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CAAP-22-0000268

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI‘I

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

Plaintiffs-Appellants,

v.

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. AILA, 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

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CIVIL NO. 1CCV-20-0000235

APPEAL FROM THE

1) FINAL JUDGMENT, filed and entered on March 17, 2022;
2) ORDER DENYING PLANITIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT, filed November 5, 2021; and
3) AMENDED ORDER DENYING PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT, filed February 10, 2022

FIRST CIRCUIT COURT

HONORABLE LISA W. CATALDO
Judge

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.

STATE OF HAWAII'S ANSWERING BRIEF

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STATE DEFENDANTS-APPELLEES' ANSWERING BRIEF

I. INTRODUCTION

The core premises of Plaintiffs' breach of trust claims are that the State is not permitted to operate a public highway – Mauna Kea Access Road (MKAR) – on Hawaiian home lands and must compensate the Hawaiian home lands trust for the past use of trust lands for that road. But Plaintiffs are re-litigating a controversy that the Legislature explicitly brought to final resolution through Act 14 of 1995 (Act 14): the uncompensated use of Hawaiian home lands for public purposes.

Even assuming *arguendo* that the construction and use of MKAR on Hawaiian home lands was improper, the land exchanges initiated by Act 14 were a final resolution of all claims regarding uncompensated use of Hawaiian home lands for state roads and highways. In the Legislature's exact words, Act 14 had "the effect of *res judicata*" as to breach of trust claims that arose prior to July 1, 1988. There is no question that MKAR was in use as a public road – built and paid for by the State of Hawai‘i – long before July 1, 1988. So, there is no question that any breach of trust claims regarding the public use of MKAR were resolved by Act 14.

Nor can Plaintiffs avoid Act 14 as a bar to their claims by focusing on the Department of Transportation's (DOT) 2018 designation of MKAR as a state highway, which changed the jurisdiction over MKAR from the County of Hawai‘i to the State. The governmental entity – state or county – that had jurisdiction over MKAR at any given time is of no consequence to whether Act 14 bars Plaintiffs' claims, given that the uncompensated use and status of MKAR as a public road both unquestionably began before July 1, 1988. Even more confounding is that, in seeking a court order returning MKAR to the "exclusive control" of the DHHL, Plaintiffs have declined to seek the one remedy that Act 14 left available to them; to wit, enforcement of Act 14's land

exchange provisions.

In addition to being barred by Act 14, Plaintiffs' claims fail at the outset for a separate, additional legal reason. Plaintiffs' claims are barred by the State's sovereign immunity pursuant to Act 395 of 1988 (Act 395), which expressly preserved the State's immunity for breach of trust claims arising before July 1, 1988, and for those relating to governmental activity beginning prior to that date and continuing after. For these reasons, explained fully below, this Court should affirm.

II. COUNTER STATEMENT OF THE CASE

A. Factual Background

1. The Hawaiian Homes Commission Act and the Hawaiian Home Lands

Congress enacted the Hawaiian Homes Commission Act 1920 (HHCA)[1] in 1921, creating a land trust "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). The HHCA set aside over 200,000 acres of land for the land trust, which are known as the Hawaiian home lands. *Ahuna v. Dep't of Hawaiian Home Lands*, 64 Haw. 327, 337, 640 P.2d 1161, 1167–68 (1982). Upon entry into the union in 1959, the State of Hawai‘i took title to the Hawaiian home lands, at the same time assuming responsibility for the "management and disposition" of the lands, *Kepo‘o v. Watson*, 87 Hawai‘i 91, 97, 952 P.2d 379, 385 (1998), and the fiduciary obligation to the native Hawaiian people established by the HHCA. *Ahuna*, 64 Haw. at 338, 640 P.2d at 1168. In other words, while "the State is bound by its fiduciary duty to the Native Hawaiian beneficiaries, . . . both legal title and management responsibilities over the land are still in the hands of the State." *Kepo‘o*, 87 Hawai‘i at 97, 952 P.2d at 385.

[1] Hawaiian Homes Commission Act 1920 (Act of July 9, 1921, c. 42, 42 Stat. 108).

The State implements its fiduciary duties under the HHCA through the Department of Hawaiian Home Lands (DHHL, or the Department), which is headed by a state board called the Hawaiian Homes Commission (the Commission). HHCA § 202.

2. The Humu‘ula Mauka Hawaiian Home Lands and the Mauna Kea Access Road

Section 203 of the HHCA described various parcels of land to be set aside as "available lands," and designated as Hawaiian home lands. HHCA § 203. Relevant here, section 203(1) of the Act required the Department to select 53,000 acres from Humu‘ula Mauka on Hawai‘i Island. HHCA § 203(1). In June 1929, the Commission duly selected 49,100 acres from Humu‘ula Mauka. ROA Dkt. 94 at PDF 69-70 (Commission Resolution No. 5).[2]

At the time of their designation, the Humu‘ula Mauka trust lands were controlled by the Territory's Commission on Public Lands and leased by Parker Ranch. ROA Dkt. 94 at PDF 79. The HHCA, in section 204, permitted lands designated as Hawaiian home lands to be held and managed by the Commission on Public Lands (or the Board of Land and Natural Resources following statehood) if they were not immediately required for the HHCA's purpose. *See* HHCA § 204. The Humu‘ula Mauka home lands continued to be held under BLNR's control and leased to Parker Ranch until 1976. ROA Dkt. 94 at PDF 79-81; *see also* Opening Brief (OB) at 3.

Although a road to the summit of Mauna Kea has existed since 1964, much of it was originally a dirt "jeep road." *See* ROA Dkt. 86 at PDF 8. Under the State's direction, MKAR underwent several improvement projects while the land was still under BLNR's control. *See* OB at 4. In 1967, the State Legislature appropriated $2,440,000 for projects on Mauna Kea, including the "planning, construction, and equipping" of MKAR. 1967 Haw. Sess. Laws Act 217, § 1 at

[2] All citations to CAAP Dkt. #19, the Record on Appeal, shall be as follows: ROA Dkt. [circuit court docket number] at PDF [page number in electronic PDF document], followed by a description of the document in parentheses where relevant.

292. And in 1970, the Legislature appropriated another $2,298,000 for further improvements to MKAR, specifically the "[c]onstruction of a two-lane highway from the Saddle Road in vicinity of Puu Huluhulu to the summit by way of Hale Pohaku."[3] 1970 Haw. Sess. Laws Act 187, § 1 at 413. Notably, this was listed in Act 187 as a "highways" appropriation. *Id.*

The State's construction of the "two-lane highway" was completed by 1974, and in December of that year, the County of Hawai‘i took over maintenance of the road. ROA Dkt. 94 at PDF 77. Two years later, at the Commission's request, BLNR transferred management of the Humu‘ula Mauka lands back to DHHL. ROA Dkt. 94 at PDF 62-64.

In 1983, the Commission conveyed the section of the MKAR on Hawaiian home lands to the County of Hawai‘i for maintenance purposes, ROA Dkt. 94 at PDF 87 (County of Hawai‘i Resolution), and the County accepted the road into its inventory. *Id.* The MKAR remained a county highway from 1983 until March 2018, when the Department of Transportation designated the 6.27 miles of Mauna Kea Access Road from the intersection with Daniel K. Inouye Highway to a point 125 feet past the Visitor Information Center as a State Highway, Route 210. *See* ROA Dkt. 87 at PDF 23 (DOT Highways Division Memorandum).

3. Act 395 and the Governor's Action Plan to Address Controversies Arising Prior to July 1, 1988

In 1988, the State Legislature passed the Native Hawaiian Trusts Judicial Relief Act, or Act 395. 1988 Haw. Sess. Laws Act 395, at 942-45 (Act 395). Act 395 provided a limited waiver of the State's sovereign immunity for "any breach of trust or fiduciary duty resulting from the acts or omissions of its agents, officers and employees in the management and disposition of trust

[3] The portion of the MKAR at issue in this case, i.e., the part that is located on the Humu‘ula Mauka Hawaiian home lands, is below Hale Pohaku. In other words, all parts of MKAR relevant here are situated between Saddle Road and Hale Pohaku. *See* OB at 4 and n.3.

funds and resources of . . . [t]he Hawaiian home lands trust . . . ." *Id.* §2, at 943.[4] This waiver of immunity, however, applied only to causes of action accruing *after* Act 395's effective date, or July 1, 1988. *Id.* §3; *see also* 1995 1st Spec. Sess. Laws Act 14 § 1, at 696 ("Act 395 . . . provided a limited waiver of sovereign immunity for breaches of the Hawaiian home lands trust from July 1, 1988 forward.").

In addition, Act 395 expressly preserved the State's sovereign immunity as any continuing governmental activities that had begun prior to July 1, 1988:

> No action shall be maintained under this Act for any existing projects, programs, or any other governmental activities which are continuing, and which were begun, completed, or established prior to July 1, 1988.

Id. §4, at 945.

Act 395 also sought to address past controversies that arose prior to July 1, 1988, albeit in a different fashion. Act 395 required the Governor to "present a proposal to the legislature" regarding resolution of those controversies. *Id.* §5, at 945. In the event the Governor did not present a proposal or the Governor's proposal were rejected, and no other means of resolving such controversies was established, the Act provided that there would be a right to sue for breach of trust claims arising prior to July 1, 1988. *Id.*

In 1991 the Governor presented to the Legislature the *Governor's Action Plan to Address Controversies under the Hawaiian Home Lands Trust and the Public Land Trust*. ROA Dkt. 94 at PDF 101-216. Among other things, the Action Plan proposed convening a task force comprised of representatives from DHHL, DLNR, the Office of State Planning, and the Department of the

[4] For such claims, Act 395 also required any party filing suit to "exhaust[] all administrative remedies available," and to give "not less than sixty days written notice prior to filing of the suit that unless appropriate remedial action is taken suit shall be filed." 1988 Haw. Sess. Laws Act 395 § 2, at 943-44. The Act also established a two-year statute of limitations for breach of trust claims. *Id.* §2, at 944. Act 395 was partially later codified as HRS chapter 673.

Attorney General[5] to accelerate decision making concerning "DHHL's land title and related compensation claims which are based on illegal, improper or unauthorized withdrawals, transfers, takings or uses of Hawaiian home lands." *Id.* at PDF at 146-47.

The Action Plan laid out some of the past and ongoing issues regarding governmental use of land designated as Hawaiian home land, including transfers of Hawaiian home lands "for uses such as airports, schools, parks, military installations and other public projects." ROA Dkt. 94 at PDF 142 (Governor's Action Plan). It noted past and ongoing governmental use of Hawaiian home lands for, *inter alia*, "water tank sites, road easements . . .[,] a transportation baseyard," *id.*, and stated that it planned to address "public highway access through Hawaiian home lands," ROA Dkt. 94 at PDF 161. The Action Plan also acknowledged that "Hawaiian home lands have been taken for public use, in some instances, without any formal record of transaction or formal conveyance," *id.* at 142, and that "[n]one of the executive orders, governors' proclamations, unauthorized uses and land transfers that illegally or improperly involved Hawaiian home lands was accompanied by compensation to the Hawaiian home lands trust for the withdrawal or use of the lands." *Id.* The Legislature found that the Action Plan met the intention of Act 395, and passed a concurrent resolution accepting and amending the Action Plan. Act 14 at §1.

The Task Force first convened in 1991, and through its efforts, the Legislature resolved several DHHL claims during the 1992 and 1993 legislative sessions. *Id.* Additionally, as a separate initiative in 1994, the Governor initiated the transfer of 16,518 acres of State lands to the Hawaiian home lands trust. *Id.* Regarding the resolution of issues related to the use of Hawaiian home lands for public purposes, the Task Force presented to the Legislature in the 1995 session a

[5] Following a lawsuit, an independent representative of native Hawaiian beneficiaries was also appointed to participate on the Task Force as the "sole representative of the beneficiary class," beginning in August 1993. Act 14, § 1, at 698

Final Report, which included a Memorandum of Understanding (MOU) signed by all parties on the Task Force, including the independent representative. *See* Act 14 at § 1, 697; *see also* ROA Dkt. 95 at PDF 2-30, 34-41. The Final Report recommended to the Legislature "a packaged approach to the resolution of the remaining claims," including an "[e]xchange of lands to resolve uses of Hawaiian home lands for roads and highways." ROA Dkt. 95 at PDF 6.

Specifically as it relates to this case, the Final Report recommended that the State provide "[c]ompensation of all remaining confirmed uncompensated public uses of Hawaiian home lands, including . . . (c) [a] land exchange to remedy uncompensated use of the DHHL lands for State roads and highways." *Id.* at PDF 24. The MOU attached to the Final Report reflected the same intent to resolve use of Hawaiian home lands for public roads. *See id.* at PDF 38 ("The task force will initiate a land exchange to remedy uncompensated use of Hawaiian home lands for state roads and highways."). The intent behind the MOU was that it would become binding upon the Legislature's enactment of appropriate legislation, and at such time, remaining claims regarding the DHHL lands would be resolved. *Id.* at PDF 40.

4. Act 14

The same year that the Task Force presented its Final Report – 1995 – the Legislature did exactly that and enacted Act 14. At the outset, the Legislature noted that Act 14 was intended to resolve not just improper *withdrawals* of Hawaiian home lands by the State and territorial governments, but also improper *use* of trust lands: "The legislature . . . finds that thousands of acres of Hawaiian home lands were allegedly used, disposed of, or withdrawn from the trust by territorial or state executive actions in contravention of the HHCA." Act 14, §1. The Legislature also explained that it intended Act 14 to be a final resolution of the Hawaiian home lands controversies addressed by the Task Force and the Governor's Action Plan:

> The legislature by this Act hereby takes these measures to bring the desired closure, to fully effectuate in part the intent of S.C.R. No. 185, H.D. 1, 1991 and the governor's Action Plan, and to fully effectuate the legislature's intent of final disposition of the matters addressed by this Act.

Id.; *see also id.* §2 ("The primary purposes of this Act are to: (1) Resolve all controversies relating to the Hawaiian home lands trust which arose between August 21, 1959 and July 1, 1988; (2) Prohibit any and all future claims against the State resulting out of any controversy relating to the Hawaiian home lands trust which arose between August 21, 1959 and July 1, 1988[.]").

In addition to several other initiatives,[6] Act 14 provided that "[t]he State, while not admitting the validity of any claims, hereby resolves and satisfies all controversies and claims encompassed by this Act by . . . (2) . . . the initiation of a land exchange to remedy uncompensated use of Hawaiian home lands for state roads claims and highways[.]" *Id.* §6(2). The passage of the Act was intended to be "in full satisfaction and resolution of all controversies at law and in equity . . . arising out of or in any way connected with the management, administration, supervision of the trust" between August 21, 1959 and July 1, 1988. *Id.* §4. To that end, the Legislature gave Act 14 the effect of res judicata as to such claims:

> The passage of this Act shall have the effect of <u>res judicata</u> as to all parties, claims, and issues which arise and defenses which have been at issue, or which could have been, or could in the future be, at issue, which arose between August 21, 1959 and July 1, 1988, whether brought against the State or its officials, directly or indirectly, by subrogation, derivative or third party action, tender, federal action, or by any other means whatsoever.

Act 14, §4 (emphasis in original).

Although Act 14 barred breach of trust claims as to these controversies, the Legislature

[6] For example, Act 14 mandated "[t]he establishment of the Hawaiian home lands trust fund and the requirement that the State make twenty annual deposits of $30,000,000, or their discounted value equivalent, into the trust fund." Act 14, §6(1).

nevertheless provided a means of relief as to the provisions of Act 14, making actions to enforce the provisions of the Act the exclusive remedy:

> Notwithstanding any other law to the contrary, the State and its officials, the members of the board, the members of the Commission and the independent representative shall not be subject to suit by any party on any decision relating to the resolution of these claims, except for actions to enforce the provisions of this Act.

Id. §17.

By June 30, 2015, the State had satisfied the funding component of Act 14[7] and had transferred several thousand acres of land to DHHL.[8] ROA Dkt. 95 at PDF 112-113 (DHHL submittal to HHC, Jan. 2019). As of 2019, completion of parts of Act 14's land transfer and exchange requirements remained outstanding, including compensation of approximately 346.203 acres to satisfy the act's roads and highways land exchange requirement. *Id.* DHHL and other State agencies are working on finalizing outstanding matters under Act 14, including finalizing review of whether the Hawaiian home lands trust has in fact received sufficient lands to satisfy Act 14. *See* ROA Dkt. 95 at PDF 131-32 (DHHL Media Statement re Seeking Act 14 Private Counsel).

B. Procedural History

In September of 2019, Plaintiffs sent to DOT, the Commission, and the Department of the Attorney General a "Sixty-day Notice of Intent to Sue For Trust Breaches in Absence of

[7] Satisfaction of Act 14's funding component included establishment of the Hawaiian home lands trust fund; twenty annual deposits of $30,000,000 into the trust fund; payment of $2,348,558 as advance rent for continued use of trust lands under Nanaikapono Elementary School; payment of $2,390,000 for the State's uncompensated use of trust lands between 1959 and 1995; and payment of $1,539,000 to DHHL for use of land in Hanapepe, Kaua'i. ROA Dkt. 95 at PDF 112-13.

[8] As of 2019, of the 16,518 acres of useable land for which the State had initiated transfers in 1994, *see id.* at 113; Act 14 §1, just under 697 acres remained pending transfer completion. ROA Dkt. 95 at PDF 113.

Corrective Action Related to Land Exchanges to Compensate for Illegally Taken Streets and Roads." ROA Dkt. 87 at PDF 48-50. The notice stated that Plaintiffs intended to sue for breaches of trust based in large part on alleged failures to implement the terms of Act 14. *See id.* at PDF 48 ("[W]ith the passage of Act 14, the State of Hawai'i pledged to enter into land exchanges to compensate the HHCA trust for 346 acres of land, which it, through its various agents, illegally took."); *id.* ("These omissions constitute another series of new and independent breaches of trust for failure to implement the terms of Act 14, which were designed to fully and finally remedy the breaches of trust associated with the taking of these same trust lands.").

Plaintiffs filed their operative First Amended Complaint (FAC) on February 20, 2020, asserting two counts: (1) breach of trust against the DHHL Defendants, and (2) breach of trust against the State. ROA Dkt. 12 at PDF 8-11 (FAC). Plaintiffs seek declaratory and injunctive relief, and damages. Specifically, they seek a declaration that the State has breached its trust duties by using the land underlying MKAR without compensation (and that DHHL has breached its trust duties by failing to redress such use); the return of control of the MKAR from DOT to DHHL; and damages to remedy the uncompensated use of trust lands for the MKAR. *Id.* at PDF 11-12.

Defendants filed a Motion to Dismiss the FAC on several grounds. First, that pursuant to Act 395 the State had not waived its sovereign immunity as to Plaintiffs' breach of trust claims. ROA Dkt. 54 at 8-10. Second, that Act 14 separately barred Plaintiffs' claims because it "resolved all claims regarding the Hawaiian home lands trust, including the use of Hawaiian home lands as state roads and highways," and made enforcement of the land exchange provision the exclusive remedy. *Id.* at PDF 10-11. Finally, Defendants argued that Plaintiffs lacked standing to challenge the 2018 designation of MKAR as a state highway. *Id.* at PDF 12-13. The circuit court denied the

State's motion at the hearing held May 8, 2020. ROA Dkt. 82. Defendants thereafter answered the FAC and filed a First Amended Answer on May 28, 2020. ROA Dkt. 76, 80.

