of the trust lands underlying MKAR. It is that uncompensated use of Hawaiian home lands that warranted MKAR’s inclusion into the land exchange contemplated by Act 14. Upon passage of Act 14, the contemplated land exchange was in

⁶ Plaintiffs filed their pretrial statement on October 12, 2020, Dkt. #111, and Defendants filed their responsive pretrial statement on December 14, 2020. Dkt. #120. While the summary judgment decision was pending, on December 13, 2020, the circuit court filed its order setting trial for May 2, 2022. Dkt. #118.

full satisfaction and resolution of all controversies or claims related to the home lands underlying MKAR. See 1995 Haw. Sp. Sess. L. Act 14 § 4 at 699 (“The passage of this Act is in full satisfaction and resolution of all controversies at law and in equity, known or unknown, now existing or hereafter arising, established or inchoate, arising out of or in any way connected with the management, administration, supervision of the trust, or disposition by the State or any governmental agency of any lands or interests in land which are or were or are alleged to have been Hawaiian home lands, or to have been covered by the HHCA arising between August 21, 1959 and July 1, 1988.”)

Because the controversies or claims regarding the trust lands underlying MKAR arose between August 21, 1959 and July 1, 1988, Act 14 also makes clear that upon its passage, the Act resolved all future claims related to those Hawaiian home lands. See 1995 Haw. Sp. Sess. L. Act 14 § 4 at 699 (“The passage of this Act is in full satisfaction and resolution of all controversies at law and in equity, known or unknown, now existing or hereafter arising”) (underscore added).⁹ As such, no cause of action can accrue related to the home lands underlying MKAR after June 30, 1988 so as to permit suit pursuant to HRS ch. 673. See 1995 Haw. Sp. Sess. L. Act 14 § 12 (1) at 702.

Id.

On December 3, 2021, Plaintiffs filed a Motion for Leave to File Interlocutory Appeal, *see* Dkt. #134, and a Proposed Stipulation for Extension of Time to Appeal the November 5, 2021 Order, *see* Dkt. #136, the latter of which the court granted on December 8, 2021. Plaintiffs withdrew their Motion for Leave on February 8, 2022. *See* Dkt. #152. On February 10, 2022, Defendants filed a Stipulation and Order to Amend Order Denying Plaintiffs’ Motion for Partial Summary Judgment November 5, 2021 to amend the November 5, 2021 Order to reflect that the court already ruled on Plaintiffs’ claims and that “summary judgment be entered in favor of Defendants because no genuine issue as to any material fact exists and Defendants are entitled to summary judgment as a matter of law.” Dkt. #155. The Court filed its Amended Order Denying Plaintiffs’ Motion for Partial Summary Judgment that same day. Dkt. #157; CAAP Dkt. #4. Final Judgment was entered on March 16, 2022. Dkt. #159; CAAP Dkt. #2 (attached hereto as Appendix B).

Plaintiffs filed a timely notice of appeal on April 13, 2022. CAAP Dkt. #1.

III. STATEMENT OF POINTS OF ERROR

1. The circuit court erred in entering its February 10, 2022 Amended Order Denying Plaintiffs’ Motion for Partial Summary Judgment.⁷ Dkt. #157. The court’s

⁷ The circuit court’s error necessarily also includes all orders subsidiary to the February 10, 2022 Amended Order, including the November 5, 2021 Order Denying Plaintiffs’ Motion for Partial

conclusions made in error are found at Dkt. #157 at 3-9, and the challenged decision is attached hereto as Appendix A. Plaintiffs objected to, and otherwise brought the error to the attention of the circuit court, at Dkt. #62 at 10-12, Dkt. #84; Dkt. #97, Dkt. #106 (Tr. 4:5-32:16; Tr. 39:19-10:15; Tr. 58:7-16; Tr. 53:19-64:16; Tr. 67:6-75:3), and Dkt. #104.

IV. STANDARD OF REVIEW

Appellate courts review a circuit court’s grant or denial of summary judgment de novo. *Lambert v. Waha*, 137 Hawai‘i 423, 431, 375 P.3d 202, 210 (2016) (citing *Querubin v. Thronas*, 107 Hawai‘i 48, 56, 109 P.3d 689, 697 (2005)).

Summary judgment shall be rendered “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” HRCP Rule 56(b); *First Hawaiian Bank v. Weeks*, 70 Haw. 392, 396, 772 P.2d 1187, 1190 (1989). The movant may meet its burden for summary judgment by showing that, if the case went to trial, there would be no competent evidence to support a judgment for his opponent. *See id.* “[W]hen the moving party satisfies its initial burden of production [] the burden shift[s] to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.” *French v. Haw. Pizza Hut, Inc.*, 105 Hawai‘i 462, 470, 99 P.3d 1046, 1054 (2004).

This Court must “strictly scrutinize the actions of government” when the government acts as a trustee. *Ahuna v. Dep’t of Hawaiian Home Lands*, 64 Haw. 327, 339, 640 P.2d 1161, 1169 (1982) (adopting the U.S. Supreme Court approach toward native peoples in reviewing the federal government trustee’s action toward its beneficiaries). It must also liberally construe HRS chapter 673 to advance remedies to address the resulting depletion of trust assets. *See Kalima v. State*, 148 Hawai‘i 129, 134, 468 P.3d 143, 148 (2020) (“*Kalima IP*”).⁸

Summary Judgment it amended and replaced, Dkt. #126, and all judgments entered in reliance of it, including the March 16, 2022 Final Judgment. Dkt. #159

⁸ HRS chapters 673 and 674 were enacted to resolve long-standing controversies arising from the State’s breaches of its duties under the Act. *See* Act 14, § 1 at 696-97, §§ 12-15 at 702, § 18 at 703. Chapter 674 is a remedial statute authorizing a process for damages claims by individual native Hawaiians injured by a State breach of trust. Chapter 673 is a companion remedial statute authorizing a process for native Hawaiians to seek remedies for trust-wide breaches of trust. The Hawai‘i Supreme Court recently held that Chapter 674 should be “liberally construed to

V. **THE COURT ERRED WHEN IT DENIED PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND ENTERED JUDGMENT IN FAVOR OF DEFENDANTS**

Because the material facts are not in dispute and the controlling law is well-settled, Plaintiffs were entitled to summary judgment on their claims that (1) the Access Road is located on trust lands under the jurisdiction of DHHL Defendants, (2) the Access Road is not a State or public highway, (3) State Defendants have breached their trust duties and violated the terms of the Act by taking trust lands without compensation, and (4) DHHL Defendants breached their trust duties and violated the terms of the Act by failing to redress State Defendants' breaches of trust.