Plaintiffs later filed their Motion for Partial Summary Judgment (MPSJ), seeking an order granting their requested declaratory relief. ROA Dkt. 84-87; *see also* OB at 10. Defendants filed a Memorandum in Opposition, ROA Dkt. 92-95, asserting the same arguments they had raised in the earlier Motion to Dismiss, plus two additional arguments: (1) Plaintiffs could not maintain an HRS chapter 673 breach of trust claim because they had failed to exhaust administrative remedies under HRS § 673-3; and (2) Plaintiffs had failed to present evidence that the State was in breach of its trust obligations regarding MKAR. ROA Dkt. 92 at PDF 21-24.

Following a hearing, *see* ROA Dkt. 106 (Aug. 4, 2020 Transcript), the circuit court denied Plaintiffs' motion, ruling that Act 14 "plain[ly] and unambiguous[ly]" barred their claims:

> 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.
> . . . .
> 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 full satisfaction and resolution of all controversies or claims related to the home lands underlying MKAR.

ROA Dkt. 126 at PDF 6-8 (Order Denying Plaintiffs' MPSJ) (emphasis in original).

The circuit court later entered final judgment in favor of Defendants, ROA Dkt. 161 (Final Judgment), and Plaintiffs timely appealed, *see* CAAP Dkt. 1 (Notice of Appeal).

III. STANDARD OF REVIEW

A. Summary Judgment

"[I]n reviewing summary judgment decisions, an appellate court steps into the shoes of the trial court and applies the same legal standard as the trial court applied." *Citizens for Equitable & Responsible Gov't v. Cnty. of Hawai'i*, 108 Hawai'i 318, 321–22, 120 P.3d 217, 220–21 (2005) (quoting *Beamer v. Nishiki*, 66 Haw. 572, 577, 670 P.2d 1264, 1270 (1983) (cleaned up)). As such, "[s]ummary judgment is appropriate if the pleadings, depositions, and answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Id.* (quoting *Pac. Int'l Serv. Corp. v. Hurip*, 76 Hawai'i 209, 213, 873 P.2d 88, 92 (1994)).

B. Statutory Interpretation

A trial court's conclusions of law are reviewed de novo under the right/wrong standard. *Id.* (citing *Fujimoto v. Au*, 95 Hawai'i 116, 137, 19 P.3d 699, 720 (2001)). "Statutory interpretation is a question of law reviewable de novo." *Hawaiian Dredging Constr. Co., Inc. v. Fujikawa Assocs., Inc.*, 142 Hawai'i 429, 433, 420 P.3d 360, 364 (2018) (quoting *State v. Wheeler*, 121 Hawai'i 383, 390, 219 P.3d 1170, 1177 (2009) (internal quotation marks omitted). This court's construction of statutes is guided by the following rules:

> First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily

> from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.

Id. at 433-34, 420 P.3d at 364-65 (quoting *Wheeler*, 121 Hawai‘i at 390, 219 P.3d at 1177).

IV. ARGUMENT

The circuit court correctly found that Act 14 unambiguously bars Plaintiffs' claims. For the reasons explained fully below, this Court should affirm on the same grounds. In addition, as a separate and alternative legal basis upon which this Court may affirm,[9] Plaintiffs' claims are barred by the State's sovereign immunity, which was expressly preserved in Act 395 for breach of trust claims arising before July 1, 1988 and in regard to governmental activities beginning before that date and continuing after.

A. Act 14 Bars Plaintiffs' Claims

1. Act 14 resolved breach of trust claims regarding the use of MKAR as a public road

In no uncertain terms, Act 14 provided a full and final resolution to breach of trust claims involving the management, supervision, or disposition of trust lands by the State that arose between August 21, 1959, and July 1, 1988. Moreover, the Act expressly stated that it would "have the effect of res judicata" as to such claims:

> 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.

[9] This Court may affirm "on any ground in the record that supports affirmance," even if the lower court relied on a different ground or theory. *Poe v. Hawai‘i Lab. Rels. Bd.*, 87 Hawai‘i 191, 197, 953 P.2d 569, 575 (1998). Of course, if this Court should affirm on the same grounds as the circuit court – i.e., that Act 14 bars Plaintiffs' claims – then there is no need to even reach this alternative argument.

> The passage of this Act shall have the effect of res judicata as to all parties, claims, and issues which arise and defenses which have been at issue, or which could have been, or could in the future be, at issue, which arose between August 21, 1959 and July 1, 1988, whether brought against the State or its officials, directly or indirectly, by subrogation, derivative or third party action, tender, federal action, or by any other means whatsoever.

Act 14, §4 (emphasis in original); *see also Kalima,* 111 Hawai‘i at 112, 137 P.3d at 1018 (Act 14's "plain language expresses a clear intent to settle all 'title-related' claims").

There is no question that breach of trust claims regarding MKAR fall under Act 14's full and final resolution. The road was built by the State in the 1970s when it appropriated substantial sums of money to construct a "two-lane highway." The MKAR has been in public use near continuously since then. The State has acknowledged that for many years the public use of the MKAR on Hawaiian home lands went uncompensated. In other words, it is beyond dispute that between August 21, 1959, and July 1, 1988, the State put the Hawaiian home lands underlaying MKAR into use for a public purpose, without compensation. But it is precisely that uncompensated use that the Legislature remedied through the passage of Act 14. And Plaintiffs even acknowledge in their complaint that their claims "aris[e] out of or [are] . . . connected with the management, administration, supervision of the trust, or disposition by the State" of lands in the Hawaiian homes trust, as Act 14 specifies. In their complaint, Plaintiffs allege:

> 106. As trustees, State Defendants are liable for their continued use of the MKAR without paying rent to DHHL Defendants since July 1, 1988.
>
> 107. Since that date, State Defendants have breached their trust duties by failing to timely pay compensation for their use of Hawaiian home lands trust lands underlying the MKAR.
>
> 108. These breaches of trust result from the acts or omissions of State Defendants' agents, officers, and employees ***in the management and disposition of trust resources*** of the Hawaiian home lands trust.

ROA Dkt. 12 at PDF 10 (FAC) (emphasis added).

These allegations are simply not consistent with Plaintiffs' current arguments that Act 14 does not apply. They allege that their breach of trust claims arose out of the State's management and disposition of trust resources, and that the breaches started on July 1, 1988. But nothing happened on July 1, 1988 that would signify the beginning of the breach or the arising of Plaintiffs' claims. In other words, Plaintiffs' claims plainly arose *prior to* July 1, 1988, and Plaintiffs' adoption of that date as the beginning of their breach of trust claims is purely an artfully pled attempt to avoid Act 14's preclusive effect.[10]

Plaintiffs also run afoul of Act 14 because they have failed to seek the sole remedy that the act permits. Section 6 of Act 14 provides the specifics as to how the Act "resolve[d] and satisfie[d] all controversies and claims encompassed by [the] Act." Act 14, §6. In addition to requiring the State to establish a trust fund, *see* Act 14, §6(1), it provided for the initiation of several land transfers and exchanges. With respect to roads and highways, the Act required "the initiation of a land exchange to remedy uncompensated use of Hawaiian home lands for state roads claims and highways." Act 14, §6(2).

Importantly, Act 14 made the enforcement of the land exchange the *exclusive* remedy for claims falling under the Act's purview. *See* Act 14, §17 ("Notwithstanding any other law to the contrary, the State and its officials, the members of the board, the members of the Commission . . . shall not be subject to suit by any party on any decision relating to the resolution of these claims, *except for actions to enforce the provisions of this Act*." (Emphasis added)). Enforcing the land exchange provision of Act 14, however, is the one remedy that Plaintiffs do *not* seek. *See* ROA

[10] For reasons discussed further, *infra* Part IV.A.i, Plaintiffs' allegations that the breaches of trust began on July 1, 1988 are also inconsistent with their current arguments that the breaches did not begin until 2018. *See, e.g.*, OB at 27-28.

Dkt. 12 at PDF 11-12 (First Amended Complaint) (seeking declarations that Defendants have "breached their trust obligations by using Hawaiian home lands underlying the MKAR without compensation," that "control over the Hawaiian home lands underlying the MKAR rests solely with the DHHL Defendants," that "the MKAR is not a state highway," orders for monetary damages, and orders enjoining State DOT "from asserting control or authority over the MKAR," and from declaring MKAR to be a state highway). Plaintiffs have even expressly acknowledged that they do not want to enforce Act 14's land exchange provision, despite their apparent recognition that the land exchange initiated by Act 14 applies to MKAR. As Plaintiffs' counsel stated at the hearing on Plaintiffs' MPSJ:

> This case is about what happened between 1988 -- or -- or specifically between the passage of Act 14 and now, what happens in the middle, and there's a lot to be concerned with, with the lack of movement on the transaction contemplated by Act 14. But, again, that's not what this case is about so that remedy that -- that is apparently available is not an administrative remedy for the claims of plaintiffs because they're not seeking to enforce a land exchange.

ROA Dkt. 106 at PDF 69 (Aug. 4, 2020 Transcript).

In short, Plaintiffs believe that they can avoid Act 14's preclusive effect by simply not asking the court to enforce the land exchange provision, and that they may continue to bring breach of trust claims until the land exchange provisions of Act 14 are fully completed (i.e., during the "middle," as Plaintiffs' counsel and the circuit court phrased it).[11] But this theory is

[11] Plaintiffs' characterizations of their claims have been inconsistent throughout this litigation. They have at times characterized the alleged breach of trust as being based on a failure to implement the terms of Act 14, *see, e.g.,* ROA Dkt. 87 at PDF 48 (Notice of Intent to Sue) (describing a "series of new and independent breaches of trust for failure to implement the terms of Act 14"), and at other times as having nothing to do with Act 14, *see, e.g.*, OB at 15 ("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."). At yet other times, they have taken a middle ground and suggested that while they have

antithetical to the plain terms of Act 14. Even were it not for the exclusive remedy provision in section 17, there is nothing in Act 14 that requires relinquishment of control over the MKAR (or any other public road) back to DHHL. Indeed, that was plainly not the Act's intent, because one of the express purposes of Act 14 was to bring claims like this to final resolution to *prevent* "disruption of public purposes." Act 14, §1. In other words, Act 14 was intended to provide compensation and final settlement for the use of Hawaiian home lands for public purposes, *without* disrupting those public uses or otherwise requiring them to end.

That purpose is especially important here, where the relief Plaintiffs request – i.e., the transfer of control over a public road from DOT to DHHL – would surely disrupt the public use of MKAR. Even if Plaintiffs do not wish for DHHL to close MKAR, DHHL's plans for the Hawaiian home lands in the Humu'ula area neither "contemplate . . . DHHL's control of the [MKAR]," nor "consider, contemplate, account, or budget for the liabilities and other costs associated with the control, repair and maintenance of MKAR." ROA Dkt. 93 at PDF 5 (Choy Dec.). And the powers available to DOT and the counties that are necessary to exert proper authority over public roads, *see, e.g.*, HRS § 264-1.5 ("Emergency powers; traffic emergency zones"), are simply not available to DHHL because nothing in the HHCA grants DHHL any kind of police power or other authority over highways.

In essence, Plaintiffs are attempting to relitigate the exact type of controversy that the Legislature resolved via Act 14. And the fact that the Legislature provided a remedy – i.e., to enforce the terms of Act 14 – belies Plaintiffs' assertion that "the circuit court's decision . . .

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brought breach of trust claims here, they would be free to bring a separate suit to enforce Act 14's terms. *See* ROA Dkt. 106 at PDF 30 (Aug. 4, 2020 Transcript) (Plaintiffs' counsel explaining that Plaintiffs are "not happy with the failure to . . . consummate the . . . agreement which occurred via Act 14 and they would be able, under Act 14, to sue to enforce. That . . . would be their . . . decision but that's out of the . . . realm of this case.").

would close the courthouse doors to beneficiaries who wish to end ongoing breaches of trust . . . ." OB at 30. Rather, it is Plaintiffs' own decision to forgo that remedy and seek one that is plainly barred that is the cause of their frustration; not the circuit court's decision.

2. The 2018 designation of MKAR as a state highway does not take Plaintiffs' claims outside of Act 14's scope

In an attempted end run around Act 14's plain terms, Plaintiffs assert that it was not until 2018 – when DOT designated MKAR as a state highway – that their breach of trust claims arose. However, the entity that asserted jurisdiction and control over MKAR at any given time, either the State or the County of Hawai‘i, is of no relevance to whether the claims arose prior to July 1, 1988 because Plaintiffs' breach of trust claims stem from the uncompensated use of MKAR as a public road, which indisputably started prior to July 1, 1988 and continues to the present day. It simply makes no difference, and certainly does not create a new actionable claim, that the management of MKAR changed from the County to the State in 2018.

Plaintiffs' attempts to avoid Act 14's preclusive effects by directly challenging the 2018 designation of the road as a state highway also fail for several other reasons. First, the statute under which DOT made the designation and under which Plaintiffs challenge the same – HRS § 264-42 – does not provide Plaintiffs with any private right of enforcement action. Second, even if such a right existed, Plaintiffs lack standing to challenge the 2018 state highway designation.

i. The 2018 Designation of MKAR as a state highway is untethered from Plaintiffs' claimed injury

As an initial matter, Act 14's resolution of controversies applied to public uses of Hawaiian home lands by *any* arm or subdivision of the State. So, it made no difference whether the road was under the jurisdiction of the State or the County. Although section 6(2) of Act 14

referred to "state roads claims and highways,"[12] the Act expressly included the counties in the definition of the "State." *See* Act 14, §3 ("'Governmental agency' or 'State' means the State of Hawaii, municipal or county governments, or any department, bureau, division, agency or political subdivision thereof, or any board, commission, or administrative agency thereof."). Thus, trust claims regarding MKAR, which had been built by the State in the 1970s but by the time of Act 14's passing was under the jurisdiction of the County of Hawai'i, were unquestionably included in Act 14's road claims resolution.

Plaintiffs do not dispute this, but instead assert that the State's designation of MKAR as a state highway in 2018 created an entirely new breach of trust cause of action. *See* OB at 27-28 ("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."). But the erroneousness of this theory is laid bare by even a cursory look at Plaintiffs' alleged injuries and alleged "[d]amages [r]esulting from State Defendants' [b]reach of [t]rust":

> 71. The State Defendants use of Hawaiian home lands trust lands underlying the MKAR depleted the trust of both land and revenue.
>
> 72. The Hawaiian home lands trust was damaged as a result of the lost land and revenue, and potential associated interest or profit, which would have otherwise been paid to or included in the Hawaiian home lands trust.
>
> 73. The total compensation for use of the MKAR since 1988 through the present and continuing through final judgment in this action exceeds the jurisdictional minimum in an amount to be

[12] Notably, Act 14 makes no reference to HRS chapter 264, and does not use the terms "state highway" or "county highway" at all. There is, in other words, no indication that the Legislature intended for Act 14 to be limited in scope by HRS chapter 264, making Plaintiffs reliance on that chapter irrelevant to the question of whether Act 14 bars their claims.

> proven at trial.
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> . . . .
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> 103. State Defendants have breached their trust duties by taking and using Hawaiian home lands trust lands without compensation.
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> . . . .
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> 106. As trustees, State Defendants are liable for their continued use of the MKAR without paying rent to DHHL Defendants since July 1, 1988.
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> 107. Since that date, State Defendants have breached their trust duties by failing to timely pay compensation for their use of Hawaiian home lands trust lands underlying the MKAR.
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> 108. These breaches of trust result from the acts or omissions of State Defendants' agents, officers, and employees in the management and disposition of trust resources of the Hawaiian home lands trust.

ROA Dkt. 12 at PDF 7-10 (First Amended Complaint).

It is readily apparent from their allegations that Plaintiffs' injuries and breach of trust claims stem from the uncompensated use of MKAR as a public road in general, and not its designation as a "state highway" in 2018. Any doubt about this is surely erased by Plaintiffs' assertion that the State is liable for its "continued use of the MKAR without paying rent to DHHL Defendants ***since July 1, 1988***." *Id.* (emphasis added). Of course, if Plaintiffs' claims truly "concern [only] the breaches of trust that occurred forty years later in 2018," OB at 28, and only "arose" at that time, as Plaintiffs assert, *id.* at 27, Plaintiffs would not, and could not, claim that the State's liability for unpaid rent extends back to 1988. It makes no sense for Plaintiffs to simultaneously assert on one hand that the alleged breaches began on July 1, 1988, and on the other that "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 [in 2018]."

Plaintiffs make no attempt to explain this paradox. And in any event, if Plaintiffs' claims did somehow arise in 1988, immediately after the enactment of Act 14, they would be time-barred by HRS § 673-10, which provides that a suit for breach of trust must be filed within two years "after the cause of action first accrues."[13] However, there is nothing in the record that would indicate any change in circumstances in 1988 vis-à-vis MKAR that would trigger Plaintiffs' claims, because MKAR remained in use as a public road and under county maintenance jurisdiction between 1974 and 2018. Since the only significance of July 1, 1988 is that claims arising prior are barred, Plaintiffs' assertions of liability extending back to July 1, 1988 appear to be an implicit acknowledgment that the claims actually arose prior to that date, which of course means they are precluded by Act 14.

The only attempt Plaintiffs have made to explain how the 2018 designation caused any separate harm aside from the general public use of MKAR, is that it "caused real and tangible harm to Plaintiffs and other trust beneficiaries through (1) the State Defendants' closure of the MKAR for five months, . . . and (2) the failure to compensate the trust for the State's use and control of trust lands following the 2018 designation." ROA Dkt. 97 at PDF 10 (Plfs. Reply in Support of MPSJ). The second of these, as an alleged basis for the claims accruing in 2018, is nonsensical, because in the very same document, Plaintiffs assert that the County of Hawai‘i also asserted "improper control over the MKAR" between 1983 and 2018. *Id.* at PDF 9-10. If the "improper control" over MKAR was ongoing prior to 2018, then exactly the same (alleged) harm continued unabated after the State took over responsibility for the road after 2018. And again, Act 14 made no distinction as to public uses being made by the State versus the county governments in its final resolution of controversies. *See* Act 14, §3 (including "county governments" in the

[13] Plaintiffs did not file their initial complaint until February 13, 2020. ROA Dkt. 1.

definition of the "State").

As to the claim that DOT's "closure of the MKAR for five months" harmed them, Plaintiffs offer no explanation or allegation as to how the closure of the MKAR could form the basis for a breach of trust claim. Plaintiffs' complaint references the temporary closure of the road, *see* ROA Dkt. 12 (FAC ¶65), but the only "damages" Plaintiffs allege are entirely disconnected since they involve only the "deplet[ion] of the trust" and the failure to pay compensation for the use of the trust lands. *Id.* at ¶¶70-73. In any event, there are no trust duties implicated by the temporary closure of MKAR. The only harm that could conceivably result to Plaintiffs as a result of the closure of MKAR would be a temporary inability to reach the summit of Mauna Kea. But the summit of Mauna Kea is not on Hawaiian home lands. And nothing in the HHCA – which forms the basis of Plaintiffs' trust claims, *see id.* at ¶6 – provides any right to access the summit or establishes any trust duty for the State to provide access to the summit.

Thus, whether MKAR is controlled by the State or the County is inconsequential to Plaintiffs' breach of trust claims and the harms that allegedly arise from those claimed breaches. As a result, Plaintiffs have not demonstrated that the circuit court was wrong to conclude that their claims arose prior to July 1, 1988 and are barred by Act 14.

ii. Plaintiffs have no private right of action to challenge the 2018 designation of MKAR as a state highway under HRS § 264-42

Even if it were somehow relevant to their breach of trust claims, Plaintiffs have no right to challenge the 2018 designation of MKAR as a state highway under HRS §264-42 because that statute does not create any private right of enforcement action, either expressly or implicitly.

Although not asserted as a separate cause of action,[14] Plaintiffs argue that DOT's 2018

[14] It should be noted that Plaintiffs' FAC includes only two causes of action; both for breaches of the Hawaiian home lands trust. It goes without saying that HRS chapter 264 – which governs only

designation of MKAR violated HRS § 264-42, which provides:

> The director of transportation acting in cooperation with appropriate federal and county agencies, may designate for inclusion in the state highway system, such other public highways, including county highways, which are used primarily for through traffic and not for access to any specific property, whether residential, business, or other abutting property.

HRS § 246-42.

"[R]equirements imposed by statutes do not necessarily give rise to a private right of action." *Flores v. Logan*, 151 Hawai'i 357, 368, 513 P.3d 423, 434 (2022) (quoting *Hungate v. Law Office of David B. Rosen*, 139 Hawaii 394, 405, 391 P.3d 1, 12 (2017)). And even if a party brings an action for declaratory relief to enforce a statute, that statute "must provide for an express or implied private right of action." *Id.* (quoting *Cnty. of Haw. v. Ala Loop Homeowners*, 123 Hawai'i 391, 407 n.20, 235 P.3d 1103, 1119 n.20 (2010)). Neither HRS § 264-42 (nor any other part of HRS chapter 264), provides an express private right of action. Nevertheless,

> [i]n determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff one of the class for whose [e]special benefit the statute was enacted; ... that is, does the statute create a ... right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? ... Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

Flores, 151 Hawai'i at 368, 513 P.3d at 434.

In *Flores*, the Court held that there was no private right of action under HRS § 52D-5. First, the Court stated that the statute was intended to "provide continuity to police investigations from one county jurisdiction to another," rather than for the special benefit of private citizens like Flores. *Id.* at 369, 513 P.3d at 435. Second, the Court noted that there was "no indication of

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the highways of the state – contains no trust duties vis-à-vis the Hawaiian home lands trust.

legislative intent to create or deny a private right of action," and that because "strong evidence is necessary to imply a private right of action," without such evidence, it would "decline to infer" such a right. *Id.* Finally, the Court concluded that allowing an individual to sue police chiefs under HRS § 52D-5 would be inconsistent with "[t]he underlying purpose to ensure cooperative, mutual aid and assistance between the counties' chiefs of police to conduct investigations in each other's respective jurisdictions," because it "would interfere with the ability of police from different jurisdictions to cooperate and provide continuity to police investigations." *Id.*

For similar reasons, this Court should decline to recognize a private right of action under HRS § 264-42. The underlying purpose of that statute, which allows the State to designate roads as state highways, was to help the State satisfy an "acute need for more and better highways as a result of the growth in population and the increase in the number of automobiles . . . ." 1965 Haw. Sess Laws Act 159, at 215-16. The Legislature also noted when enacting HRS § 264-42, that the State "ha[d] embarked on a huge highway program committing millions of dollars over the coming years," and that "the responsibility for the construction, maintenance and general administration of all major thoroughfares is properly that of the State." *Id.*

The legislative history therefore indicates that the statute was intended not for the special benefit of individual private citizens such as Plaintiffs, but rather to give the State more flexibility in building and maintaining an adequate inventory of state highways. Like in *Flores*, there is no evidence, "strong" or otherwise, of an intent to create a private right of action. And like in *Flores*, allowing private suits to challenge state highway designations would be inconsistent with the statute's underlying purpose of allowing the State more flexibility to meet the growing need for "more and better" highways, because it would hinder the State's ability to take over maintenance of highways in the state. Thus, Plaintiffs have no private right of action to enforce the State's

designation of MKAR as a state highway in 2018.

iii. Plaintiffs lack standing to challenge the 2018 designation of MKAR as a state highway

Even if a private enforcement right existed to challenge the 2018 designation, Plaintiffs would still not have standing to do so. The Hawaii supreme Court in *Tax Foundation of Hawai'i v. State* ruled that although a party seeking declaratory relief need not satisfy the traditional three-part "injury-in-fact" test, there are nevertheless still "standing" requirements under HRS § 632-1 that must be satisfied. *See Tax Foundation of Hawai'i v. State*, 144 Hawai'i 175, 202, 439 P.3d 127, 154 (2019). Specifically,

> a party has standing to seek declaratory relief in a civil case brought pursuant to HRS § 632-1 (1) where antagonistic claims exist between the parties (a) that indicate imminent and inevitable litigation, or (b) where the party seeking declaratory relief has a concrete interest in a legal relation, status, right, or privilege that is challenged or denied by the other party, who has or asserts a concrete interest in the same legal relation, status, right, or privilege; ***and*** (2) a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding.

Id. (emphasis added); *see also* HRS § 632-1(b).

At minimum, Plaintiffs cannot satisfy the second part of this standing test, i.e., that "a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding." Plaintiffs' claims regarding the 2018 designation, and their attempts to have MKAR declared not a state highway, are completely untethered from their claimed injuries and the controversy that gives rise to this case, namely the allegedly uncompensated use of MKAR as a public road. Plaintiffs allege that DHHL breached the trust "[b]y permitting the State Defendants' use of the MKAR for free," ROA Dkt. 12 at PDF 8 (FAC ¶84), and that "State Defendants have breached their trust duties by taking and using . . . trust lands without compensation."[15] *Id.* ¶103. But a

[15] Although Plaintiffs' assert two separate breaches of trust by separate entities – the State and

declaration invalidating the 2018 designation of MKAR as a state highway would neither resolve these alleged breaches nor provide any compensation (or the basis for any compensation) for the current or past public use of the road.

In short, any declaration that MKAR is not a state highway under HRS chapter 264 would not provide Plaintiffs with the relief they seek; specifically compensation to the Hawaiian home lands trust. The question of whether the trust has been properly compensated for the public use of Hawaiian home lands – the core controversy giving rise to this case – would remain unresolved.

B. Plaintiffs' Claims are Barred by the State's Sovereign Immunity

The doctrine of sovereign immunity bars suits against the State "for money damages, except where there has been a 'clear relinquishment' of immunity and the State has consented to be sued." *Sierra Club v. Dep't of Transportation of State of Hawai'i*, 120 Hawai'i 181, 226, 202 P.3d 1226, 1271 (2009), as amended (May 13, 2009) (quoting *Bush v. Watson*, 81 Hawai'i 474, 481, 918 P.2d 1130, 1137 (1996)). Generally, under the rule established in *Ex parte Young*, 209 U.S. 123 (1908), and adopted by the Hawai'i Supreme Court, relief against the State that is truly prospective in nature will be permitted even absent a clear relinquishment of immunity:

> we have adopted the rule in *Young*, which:
>
> > makes an important distinction between prospective and retrospective relief. If the relief sought against a state official is prospective in nature, then the relief may be allowed regardless of the state's sovereign immunity. This is true even though accompanied by a substantial ancillary effect on the state treasury. However, relief that is tantamount to an award of damages for a past violation of law, even though

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DHHL – there is in fact only one true trustee, the State, which administers the Hawaiian home lands trust through DHHL. While any agency of the State can make actions or omissions that constitute a breach of trust, the responsibility is ultimately that of the State. *See, e.g.*, *Kepo'o*, 87 Hawai'i at 97, 952 P.2d at 385 ("[T]he State has assumed a trust obligation regarding Hawaiian home lands and must manage and dispose of these lands in a manner consistent with its fiduciary duty to the beneficiaries."). Plaintiffs present a false dichotomy by alleging separate breaches of trust by the State and DHHL as though the two are entirely separate entities.

styled as something else, is barred by sovereign immunity.

Id. (quoting *Bush*, 81 Hawai‘i at 481, 918 P.2d at 1137).

Here, the State has waived its immunity for breach of trust claims that arose *after* July 1, 1988. It has expressly *preserved* its immunity for claims that arose *prior* to that date. And although Plaintiffs request monetary damages and both declaratory and injunctive relief, their requested equitable relief is tantamount to an award of damages and is thus barred.

1. Act 395 Preserved the State's sovereign immunity for breach of trust claims arising before July 1, 1988

Act 395 provided a limited waiver of the State's sovereign immunity "for any breach of trust or fiduciary duty resulting from the acts or omissions of its agents, officers and employees in the management and disposition of trust funds and resources of . . . [t]he Hawaiian home lands trust[.]" Act 395 §2 (later codified in part as HRS chapter 673); *see also* HRS § 673-1. However, this waiver applied only to actions accruing *after* July 1, 1988. *Id.* at §3 ("This Act shall not apply to any cause of action which accrued . . . prior to July 1, 1988."); *see also Kalima v. State*, 111 Hawai‘i 84, 88, 137 P.3d 990, 994 (2006) ("Act 395 provided a limited waiver of sovereign immunity . . . relating to breaches of the State's trust responsibilities occurring after July 1, 1988").

For all the reasons explained earlier in this brief, *see* Part IV.A, Plaintiffs' claims accrued prior to July 1, 1988, when the public use of MKAR began without compensation being paid to the trust. But Act 395 makes it even clearer that Act 395's limited waiver of immunity does not apply to Plaintiffs' claims. In section 4, Act 395 also provided that "[n]o action shall be maintained under this Act for any existing projects, programs, or any other governmental activities which are continuing, and which were begun, completed, or established prior to July 1, 1988." Act 395 §4. Thus, such actions are unambiguously exempted from Act 395's waiver of sovereign

immunity.

MKAR is plainly an existing project that that was begun before July 1, 1998. Act 395 does not define "project," but in other statutory contexts, the term includes development and construction of infrastructure. *See, e.g.*, *Kahana Sunset Owners Ass'n v. Cty. of Maui*, 86 Hawai'i 66, 75, 947 P.2d 378, 387 (1997) (housing development and related infrastructure was a "project" under the Hawaii Environmental Protection Act (HEPA)); *Sierra Club v. Office of Planning, State of Haw.*, 109 Hawai'i 411, 415, 126 P.3d 1098, 1102 (2006) (same); *Citizens for Protection of North Kohala Coastline v. Cty. of Haw.*, 91 Hawai'i 94, 104, 979 P.2d 1120, 1130 (1999) (hotel resort and related infrastructure was a HEPA "project"). There is no reason that the construction and continuing maintenance of MKAR is not similarly a "project."

Even if MKAR somehow is not a "project" or "program" under Act 395, it would nevertheless fall into the catch-all language of section 4, i.e., "any other governmental activities which are continuing and which were begun, completed, or established prior to July 1, 1988." There can be no doubt that the construction, maintenance, and operation of MKAR is an "activity" that began before July 1, 1988 and continued thereafter. *See, e.g.*, ROA Dkt. 94 at PDF 87 (County of Hawaii resolution describing the county's "maintenance *activities*" on MKAR (emphasis added)). Thus, even if Plaintiffs' claims somehow did not arise prior to July 1, 1988, they most certainly relate to a government activity that was begun before that date and which continued after. As such, the State has not waived its immunity for Plaintiffs' breach of trust claims.

2. Plaintiffs' claims are for retrospective relief or monetary damages

Much of Plaintiffs' requested relief is unambiguously for monetary damages and is retrospective in nature. *See, e.g.*, ROA Dkt. 12 at PDF 7, 12 (FAC) (requesting "compensation for

use of the MKAR since 1988 through the present" and "land and/or money damages to restore the Hawaiian home lands trust"). Such retrospective and monetary relief does not fall under the *Ex Parte Young* exception to sovereign immunity and is barred. *See Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Hawai'i 192, 208 n. 26, 891 P.2d 279, 295 n. 26 (1995) ("[C]laimants cannot recover money damages or the equivalent for past violations of law.").

Although the remainder of Plaintiffs' requested relief is styled as declaratory/injunctive relief, "[s]imply asking for injunctive relief and not damages does not clear the path for suit." *Kaho'ohanohano v. State*, 114 Hawai'i 302, 336, 162 P.3d 696, 730 (2007) (quoting *Bush*, 81 Hawai'i at 481, 918 P.2d at 1137). "[R]elief that is 'tantamount to an award of damages for a past violation of law, even though styled as something else,' is barred by sovereign immunity." *Sierra Club*, 120 Hawai'i at 226, 202 P.3d at 1271 (quoting *Bush*, 81 Hawai'i at 481, 918 P.2d at 1137). In determining whether sovereign immunity bars a request for injunctive relief, "the crucial inquiry is whether the relief sought for a past violation of law is 'tantamount to an award of damages' or would merely have an 'ancillary' effect on the state treasury." *Kaho'ohanohano*, 114 Hawai'i at 336, 162 P.3d at 730.

In *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992), the plaintiffs requested injunctive relief to restore to the public lands trust a parcel of ceded land that had been exchanged for private lands, arguing that the transfer constituted a breach of trust. *Id.* at 584-85, 837 P.2d at 1253. The Court held that the effect of this relief on the State treasury would be direct, not ancillary, and thus sovereign immunity barred the requested relief:

> PDF's request that the trust status of the exchanged lands be restored by means of a constructive trust is "essentially equivalent" to a nullification of the exchange and the return of the exchanged lands to the trust res. The effect on the state treasury would be direct and unavoidable, rather than ancillary, because imposing a constructive trust on lands now held by Campbell would require that the State to

> compensate Campbell for its property. See U.S. Const. amend. V; Haw. Const. art. I, § 20. We therefore hold that PDF's requested relief is, in effect, a request for compensation for the past actions of the BLNR members. All of PDF's claims against the defendant state officials which are based on the alleged illegality of the subject land exchange, on either constitutional or statutory grounds, are barred by the State's sovereign immunity.

Id. at 611, 837 P.2d at 1267.

Here, Plaintiffs seek a declaration that MKAR is under the sole control and authority of DHHL, ROA Dkt. 12 at PDF 11, ¶C, an injunction preventing DOT from "declaring the MKAR to be a state highway, or otherwise relying on its determination that the MKAR is a state highway," *id.* at ¶J and a declaration that MKAR is not a state highway or a public highway at all. *Id.* at ¶D; PDF 10, ¶100. This requested relief is inherently intertwined with Plaintiffs' requests for monetary relief in the form of unpaid rent to compensate the trust. For example, Plaintiffs request that DOT be enjoined "from asserting control or authority over the MKAR unless and until [the State has] complied with [its] trust duties and the terms of the HHCA," namely, by paying for the allegedly "rent free use of the MKAR." *Id.*at PDF 11, ¶A. But as explained above, such monetary relief is itself barred by the State's immunity; Plaintiffs cannot disguise a demand for monetary relief by holding the road hostage and conditioning their requested injunctive/declaratory relief on payment of those damages. *See Green v. Mansour*, 474 U.S. 64, 73 (1985) ("[A] declaratory judgment is not available when the result would be a partial 'end run' around our decision in *Edelman v. Jordan*."[16]).

Moreover, a declaration that MKAR is not a public highway would place in serious doubt the State's ability to continue operating MKAR as a public road, essentially turning back the clock

[16] In *Edelman v. Jordan*, 415 U.S. 651, 668 (1974), the United States Supreme Court held that a "retroactive award of monetary relief as a form of 'equitable restitution,' . . . is in practical effect indistinguishable in many aspects from an award of damages against the State," and is barred, in federal court, by a state's Eleventh Amendment Immunity.

and undoing the vast amount of work that culminated in Act 14 resolving the legal status of public roads on Hawaiian home lands. Losing the ability to operate MKAR as a public highway would mean the public would lose the benefit of the road and the State's past expenditures on improving the road, and would require the expenditure of State funds to replace it.[17] This makes the present case similar to *Pele Defense Fund*, where the Court found that restoration of the exchanged trust lands was "in effect, a request for compensation for the past actions of the BLNR members." *Pele Defense Fund v. Paty*, 73 Haw. at 611, 837 P.2d at 1267.

In the same vein, Plaintiffs' attempts to have MKAR's "public highway" status extinguished makes this case distinguishable from *Office of Hawaiian Affairs v. Housing and Community Development Corp. of Hawaii*, 17 Hawai'i 174, 177 P.3d 884 (2008), *rev'd and remanded sub nom. Hawaii v. Off. of Hawaiian Affs.*, 556 U.S. 163 (2009) ("*OHA*"). In *OHA*, this Court held that reversing a land transfer from one state agency (Department of Land and Natural Resources (DLNR)) to another (the Housing Finance and Development Corporation (HFDC)) would not be tantamount to a damages award for a past violation, even though HFDC had spent $31 million on building infrastructure on the land. *Id.* at 199-200, P.3d at 909-10. The Court distinguished *Pele Defense Fund* because requiring HFDC to return the parcel to DLNR would mean the land remained under the State's control, albeit under the jurisdiction of a different agency. *Id.* at 200, P.3d at 910. Specifically, this Court stated that this did not result in a direct effect on the State's treasury because "the benefit of the $31 million expenditure by HFDC on infrastructure remains with the State" after reversing the transfer, and that "the return of the property . . . effectively changes nothing" because it would remain with the State. *Id.*

[17] As noted *supra,* Part II.A.2, in 1970, the Legislature appropriated $2,298,000 for the "[c]onstruction of a two-lane highway" on MKAR between Puu Huluhulu and Hale Pohaku.

That would not be the case here. Although DHHL and DOT are both State agencies, Plaintiffs' request to have MKAR returned to the control of DHHL is contingent on a declaratory ruling that MKAR is not a public highway. *See* ROA Dkt. 12 at PDF 6 (Complaint ¶55); *id.* at PDF 11 (Prayer for Relief ¶D). Thus, unlike in *OHA*, granting Plaintiffs' requested equitable relief here would extinguish the benefit of MKAR to the public as a public road, and the benefit to the State of its expenditures in constructing the road. And taking this case even further afield from *OHA* is the fact that Plaintiffs seek to extinguish the public benefit of MKAR as a public highway "unless and until [State Defendants] have complied with their trust duties and the terms of the HHCA," ROA Dkt. 12 at PDF 12 (Prayer for Relief ¶I), which, stated differently, means until monetary compensation is paid to the Hawaiian home lands trust, *see id.* at ¶B ("State Defendants have breached their trust obligations by using Hawaiian homes lands underlying the MKAR without compensation to the Hawaiian home lands trust and in violation of the HHCA").

Thus, even though Plaintiffs seek a transfer of control over MKAR from one State agency to another, *OHA* does not control here. Because Plaintiffs essentially seek to hold the MKAR hostage until the State pays damages for the allegedly uncompensated past use of the road, their requested relief would have a direct and unavoidable effect on the State treasury. Their relief is therefore barred by the State's sovereign immunity.

As noted earlier, however, this does not leave beneficiaries of the trust without a remedy. The Legislature provided a remedy for beneficiaries by permitting actions to enforce the terms of Act 14. Again, Plaintiffs here have simply declined to seek this remedy.

V. RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are set out in Appendices A-C.

VI. CONCLUSION

For all these reasons, this Court should affirm the circuit court's judgment.

DATED: Honolulu, Hawai'i, November 2, 2022.

/s/ Ewan C. Rayner
EWAN C. RAYNER
Deputy Solicitor General

Attorney for Defendants-Appellees,

INDEX TO ADDENDUM

HAWAIIAN HOMES COMMISSION ACT, 1920

(Act of July 9, 1921, c 42, 42 Stat 108)

Note

This Act is now part of the State Constitution and is subject to amendment or repeal as prescribed in Article XII of the Constitution.

Consent of Congress

Consent of Congress, see Pub. L. 99-557 (October 27, 1986); H. J. Res. 32, 105th Cong. 1st Sess., Pub. L. No. 105-21, 111 Stat. 235 (June 27, 1997), for §§209 and 219.1; and S.J. Res. 23, 102nd Cong. 2nd Sess., Pub. L. No. 102-398, 106 Stat. 1953 (October 6, 1992), for §§202, 203, 204, 208, 209, 213, 214, 215, 220, 221, 222, and 227.