Act 14 did not preclude Plaintiffs' claims or their entitlement to summary judgment. Act 14 resolved only those claims that existed between August 21, 1959 and July 1, 1988, and the State's taking of the Access Road through its designation of it as a State highway occurred forty years after that period. Act 14 itself preserved future breach of trust claims, such as Plaintiffs' claims brought in this matter. Permitting Plaintiffs to enforce the Act and preserve the trust is especially critical where, as here, DHHL Defendants and the State refuse to rectify the ongoing taking and disposition of trust lands. The court's decision below should be vacated, and summary judgment should be granted in favor of Plaintiffs.

A. **THE MATERIAL FACTS ARE NOT IN DISPUTE**

As a matter of law, none of the material facts are in dispute. Therefore, this case is ripe for this Court to determine whether Plaintiffs were entitled to partial summary judgment below.

While it is true that a movant bears the burden of proving that they are entitled to relief regardless of whether a motion for summary judgment is adequately opposed, "[a] non-movant's failure to oppose the facts averred by the movant may constitute [an] admission of those facts." *Arakaki v. SCD-Olanani Corp.*, 110 Hawai'i 1, 6, 129 P.3d 504, 509 (2006); HRCP Rule 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule,

suppress the perceived evil and advance the enacted remedy' and should *not* be narrowly interpreted to 'impede rather than advance the remedies' provided by the statute." *Kalima II*, 148 Hawai'i at 134, 468 P.3d at 148 (emphasis added). For the same reasons, this Court should adopt a similar liberal construction when interpreting HRS chapter 673.

must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.”); *Coleman v. Hwashin Am. Corp.*, 2019 U.S. Dist. LEXIS 13983, *8 (M.D. Ala. 2019) (“If the nonmovant ‘fails to properly address another party’s assertion of fact’ as required by Rule 56(c), then the court may ‘consider the fact undisputed for purposes of the motion’ and ‘grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it.”); *King v. United States DOJ*, 245 F. Supp. 3d 153, 159 (D.D.C. 2017) (“[I]f the nonmovant fails to respond to a movant’s factual submission—and fails to take advantage of opportunities to rectify that failure—the district court may ‘consider the fact undisputed for purposes of the motion.’”); *CSX Transp., Inc. v. Gen. Mills, Inc.*, No. 1:14-CV-201-TWT, 2019 U.S. Dist. LEXIS 101123, *6 (N.D. Ga. 2019) (“[F]acts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them [on summary judgment].”) (internal citations omitted).

Below, Plaintiffs satisfied their burden on summary judgment to establish that there are no factual disputes for trial. After Plaintiffs submitted admissible evidence in support of its Motion for Partial Summary Judgment, Defendants failed to identify any material factual disputes and instead opposed the motion on legal grounds. *See* Dkt. #92. When asked by the circuit court at the hearing on the motion to identify which material facts Defendants dispute, Defendants failed to identify any of the material facts as set forth in Plaintiffs’ reply (and reproduced in section II.B.3., *supra*) as being in dispute. *See* Dkt. #97 at 2-3; Dkt. #106 (Tr. 40:16-41:25). Because Defendants failed to challenge these factual issues, they should be true for purposes of the Motion.⁹

⁹ Defendants failed to raise any evidentiary objections to Plaintiffs’ submitted evidence in its opposition to the Motion. *See* Dkt. #92. At the August 4, 2020 hearing on this matter, Defendants raised objections to the admissibility of certain exhibits and testimony submitted by Plaintiffs in support of their Motion. Dkt. #106 (Tr. 32:17-40:15). Plaintiffs addressed those objections, provided additional evidence, and submitted an offer of proof by way of their Supplemental Memorandum, which was not thereafter challenged by Defendants. *See* Dkt. #104. Therefore, even if Defendants’ failure to dispute Plaintiffs’ assertions of material facts do not constitute an admission as to those facts, Plaintiffs are still entitled to summary judgment based on admissible exhibits, testimony, and admissions. *See id.*

Therefore, this Court should deem the material facts Plaintiffs introduced before the circuit court on summary judgment as undisputed for purposes of the Motion.

B. THE CONTROL OF THE ACCESS ROAD RESTS SOLELY WITH DHHL DEFENDANTS

The Access Road is located on Hawaiian homes trust lands under the exclusive control of DHHL Defendants.

The Act prevents State Defendants from asserting control over Hawaiian home lands unless specifically authorized by the Commission in compliance with the Act. *See* HHCA § 206 (“The powers and duties of the governor and the board of land and natural resources . . . shall not extend to [trust lands], except as specifically provided in [the HHCA].”); *id.* § 204 (“[A]ll available lands shall immediately assume the status of Hawaiian home lands **and be under the control of the [Department]** to be used and disposed of in accordance with the provisions of this Act[.]”) (emphasis added); *Kalima II*, 148 Hawai‘i at 150, 468 P.3d at 164 (2020) (noting State Defendants’ trust duty “to correct the ongoing dispossession of trust lands.”). While the State may obtain a lease, license, or other disposition from DHHL Defendants to use and control trust lands, *see Ahia v. Dep’t of Transp.*, 69 Haw. 538, 544-46, 751 P.2d 81, 85-86 (1988), it can only do so (1) with the approval of the Commission, *see* HHCA § 204; Hawai‘i Administrative Rules (“HAR”) § 10-2-42 (requiring approval of the Commission for land dispositions), and (2) under terms and conditions consistent with land dispositions authorized by HRS chapter 171 as well as the purposes and trust duties set forth in the Act. *See* HHCA § 204; HAR §§ 10-4-1, 10-4-21-22; Dkt. #86 at 70-71 (urging “fair compensation” from unauthorized users); *Kalima II*, 148 Hawai‘i at 151, 468 P.3d at 165.