Law Journals and Reviews

The Native Hawaiian Trusts Judicial Relief Act: The First Step in an Attempt to Provide Relief. 14 UH L. Rev. 889.

Title 1: Definitions

Title 1A: Purpose

Title 2: Hawaiian Homes Commission

APPENDIX A

Note

Amendment of Act and funding for Native Hawaiian roll commission. L 2011, c 195, §§3, 4.
Public land trust information system. L 2011, c 54.

Cross References

Native Hawaiian recognition, see chapter 10H.

Attorney General Opinions

Threatened and endangered plants are protected on Hawaiian home lands under the provisions of chapter 195D, as well as under the provisions of the federal Endangered Species Act of 1973, to the same extent that the plants are protected elsewhere in Hawaii. Anyone who "takes" threatened or endangered plants on Hawaiian home lands is subject to state and federal civil and criminal penalties. Att. Gen. Op. 95-5.

Law Journals and Reviews

Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue. 16 UH L. Rev. 1.

Native Hawaiian Homestead Water Reservation Rights: Providing Good Living Conditions for Native Hawaiian Homesteaders. 25 UH L. Rev. 85.

Case Notes

Claims under Act arise exclusively under state law; hence, Eleventh Amendment bars federal court from deciding claims against state officials based solely on this Act. 45 F.3d 333.

Appellant who claimed article XII's (of the state constitution) implementation of this Act violated the Fourteenth Amendment because government benefits, leases to public lands, are available only to native Hawaiians, lacked standing. 342 F.3d 934.

Lessee defendants' motion to dismiss granted, where plaintiffs claimed native Hawaiian lessee defendants violated this Act, as well as plaintiffs' rights under 42 U.S.C. §1983 by subleasing Hawaiian home lands to non-native Hawaiians. 824 F. Supp. 1480.

To the extent plaintiffs sought redress for violations of the Hawaii constitution or this Act, the Eleventh Amendment barred the state law claims; thus, state defendants' motion for summary judgment granted on all state law claims against state officials brought in their official capacities; state defendants sued in personal capacities were entitled to qualified immunity. 824 F. Supp. 1480.

Association that included native Hawaiian beneficiaries asserted viable claim under 42 U.S.C. §1983 alleging breach of trust duties by appellees under this Act via Admission Act. 78 H. 192, 891 P.2d 279.

Act is part of Hawai‘i constitution and does not constitute federal law; thus, federal preemption principles did not apply to case where there was no relevant federal law at issue and conflict between Act and state statute was matter of state constitutional law. 87 H. 91, 952 P.2d 379.

Chapter 343 does not conflict with this Act, has only

incidental impact on Hawaiian home lands, and is not inconsistent with interests of the beneficiaries; thus, chapter applies to Hawaiian home lands. 87 H. 91, 952 P.2d 379.

For Hawaiian home lands, the department of Hawaiian home lands is the accepting authority for applicant proposals under §343-5 (c); because the governor is not involved, there is no conflict with this Act. 87 H. 91, 952 P.2d 379.

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TITLE 1: DEFINITIONS

§1. That this Act may be cited as the "Hawaiian Homes Commission Act, 1920."

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§2. That when used in this Act the term "Hawaiian Organic Act" means the Act entitled "An Act to provide a government for the Territory of Hawaii," approved April 30, 1900, as amended.

Attorney General Opinions

This Act construed as a state constitutional provision rather than an Act of Congress. Att. Gen. Op. 81-4.

Case Notes

The Hawaii Admission Act transferred complete responsibility of the Hawaiian Homes Commission Act program and the homelands to Hawaii and claims based on that Act do not "arise under" federal laws. 588 F.2d 1216.

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[TITLE 1A: PURPOSE]

[§101. Purpose.] *[Text of section subject to consent of Congress.]* (a) The Congress of the United States and the State of Hawaii declare that the policy of this Act is to enable native Hawaiians to return to their lands in order to fully support self-sufficiency for native Hawaiians and the self-determination of native Hawaiians in the administration of this Act, and the preservation of the values, traditions, and culture of native Hawaiians.

(b) The principal purposes of this Act include but are not limited to:

(1) Establishing a permanent land base for the benefit and use of native Hawaiians, upon which they may live, farm, ranch, and otherwise engage in commercial or industrial or any other activities as authorized in this Act;

(2) Placing native Hawaiians on the lands set aside under this Act in a prompt and efficient manner and assuring long-term tenancy to beneficiaries of this Act and their successors;

(3) Preventing alienation of the fee title to the lands set aside under this Act so that these lands will always be held in trust for continued use by native Hawaiians in perpetuity;

(4) Providing adequate amounts of water and supporting infrastructure, so that homestead lands will always be usable and accessible; and

(5) Providing financial support and technical assistance to native Hawaiian beneficiaries of this Act 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.

(c) In recognition of the solemn trust created by this Act, and the historical government to government relationship between the United States and Kingdom of Hawaii, the United States and the State of Hawaii hereby acknowledge the trust established under this Act and affirm their fiduciary duty to faithfully administer the provisions of this Act on behalf of

the native Hawaiian beneficiaries of the Act.

(d) Nothing in this Act shall be construed to:

(1) Affect the rights of the descendants of the indigenous citizens of the Kingdom of Hawaii to seek redress of any wrongful activities associated with the overthrow of the Kingdom of Hawaii; or

(2) Alter the obligations of the United States and the State of Hawaii to carry out their public trust responsibilities under section 5 of the Admission Act to native Hawaiians and other descendants of the indigenous citizens of the Kingdom of Hawaii. [L 1990, c 349, §1]

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TITLE 2: HAWAIIAN HOMES COMMISSION

§201. Definitions. (a) When used in this title:

"Commission" means the Hawaiian homes commission.

"Fund" means the Hawaiian home loan fund.

"Hawaiian home lands" means all lands given the status of Hawaiian home lands under the provisions of section 204 of this title.

"Irrigated pastoral land" means land not in the description of the agricultural land but which, through irrigation, is capable of carrying more livestock the year through than first-class pastoral land.

"Native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.

"Public land" has the same meaning as defined in paragraph (3) of subdivision (a) of section 73 of the Hawaiian Organic Act.

"State" means the State of Hawaii.

"Tract" means any tract of Hawaiian home lands leased, as authorized by section 207 of this title, or any portion of the tract.

(b) Any term defined or described in section 347 or 351 of the Revised Laws of Hawaii of 1915, except a term defined in subsection (a) of this section, shall, whenever used in this title, have the same meaning as given by such definition or description. [Am Jun. 8, 1954, c 321, §2, 68 Stat 263; am L 1963, c 207, §5(a); am L 1997, c 197, §1]

Revision Note

Definitions rearranged pursuant to §23G-15.

Law Journals and Reviews

The Lum Court and Native Hawaiian Rights. 14 UH L. Rev. 377.

Case Notes

Native Hawaiians have no standing to challenge

constitutionality of Act on equal protection grounds as they would be asserting the rights of non-Hawaiian third parties. 795 F. Supp. 1009.

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[§201.5.] Federal reaffirmation. *[Text of section subject to consent of Congress.]* The United States and State of Hawaii hereby reaffirm and recognize that:

(1) The native Hawaiian people are a distinct native, indigenous people who have maintained their own language, culture, and traditions, and have established Hawaiian home lands areas protected under federal and state law;

(2) The United States has a unique trust responsibility to promote the welfare of the aboriginal, indigenous people of the State, and the federal government has delegated broad authority to the State to act for their betterment; and

(3) The aboriginal, indigenous people of the State retain their inherent sovereign authority and their right to organize for their common welfare. [L 2001, c 302, pt of §2]

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[§201.6.] Community based governance on Hawaiian home lands. *[Text of section subject to consent of Congress.]* It is the policy of the State to support participation in governance by promoting the empowerment of democratically-elected Hawaiian homestead community self-governance organizations.

In furtherance of this policy, and with the consent of the Congress of the United States, the State may delegate to a democratically-elected organization representing a Hawaiian homestead community or communities the authorities delegated to the State by the United States relating to the administration of the Hawaiian Homes Commission Act, 1920, as amended.

The commission may establish a working relationship with a democratically-elected Hawaiian homestead community self-governance organization to promote community welfare. The selection of authorities to be delegated shall be left to the Hawaiian homes commission's discretion. The commission may establish criteria to determine the boundaries and location of a Hawaiian homestead community and whether a Hawaiian homestead community organization is eligible for delegation. Criteria for eligibility shall include but not be limited to the following:

(1) The organization and its leadership is a bona fide representative body of native Hawaiian residents, homestead lessees, qualified successors residing within the homestead community, and native Hawaiians who have designated that homestead community as their primary choice of residence with the department of Hawaiian home lands and who are awaiting an award of a lease under this Act;

(2) The organization is governed by free and fair elections; and

(3) The organization demonstrates sufficient capacity to implement the authorities that are delegated.

The commission may contract with and delegate authority to a Hawaiian homestead community self-governance organization to perform governmental services for the homestead community represented by that homestead organization. Any such contract shall include a requirement that the government service shall be performed at a level and quality comparable to the services that

would otherwise be provided by the department of Hawaiian home lands.

The department of Hawaiian home lands may adopt rules in accordance with chapter 91, Hawaii Revised Statutes, to implement this section. [L 2001, c 302, pt of §2]

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§202. Department officers, staff, commission, members, compensation. (a) There shall be a department of Hawaiian home lands which shall be headed by an executive board to be known as the Hawaiian homes commission. The members of the commission shall be nominated and appointed in accordance with section 26-34, Hawaii Revised Statutes. The commission shall be composed of nine members, as follows: three shall be residents of the city and county of Honolulu; two shall be residents of the county of Hawaii one of whom shall be a resident of east Hawaii and the other a resident of west Hawaii; two shall be residents of the county of Maui one of whom shall be a resident from the island of Molokai; one shall be a resident of the county of Kauai; and the ninth member shall be the chairman of the Hawaiian homes commission. All members shall have been residents of the State at least three years prior to their appointment and at least four of the members shall be descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. The members of the commission shall serve without pay, but shall receive actual expenses incurred by them in the discharge of their duties as such members. The governor shall appoint the chairman of the commission from among the members thereof.

The commission may delegate to the chairman such duties, powers, and authority or so much thereof, as may be lawful or proper for the performance of the functions vested in the commission. The chairman of the commission shall serve in a full-time capacity. He shall, in such capacity, perform such duties, and exercise such powers and authority, or so much thereof, as may be delegated to him by the commission as herein provided above.

(b) The provisions of section 76-16, Hawaii Revised Statutes, shall apply to the positions of first deputy and private secretary to the chairman of the commission. The department may hire temporary staff on a contractual basis not subject to chapters 76 and 78, Hawaii Revised Statutes, when the services to be performed will assist in carrying out the purposes of the Act. These positions may be funded through appropriations for capital improvement program projects and by the administration account, operating fund, or native Hawaiian rehabilitation fund. No contract shall be for a period longer

than two years, but individuals hired under contract may be employed for a maximum of six years; provided that the six-year limitation shall not apply if the department, with the approval of the governor, determines that such contract individuals are needed to provide critical services for the efficient functioning of the department. All other positions in the department shall be subject to chapter 76, Hawaii Revised Statutes.

All vacant and new civil service positions covered by chapter 76, Hawaii Revised Statutes, shall be filled in accordance with section 76-22.5, Hawaii Revised Statutes; provided that the provisions of these sections shall be applicable first to qualified persons of Hawaiian extraction. [Am Jul. 26, 1935, c 420, §1, 49 Stat 504; May 31, 1944, c 216, §1, 58 Stat 260; Jul. 9, 1952, c 618, 66 Stat 515; am L 1963, c 207, §1; am imp L 1965, c 223, §§5, 8; am L 1977, c 174, §1; am L 1983, c 147, §2; am L 1984, c 199, §2; am L 1985, c 295, §1; am L 1986, c 249, §1; am L 1989, c 265, §2; am L 2002, c 148, §48]

Cross References

Acting board members, see §26-36.
Membership on other boards prohibited, see §78-4.
Public agency meetings and records, see chapter 92.

Attorney General Opinions

Provision conferring employment preference to Hawaiians conflicts with Title VII of the Civil Rights Act of 1964 and is invalid. Att. Gen. Op. 81-4.

Law Journals and Reviews

Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts. 14 UH L. Rev. 519.

§203. Certain public lands designated "available lands." All public lands of the description and acreage, as follows, excluding (a) all lands within any forest reservation, (b) all cultivated sugar-cane lands, and (c) all public lands held under a certificate of occupation, homestead lease, right of purchase lease, or special homestead agreement, are hereby designated, and hereinafter referred to, as "available lands":

(1) On the island of Hawaii: Kamaoa-Puueo (eleven thousand acres, more or less), in the district of Kau; Puukapu (twelve thousand acres, more or less), Kawaihae 1 (ten thousand acres, more or less), and Pauahi (seven hundred and fifty acres, more or less), in the district of South Kohala; Kamoku-Kapulena (five thousand acres, more or less), Waimanu (two hundred acres, more or less), Nienie (seven thousand three hundred and fifty acres, more or less), in the district of Hamakua; fifty-three thousand acres to be selected by the department from the lands of Humuula Mauka, in the district of North Hilo; Panaewa, Waiakea (two thousand acres, more or less), Waiakea-kai, or Keaukaha (two thousand acres, more or less), and two thousand acres of agricultural lands to be selected by the department from the lands of Piihonua, in the district of South Hilo; and two thousand acres to be selected by the department from the lands of Kaohe-Makuu, in the district of Puna; land at Keaukaha, Hawaii, more particularly described as follows:

PARCEL I

Now set aside as Keaukaha Beach Park by Executive Order Numbered 421, and being a portion of the Government land at Waiakea, South Hilo, Hawaii.

Beginning at the southeast corner of this parcel of land, on the north side of Kalanianaole Road, the coordinates of said point of beginning referred to Government survey triangulation station "Halai" being five thousand six hundred and eighty-one and twelve one-hundredths feet north and seventeen thousand nine hundred and thirty-three and fifteen one-hundredths feet east, as shown on Government Survey Registered Map Numbered 2704, and running by true azimuths.

1. Sixty-one degrees fifty-eight minutes one thousand three hundred and fifty-one and seventy-three one-hundredths

feet along the north side of Kalanianaole Road (fifty feet wide);

2. One hundred and fifty-one degrees fifty-eight minutes eight hundred and forty feet along United States military reservation for river and harbor improvements (Executive Order Numbered 176);

Thence along the seashore at high-water mark, the direct azimuths and distances between points at seashore being:

3. Two hundred and eighty-two degrees no minutes four hundred and sixty-eight and fifty one-hundredths feet;

4. Three hundred and thirteen degrees twenty minutes four hundred and forty-one feet;

5. Two hundred and sixty degrees twenty minutes one hundred and forty feet;

6. Two hundred and forty-two degrees twenty minutes two hundred and fifty feet;

7. One hundred and eighty-eight degrees forty minutes sixty feet;

8. Two hundred and seventy-two degrees twenty minutes one hundred and seventy feet;

9. Two hundred and five degrees no minutes sixty feet;

10. One hundred and ten degrees twenty minutes two hundred and twenty feet;

11. Ninety degrees fifty minutes eighty feet;

12. One hundred and sixty-two degrees no minutes one hundred and seventy feet;

13. Two hundred and fifty degrees thirty minutes four hundred and thirty feet;

14. Three hundred and thirty-one degrees fifty-eight minutes three hundred and eighty feet along parcel II of Government land to the point of beginning and containing an area of eleven and twenty one-hundredths acres, more or less.

PARCEL II

Being a portion of the Government land of Waiakea, South Hilo, Hawaii, and located on the north side of Kalanianaole Road and adjoining parcel I, hereinbefore described.

Beginning at the south corner of this parcel of land, on the north side of Kalanianaole Road, the coordinates of said

point of beginning referred to Government survey triangulation station "Halai," being five thousand six hundred and eighty-one and twelve one-hundredths feet north and seven thousand nine hundred and thirty-three and fifteen one-hundredths feet east and running by true azimuths:

1. One hundred and fifty-one degrees fifty-six minutes three hundred and eighty feet along the east boundary of parcel I;

2. Two hundred and twenty-nine degrees forty-five minutes thirty seconds one hundred and ninety-one and one one-hundredths feet;

3. One hundred and ninety-eight degrees no minutes two hundred and thirty feet to a one-and-one-half inch pipe set in concrete;

4. Three hundred and seven degrees thirty-eight minutes five hundred and sixty-two and twenty-one one-hundredths feet to a one-and-one-half inch pipe set in concrete;

5. Twenty-eight degrees no minutes one hundred and twenty-one and thirty-seven one-hundredths feet to the north side of Kalanianaole Road;

6. Sixty-one degrees fifty-eight minutes four hundred and eighty-three and twenty-two one-hundredths feet along the north side of Kalanianaole Road to the point of beginning and containing an area of five and twenty-six one-hundredths acres, more or less.

(2) On the island of Maui: Kahikinui (twenty-five thousand acres, more or less) in the district of Kahikinui, and the public lands (six thousand acres, more or less) in the district of Kula;

(3) On the island of Molokai: Palaau (eleven thousand four hundred acres, more or less), Kapaakea (two thousand acres, more or less), Kalamaula (six thousand acres, more or less), Hoolehua (three thousand five hundred acres, more or less), Kamiloloa I and II (three thousand six hundred acres, more or less), and Makakupaia (two thousand two hundred acres, more or less) and Kalaupapa (five thousand acres, more or less);

(4) On the island of Oahu: Nanakuli (three thousand acres, more or less), and Lualualei (two thousand acres, more or less), in the District of Waianae; and Waimanalo (four thousand acres, more or less), in the District of Koolaupoko, excepting

therefrom the military reservation and the beach lands; and those certain portions of the lands of Auwaiolimu, Kewalo, and Kalawahine described by metes and bounds as follows, to-wit:

(I) Portion of the Government land at Auwaiolimu, Punchbowl Hill, Honolulu, Oahu, described as follows:

Beginning at a pipe at the southeast corner of this tract of land, on the boundary between the lands of Kewalo and Auwaiolimu, the coordinates of said point of beginning referred to Government Survey triangulation station "Punchbowl," being one thousand one hundred and thirty-five and nine-tenths feet north and two thousand five hundred and fifty-seven and eight-tenths feet east as shown on Government Survey Registered Map Numbered 2692, and running by true azimuths:

1. One hundred and sixty-three degrees thirty-one minutes two hundred and thirty-eight and eight-tenths feet along the east side of Punchbowl-Makiki Road;

2. Ninety-four degrees eight minutes one hundred and twenty-four and nine-tenths feet across Tantalus Drive and along the east side of Puowaina Drive;

3. One hundred and thirty-one degrees thirteen minutes two hundred and thirty-two and five-tenths feet along a twenty-five foot roadway;

4. One hundred and thirty-nine degrees fifty-five minutes twenty and five-tenths feet along same;

5. One hundred and sixty-eight degrees seventeen minutes two hundred and fifty-seven and eight-tenths feet along Government land (old quarry lot);

6. One hundred and fifty-six degrees thirty minutes three hundred and thirty-three feet along same to a pipe;

7. Thence following the old Auwaiolimu stone wall along L. C. Award Numbered 3145, to Laenui, grant 5147 (lot 8 to C.W. Booth), L.C. Award Numbered 1375, to Kapule, and L.C. Award Numbered 1355, to Kekuanoni, the direct azimuth and distance being two hundred and forty-nine degrees forty-one minutes one thousand three hundred and three and five-tenths feet;

8. Three hundred and twenty-one degrees, twelve minutes, six hundred and ninety-three feet along the remainder of the land of Auwaiolimu;

9. Fifty-one degrees, twelve minutes, one thousand and four hundred feet along the land of Kewalo to the point of

beginning, containing an area of twenty-seven acres, excepting and reserving therefrom Tantalus Drive and Auwaiolimu Street crossing this land.

(II) Portion of the land of Kewalo, Punchbowl Hill, Honolulu, Oahu, being part of the lands set aside for the use of the Hawaii Experiment Station of the United States Department of Agriculture by proclamation of the Acting Governor of Hawaii, dated June 10, 1901, and described as follows:

Beginning at the northeast corner of this lot, at a place called "Puu Ea" on the boundary between the lands of Kewalo and Auwaiolimu, the coordinates of said point of beginning referred to Government survey triangulation station "Punchbowl," being three thousand two hundred and fifty-five and six-tenths feet north and five thousand two hundred and forty-four and seven-tenths feet east, as shown on Government Survey Registered Map Numbered 2692 of the State of Hawaii, and running by true azimuths:

1. Three hundred and fifty-four degrees thirty minutes nine hundred and thirty feet along the remainder of the land of Kewalo, to the middle of the stream which divides the lands of Kewalo and Kalawahine;

2. Thence down the middle of said stream along the land of Kalawahine, the direct azimuth and distance being forty-nine degrees sixteen minutes one thousand five hundred and twelve and five-tenths feet;

3. One hundred and forty-one degrees twelve minutes eight hundred and sixty feet along the remainder of the land of Kewalo;

4. Two hundred and thirty-one degrees twelve minutes five hundred and fifty-two and six-tenths feet along the land of Auwaiolimu to "PUU IOLE";

5. Thence still along the said land of Auwaiolimu following the top of the ridge to the point of beginning, the direct azimuth and distance being two hundred and thirty-two degrees twenty-six minutes one thousand four hundred and seventy feet and containing an area of thirty acres; excepting and reserving therefrom Tantalus Drive crossing this land;

(III) Portion of the land of Kalawahine makai of Tantalus Drive consisting of twelve acres, more or less, said parcel described more specifically in tax map key 2-4-34-8, which

includes certain parcels adjoining the Ewa portion of Kalawahine Place currently occupied by short-term land dispositions if the persons residing on those parcels meet the qualifications established by the Legislature of the State of Hawaii and elect to have the land under their homes transferred to the department, and certain portions of the Ewa portion of the parcel, but excluding the hillside side portions of the southeast parcel, with metes and bounds designated by the department and approved by the department of land and natural resources; provided that persons now residing on portion of the land described, be given first opportunity to lease the lands on which they now reside, for a term of 99 years, whether or not they be native Hawaiians as defined in the Hawaiian Homes Commission Act of 1920, as amended.

(IV) Portion of the Hawaii Experiment Station under the control of the United States Department of Agriculture, situated on the northeast side of Auwaiolimu Street.

KEWALO-UKA, HONOLULU, OAHU

Being a portion of the land of Kewalo-uka conveyed by the Territory of Hawaii to the United States of America by proclamations of the Acting Governor of Hawaii, Henry E. Cooper, dated June 10, 1901, and August 16, 1901, and a portion of the United States Navy Hospital reservation described in Presidential Executive Order Numbered 1181, dated March 25, 1910.

Beginning at the west corner of this parcel of land, on the Auwaiolimu-Kewalo-uka boundary and on the northeast side of Auwaiolimu Street, the coordinates of said point of beginning referred to Government survey triangulation station "Punchbowl," being one thousand two hundred and thirty and fifty-eight one-hundredths feet north and two thousand six hundred and seventy-five and six one-hundredths feet east as shown on Government Survey Registered Map Numbered 2985 and running by azimuths measured clockwise from true south:

1. Two hundred and thirty-one degrees twelve minutes one thousand two hundred and forty-eight and twenty-six one-hundredths feet along the land of Auwaiolimu;

2. Three hundred and twenty-one degrees twelve minutes

eight hundred and sixty feet along Hawaiian home land as described in Presidential Executive Order Numbered 5561;

3. Thence down along the middle of stream in all its turns and windings along the land of Kalawahine to the north corner of Roosevelt High School lot, the direct azimuth and distance being thirty-three degrees forty-eight minutes forty seconds one thousand one hundred and twelve and twenty one-hundredths feet;

Thence still down along the middle of stream for the next seven courses along the Roosevelt High School premises, the direct azimuth and distances between points in middle of said stream being:

4. Twenty-three degrees forty minutes twenty-eight and ninety one-hundredths feet;

5. Eight degrees no minutes one hundred and fifteen feet;

6. Three hundred and thirty-seven degrees fifty minutes forty-eight feet;

7. Two degrees thirty minutes sixty feet;

8. Forty-nine degrees forty minutes fifty-two feet;

9. Forty-six degrees six minutes ninety and seventy one-hundredths feet;

10. Ninety-two degrees forty-three minutes ninety-five and sixty one-hundredths feet; thence

11. Eighty-three degrees thirty-eight minutes seventy-one and sixty-three one-hundredths feet along state land to the northeast side of Auwaiolimu Street;

12. Thence on a curve to the left with a radius of one thousand one hundred and seventy-six and twenty-eight one-hundredths feet along the northeast side of Auwaiolimu Street along land described in Presidential Executive Order Numbered 1181, dated March 25, 1910, the direct azimuth and distance being one hundred and seventy-two degrees twenty-nine minutes thirty-five seconds one hundred and sixty-four and thirty-nine one-hundredths feet;

13. Thence continuing on a curve to the left with a radius of one thousand one hundred and seventy-six and twenty-eight one-hundredths feet along the northeast side of Auwaiolimu Street, the direct azimuth and distance being one hundred and sixty degrees fifty minutes forty-eight seconds three hundred and twelve and seventy-five one-hundredths feet;

14. Two hundred and twenty-four degrees fifty-three minutes

six hundred and seventy and sixty-five one-hundredths feet along the Quarry Reservation (State of Hawaii, owner);

15. One hundred and ten degrees six minutes two hundred and thirty-nine and twenty one-hundredths feet along same;

16. Ninety-two degrees five minutes two hundred and two and twenty one-hundredths feet along same;

17. Fifty-three degrees twenty minutes three hundred and forty and thirty-four one-hundredths feet along same;

18. One hundred and forty-two degrees thirty minutes four hundred and twenty-four and sixty-eight one-hundredths feet along the northeast side of Auwaiolimu Street to the point of beginning and containing an area of twenty-seven and ninety one-hundredths acres; excepting and reserving therefrom that certain area included in Tantalus Drive, crossing this land.

(V) Portion of Kewalo-uka Quarry Reservation. Situate on the northeast side of Auwaiolimu Street.

KEWALO-UKA, HONOLULU, OAHU

Being land reserved by the State of Hawaii within the Hawaii Experiment Station under the control of the United States Department of Agriculture, as described in proclamations of the Acting Governor of Hawaii, Henry E. Cooper, dated June 10, 1901.

Beginning at the northwest corner of this parcel of land and on the northeast side of Auwaiolimu Street, the coordinates of said point of beginning referred to Government survey triangulation station "Punchbowl," being eight hundred and ninety-three and sixty-six one-hundredths feet north and two thousand nine hundred and thirty-three and fifty-nine one-hundredths feet east as shown on Government Survey Registered Map Numbered 2985 and running by azimuths measured clockwise from true south:

1. Two hundred and thirty-three degrees twenty minutes three hundred and forty and thirty-four one-hundredths feet along the Hawaii Experiment Station under the control of the United States Department of Agriculture;

2. Two hundred and seventy-two degrees five minutes two hundred and two and twenty one-hundredths feet along same;

3. Two hundred and ninety degrees six minutes two hundred and thirty-nine and twenty one-hundredths feet along same;

4. Forty-four degrees fifty-three minutes six hundred and seventy and sixty-five one-hundredths feet along same to the northeast side of Auwaiolimu Street;

5. Thence on a curve to the left with a radius of one thousand one hundred and seventy-six and twenty-eight one-hundredths feet along the northeast side of Auwaiolimu Street, the direct azimuth and distance being one hundred and forty-seven degrees fifty-one minutes thirteen seconds two hundred and nineteen and fifty one-hundredths feet;

6. One hundred and forty-two degrees thirty minutes one hundred and thirty-four and fifty-five one-hundredths feet along the northeast side of Auwaiolimu Street;

7. Two hundred and thirty-two degrees thirty minutes twenty feet along same;

8. One hundred and forty-two degrees thirty minutes seventy-one and fifty-seven one-hundredths feet along same to the point of beginning and containing an area of four and six hundred and forty-six one-thousandths acres.

(VI) Being a portion of government land of Auwaiolimu, situated on the northeast side of Hawaiian home land of Auwaiolimu and adjacent to the land of Kewalo-uka at Pauoa Valley, Honolulu, Oahu, State of Hawaii. Beginning at a pipe in concrete at the south corner of this parcel of land, being also the east corner of Hawaiian home land, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Punchbowl," being two thousand twelve and seventy-five one-hundredths feet south and three thousand six hundred forty-seven and eighty-seven one-hundredths feet east, and thence running by azimuths measured clockwise from true south:

1. One hundred and forty-one degrees twelve minutes six hundred and ninety-three feet along Hawaiian home land;

2. Thence along middle of stone wall along L.C.Aw. 1356 to Kekuanoni, Grant 5147, Apana 1 to C.W.Booth, L.C.Aw. 1351 to Kamakainau, L.C.Aw. 1602 to Kahawai, Grant 4197 to Keauloa, L.C. Aw. 5235 to Kaapuiki and Grant 2587 to Haalelea;

3. Two hundred and ninety-five degrees thirty minutes three hundred and twenty feet along the remainder of government land of Auwaiolimu;

4. Twenty-four degrees sixteen minutes thirty seconds one thousand five hundred seventy-nine and thirty-six one-hundredths

feet along the remainder of government land of Auwaiolimu;

5. Thence along middle of ridge along the land of Kewalo-uka to a point called "Puu Iole" (pipe in concrete monument), the direct azimuth and distance being fifty-six degrees no minutes eight hundred and thirty feet;

6. Fifty-two degrees twelve minutes five hundred fifty-two and sixty one-hundredths feet along the land of Kewalo-uka to the point of beginning and containing an area of thirty-three and eighty-eight one-hundredths acres, more or less.

(VII) Being portions of government lands of Kewalo-uka and Kalawahine situated on the east side of Tantalus Drive at Pauoa Valley, Honolulu, Oahu, State of Hawaii. Beginning at the west corner of this parcel of land, the true azimuth and distance to a point called "Puu Ea" (pipe in concrete monument) being one hundred and seventy-four degrees thirty minutes four hundred one and ninety-nine one-hundredths feet, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Punchbowl" being two thousand eight hundred fifty-five and ten one-hundredths feet north and five thousand two hundred eighty-two and twenty-five one-hundredths feet east and thence running by azimuths measured clockwise from true south:

1. Two hundred and forty-eight degrees nineteen minutes forty seconds eight hundred fifty and fifty-four one-hundredths feet along the land of Kewalo-uka;

2. Sixteen degrees thirty minutes five hundred feet along the land of Kewalo-uka, along the land of Kalawahine;

3. Twenty-five degrees no minutes five hundred feet along the land of Kalawahine;

4. Thirty-five degrees no minutes three hundred and twenty feet along the land of Kalawahine;

5. Fifty degrees forty-six minutes ninety-six and seventy one-hundredths feet along Makiki Forest Ridge lots;

6. Seventy-three degrees twenty minutes two hundred fifty-five and ninety one-hundredths feet along Makiki Forest Ridge lots;

7. Eighty-six degrees thirty-two minutes one hundred sixty-three and forty one-hundredths feet along Makiki Forest Ridge lots;

8. Thence along the south side of Tantalus Drive on a curve to the right with a radius of two hundred and seventy

feet, the direct azimuth and distance being two hundred and twenty-one degrees twelve minutes nineteen seconds ninety-eight and thirty-six one-hundredths feet;

9. Two hundred and thirty-one degrees forty-two minutes one hundred ninety-three and thirty-five one-hundredths feet along the south side of Tantalus Drive;

10. Still along Tantalus Drive on a curve to the left with a radius of one hundred eighty and seventy-eight one-hundredths feet, the direct azimuth and distance being one hundred and eighty-one degrees forty-five minutes fifty-five seconds two hundred seventy-six and seventy-two one-hundredths feet;

11. Two hundred and forty-two degrees fifteen minutes sixty-two and thirty-two one-hundredths feet along the land of Kewalo-uka;

12. One hundred and seventy-four degrees thirty minutes five hundred twenty-eight and one one-hundredths feet along the land of Kewalo-uka to the point of beginning and containing an area of five hundred and seventy-four thousand seven hundred and thirty square feet or thirteen and one hundred ninety-four one-thousandths acres.

(5) On the island of Kauai: Upper land of Waimea, above the cultivated sugar cane lands, in the district of Waimea (fifteen thousand acres, more or less); and Moloaa (two thousand five hundred acres, more or less), and Anahola and Kamalomalo (five thousand acres, more or less).

Wailuku, Maui: That parcel of government land, situate in the District of Wailuku, Island and County of Maui, comprising twelve and four hundred and fifty-five one-thousandths acres of the ILI OF KOU and being a portion of the land covered by General Lease Numbered 2286 to Wailuku Sugar Company, Limited, notwithstanding the fact that said parcel is cultivated sugar cane land, subject, however, to the terms of said lease.

Cultivated Sugar Cane Lands: That parcel of Anahola, Island of Kauai, comprising four hundred and one and four hundred and twenty-three one-thousandths acres, hereinafter described and being portion of the land covered by general lease numbered 2724 to the Lihue Plantation Company, Limited, notwithstanding the fact that said parcel is cultivated sugar cane land, subject however, to the terms of said lease, said parcel being more particularly described as follows:

Being a portion of land described in general lease numbered 2724 to the Lihue Plantation Company situate in the district of Anahola, Kauai, State of Hawaii, beginning at the northwest corner of this parcel of land, the coordinates of which referred to government triangulation station south base are three thousand and forty-nine and sixty-two one-hundredths feet south, one thousand nine hundred and thirty-two and twenty-five one-hundredths feet west, and running thence by azimuths measured clockwise from true south two hundred and eighty-four degrees thirty minutes two hundred and fifty feet, thence on the arc of circular curve to the left, with a radius of eight hundred and ninety feet and a central angle of thirty-five degrees fifteen minutes, the direct azimuth and distance being two hundred and sixty-six degrees fifty-two minutes thirty seconds five hundred and thirty-eight and ninety-six one-hundredths feet, thence two hundred and forty-nine degrees fifteen minutes one thousand eight hundred and nine and twenty-five one-hundredths feet, thence two hundred and twenty-four degrees fifteen minutes three thousand fifty-six feet, thence one hundred and thirty-four degrees fifteen minutes two hundred and seven feet, to the seashore at Anahola Bay, thence along the seashore around Kahala Point, the direct azimuth and distance being two hundred and thirty-seven degrees six minutes seven seconds one thousand and sixty and fourteen one-hundredths feet, thence along the seashore, the direct azimuth and distance being three hundred and thirty-two degrees no minutes one thousand eight hundred and twenty-seven feet, thence along the seashore, the direct azimuth and distance being three hundred and fifty-five degrees no minutes one thousand eight hundred and twenty-seven feet, thence eighty-seven degrees twenty minutes seven hundred and forty feet, thence fifty-nine degrees no minutes two thousand seven hundred and fifteen feet, thence sixty-nine degrees fifteen minutes one thousand eight hundred and eighty-seven and thirty-six one-hundredths feet, thence on the arc of a circular curve to the right with a radius of three thousand and twelve feet, and a central angle of thirty-five degrees fifteen minutes the direct azimuth and distance being eighty-six degrees fifty-two minutes thirty seconds one thousand eight hundred and twenty-three and ninety-eight one-hundredths feet, thence one hundred and four degrees thirty minutes two hundred and fifty feet,

thence one hundred and ninety-four degrees thirty minutes one thousand and thirty-one feet, thence on the arc of a circular curve to the left with a radius of six hundred and seven and ninety-five one-hundredths feet and a central angle of fifty-three degrees three minutes thirty seconds the direct azimuth and distance being seventy-seven degrees fifty-eight minutes fifteen seconds five hundred and forty-three and nine one-hundredths feet to the government road, thence two hundred and thirty-one degrees twenty-six minutes thirty seconds one hundred and thirteen and sixty-one one-hundredths feet along the government road, thence along the government road on the arc of a circular curve to the left with a radius of four hundred and seventy-seven feet and a central angle of forty-four degrees twenty-six minutes thirty seconds, the direct azimuth and distance being two hundred and nine degrees thirteen minutes fifteen seconds three hundred and sixty and seventy-eight one-hundredths feet, thence one hundred and eighty-seven degrees no minutes one hundred and sixty-nine and fifty-four one-hundredths feet along the government road, thence on the arc of a circular curve to the left with a radius of three hundred and fifty-one and eight one-hundredths feet and a central angle of eighty-two degrees thirty minutes the direct azimuth and distance being three hundred and twenty-five degrees forty-five minutes four hundred and sixty-two and ninety-seven one-hundredths feet, thence one hundred and ninety-four degrees thirty minutes five hundred and seventy-nine feet, thence one hundred and four degrees thirty minutes three hundred feet, thence one hundred and ninety-four degrees thirty minutes two hundred feet, thence two hundred eighty-four degrees thirty minutes three hundred feet, thence one hundred and ninety-four degrees thirty minutes two hundred and fifty-two feet to the point of beginning containing an area of four hundred and one and four hundred and twenty-three one-thousandths acres more or less. [Am May 16, 1934, c 290, §1, 48 Stat 777; Aug. 29, 1935, c 810, §1, 49 Stat 966; Jul. 10, 1937, c 482, 50 Stat 497; Nov. 26, 1941, c 544, §1, 55 Stat 782; May 31, 1944, c 216, §2, 58 Stat 260; Jun. 3, 1948, cc 384, 397, 62 Stat 295, 303; Jul. 9, 1952, c 614, §§1, 2, 66 Stat 511; am L 1963, c 207, §§2, 5; am L 1990, c 150, §7]

WITHDRAWALS OF AVAILABLE LAND

The Act of May 31, 1944, c 216, §2, 58 Stat 260, repealed so much of the above section as designates the lands hereinafter described as "available lands," and restored such lands to their previous status under the control of the Territory of Hawaii. The lands so restored on the island of Hawaii are:

Those portions of Keaukaha tract 1, being additions to the Hilo airplane landing field, comprising several parcels of land as follows:

Parcel 1. Land situated at Keaukaha, tract 1, Waiakea, South Hilo, island of Hawaii, State of Hawaii, being portions of lots 96, 97, 182, 183, 184, 185, Desha Avenue, and twenty-five foot alley, of the Keaukaha residence lots, as shown on government survey registered maps 2723 and 3017, on file in the department of accounting and general services at Honolulu.