The Access Road is subject to the exclusive control of DHHL Defendants. Defendants concede that the subject properties underlying the Access Road are Hawaiian home lands. *See* Dkt. #86 at 8-11; Dkt. #106 (Tr. 57:14-23; Tr. 62:19-21; Tr. 63:1-3); Dkt. #108 (noting, at ~11:18 (“[question:] who owns the deed or who controls the deed for the Access Road? . . . [answer by Defendant Ailā:] we own the underlying property[.]”); *see* video at ~23:08 (“[counsel for Defendants:] “Department of Hawaiian homelands owns the fee to the [Access Road].”). State Defendants did not obtain a Commission-approved lease, license, easement, or other land disposition for the trust lands under Access Road as required by the Act and its implementing rules. Dkt. #87 at 25 (admitting that State Defendants’ purported authority over the Access Road

arises from its State Highway designation); Dkt. #92 at 8 (stating that State Defendants’ authority over the Access Road is authorized by Act 14); Dkt. #106 (Tr. 57:14-23) (counsel for Defendants admitting that “the land exchange . . . is not completed”); *see id.* (Tr. 62:19-21 (same)); Dkt. #108. Accordingly, the Access Road is “under the control of the [Department] to be used and disposed of in accordance with the provisions of [the] Act[.]” HHCA § 204.

DOT Defendants’ attempt to unilaterally designate the Access Road for inclusion into the State highway system was not effective to transfer ownership or operation and control to the State. The inclusion of the Access Road in the State highway system failed as a matter of law, because there was no deed of conveyance or final order of condemnation for the road, *see infra* Section V.C., and the enactment of Act 14 over 20 years prior—which did not vest title to the road with the State—did nothing to somehow cure Defendants’ failure to obtain the necessary title to the road. *See infra* Section V.E.

Therefore, because there are no disputed issues of material fact, and Plaintiffs are entitled to judgment as a matter of law, the circuit court erred when it denied Plaintiffs’ request to declare that the Access Road is located on trust lands under the control of DHHL Defendants.

C. THE ACCESS ROAD IS NOT A STATE OR PUBLIC HIGHWAY

DOT Defendants violated its own authorizing statute when it designated the Access Road a State Highway without a deed of conveyance or order of condemnation. The Access Road is not a public highway, and the State Defendants has no legal authority over it.

The State, through the DOT, has legal authority over “State” highways included in the State highway system. *See* HRS § 26-19; § 264-43. Pursuant to Chapter 264, there are only two ways that a road may become a public highway: (1) dedication by deed of conveyance naming the State or County of Hawai‘i as grantee delivered to and accepted by (a) the director of transportation (state highway) or (b) the Hawai‘i County Council (county public highway); or (2) issuance of a final order of condemnation by a court. *See* HRS § 264-1(c). In the case of a county-public highway, the DOT may unilaterally designate such a highway for inclusion into the State highway system if used primarily for through traffic. *See* HRS § 264-42.

DOT Defendants violated HRS chapter 264 when it designated the Access Road for inclusion into the State highway system. On March 15, 2018, Defendant DOT “approved” the unilateral designation of the Access Road as State Highway Route 210 to place the control and management of the Access Road under its purview. *See* Dkt. #87 at 23; HRS § 26-19; *see also*

Dkt. #80 at 10 ¶ 64. However, there is no dispute that there is no deed of conveyance for the lands underlying the Access Road to the director of transportation or the County Council and no order of condemnation for the same issued by a court. Therefore, the Access Road cannot be considered a state highway by way of deed of conveyance or order of condemnation. *See* HRS § 264-1(c). Because the Access Road is also not a county highway used for through traffic, Defendant DOT exceeded its authority under HRS § 264-42 by attempting to designate it for inclusion into the State highway system by way of a unilateral memorandum. *See* Dkt. #87 at 23. Therefore, DOT did not comply with HRS chapter 264 in asserting control over the Access Road as a State highway.

Because there are no disputed issues of material fact, and Plaintiffs are entitled to judgment as a matter of law, the circuit court erred when it refused to declare that the Access Road is not a state or public highway.

D. DEFENDANTS BREACHED THEIR TRUST DUTIES

1. ALL DEFENDANTS OWE TRUST DUTIES TO HAWAIIAN HOME LAND BENEFICIARIES

Defendants are under strict fiduciary obligations when dealing with the Hawaiian home lands trust and its beneficiaries.

In creating the Hawaiian home lands trust, the federal government “[undertook] a trust obligation benefiting the aboriginal [native Hawaiian] people[.]” *Ahuna*, 64 Haw. at 338, 640 P.2d at 1168; *see also Kalima I*, 111 Hawai‘i at 87, 137 P.3d at 993. Upon admission into the United States, the State of Hawai‘i voluntarily accepted that trust obligation “to assume the management and disposition of the Hawaiian home lands and to adopt the HHCA as a provision of the State Constitution.” *Id.* (citing Hawai‘i Admission Act, § 4); *see also* Haw. Const. art. XII, § 3 (“As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the [HHCA], as amended, shall be adopted as a provision of the constitution of this State[.]”). The State reaffirmed its commitment to these trust responsibilities by adding a constitutional provision guiding its management of the Hawaiian home lands. *See* Haw. Const. art. XII, § 2 (“The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian home projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out.”). The extent and nature of Defendants’ trust duties including those “high fiduciary duties normally owed by a

trustee to its beneficiaries.” *Ahuna*, 64 Haw. at 338, 640 P.2d at 1168 (recognizing that Defendants are “charged . . . with moral obligations of the highest responsibility and trust” and must be “judged by the most exacting fiduciary standards.”) (citing *Seminole Nation v. United States*, 316 U.S. 286, 297-97 (1942)) (emphases in original).