Beginning at the south corner of this piece of land and on the west boundary of the Hawaiian home land, the true azimuth and distance from the northwest corner of the Hilo airport addition, as shown on government survey registered maps 2723 and 3017 on file in the department of accounting and general services at Honolulu, and on the south side of Kamehameha Avenue, being one hundred and eighty degrees no minutes four hundred and three and thirty-one one-hundredths feet, and the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halai" being two thousand five hundred and twenty and thirty-one one-hundredths feet north and fifteen thousand five hundred and fifty-three one-hundredths feet east, thence running by azimuths measured clockwise from true south:

1. One hundred and eighty degrees no minutes six hundred and fifteen and ninety-five one-hundredths feet along Government land and tract A of grant deeded by Territory of Hawaii to Hilo Railroad Company;

2. Three hundred and ten degrees forty-two minutes four hundred and one and sixty-six one-hundredths feet along the remainders of Desha Avenue, lots 96, 97, twenty-five-foot alley, and lot 182 of the Keaukaha residence lots; and

3. Forty degrees forty-two minutes four hundred and sixty-six and ninety-seven one-hundredths feet along the remainders of lots 182, 183, 184, 185, and Desha Avenue and the Keaukaha residence lots to the point of beginning, and containing an area

of two and one hundred and fifty-five one-thousandths acres, more or less.

Parcel 2. Land situated on the south side of Kamehameha Avenue, at Keaukaha, tract 1, Waiakea, South Hilo, Island of Hawaii, State of Hawaii, being all of lots 449 to 486, inclusive, all of lots 546 to 564, inclusive, and portions of Kauhane, Spencer, Pua, and Kamaka Avenues of the Keaukaha residence lots, as shown on Government Survey Registered Maps 2723 and 3017, on file in the department of accounting and general services at Honolulu.

Beginning at the northwest corner of this piece of land; being also the southwest corner of Kamehameha and Kauhane Avenues, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halai" being two thousand one hundred and seventeen feet north and sixteen thousand eight hundred and eighty feet east, thence running by azimuths measured clockwise from true south:

1. Two hundred and seventy degrees no minutes two thousand and seventeen and eighty-five one-hundredths feet along the south side of Kamehameha Avenue;

2. Three hundred and sixty degrees no minutes four hundred and fifty feet along lots 448 and 487 of the Keaukaha residence lots;

3. Three hundred and sixty degrees no minutes fifty feet across Kamaka Avenue;

4. Three hundred and sixty degrees no minutes two hundred and twenty-five feet along lot 545 of the Keaukaha residence lots;

5. Ninety degrees no minutes three hundred and ninety-two and forty-eight one-hundredths feet along lots 583, 582, 581, and 580 of the Keaukaha residence lots;

6. Ninety degrees no minutes fifty feet across Pua Avenue;

7. Ninety degrees no minutes eight hundred and one and fifteen one-hundredths feet along lots 579, 578, 577, 576, 575, 574, 573, and 572, of the Keaukaha residence lots;

8. Ninety degrees no minutes fifty feet across Spencer Avenue;

9. Ninety degrees no minutes six hundred and seventy-four and twenty-two one-hundredths feet along lots 571, 570, 569, 568, 567, 566, and 565, of the Keaukaha residence lots;

10. Ninety degrees no minutes fifty feet across Kauhane

Avenue; and

11. One hundred and eight degrees no minutes seven hundred and twenty-five feet along Puuhala Reserve and the present Hilo airport addition, as shown on Government Survey Registered Maps 2723 and 3017 on file in the department of accounting and general services at Honolulu, to the point of beginning, and containing an area of thirty-three and five hundred and eighty-five one-thousandths acres, more or less.

Parcel 3. As returned to the Commissioner of Public Lands of the Territory of Hawaii by resolution numbered 78 of the Hawaiian Homes Commission, dated May 13, 1942. Land situated at Keaukaha, tract 1, Waiakea, South Hilo, Island of Hawaii, State of Hawaii, being the whole of lots 446, 447, 448, 487, 488, 489, 543, 544, 545, 584, 585, and 586 and portions of lots 581, 582, and 583, and a portion of Kamaka Avenue, of the Keaukaha residence lots, as shown on Government Survey Registered Maps 2723 and 3017, more particularly described as follows:

Beginning at the northeast corner of this piece of land, being also the northeast corner of lot 446 and the southwest corner of Kamehameha and Baker Avenues, the true azimuth and distance from the northwest corner of Hilo airport addition (of twenty and fifty-four one-hundredths acres and on the south side of Kamehameha Highway), as shown on Government Survey Registered Maps 2723 and 3017, being two hundred and seventy degrees no minutes and three thousand six hundred and eighty-eight and seventy one-hundredths feet, and the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halai" being two thousand one hundred and seventeen feet north and nineteen thousand one hundred and ninety-two and twenty-three one-hundredths feet east, thence running by azimuths measured clockwise from true south:

1. Three hundred and sixty degrees no minutes four hundred and fifty feet along the west side of Baker Avenue;

2. Three hundred and sixty degrees no minutes fifty feet across Kamaka Avenue;

3. Three hundred and sixty degrees no minutes four hundred and fifty feet along the west side of Baker Avenue;

4. Ninety degrees no minutes two hundred and ninety-four and thirty-eight one-hundredths feet along the north side of Kawika Avenue;

5. One hundred and eighty degrees no minutes one hundred and twelve and fifty one-hundredths feet along lot 583 of the Keaukaha residence lots;

6. One hundred and ten degrees fifty-five minutes three hundred and fifteen and thirteen one-hundredths feet along the remainders of lots 583, 582, and 581 of the Keaukaha residence lots;

7. Two hundred and seventy degrees no minutes two hundred and ninety-four and thirty-six one-hundredths feet along lots 548, 547, and 546 of the Keaukaha residence lots;

8. One hundred and eighty degrees no minutes two hundred and twenty-five feet along lot 546 of the Keaukaha residence lots;

9. One hundred and eighty degrees no minutes fifty feet across Kamaka Avenue;

10. One hundred and eighty degrees no minutes four hundred and fifty feet along lots 486 and 449 of the Keaukaha lots to the south side of Kamehameha Avenue; and

11. Two hundred and seventy degrees no minutes two hundred and ninety-four and thirty-eight one-hundredths feet along the south side of Kamehameha Avenue to the point of beginning and containing an area of six and eighty one-hundredths acres.

Parcel 4. As returned to the Commissioner of Public Lands of the Territory of Hawaii by resolution numbered 78 of the Hawaiian Homes Commission, dated May 13, 1942. Land situated at Keaukaha, tract 1, Waiakea, South Hilo, Island of Hawaii, State of Hawaii, being the whole of lots 93, 94, 95, 98, 99, 100, 101, and 102 and portions of lots 92, 96, 97, and 103 and a portion of Desha Avenue of the Keaukaha residence lots, as shown on Government Survey Registered Maps 2723 and 3017, more particularly described as follows:

Beginning at the northwest corner of this piece of land, being also the northwest corner of lot 94 and on the southeast side of twenty-five-foot road, the true azimuth and distance from the northwest corner of Hilo airport addition (of twenty and fifty-four one-hundredths acres and on the south side of Kamehameha Highway), as shown on Government Survey Registered Maps 2723 and 3017, being one hundred and eighty degrees no minutes one thousand seven hundred and fifty-one and eighty-seven one-hundredths feet, and the coordinates of said point of beginning referred to Government Survey Triangulation Station "Halai"

being three thousand eight hundred and sixty-eight and eighty-seven one-hundredths feet north and fifteen thousand five hundred and three and fifty-three one-hundredths feet east, thence running by azimuths measured clockwise from true south:

1. Two hundred and forty-three degrees fifty minutes one hundred and seventy-seven and ninety-three one-hundredths feet along the southeast side of twenty-five-foot road;

2. Three hundred and thirty-three degrees fifty minutes two hundred and thirty-five and sixty one-hundredths feet along lot 92 of the Keaukaha residence lots;

3. Two hundred and forty-three degrees fifty minutes one hundred feet along the remainder of lot 92 of the Keaukaha residence lots;

4. Three hundred and thirty-three degrees fifty minutes two hundred feet along lot 91 of the Keaukaha residence lots;

5. Three hundred and thirty-three degrees fifty minutes fifty feet across Desha Avenue;

6. Two hundred and forty-three degrees fifty minutes one hundred feet along the southeast side of Desha Avenue;

7. Three hundred and thirty-three degrees fifty minutes two hundred and thirty-five and sixty one-hundredths feet along lot 103 of the Keaukaha residence lots;

8. Two hundred and forty-three degrees fifty minutes one hundred feet along the remainder of lot 103 of the Keaukaha residence lots;

9. Three hundred and thirty-three degrees fifty minutes two hundred feet along the southwest side of Kauhane Avenue;

10. Sixty-three degrees fifty minutes six hundred and eighty-eight and thirty-six one-hundredths feet along the northwest side of twenty-five-foot road;

11. One hundred and thirty degrees forty-two minutes two hundred and eighty-six and seventy-three one-hundredths feet along the remainders of lots 97 and 96 and Desha Avenue of the Keaukaha residence lots; and

12. One hundred and eighty degrees no minutes seven hundred and thirty-two and sixty-one one-hundredths feet along Government land and tract A of grant deed by the Territory of Hawaii to Hilo Railroad Company to the point of beginning and containing an area of ten and eight hundred and forty-nine one-thousandths acres.

The Act of June 12, 1948, c 458, 62 Stat 387, withdrew certain land as available land. The Act provided:

"That the portion of Hawaiian Homes Commission land of Waiakea-kai or Keaukaha, South Hilo, Hawaii, Territory of Hawaii, more fully described as follows, is withdrawn as 'available land' within the meaning of the Hawaiian Homes Commission Act of 1920 (42 Stat. 108), as amended, and is hereby restored to its previous status under the control of the Territory of Hawaii:

"Portion of Hawaiian home land of Keaukaha, tract 2, Waiakea, South Hilo, Island of Hawaii, Territory of Hawaii, as returned to the Commissioner of Public Lands of the Territory of Hawaii by Resolution numbered 85 of the Hawaiian Homes Commission, dated July 18, 1944, and more particularly described as follows:

"Beginning at a spike at the northwest corner of this tract of land and on the southeast corner of the intersection of Nene and Akepa Streets, the coordinates of said point of beginning referred to Government Survey Triangulation Station 'Halai' being five thousand two hundred and eight and twenty-one one-hundredths feet north and twenty-four thousand eight hundred and eighteen and six one-hundredths feet east, and running by azimuths measured clockwise from true south:

"1. Two hundred and ninety degrees eleven minutes five hundred and sixty-one and eighty-two one-hundredths feet along the south side of Nene Street;

"2. Thence along same on a curve to the left with a radius of one thousand four hundred and sixty-five and four-tenths feet, the chord azimuth and distance being two hundred and sixty-eight degrees thirty-seven minutes one thousand and seventy-seven and thirty one-hundredths feet;

"3. Two hundred and forty-seven degrees three minutes five hundred and ninety-six and sixty-two one-hundredths feet along same;

"4. Three hundred and sixty degrees no minutes one thousand two hundred and thirty-seven and eighty-five one-hundredths feet;

"5. Ninety degrees no minutes two thousand one hundred and fifty-three and sixty-nine one-hundredths feet;

"6. One hundred and eighty degrees no minutes one thousand one hundred and seventy-three and four one-hundredths feet along the east side of the proposed extension of Akepa Street to the

point of beginning, and containing an area of fifty acres, more or less.

"Section 2. Notwithstanding the foregoing provisions of this Act, if, at any time, in the opinion of the Commissioner of Public Lands, use of the above described lands has been discontinued by the Department of Commerce, upon the making of such a determination by the Commissioner of Public Lands such lands shall become available lands within the meaning of Section 203 of title II of the Hawaiian Homes Commission Act, 1920, as amended."

The Act of August 29, 1935, c 819, §1, 49 Stat 966, and the Act of May 31, 1944, c 216, §2, 58 Stat 260, repealed so much of the above section as designates the lands hereinafter described as "available lands", and restored such lands to their previous status under the control of the Territory of Hawaii. The lands so restored on the Island of Molokai as of August 29, 1935 are:

Those portions of Hoolehua, apana 2, and Palaau, apana 2, comprising the Molokai airplane landing field as set aside for public purposes by Executive Order Numbered 307 of the Governor of the Territory of Hawaii, dated December 15, 1927, consisting of two hundred four and nine-tenths acres, more or less, and particularly described as follows:

Beginning at a point on the southeast corner of the said land, from which the azimuth (measured clockwise from true south) and distance to United States Coast and Geodetic Survey Triangulation Station "Middle Hill" (Kualapuu) is two hundred and seventy-two degrees twenty-three minutes thirty-nine seconds, twelve thousand seven hundred twenty and nine-tenths feet, thence from said point of beginning by metes and bounds, eighty-five degrees ten minutes thirty seconds, three thousand four hundred and twenty-seven feet; one hundred and eighty degrees fifty-six minutes thirty seconds, two thousand six hundred thirty and two-tenths feet; two hundred and seventy-nine degrees fifty-five minutes thirty seconds, four thousand nine hundred seven and three-tenths feet; three hundred and forty-six degrees twenty minutes, three hundred forty-two and three-tenths feet near west edge of Kakainapahao Gulch; three degrees twenty-six minutes, four hundred twenty-seven and one-tenth feet; eighty-three degrees twenty-four minutes, one thousand four hundred sixty-eight and two tenths feet; five degrees fifty-

eight minutes, five hundred seventy-one and three-tenths feet to the point of beginning.

The land so restored on the Island of Molokai as of May 31, 1944 is:

That portion of Palaau, Apana 2, being an addition to the Molokai airplane landing field, as follows:

Parcel 1. As returned to the Commissioner of Public Lands of the Territory of Hawaii by resolution numbered 68 of the Hawaiian Homes Commission, dated March 3, 1941, and consisting of thirteen and five hundred and twenty-seven one-thousandths acres, more or less, more particularly described as follows:

Beginning at the southeast corner of this piece of land, on the west boundary of the present Molokai airport, the true azimuth and distance from the northwest corner of the Molokai airport (Executive Order Numbered 809) being no degrees fifty-six minutes thirty seconds two hundred and forty-two feet, and the coordinates of said point of beginning referred to Government Survey Triangulation Station "Middle Hill" being one and fifteen one-hundredths feet north and sixteen thousand one hundred and twenty-eight and one one-hundredths feet west, thence running by true azimuths measured clockwise from south:

(1) Sixty degrees twenty-five minutes eight hundred and forty-one and seventy-four one-hundredths feet along the remainders of fifty-foot road and lot 170 of the Hawaiian Homes land;

(2) One hundred and eighty degrees fifty-six minutes thirty seconds eight hundred and twelve and sixty-two one-hundredths feet along the remainder of lot 170 of the Hawaiian Homes land;

(3) Two hundred and forty degrees twenty-five minutes eight hundred and forty-one and seventy-four one-hundredths feet along the remainders of Lot 170, Pine Avenue, lot 158 and fifty-foot road of the Hawaiian Homes land, to the west side of the Molokai airport; and

(4) No degrees fifty-six minutes thirty seconds eight hundred and twelve and sixty-two one-hundredths feet along the west side of the present Molokai airport to the point of beginning.

Attorney General Opinions

The term "available lands" does not include land already set apart by Presidential Executive Order at time of enactment of

this Act. Att. Gen. Op. 64-44.

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§204. Control by department of "available lands," return to board of land and natural resources, when; other lands, use of. (a) 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, except that:

(1) In case any available land is under lease by the Territory of Hawaii, by virtue of section 73 of the Hawaiian Organic Act, at the time of the passage of this Act, such land shall not assume the status of Hawaiian home lands until the lease expires or the board of land and natural resources withdraws the lands from the operation of the lease. If the land is covered by a lease containing a withdrawal clause, as provided in section 73(d) of the Hawaiian Organic Act, the board of land and natural resources shall withdraw such lands from the operation of the lease whenever the department gives notice to the board that the department is of the opinion that the lands are required by it for the purposes of this Act; and such withdrawal shall be held to be for a public purpose within the meaning of that term as used in section 73(d) of the Hawaiian Organic Act.

(2) Any available land, including lands selected by the department out of a larger area, as provided by this Act, not leased as authorized by section 207(a) of this Act, may be returned to the board of land and natural resources as provided under section 212 of this Act, or may be retained for management by the department. Any Hawaiian home lands general lease issued by the department after June 30, 1985, shall contain a withdrawal clause allowing the department to withdraw the land leased at any time during the term of the lease for the purposes of this Act.

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 chapter 171, Hawaii Revised Statutes; provided that the department may not sell or dispose of such lands in fee simple except as authorized under section 205 of this Act; provided further that the department is expressly authorized to negotiate, prior to negotiations with the general public, the disposition of Hawaiian home lands or any improvements thereon to a native Hawaiian, or organization or association owned or controlled by native Hawaiians, for commercial, industrial, or other business purposes, in accordance with the procedures set forth in chapter 171, Hawaii Revised Statutes.

(3) The department, with the approval of the Secretary of the Interior, in order to consolidate its holdings or to better effectuate the purposes of this Act, may exchange the title to available lands for land, privately or publicly owned, of an equal value. All lands so acquired by the department shall assume the status of available lands as though the land were originally designated as available lands under section 203 of this Act, and all lands so conveyed by the department shall assume the status of the land for which it was exchanged. The limitations imposed by section 73 (l) of the Hawaiian Organic Act and the land laws of Hawaii as to the area and value of land that may be conveyed by way of exchange shall not apply to exchanges made pursuant hereto. No such exchange of land publicly owned by the State shall be made without the approval of two-thirds of the members of the board of land and natural resources. For the purposes of this paragraph, lands "publicly owned" means land owned by a county or the State or the United States.

(b) Unless expressly provided elsewhere in this Act, lands or an interest therein acquired by the department pursuant to section [213(e)], 221(c), or 225(b), or any other section of this Act authorizing the department to acquire lands or an interest therein, may be managed and disposed of in the same manner and for the same purposes as Hawaiian home lands. [Am Mar. 27, 1928, c 142, §1, 45 Stat 246; Jul. 10, 1937, c 482, 50 Stat 503; Feb. 20, 1954, c 10, §1, 68 Stat 16; Jun. 18, 1954, c

319, §1, 68 Stat 262; am L 1963, c 207, §§2, 5(b); am L 1965, c 271, §1; am L 1976, c 24, §1; am Const Con 1978 and election Nov 7, 1978; am L 1985, c 60, §1; am L 1990, c 14, §1; am L 2000, c 119, §1]

Revision Note

In subsection (b), "section 213(e)" substituted for "section 213(b)(1)".

Cross References

As to last two sentences of subsection (a)(3), compare §§171-5 and 171-50.

Attorney General Opinions

Hawaiian home lands needed for purposes of the Act are to be used and disposed of in accordance with the Act and are not subject to county zoning requirements. Att. Gen. Op. 72-21.

Threatened and endangered plants are protected on Hawaiian home lands under the provisions of chapter 195D, as well as under the provisions of the federal Endangered Species Act of 1973, to the same extent that the plants are protected elsewhere in Hawaii. Anyone who "takes" threatened or endangered plants on Hawaiian home lands is subject to state and federal civil and criminal penalties. Att. Gen. Op. 95-5.

Law Journals and Reviews

The Lum Court and Native Hawaiian Rights. 14 UH L. Rev. 377.

Case Notes

In dealing with eligible native Hawaiians, department of Hawaiian home lands must adhere to high fiduciary duties normally owed by a trustee to its beneficiaries. 64 H. 327, 640 P.2d 1161.

Commission may lease lands in accordance with §207(a) to the government because it is a member of the public. 69 H. 538, 751

P.2d 81.
  Section not violated by application of chapter 343. 87 H. 91, 952 P.2d 379.

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§204.5. Additional powers. In addition and supplemental to the powers granted to the department by law, and notwithstanding any law to the contrary, the department may:

(1) With the approval of the governor, undertake and carry out the development of any Hawaiian home lands available for lease under and pursuant to section 207 of this Act by assembling these lands in residential developments and providing for the construction, reconstruction, improvement, alteration, or repair of public facilities therein, including, without limitation, streets, storm drainage systems, pedestrian ways, water facilities and systems, sidewalks, street lighting, sanitary sewerage facilities and systems, utility and service corridors, and utility lines, where applicable, sufficient to adequately service developable improvements therein, sites for schools, parks, off-street parking facilities, and other community facilities;

(2) With the approval of the governor, undertake and carry out the development of available lands for homestead, commercial, and multipurpose projects as provided in section 220.5 of this Act, as a developer under this section or in association with a developer agreement entered into pursuant to this section by providing for the construction, reconstruction, improvement, alteration, or repair of public facilities for development, including, without limitation, streets, storm drainage systems, pedestrian ways, water facilities and systems, sidewalks, street lighting, sanitary sewerage facilities and systems, utility and service corridors, and utility lines, where applicable, sufficient to adequately service developable improvements therein, sites for schools, parks, off-street parking facilities, and other community facilities;

(3) With the approval of the governor, designate by resolution of the commission all or any portion of a development or multiple developments undertaken pursuant to this section an "undertaking" under part III of chapter 39, Hawaii Revised Statutes; and

(4) Exercise the powers granted under section 39-53, Hawaii Revised Statutes, including the power to issue revenue bonds from time to time as authorized by the legislature.

All provisions of part III of chapter 39, Hawaii Revised Statutes, shall apply to the department and all revenue bonds issued by the department shall be issued pursuant to the provisions of that part, except these revenue bonds shall be issued in the name of the department, and not in the name of the State.

As applied to the department, the term "undertaking" as used in part III of chapter 39 shall include a residential development or a development of homestead, commercial, or multipurpose projects under this Act. The term "revenue" as used in part III of chapter 39, shall include all or any portion of the rentals derived from the leasing of Hawaiian home lands or available lands, whether or not the property is a part of the development being financed. [L 1989, c 283, pt of §2; ree L 1997, c 197, §2]

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§205. Sale or lease, limitations on. Available lands shall be sold or leased only:

(1) In the manner and for the purposes set out in this title; or

(2) As may be necessary to complete any valid agreement of sale or lease in effect at the time of the passage of this Act;

except that such limitations shall not apply to the unselected portions of lands from which the department has made a selection and given notice thereof, or failed so to select and give notice within the time limit, as provided in paragraph (3) of section 204 of this title. [Am L 1963, c 207, §2; am L 1997, c 197, §3]

Note

The reference was to paragraph (3) of section 204 as originally enacted, which fixed a period of eight years after the first meeting of the commission [department]. The first meeting was held September 20, 1921.

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§206. Other officers not to control Hawaiian home lands; exception. The powers and duties of the governor and the board of land and natural resources, in respect to lands of the State, shall not extend to lands having the status of Hawaiian home lands, except as specifically provided in this title. [Am L 1963, c 207, §5(a), (b); ree L 1997, c 197, §4]

Note

The Act of July 10, 1937, c 484, 50 Stat 508, provides in part: "That the legislature of the Territory of Hawaii may create a public corporate authority to engage in slum clearance, or housing undertakings, or both, within such Territory.... The legislature.... may, without regard to any federal acts restricting the disposition of public lands of the Territory, authorize the commissioner of public lands, the Hawaiian homes commissioner, and any other officers of the Territory having power to manage and dispose of its public lands, to grant, convey, or lease to such authority parts of the public domain, and may provide that any of the public domain or other property acquired by such authority may be mortgaged by it as security for its bonds...."

Attorney General Opinions

Governor's power to set aside public lands by executive order does not extend to Hawaiian home lands. Att. Gen. Op. 75-3.

Threatened and endangered plants are protected on Hawaiian home lands under the provisions of chapter 195D, as well as under the provisions of the federal Endangered Species Act of 1973, to the same extent that the plants are protected elsewhere in Hawaii. Anyone who "takes" threatened or endangered plants on Hawaiian home lands is subject to state and federal civil and criminal penalties. Att. Gen. Op. 95-5.

Law Journals and Reviews

Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts. 14 UH L. Rev. 519.

Case Notes

Absent demonstrable intent to restrict government's authority to enforce state and county criminal laws on Hawaiian home lands, section does not preclude enforcement of such laws. 80 H. 168, 907 P.2d 754.

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§207. Leases to Hawaiians, licenses. (a) The department is authorized to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands within the following acreage limits per each lessee: (1) not more than forty acres of agriculture lands or lands used for aquaculture purposes; or (2) not more than one hundred acres of irrigated pastoral lands and not more than one thousand acres of other pastoral lands; or (3) not more than one acre of any class of land to be used as a residence lot; provided that in the case of any existing lease of a farm lot in the Kalanianaole Settlement on Molokai, a residence lot may exceed one acre but shall not exceed four acres in area, the location of such area to be selected by the department; provided further that a lease granted to any lessee may include two detached farm lots or aquaculture lots, as the case may be, located on the same island and within a reasonable distance of each other, one of which, to be designated by the department, shall be occupied by the lessee as the lessee's home, the gross acreage of both lots not to exceed the maximum acreage of an agricultural, pastoral, or aquacultural lot, as the case may be, as provided in this section.

(b) The title to lands so leased shall remain in the State. Applications for tracts shall be made to and granted by the department, under such regulations, not in conflict with any provisions of this title, as the department may prescribe. The department shall, whenever tracts are available, enter into such a lease with any applicant who, in the opinion of the department, is qualified to perform the conditions of such lease.

(c)(1) The department is authorized to grant licenses as easements for railroads, telephone lines, electric power and light lines, gas mains, and the like. The department is also authorized to grant licenses for lots within a district in which lands are leased under the provisions of this section, for:

(A) Churches, hospitals, public schools, post offices, and other improvements for public purposes; and

(B) Theaters, garages, service stations, markets, stores, and other mercantile establishments

(all of which shall be owned by native Hawaiians or by organizations formed and controlled by native Hawaiians).

(2) The department is also authorized to grant licenses to the United States for reservations, roads, and other rights-of-way, water storage and distribution facilities, and practice target ranges.

(3) Any license issued under this subsection shall be subject to such terms, conditions, and restrictions as the department shall determine and shall not restrict the areas required by the department in carrying on its duties, nor interfere in any way with the department's operation or maintenance activities. [Am Feb. 3, 1923, c 56, §1, 42 Stat 1222; May 16, 1934, c 290, §2, 48 Stat 779; Jul. 10, 1937, c 482, 50 Stat 504; May 31, 1944, c 216, §§3, 4, 58 Stat 264; Jun. 14, 1948, c 464, §§1, 2, 62 Stat 390; Jun. 18, 1954, c 321, §1, 68 Stat 263; Aug. 23, 1958, Pub L 85-733, 72 Stat 822; am L 1963, c 207, §2; am L 1981, c 90, §1; am L 1983, c 125, §2; am L 1984, c 27, §1 and c 37, §2; am L 1985, c 69, §1 and c 159, §2; am L 1997, c 196, §2]

Note

In addition to the provisions herein made for leases to native Hawaiians, the Act of June 20, 1938, c 530, §3, 52 Stat 781, after providing for the Kalapana extension to the Hawaii National Park, authorized the Secretary of the Interior to lease home sites herein to native Hawaiians under certain circumstances.

Homesteaders Cooperative Association use of Hoolehua Store building free of rent, subject to certain conditions. L 1959, JR 17.

Revision Note

In subsection (b), "State" substituted for "United States" in view of section 5(b) of Hawaii Admission Act.

Attorney General Opinions

Section does not authorize the commission to grant a permit to occupy Hawaiian homes premises from month to month on a monthly charge basis. Att. Gen. Op. 61-64.

Commission has no authority to permit a lessee to subdivide homestead tract and sublease a portion thereof to daughter. Att. Gen. Op. 61-65.

Neither the department nor any lessee is authorized to develop multi-unit dwellings. Att. Gen. Op. 62-9.

Lands not needed for purposes of Act could be subjected to county zoning regulations. Att. Gen. Op. 72-21.

Law Journals and Reviews

The Lum Court and Native Hawaiian Rights. 14 UH L. Rev. 377.

Case Notes

As subsection (c)(1)(A) of this Act does not provide a "statutory entitlement" to any entity which may be granted a license pursuant to it, plaintiff energy producer failed to establish that plaintiff's exclusive telecommunications service license issued under this subsection constituted "property" which would entitle plaintiff to due process protection. 110 H. 419, 134 P.3d 585.

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[§207.5.] Housing development. The department is authorized to develop and construct single-family and multifamily units for housing native Hawaiians. The method of disposition, including rentals, as well as the terms, conditions, covenants, and restrictions as to the use and occupancy of such single-family and multifamily units shall be prescribed by rules adopted by the department pursuant to chapter 91. [L 1997, c 196, §1]

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§208. Conditions of leases. Each lease made under the authority granted the department by section 207 of this Act, and the tract in respect to which the lease is made, shall be deemed subject to the following conditions, whether or not stipulated in the lease:

(1) The original lessee shall be a native Hawaiian, not less than eighteen years of age. In case two lessees either original or in succession marry, they shall choose the lease to be retained, and the remaining lease shall be transferred, quitclaimed, or canceled in accordance with the provisions of succeeding sections.

(2) The lessee shall pay a rental of $1 a year for the tract and the lease shall be for a term of ninety-nine years; except that the department may extend the term of any lease; provided that the approval of any extension shall be subject to the condition that the aggregate of the initial ninety-nine year term and any extension granted shall not be for more than one hundred ninety-nine years.

(3) The lessee may be required to occupy and commence to use or cultivate the tract as the lessee's home or farm or occupy and commence to use the tract for aquaculture purposes, as the case may be, within one year after the commencement of the term of the lease.

(4) The lessee thereafter, for at least such part of each year as the department shall prescribe by rules, shall occupy and use or cultivate the tract on the lessee's own behalf.

(5) The lessee shall not in any manner transfer to, or otherwise hold for the benefit of, any other person or group of persons or organizations of any kind, except a native Hawaiian or Hawaiians, and then only upon the approval of the department, or agree so to transfer, or otherwise hold, the lessee's interest in the tract; except that the lessee, with the approval of the department, also may transfer the lessee's interest in the tract to the following qualified relatives of the lessee who are at least one-quarter Hawaiian: husband, wife, child, or grandchild. A lessee who is at least one-quarter Hawaiian who has received an interest in the

tract through succession or transfer may, with the approval of the department, transfer the lessee's leasehold interest to a brother or sister who is at least one-quarter Hawaiian. Such interest shall not, except in pursuance of such a transfer to or holding for or agreement with a native Hawaiian or Hawaiians or qualified relative who is at least one-quarter Hawaiian approved of by the department or for any indebtedness due the department or for taxes or for any other indebtedness the payment of which has been assured by the department, including loans from other agencies where such loans have been approved by the department, be subject to attachment, levy, or sale upon court process. The lessee shall not sublet the lessee's interest in the tract or improvements thereon; provided that a lessee may be permitted, with the approval of the department, to rent to a native Hawaiian or Hawaiians, lodging either within the lessee's existing home or in a separate residential dwelling unit constructed on the premises.

(6) Notwithstanding the provisions of paragraph (5), the lessee, with the consent and approval of the commission, may mortgage or pledge the lessee's interest in the tract or improvements thereon to a recognized lending institution authorized to do business as a lending institution in either the State or elsewhere in the United States; provided the loan secured by a mortgage on the lessee's leasehold interest is insured or guaranteed by the Federal Housing Administration, Department of Veterans Affairs, or any other federal agency and their respective successors and assigns, which are authorized to insure or guarantee such loans, or any acceptable private mortgage insurance as approved by the commission. The mortgagee's interest in any such mortgage shall be freely assignable. Such mortgages, to be effective, must be consented to and approved by the commission and recorded with the department.

Further, notwithstanding the authorized purposes of loan limitations imposed under section 214 of this Act and the authorized loan amount limitations

imposed under section 215 of this Act, loans made by lending institutions as provided in this paragraph, insured or guaranteed by the Federal Housing Administration, Department of Veterans Affairs, or any other federal agency and their respective successors and assigns, or any acceptable private mortgage insurance, may be for such purposes and in such amounts, not to exceed the maximum insurable limits, together with such assistance payments and other fees, as established under section 421 of the Housing and Urban Rural Recovery Act of 1983 which amended Title II of the National Housing Act of 1934 by adding section 247, and its implementing regulations, to permit the Secretary of Housing and Urban Development to insure loans secured by a mortgage executed by the homestead lessee covering a homestead lease issued under section 207(a) of this Act and upon which there is located a one to four family single family residence.

(7) The lessee shall pay all taxes assessed upon the tract and improvements thereon. The department may pay such taxes and have a lien therefor as provided by section 216 of this Act.

(8) The lessee shall perform such other conditions, not in conflict with any provision of this Act, as the department may stipulate in the lease; provided that an original lessee shall be exempt from all taxes for the first seven years after commencement of the term of the lease. [Am Jul. 10, 1937, c 482, 50 Stat 504; Nov. 26, 1941, c 544, §2, 55 Stat 783; Aug. 21, 1958, Pub L 85-710, 72 Stat 706; am L 1963, c 207, §2; am L 1967, c 146, §§1, 2; am L 1973, c 66, §1; am L 1974, c 175, §1; am L 1978, c 229, §5; am L 1981, c 90, §2; am L 1985, c 60, §2 and c 284, §1; am L 1990, c 305, §1; am L 1997, c 196, §3; am L 1999, c 17, §1; am L 2002, c 12, §1; am L 2005, c 53, §1]

Attorney General Opinions

Lessee is prohibited from subdividing homestead tract and subleasing a portion thereof to lessee's daughter. Att. Gen.

Op. 61-65.

Bank of Hawaii is not an eligible mortgagee; improvements may not be treated as personalty. Att. Gen. Op. 65-15.

Case Notes

Tax on the tract is the tax on the fee simple estate and not on lessee's leasehold interest. 60 H. 487, 591 P.2d 607.

Third party agreements with non-Hawaiians which transferred portion of lessees' interest in homesteads void ab initio as violative of paragraph (5). 81 H. 474, 918 P.2d 1130.

Approval of home loan did not constitute approval of department for transfer of lease. 4 H. App. 446, 667 P.2d 839.

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§209. Successors to lessees. (a) Upon the death of the lessee, the lessee's interest in the tract or tracts and the improvements thereon, including growing crops and aquacultural stock (either on the tract or in any collective contract or program to which the lessee is a party by virtue of the lessee's interest in the tract or tracts), shall vest in the relatives of the decedent as provided in this paragraph. From the following relatives of the lessee who are (1) at least one-quarter Hawaiian, husband, wife, children, grandchildren, brothers, or sisters, or (2) native Hawaiian, father and mother, widows or widowers of the children, widows or widowers of the brothers and sisters, or nieces and nephews,--the lessee shall designate the person or persons to whom the lessee directs the lessee's interest in the tract or tracts to vest upon the lessee's death. The Hawaiian blood requirements shall not apply to the descendants of those who are not native Hawaiians but who were entitled to the leased lands under section 3 of the Act of May 16, 1934 (48 Stat. 777, 779), as amended, or under section 3 of the Act of July 9, 1952 (66 Stat. 511, 513). In all cases that person or persons need not be eighteen years of age. The designation shall be in writing, may be specified at the time of execution of the lease with a right in the lessee in similar manner to change the beneficiary at any time and shall be filed with the department and approved by the department in order to be effective to vest the interests in the successor or successors so named.

In case of the death of any lessee, except as hereinabove provided, who has failed to specify a successor or successors as approved by the department, the department may select from only the following qualified relatives of the decedent:

(1) Husband or wife; or

(2) If there is no husband or wife, then the children; or

(3) If there is no husband, wife, or child, then the grandchildren; or

(4) If there is no husband, wife, child, or grandchild, then brothers or sisters; or

(5) If there is no husband, wife, child, grandchild, brother, or sister, then from the following relatives of the lessee who are native Hawaiian: father

and mother, widows or widowers of the children, widows or widowers of the brothers and sisters, or nieces and nephews.

The rights to the use and occupancy of the tract or tracts may be made effective as of the date of the death of the lessee.

In the case of the death of a lessee leaving no designated successor or successors, husband, wife, children, grandchildren, or relative qualified to be a lessee of Hawaiian home lands, the land subject to the lease shall resume its status as unleased Hawaiian home lands and the department is authorized to lease the land to a native Hawaiian as provided in this Act.

Upon the death of a lessee who has not designated a successor and who leaves a spouse not qualified to succeed to the lease or children not qualified to succeed to the lease, or upon the death of a lessee leaving no relative qualified to be a lessee of Hawaiian home lands, or the cancellation of a lease by the department, or the surrender of a lease by the lessee, the department shall appraise the value of all the improvements and growing crops or improvements and aquacultural stock, as the case may be, and shall pay to the nonqualified spouse or the nonqualified children as the lessee shall have designated prior to the lessee's death, or to the legal representative of the deceased lessee, or to the previous lessee, as the case may be, the value thereof, less any indebtedness to the department, or for taxes, or for any other indebtedness the payment of which has been assured by the department, owed by the deceased lessee or the previous lessee. These payments shall be made out of the Hawaiian home loan fund and shall be considered an advance therefrom and shall be repaid by the successor or successors to the tract involved. If available cash in the Hawaiian home loan fund is insufficient to make these payments, payments may be advanced from the Hawaiian home general loan fund and shall be repaid by the successor or successors to the tract involved; provided that any repayment for advances made from the Hawaiian home general loan fund shall be at the interest rate established by the department for loans made from the Hawaiian home general loan fund. The successor or successors may be required by the commission to obtain private financing in accordance with section 208(6) to pay off the amount advanced from the Hawaiian home loan fund or Hawaiian home general loan fund.

(b) The appraisal of improvements and growing crops, or stock, if any, shall be made by any one of the following methods:

(1) By a disinterested appraiser hired by the department; provided that the previous lessee or deceased lessee's legal representative shall not be charged for the cost of the appraisal; or

(2) By one disinterested appraiser mutually agreeable to both the department and the previous lessee or the deceased lessee's legal representative, with the cost of appraisal borne equally by the two parties; or

(3) By not more than three disinterested appraisers of which the first shall be contracted for and paid by the department. If the previous lessee or the deceased lessee's legal representative does not agree with the appraised value, the previous lessee or the deceased lessee's legal representative shall contract with and pay for the services of a second appraiser whose appraisal report shall be submitted to the department not later than ninety days from the date of the first appraisal report; provided that the first appraisal shall be used if the second appraiser is not hired within thirty days from the date the department transmits the first appraisal report to the previous lessee or the deceased lessee's representative. If the appraisal values are different and a compromise value between the two appraisals is not reached, a third appraisal shall be made by an appraiser appointed by the first two appraisers not later than ninety days from the date of the second appraisal report and the third appraiser shall determine the final value. The cost of the third appraisal shall be borne equally by the department and the previous lessee or the deceased lessee's legal representative.

The department may adopt rules not in conflict with this section to establish appraisal procedures, including the time period by which the department and the previous lessee or the deceased lessee's legal representative shall act on appraisal matters.

(c) If a previous lessee has abandoned the tract or tracts

or cannot be located after at least two attempts to contact the previous lessee by certified mail, the department by public notice published at least once in each of four successive weeks in a newspaper of general circulation in the State shall give notice to the previous lessee that the lease will be canceled in accordance with sections 210 and 216 of this title and the department will appraise the value of the improvements and growing crops and stock, if any, if the previous lessee does not present himself or herself within one hundred and twenty days from the first day of publication of the notice. Following cancellation of the lease and appraisal of the improvements and growing crops and stock, if any, the department shall make the payout as provided in subsection (a).