Defendants’ well-settled duties include: (1) “administer[ing] the trust solely in the interest of the beneficiar[ies],” *Ahuna*, 64 Haw. at 340, 640 P.2d at 1169; *see also Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai‘i*, 117 Hawai‘i 174, 195, 177 P.3d 884, 905 (2008) (“*OHA v. HCDCH*”); (2) “us[ing] reasonable skill and care to make trust property productive . . . or simply [] act[ing] as an ordinary and prudent person would in dealing with his own property[.]” *Ahuna*, 64 Haw. at 340, 640 P.2d at 1169; *see also Estate of Dwight*, 67 Haw. 139, 146, 681 P.2d 563, 568 (1984) (“[W]here the trust corpus is land, the trustee is normally under a duty to manage it so that it will produce income.”); (3) protecting trust property from harm, *see United States v. White Mt. Apache Tribe*, 537 U.S. 465, 475 (2003) (“[E]lementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.”); *Kalima II*, 148 Hawai‘i at 150, 468 P.3d at 164 (citing *Ching v. Case*, 145 Hawai‘i 148, 170, 449 P.3d 1146, 1168 (2019) (“The most basic aspect of the State’s trust duties is the obligation ‘to protect and maintain the trust property and regulate its use.’”) (quoting *State ex rel. Kobayashi v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977)); Restatement (Second) of Trusts § 176 (2012) (“The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property.”); *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 572 (1985) (“One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets[.]”); and (4) abiding by the terms of the trust. *See* Hawai‘i Admission Act, § 4; Haw. Const. art XII, § 2; *Kalima II*, 148 Hawai‘i at 150, 468 P.3d at 164 (concluding that “[t]he State also breached its trust duties by failing to restore those lands to the Trust and by failing to compensate the Trust for the lands’ rental value while in use by non-beneficiaries.”).

In addition to acting as a prudent trustee in dealing with trust property, DHHL Defendants are specifically obligated to comply with, uphold, and enforce the provisions of the Act. The Department, led by the Commission, must discharge the State’s duty to administer the Act. *See* HRS § 26-17 (“The department shall administer the [HHCA] as set forth in the Constitution of the State and by law.”); HHCA § 204 (“Upon the passage of this Act, all

available lands shall immediately assume the status of Hawaiian home lands **and be under the control of the department** to be used and disposed of in accordance with the provisions of this Act[.]” (emphasis added). The DHHL Defendants also adopted a rule to implement their duties:

As trustees, it shall be the duty of commissioners to: (1) Act exclusively in the interest of beneficiaries under the act; (2) Hold and protect the trust property for beneficiaries under the act; (3) Exercise such care and skill as a person of ordinary prudence would exercise in dealing with one’s own property in the management of Hawaiian Home lands; and (4) Adhere to the terms of the trust as set forth in the act.

HAR § 10-2-19. Accordingly, the duties guiding DHHL Defendants’ management of Hawaiian home lands trust are well defined and easily subject to judicial enforcement.

2. STATE DEFENDANTS BREACHED THEIR TRUST DUTIES

a. State Defendants Breached Their Duties By Interfering With DHHL’s Exclusive Control Over The Lands Underlying The Access Road

State Defendants breached their trust duties under the Act by asserting control over the trust lands underlying the Access Road.

State Defendants have a fiduciary duty to abide by the terms of the Hawaiian home lands trust and the Act. *See supra* Section IV.B. The Act prevents State Defendants from asserting control over Hawaiian home lands unless specifically authorized by the Commission in compliance with the Act. *See* HHCA § 206 (“The powers and duties of the governor and the board of land and natural resources . . . shall not extend to [trust lands], except as specifically provided in [the HHCA].”); *see also id.* § 204; *Kalima II*, 148 Hawai‘i at 150, 468 P.3d at 164 (noting State Defendants’ trust duty “to correct the ongoing dispossession of trust lands.”). While the State may obtain a lease, license, or other disposition from DHHL Defendants to use and control trust lands, *see Ahia*, 69 Haw. at 544-46, 751 P.2d at 85-86, it can only do so (1) with the approval of the Commission, *see* HHCA § 204; HAR § 10-2-42, and (2) under terms and conditions consistent with land dispositions authorized by HRS chapter 171 as well as the purposes and trust duties set forth in the Act. *See* HHCA § 204; HAR §§ 10-4-1, 10-4-21-22; *Kalima II*, 148 Hawai‘i at 151, 468 P.3d at 165.

State Defendants have asserted control over Hawaiian homes trust lands without proper approval or authority from DHHL Defendants. The Access Road is on Hawaiian home lands, *see supra* Section V.B. State Defendants asserted control over the trust lands underlying the Access

Road in breach of the Act and its high fiduciary duties by designating the Access Road a State highway in an attempt to place the control and management of the Access Road under its purview. *See* Dkt. #87 at 23; HRS § 26-19; *see also* Dkt. #80 at 10 ¶64. State Defendants continued to exercise control over the Access Road on July 15, 2019 by closing it to the public for four months. *See* Dkt. #87 at 28; *see also* Dkt. #80 at 10 ¶ 62. To remove all doubt, State Defendants issued a public statement admitting their position that the Access Road “is under the control and jurisdiction of [the DOT]” and that the “State DOT has controlled and maintained [the Access Road] since it became part of [the State Highway System].” Dkt. #87 at 25-26; Dkt. #80 at 10 ¶ 63.

Therefore, there are no disputed issues of material fact, and Plaintiffs are entitled to judgment, as a matter of law, that State Defendants breached their trust duties by unlawfully asserting control over the trust lands underlying the Access Road. Accordingly, the circuit court erred when it failed to grant summary judgment in favor of Plaintiffs.

b. State Defendants Breached Their Duties By Failing To Properly Compensate The Hawaiian Home Lands Trust

State Defendants’ ongoing control of trust lands without compensation is a breach of trust.

The HHCA mandates that available lands can only be disposed of “[i]n the manner and for the purposes set out in th[e Act.]” HHCA § 205(1); *see also* HAR § 10-4-1. Primarily, the Act authorizes the Department to issue leases to native Hawaiians. *See* HHCA § 207(a); *Ahia*, 69 Haw. at 544, 751 P.2d at 85. If, however, the Commission decides “any retained available lands are not required for leasing to native Hawaiians for purposes described in § 207(a),” it may also “dispose of those lands to the public” to generate revenue for the Hawaiian home lands trust. *Ahia*, 69 Haw. at 545-56, 751 P.2d at 86-89. The Act mandates fair market-value compensation for the use of trust lands. *See* HHCA § 204(2) (“In the management of any retained available lands not required for leasing under section 207(a), the department may dispose of those lands or any improvements thereon to the public, including native Hawaiians, on the same terms, conditions, restrictions, and uses applicable to the disposition of public lands in [HRS] chapter 171[.]”); HRS § 171-17(a) (“No such lands shall be sold or leased for a sum less than the value fixed by appraisal.”). The State itself has acknowledge this well-settled legal principle. *See*

HHCA § 204(2); HRS § 171- 17(a) (“No such lands shall be sold or leased for a sum less than the value fixed by appraisal[.]”)

State Defendants breached their trust duties by not compensating the Hawaiian home lands trust for the use of trust lands. State Defendants failed to compensate the trust for their control and use of the trust lands underlying the Access Road for over two years. *See* Dkt. #87 at 16-21; Dkt. #95 at 104-109; Dkt. #108; *see also supra* note 4. In so doing, State Defendants ignore the very spirit of the Act, *see* Haw. Const. art XII, § 2, by effectively removing trust lands from the Department’s inventory for without ensuring the trust is made whole.¹⁰ *See Kalima II*, 148 Hawai‘i at 147-151, 468 P.3d at 161-165 (regarding the State’s failure to recover trust lands improperly taken by the federal government, the Hawai‘i Supreme Court concluded that the State “breached its trust duties by failing to restore those lands to the Trust and by failing to compensate the Trust for the lands’ rental value while in use by non-beneficiaries.”).

Therefore, there are no disputed issues of material fact, and Plaintiffs are entitled to judgment, as a matter of law, that State Defendants breached their trust duties by failing to compensate the Hawaiian home lands trust for its unlawful control of the Access Road. The circuit court therefore erred when it failed to grant summary judgment.

c. State Defendants Are Liable For Damages To Restore The Hawaiian Home Lands Trust

As a result of State Defendants’ breach of their trust duties to Hawaiian home lands beneficiaries, they are liable for land or monetary damages to restore the trust for depletions in an amount to be determined by the circuit court. *See* HRS § 673-10.

Under HRS chapter 673, the State of Hawai‘i waived its sovereign immunity for claims for land or monetary damages to restore depletions of the Hawaiian home lands trust resulting from “any breach of trust or fiduciary duty[.]” HRS §§ 673-1, 673-4. Any native Hawaiian, as

¹⁰ State Defendants have no authority to dispose of their own public trust lands without compensation, *see* HRS § 171-17(b) (requiring lease rentals of state land use minimums be determined by qualified and disinterested appraisers), yet their use of Hawaiian home trust lands remains uncompensated. This is a clear repudiation of the common law trust duties to administer and manage trust lands solely in the interest of beneficiaries, make trust property productive, and preserve and maintain trust assets. *See Ahuna*, 64 Haw. at 340, 640 P.2d at 1169; *OHA v. HCDCH*, 117 Hawai‘i at 195, 177 P.3d at 905; *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. at 572.

defined in section 201(a) of the Act, may bring suit pursuant to HRS chapter 673. *See* HRS § 673-2. As a precursor to suit, Plaintiffs shall give not less than sixty days written notice prior to filing suit. *See* HRS § 673-3. The statute of limitations for a Chapter 673 claim is two years. *See* HRS § 673-10.

Plaintiffs prevailed on their Chapter 673 claim. Plaintiffs are native Hawaiians as defined under the Act. *See* Dkt. #85 at 1 ¶ 1-2; *id.* at 6 ¶ 1-2; *id.* at 15 ¶ 1-2; Dkt. #80 at 5-6 ¶¶ 17, 19, 21, 23, 26, 28. Plaintiffs provided no less than sixty days written notice prior to filing suit. *See* HRS § 673-3; Dkt. #87 at 48-50; Dkt. #85 at 10-12 ¶¶ 31-32, 38, 40, 41-45. And, because the State, through Defendant DOT, unlawfully assumed control over the Access Road *for the first time* on March 15, 2018, this suit was timely filed within two years of the DOT's attempt to designate the Access Road a state highway.

In light of the State's clear breaches of its fiduciary duties, it is liable to remediate the Hawaiian home lands trust for the deprivation of trust assets caused by its unlawful assertion of control over the Access Road, in an amount to be determined at trial. The circuit court therefore erred when it failed to grant summary judgment on State Defendants' liability under Chapter 673.¹¹

3. DHHL BREACHED THEIR TRUST DUTIES

a. DHHL Defendants Breached Their Duties By Failing To Exercise Exclusive Control Over The Access Road

DHHL Defendants breached their well-settled fiduciary duties by refusing to exercise exclusive control of—and effectively surrendering to State Defendants—the trust lands underlying the Access Road. *See supra* Section V.C.

Despite DHHL Defendants' awareness of the State's unlawful seizure of trust lands,¹² it is undisputed that they failed to challenge the State's unlawful control of these lands. *See* Dkt.

¹¹ Accordingly, this matter should be remanded back to the circuit court to determine damages owed to thrust that are needed to restore the Hawaiian home lands trust pursuant to Chapter 673.

¹² DHHL Defendants were clearly aware of the State's usurpation of trust lands given: (1) the open and highly publicized nature of the taking and use, *see* Dkt. #87 at 23-28; (2) Ayau's urging of the Commission to challenge State Defendants' control over the Access Road, *see* Dkt. #85 at 11-13 ¶¶ 31-32, 38, 40, 41-45; as well as (3) Plaintiffs' September 2019 letter outlining

#85 at 12-14 ¶¶ 39, 46, 48-49, 53. Instead, DHHL Defendants were complicit with the State’s seizure and publicly endorsed the State Defendants’ joint statement in August 2019 to close the Access Road. *See* Dkt. #87 at 25-26. DHHL Defendants’ breaches have gone further than simply abandoning their post; they held the door open while trust assets were raided. *See Ahuna*, 64 Haw. at 340, 640 P.2d at 1169; HAR § 10-2-19(3); Dkt. #86 at 77 (“The DHHL and native Hawaiians should seek effective remedies for past abuses of Hawaiian Home lands from the State and/or Federal governments.”). Even after they were put on notice of Plaintiffs’ claims and concerns, DHHL Defendants continue to act in lockstep with the State, including engaging in a joint-defense of Plaintiffs’ claims. These acts and omissions provide no benefit to the trust, and violate DHHL Defendants’ duties to administer the trust solely in the interest of the beneficiaries, act as an ordinary and prudent person would in dealing with his own property, protect trust property from harm, and abide by the terms of the Hawaiian home lands trust.¹³ *See* HAR § 10-2-19(4); HHCA §§ 204-205, 207; Dkt. #86 at 72 (“The DHHL should issue notices immediately to unauthorized users requesting that the user enter into an appropriate conveyance instrument for fair compensation or relinquish possession of Hawaiian Home lands.”).

Accordingly, there are no disputed issues of material fact, and Plaintiffs are entitled to judgment, as a matter of law, that DHHL Defendants breached their trust duties under the Act by failing to maintain control and authority over the Access Road trust lands. The circuit court therefore erred when it failed to grant summary judgment.

b. DHHL Defendants Breached Their Duties By Failing To Seek Compensation For The Taking Of The Access Road

DHHL Defendants have also breached their trust duties by failing to seek market value compensation for the Access Road from the time Defendant DOT usurped control of the Access

Defendants’ acts and omissions in spite of their clear trust duties. *See id.* at 12-13 ¶¶ 41-45; Dkt. #87 at 48-50.

¹³ DHHL Defendants’ acts and omissions also violated their duty to act exclusively in the interest of its beneficiaries, many of whom State Defendants arrested under the false pretense that they occupied a state highway. *See* Dkt. #85 at 4 ¶ 28; *id.* at 15 ¶ 11; *Ahuna*, 64 Haw. at 340, 640 P.2d at 1169; HAR § 10-2-19(1); *see also* Dkt. #86 at 80 (urging protection of access to sacred places of worship).

Road in March 2018 through the improper “designation” of it as a State highway. *See* Dkt. #87 at 10-21; *see also* Dkt. #86 at 76-77.

The Act mandates that, if trust lands are not required for leases to Native Hawaiians, then the Commission may dispose of available lands to the public to generate revenue to support homesteading, *see Ahia*, 69 Haw. at 545, 751 P.2d at 89, and then only based on fair market-value compensation. *See* HHCA § 204(a)(2); HRS § 171-17(a)-(b); Dkt. #86 at 76 (urging DHHL demand “fair compensation or possession of ... parcels” not properly authorized for use by others). DHHL Defendants never sought fair market value compensation as required by the Act. This omission clearly violates DHHL Defendants’ duty to adhere to the terms of the Act. *See* HAR § 10-2-19(4). Further, DHHL Defendants’ failure to require compensation for the use and taking of trust lands is also a breach of their explicit duty to make trust property productive and to act as a prudent landowner. *See* HAR §10-2-19(3).

In *Ahuna*, the Hawai‘i Supreme Court considered whether the Hawaiian Homes Commission commissioners acted as ordinary and prudent persons would in dealing with their own property by withholding 3.5 leasable acres from a 10-acre agricultural lease for the mere possibility that it may be subject to being used in the extension of a highway sometime in the indefinite future. *See Ahuna*, 64 Haw. at 331-32, 640 P.2d at 1164-65. The Court held that it would be unreasonable to leave these trust assets in an unproductive state when there was an opportunity to use it to benefit native Hawaiians. *See id.* at 340, 640 P.2d 1169.

As in *Ahuna*, it is similarly unreasonable for a prudent landowner to leave over 65 acres of land to the whims of another without seeking compensation for its own inability to use that same land to further trust purposes. *See* Dkt. #86 at 76 (decrying loss of “beneficial use of” and “revenues for [unauthorized] use of [trust lands]”). Ultimately, by failing to seek compensation, DHHL Defendants neglect and ignore their duty to act prudently, exclusively in the interests of their beneficiaries, and to make trust property productive. *See Ahuna*, 64 Haw. at 340, 640 P.2d 1169; HAR § 10-2-19(1).

Failing to seek compensation is not a *de minimis* violation of DHHL Defendants’ duties. The Hawai‘i Supreme Court has already concluded that the Department is underfunded and “has not been able to fulfill all of its constitutional purposes[,]” including (1) the development of home, agriculture, farm, and ranch lots, (2) home, agriculture, aquaculture, and farm and ranch loans, as well as (3) educational, economic, political, social and cultural rehabilitation projects to

improve the general welfare and conditions of native Hawaiians. *Nelson v. Hawaiian Homes Comm'n*, 127 Hawai'i at 203, 205, 277 P.2d at 281, 297, 299 (2012). DHHL Defendants likewise recognize that funding is a major barrier to addressing its growing waiting list of applicants for homesteads. *See, e.g.*, Dkt. #86 at 16. Accordingly, they cannot continue to ignore the potential past-due rental income for this use of the trust lands underlying the Access Road as a means to address the deficit and support the purposes of the Act.

DHHL Defendants failed to seek compensation for State Defendants' unauthorized taking of the Access Road. Thus, Plaintiffs are entitled to judgment as a matter of law that the former are in violation of the terms of the Act and in breach of their trust duties.

E. ACT 14 DOES NOT PRECLUDE PLAINTIFFS' CLAIMS

Act 14 does not have the effect of *res judicata* as to Plaintiffs' claims. *See* Dkt. 157 at 5-9. Because Act 14, by its own terms, only affects claims that "arise" prior to July 1, 1988, the court erred when it found that Act 14 precluded "all claims" arising out of the mismanagement of the Access Road, including the entirely new taking that occurred in 2018. *See id* at 8-9.

In the context of *res judicata*, claims are precluded if they "arise out of the same transactional nucleus of facts." *Wong v. Cayetano*, 111 Hawai'i 462, 478, 143 P.3d 1, 17 (2006). To determine whether a claim previously arose, courts look as to whether claims could have been asserted at that time. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003). As one court summarized:

"[T]he inquiry about the 'same transactional nucleus of facts' is the same inquiry as whether the claim could have been brought in the previous action." *Liquidators of European Fed. Credit Bank*, 630 F.3d at 1151. This is because:

If the harm arose at the same time, then there was no reason why the plaintiff could not have brought the claim in the first action. The plaintiff simply could have added a claim to the complaint. If the harm arose from different facts at a different time, however, then the plaintiff could not have brought the claim in the first action.

Id. Thus, "[w]hether two suits arise out of the same transactional nucleus depends upon whether they are related to the same set of facts and whether they could conveniently be tried together."

Howard v. City of Coos Bay, 871 F.3d 1032, 1039-1040 (9th Cir. 2017) (emphasis in original).

Plaintiffs' claims could not have "arisen" out of the same set of facts than the claims that Act 14 purported to settle. Act 14 only resolved breaches of trust related to the mismanagement

of trust lands that occurred between August 21, 1959 and July 1, 1988. Plaintiffs’ claims concern the breaches of trust that occurred **forty years later** in 2018—acts and omissions related to the designation of the Access Road for inclusion into the State Highways System. By making that designation, DOT asserted that it, and not the DHHL Defendants, had *de facto* “ownership” and control over the trust lands underlying the Access Road, and DHHL acquiesced to that assertion.¹⁴

Act 14 did not resolve attempts to claim title to the lands under the Access Road. The State admits that, when it constructed the Access Road between 1964-1974, it knew that the underlying lands were Hawaiian home lands trust lands that were under its management only temporarily. *See* Dkt. #92 at 10. In 1976, DHHL requested those trust lands back, and the State relinquished the same, though now burdened with a road. *See id.* In 1983, when the County exerted jurisdiction over the Access Road, it did so at DHHL’s request and **for maintenance purposes only** and even then with the express acknowledgement of DHHL Defendants’ continuing jurisdiction over and management of the road. Dkt. #92 at 10 (noting the resolution acknowledging DHHL’s jurisdiction over the Access Road and accepting only “maintenance” duties over the same). That relationship only changed in 2018, when DOT attempted to change the State Defendants’ legal interest in the subject trust lands and placed it under its exclusive control and jurisdiction. Act 14 could not have resolved Plaintiffs’ claims to fix the taking of the permanent operation and control over trust lands because that was not at issue in 1988; Defendants recognized that DHHL had jurisdiction over the Access Road then. Accordingly, there is no way that Plaintiffs’ claims could have been brought or otherwise resolved 40 years before Defendants first committed the subject breaches of trust. *See Wong*, 111 Hawai‘i at 478, 143 P.3d at 17; *Tahoe-Sierra Pres. Council, Inc.*, 322 F.3d at 1077.

The circuit court’s conclusion that Act 14 resolved all claims related to the “management, administration . . . or disposition” of the trust lands under the Access Road is precluded by other provisions of the Act. Dkt. #157 at 8. The court relied on a portion of section 4 of Act 14, which resolves all controversies “known or unknown, now existing or hereafter arising, established or inchoate, arising out of or in any way connected with the management, administration,

¹⁴ As the DOT can only designate roads that it or the County owns in fee simple for inclusion in the State Highways System, *see* HRS § 241-1, its 2018 designation is tantamount to a seizure of title.

supervision of the trust[.]” Act 14 § 4. However, other provisions of Act 14 expressly limit its reach to claims “*arising between August 21, 1959 and July 1, 1988*[.]” *see id.* § 4 (emphasis added), and prohibit only those “future claims” to those arising during the same time period. *Id.* § 2. To remove all doubt, the drafters of Act 14 expressly reserved all future claims that may arise “with respect to the administration of the Hawaiian home lands trust and are brought pursuant to chapters 673”:

Nothing in this section shall replace or affect the claims of beneficiaries with regard to (a) reparations from the federal government, (b) *claims arising subsequent to July 1, 1988* and brought pursuant to sections 2, 3, and 4 of [Chapter 673], except as otherwise provided in section 13 of this Act or (c) Hawaiian home lands trust individual claims brought pursuant to chapter 674, Hawaii Revised Statutes, except as otherwise provided in sections 14, 15 and 16 of this Act.

Id. § 4 (emphases added). Because the court’s interpretation conflicts with other provisions of Act 14, its interpretation must be rejected for one that gives meaning to the entire act. *See In re Ainoa*, 60 Haw. 487, 490, 591 P.2d 607, 609 (1979); *Kam v. Noh*, 70 Haw. 321, 326-27, 770 P.2d 414, 417-18 (1989) (“Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.”). Instead, the plain language of Act 14, when read as a whole, resolves and precludes only those claims based on acts and omissions that occurred between August 21, 1959 and July 1, 1988, regardless of whether a right to sue later arises, while at the same time preserving all future claims based on acts and omissions occurring after July 1, 1988.

The circuit court’s order also conflicts with the Act itself. The order impliedly assumes that Act 14 automatically vested title in the Access Road with the State. Dkt. #157 at 7 (stating that the Legislature did not create a “middle” period where the lands would remain in the trust). However, Act 14 does not transfer title to the Access Road, explicitly direct the transfer of the Access Road, or otherwise vest interest in the same; it only authorizes “the initiation of a land exchange.”¹⁵ Act 14 § 4. That exchange never occurred, so title and jurisdictions did not change hands. Ultimately, the Legislature did not have the ability to vest or otherwise transfer title to the Access Road away from the trust because doing so **would be in violation of the Act**. *See* HHCA

¹⁵ It is unclear if an exchange will occur in Plaintiffs’ lifetime, as none has occurred since 1995, and any land exchange is subject to beneficiary consultation and approval by the Secretary of Interior. *See* 43 CFR Part 47. Prohibiting beneficiaries from suing to stop breaches of trust would effectively permit the State to reap the benefit of Act 14 without providing anything in return.

§ 204 (“Upon the passage of this Act, all available lands shall immediately assume the status of Hawaiian home lands **and be under the control of the department** to be used and disposed of in accordance with the provisions of this Act[.]”) (emphasis added). Therefore, the circuit court’s order is in contravention of the Act and must be vacated.

Ultimately, the circuit court’s decision, if it is allowed to stand, would close the courthouse doors to beneficiaries who wish to end ongoing breaches of trust and violations of statute that were never addressed nor compensated through Act 14. The Hawai‘i Supreme Court has already determined that, where the government disposes of trust lands, the public must have recourse:

If Kapiolani Park is the subject of a charitable trust, then the City is the trustee by virtue of the executive order of the governor turning the property over to it. Where a trustee of a public charitable trust is a governmental agency, such as the City, and that agency does not file periodic accounts of its stewardship, and will not seek instructions of the court as to its duties . . . the citizens of this State would be left without protection, or a remedy, unless we hold, as we do, that members of the public, as beneficiaries of the trust, have standing to bring the matter to the attention of the court.

Were we to hold otherwise, the City, with the concurrence of the attorney general, would be free to dispose, by lease or deed, of all, or parts of, the trust comprising Kapiolani Park, as it chose, without the citizens of the City and State having any recourse to the courts. Such a result is contrary to all principles of equity and shocking to the conscience of the court.

Kapiolani Park Pres. Soc’y v. Honolulu, 69 Haw. 569, 572-73, 751 P.2d 1022, 1025 (1988). No land exchange ever happened. Defendants took and permitted the taking of trust lands without compensation, respectively. DOT Defendants failed to comply with their own authorizing statute by designating the Access Road for inclusion in the State Highway System without any deed of conveyance or order of condemnation in violation of HRS chapter 264. Plaintiffs, beneficiaries of this trust, must have recourse to repair and enforce the trust and defend the interests of those that the State swore to act for the exclusive benefit of as a condition of Statehood. This is especially true where the trustees of the trust, who are obligated to act in the beneficiaries’ best interest, refuse to take steps to stop ongoing violations of the Act and uncompensated takings of trust lands. To find that Act 14 precluded later suit reaches an illogical result inconsistent with its stated purpose of redressing past harms while permitting future claims to make the trust whole. *See* Act 14 § 2. Preventing Plaintiffs from enforcing the terms of the trust would allow the State

Defendants to receive all the benefits of using trust lands without any of the burden at the expense of trust beneficiaries.

The circuit court erred when it determined that Act 14 resolved or otherwise precluded Plaintiffs' claims.

VI. CONCLUSION

Plaintiffs respectfully request that this Court reverse and vacate the February 10, 2022 Amended Order Denying Plaintiffs' Motion for Partial Summary Judgment (and all orders subsidiary to that order) as well as the March 16, 2022 Final Judgment. Plaintiffs also request that this Court enter partial summary judgment in favor of Plaintiffs,¹⁶ or otherwise direct the circuit court below to enter an order granting partial summary judgment, and declare that: (1) State Defendants have breached their trust obligations and violated the Act by asserting control over the Hawaiian home lands underlying the Access Road and using the same without compensation; (2) State Defendants are liable for breach of the Hawaiian home lands trust pursuant to Hawai'i Revised Statutes chapter 673; (3) control of the Hawaiian home lands underlying the Access Road rests solely with DHHL Defendants; (4) the Access Road is not a state or public highway; and (5) DHHL Defendants have breached their trust obligations and violated the Act by failing to address and redress State Defendants' breaches of trust. This Court should also remand this matter to the circuit court to determine further relief, including injunctive relief and damages.

DATED: Honolulu, Hawai'i, August 24, 2022.

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¹⁶ Hawai'i's appellate courts are empowered to enter summary judgment on appeal to avoid burdening lower courts with unneeded procedure. *See Bush v. Watson*, 81 Hawai'i 474, 487, 918 P.2d 1130, 1143 (1996) (granting summary judgment on appeal to appellants); *Flint v. Mackenzie*, 53 Haw. 672, 673, 501 P.2d 357, 358 (1972) ("It is most desirable that the court cut through mere outworn procedural niceties[.]").