(d) After the cancellation of a lease by the department in accordance with sections 210 and 216 of this title, or the surrender of a lease by a lessee, the department may transfer the lease or issue a new lease to any qualified native Hawaiian regardless of whether or not that person is related in any way by blood or marriage to the previous lessee.

(e) If any successor or successors to a tract is a minor or minors, the department may appoint a guardian therefor, subject to the approval of the court of proper jurisdiction. The guardian shall be authorized to represent the successor or successors in all matters pertaining to the leasehold; provided that the guardian, in so representing the successor or successors, shall comply with this title and the stipulations and provisions contained in the lease, except that the guardian need not be a native Hawaiian as defined in section 201 of this title. [Am Jul. 10, 1937, c 482, 50 Stat 504; Nov. 26, 1941, c 544, §3, 55 Stat 783; Jul. 9, 1952, c 614, §4, 66 Stat 514; am L 1963, c 207, §2; am L 1981, c 90, §3 and c 112, §1; am L 1982, c 272, §1; am L 1985, c 137, §1; am L 1987, c 36, §§2, 3; am L 1990, c 150, §8; am L 1992, c 92, §1; am L 1993, c 147, §1; am L 1994, c 37, §1 and c 109, §1; am L 2001, c 122, §1; am L 2005, c 16, §1]

Attorney General Opinions

A lessee surrendering a lease is entitled to payment for appraised value of pineapple crops growing on tract at date of

surrender less deduction for indebtedness. Att. Gen. Op. 61-66.

On discretion of commission in the selection of a successor to a lessee who dies without designating the lessee's own successor. Att. Gen. Op. 61-75.

Distribution of "pineapple money" which includes "advances" for expenditures. Att. Gen. Op. 61-88.

Person claiming to be common-law wife under relationship established in Hawaii is not a qualified successor to lessee. Att. Gen. Op. 73-5.

"Children" construed. Att. Gen. Op. 73-18.

Case Notes

Native Hawaiians have no standing to challenge constitutionality of Act on equal protection grounds as they would be asserting the rights of non-Hawaiian third parties. 795 F. Supp. 1009.

Lessee has right to change designated successor at any time and successor's interest vests only upon lessee's death; private agreement cannot alter that right. 4 H. App. 446, 667 P.2d 839.

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§210. Cancellation of leases. Whenever the department has reason to believe that any condition enumerated in section 208, or any provision of section 209, of this title has been violated, the department shall give due notice and afford opportunity for a hearing to the lessee of the tract in respect to which the alleged violation relates or to the successor of the lessee's interest therein, as the case demands. If upon such hearing the department finds that the lessee or the lessee's successor has violated any condition in respect to the leasing of such tract, the department may declare the lessee's interest in the tract and all improvements thereon to be forfeited and the lease in respect thereto canceled, and shall thereupon order the tract to be vacated within a reasonable time. The right to the use and occupancy of the Hawaiian home lands contained in such tract shall thereupon revest in the department and the department may take possession of the tract and the improvements thereon. [Am L 1963, c 207, §2; am L 1997, c 197, §5]

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§210.5. REPEALED. L 1987, c 36, §2.

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§211. Community pastures. The department shall, when practicable, provide from the Hawaiian home lands a community pasture adjacent to each district in which agricultural lands are leased, as authorized by the provisions of section 207 of this title. [Am L 1963, c 207, §2; ree L 1997, c 197, §6]

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§212. Lands returned to control of board of land and natural resources. The department may return any Hawaiian home lands not leased as authorized by the provisions of section 207 of this Act to the control of the board of land and natural resources. Any Hawaiian home lands so returned shall, until the department gives notice as hereinafter in this section provided, resume and maintain the status of public lands in accordance with the provisions of the [Hawaii Revised Statutes]; provided that such lands may not be sold, leased, set aside, used, transferred or otherwise disposed of except under a general lease only. Any lease by the board of land and natural resources hereafter entered into shall contain a withdrawal clause, and the lands so leased shall be withdrawn by the board, for the purpose of this Act, upon the department giving at its option, not less than one nor more than five years' notice of such withdrawal; provided, that the minimum withdrawal-notice period shall be specifically stated in such lease. Each such lease, whether or not stipulated therein, shall be deemed subject to the right and duty of the board of land and natural resources to terminate the lease and return the lands to the department whenever the department gives notice to the board that the department is of the opinion that the lands are required.

Notwithstanding the provisions of section 171-95, Hawaii Revised Statutes, in the leasing of Hawaiian home lands by the board to a public utility or other governmental agency, where such use directly benefits the department of Hawaiian home lands or the homestead lessees, the rental may be nominal; in all other instances, the lease rental shall be no less than the value determined in accordance with section 171-17(b), Hawaii Revised Statutes.

Any general lease of Hawaiian home lands hereafter entered into by the board shall be void unless prior to the disposition of such lease by public auction, direct negotiation or otherwise, approval shall be obtained from the department of Hawaiian home lands. [Am L 1963, c 207, §§2, 5(b); am Const Con 1978 and election Nov. 7, 1978]

Revision Note

In the first paragraph, "Hawaii Revised Statutes" substituted for "the Hawaiian Organic Act and the Revised Laws of Hawaii 1915".

Attorney General Opinions

Governor does not have power to set aside by executive order any of the returned Hawaiian home lands. Att. Gen. Op. 75-3.

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§213. Funds and accounts. (a) There are established in the treasury of the State two revolving funds, to be known respectively as the Hawaiian home loan fund and the Hawaiian home general loan fund.

(b) Hawaiian home loan fund. The moneys in this fund shall be available for the purposes enumerated in section 214 and for payments provided in section 209 and shall not be expended for any other purpose except as provided in subsection (e).

Any interest or other earnings arising out of investments from this fund shall be credited to and deposited into the Hawaiian home operating fund.

(c) Hawaiian home general loan fund. Moneys appropriated by the legislature for the construction of homes but not otherwise set aside for a particular fund, for construction of replacement homes, for home repairs or additions, or for the development and operation of a farm, ranch, or aquaculture operation; moneys transferred from other funds; and installments of principal paid by the lessees upon loans made to them from this fund, or as payments representing reimbursements on account of advances, but not including interest on such loans or advances, shall be deposited into this fund. The moneys in the fund shall be used for purposes enumerated in section 214 and for payments provided in section 209; provided that, in addition to the conditions enumerated in section 215, farm loans shall be subject to the following conditions:

(1) To be eligible for a farm loan the applicant shall derive, or present an acceptable plan to derive, a major portion of the applicant's income from farming;

(2) Farm loans made for the purpose of soil and water conservation shall not exceed $20,000 and shall be for a term not to exceed ten years;

(3) Subsidies and grants or cost-sharing funds entitled and received by the lessee for soil and water conservation purposes shall be assigned to the department for the repayment of the outstanding farm indebtedness; and

(4) The lessee shall carry out recommended farm management practices approved by a qualified agricultural agency.

The department may create an account within this fund to support the guarantee of repayment of loans made by government agencies or private lending institutions to a holder of a lease under section 207(a) or license issued under section 207(c)(1)(B).

The department may create an account within this fund for moneys borrowed from government agencies or private lending institutions to be used for any of the purposes enumerated in section 214. Installments of principal and that part of the interest equal to the interest charged to the department by the lender paid by the lessees on the loans made to them from this account shall be deposited into the same account. Any additional interest or other earnings arising out of investments from this account shall be credited to and deposited into the Hawaiian home receipts fund.

(d) There are established in the treasury of the State four trust funds, to be known respectively as the Hawaiian home operating fund, the Hawaiian home receipts fund, the Hawaiian home trust fund, and the native Hawaiian rehabilitation fund and one special fund to be known as the Hawaiian home administration account.

(e) Hawaiian home operating fund. The interest transferred from the Hawaiian home loan fund, all moneys received by the department from any other source, and moneys transferred from the Hawaiian home receipts fund, shall be deposited into the Hawaiian home operating fund. The moneys in this fund, without the prior written approval of the governor, shall be available:

(1) For construction and reconstruction of revenue-producing improvements intended to serve principally occupants of Hawaiian home lands, including acquisition or lease therefor of real property and interests therein, such as water rights or other interests;

(2) For payment into the treasury of the State of such amounts as are necessary to meet the interest and principal charges for state bonds issued for such revenue-producing improvements;

(3) For operation and maintenance of such improvements constructed from such funds or other funds;

(4) For the purchase of water or other utilities,

goods, commodities, supplies, or equipment needed for services, or to be resold, rented, or furnished on a charge basis to occupants of Hawaiian home lands; and

(5) For appraisals, studies, consultants (including architects and engineers), or any other staff services including those in section 202(b) required to plan, implement, develop, or operate these projects.

The moneys in this fund may be supplemented by other funds available for or appropriated by the legislature for the same purposes. In addition to such moneys, this fund, with the approval of the governor, may be supplemented by transfers, made on a loan basis from the Hawaiian home loan fund for a period not exceeding ten years; provided that the aggregate amount of such transfers outstanding at any one time shall not exceed $500,000.

In addition, moneys of this fund shall be made available with the prior written approval of the governor for offsite improvements and development necessary to serve present and future occupants of Hawaiian home lands; for improvements, additions, and repairs to all assets owned or leased by the department excluding structures or improvements that the department is obligated to acquire under section 209; for engineering, architectural, and planning services to maintain and develop properties; for such consultant services as may be contracted for under this Act; for purchase or lease of necessary equipment; for acquisition or lease of real property and interest therein; and for improvements constructed for the benefit of beneficiaries of this Act and not otherwise permitted in the various loan funds or the administration account.

(f) Hawaiian home administration account. The entire receipts derived from any leasing or other disposition of the available lands pursuant to section [204(a)(2)] and transfers from the Hawaiian home receipts fund shall be deposited into this account. Any interest or other earnings arising out of investments from this fund shall be credited to and deposited into this fund. The moneys in this account shall be expended by the department for salaries and other administration expenses of the department in conformity with general law applicable to all departments of the State, and no sums shall be expended for structures and other permanent improvements. This account shall

be subject to the following conditions and requirements:

(1) The department, when required by the governor but not later than November 15 preceding each regular session of the legislature, shall submit to the state director of finance its budget estimates of expenditures for the next fiscal period in the manner required by general law;

(2) The department's budget as approved by the governor shall be included in the governor's budget report and shall be transmitted to the legislature for its approval;

(3) Upon legislative approval of a budget, the amount appropriated shall be made available to the department. If no budget is approved by the legislature prior to its adjournment, sums accruing to this account shall not be expended for any other purpose but shall remain available for future use. Any amount in this account which is in excess of the amount approved by the legislature or made available for the fiscal period may be transferred to the Hawaiian home operating fund.

(g) Hawaiian home receipts fund. All interest moneys from loans or investments received by the department from any fund except as provided for in each respective fund, shall be deposited into this fund. At the end of each quarter, all moneys in this fund may be transferred to the Hawaiian home operating fund, the Hawaiian home administration account, the Hawaiian home trust fund, and any loan fund in accordance with rules adopted by the department.

(h) Hawaiian home trust fund. Except for gifts, bequests, and other moneys given for designated purposes, moneys deposited into this fund shall be available for transfers into any other fund or account authorized by the Act or for any public purpose deemed by the commission to further the purposes of the Act. Public purpose, as used herein, includes the formation of an account within the Hawaiian home trust fund as a reserve for loans insured or guaranteed by the Federal Housing Administration, Department of Veterans Affairs, or any other federal agency and their respective successors and assigns, which are authorized to insure or guarantee loans. Notwithstanding any other law to the contrary, the department is

expressly authorized to deposit the reserve for loans in any duly organized bank in the State or elsewhere in the United States with automatic fund transfer capabilities and at such reserve amounts as shall be reasonably required by the federal agencies as a condition for participation in their respective insurance or guarantee programs.

(i) Native Hawaiian rehabilitation fund. Pursuant to Article XII, Section 1, of the Hawaii Constitution, thirty per cent of the state receipts, derived from lands previously cultivated as sugarcane lands under any other provision of law and from water licenses, and fifteen per cent of all revenues from lease agreements granted lease extensions pursuant to section 228, shall be deposited into this fund. The department shall use this money for the rehabilitation of native Hawaiians, native Hawaiian families, and Hawaiian homestead communities, which shall include the educational, economic, political, social, and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved and perpetuated.

The native Hawaiian rehabilitation fund shall be subject to the following conditions:

(1) All moneys received by the fund shall be deposited into the state treasury and kept separate and apart from all other moneys in the state treasury;

(2) The director of finance shall serve as a custodian of the fund. All payments from the fund shall be made by the director of finance only upon vouchers approved by the commission;

(3) The commission shall develop guidelines for the investment of moneys in the fund;

(4) The commission may invest and reinvest in investments authorized by chapter 88, Hawaii Revised Statutes. The commission may hold, purchase, sell, assign, transfer, or dispose of any securities and investments in which any of the moneys shall have been invested, as well as the proceeds of such investments; and

(5) The commission may pay out of any of the moneys held for investment, a reasonable amount to any person for supplying investment advisory or consultive

services; and to meet such other costs incident to the prudent investment of moneys as the commission may approve.

Any payment of principal, interest, or other earnings arising out of the loan or investment of money from this fund shall be credited to and deposited into this fund.

Sections 214, 215, 216, and 217 shall not apply to administration of this fund. The department is authorized to adopt rules under chapter 91, Hawaii Revised Statutes, necessary to administer and carry out the purposes of this fund.

The department shall submit an annual report to the legislature and the United States Department of the Interior, no later than twenty days prior to the convening of each regular session of the legislature, beginning with the regular session of 2011, on expenditures from this fund that are derived from the amounts deposited from commercial and multipurpose project lease extensions pursuant to section 228(e), including the amount expended, the recipient of the moneys expended, and the purpose of the expenditure. [Am Feb. 3, 1923, c 56, §2, 42 Stat 1222; Mar. 7, 1928, c 142, §2, 45 Stat 246; Nov. 26, 1941, c 544, §4, 55 Stat 784; Jun. 14, 1948, c 464, §3, 62 Stat 390; Jul. 9, 1952, c 615, §§1, 2, 66 Stat 514; Aug. 21, 1958, Pub L 85-708, 72 Stat 705; am L 1959 1st, c 13, §2; am L 1961, c 183, §2; am L 1963, c 114, §5 and c 207, §§2, 5(a); am L 1965, c 4, §§1, 2; am L 1967, c 146, §3; am L 1969, c 114, §1 and c 259, §1; am L 1972, c 76, §1; am L 1973, c 130, §1 and c 220, §1; am L 1974, c 170, §1, c 172, §1, c 174, §1, c 175, §§2, 3, and c 176, §2; am L 1976, c 72, §1; am L 1978, c 229, §1; am Const Con 1978 and election Nov. 7, 1978; am L 1981, c 90, §4, c 158, §1, c 192, §1, and c 203, §1; am L 1982, c 274, §2; am L 1983, c 143, §1; am L 1984, c 260, §2; am L 1985, c 284, §2; am L 1986, c 249, §2; am L 1987, c 36, §4; am L 1993, c 145, §1; am L 1994, c 152, §§2, 6; am L 1998, c 27, §§1, 2; am L 2002, c 117, §1; am L 2010, c 187, §7]

Revision Note

"Annual" and "fiscal period" substituted for "biennial" and "biennium" to conform to budgetary requirements under the Constitution. L Sp 1959 1st, c 13, made similar changes to

sections of RLH 1955.
In subsection (f), "204(a)(2)" substituted for "204(2)".

Attorney General Opinions

Funds may not be used to subsidize nursery schools. Att. Gen. Op. 62-6.

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§213.5. Establishment of special fund. A separate special fund of the department shall be established for each undertaking or part thereof financed from the proceeds of revenue bonds equally secured. Each fund shall be designated "department of Hawaiian home lands revenue bond special fund" and bear any additional designation the department deems appropriate to properly identify the fund. Any law to the contrary notwithstanding, including any provision of this Act, from and after the issuance of revenue bonds under and pursuant to the provisions of this Act and part III of chapter 39, Hawaii Revised Statutes, to finance an undertaking, all rentals, income, receipts, and other revenues derived by the department from the particular undertaking for which financing is undertaken shall be paid into the special fund established pursuant to this Act and applied in the manner and for the purposes set forth in part III of chapter 39, Hawaii Revised Statutes, and the proceedings authorizing the issuance of revenue bonds. [L 1989, c 283, pt of §2; ree L 1997, c 197, §7]

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§213.6. Hawaiian home lands trust fund. There is established a trust fund to be known as the Hawaiian home lands trust fund, into which shall be deposited all appropriations by the state legislature specified to be deposited therein. Moneys of the Hawaiian home lands trust fund shall be expended by the department, as provided by law, upon approval by the commission and shall be used for capital improvements and other purposes undertaken in furtherance of the Act. The department shall have a fiduciary responsibility toward the trust fund and shall provide annual reports therefor to the legislature and to the beneficiaries of the trust.

The commission may deposit moneys from the trust fund into depositories other than the state treasury and may manage, invest, and reinvest moneys in the trust fund. The commission may hold, purchase, sell, assign, transfer, or dispose of any securities and investments in which any of the moneys have been invested, as well as the proceeds of the investments. Moneys from the trust fund that are deposited into depositories other than the state treasury shall be exempt from the requirements of chapters 36 and 38. Any interest or other earnings arising out of investments from the trust fund shall be credited to and deposited into the trust fund. [L Sp 1995, c 14, §7; am L 2006, c 177, §1]

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§214. Purposes of loans; authorized actions. (a) The department may make loans from revolving funds to any lessee or native Hawaiian to whom, or any cooperative association to which, a lease has been issued under section 207(a) of this Act or a license has been issued under section 207(c)(1)(B) of this Act. Such loans may be made for the following purposes:

(1) The repair or maintenance or purchase or erection of dwellings on any tract, and the undertaking of other permanent improvements thereon;

(2) The purchase of livestock, swine, poultry, fowl, aquaculture stock, and farm and aquaculture equipment;

(3) Otherwise assisting in the development of tracts and of farm, ranch, and aquaculture operations, including:

(A) The initial and on-going development, improvement, operation, and expansion of homestead farms, ranches, and aquaculture enterprises;

(B) The liquidation of indebtedness incurred for any of the foregoing purposes relating to farm loans aged less than five years;

(C) The payment of normal and reasonable living expenses of a full-time farmer;

(D) The planning, layout, and installation of soil and water conservation practices; and

(E) Providing relief and rehabilitation to homestead farmers and ranchers due to damage by rain and windstorms, droughts, tidal wave, earthquake, volcanic eruption, and other natural catastrophes, and for livestock disease, epidemics, crop blights, and serious effects of prolonged shipping and dock strikes;

(4) The cost of breaking up, planting, and cultivating land and harvesting crops, the cost of excavating or constructing aquaculture ponds and tanks, the purchase of seeds, fertilizers, feeds, insecticides, medicines, and chemicals for disease and pest control for animals, fish, shellfish, and crops, and the related supplies required for farm, ranch, and aquaculture operations, the erection of fences and other permanent

improvements for farm, ranch, and aquaculture purposes and the expense of marketing; and

(5) To assist licensees in the operation or erection of theaters, garages, service stations, markets, stores, and other mercantile establishments, all of which shall be owned by native Hawaiians or by organizations formed and controlled by native Hawaiians.

(b) In addition the department may:

(1) Use moneys in the Hawaiian home operating fund, with the prior approval of the governor, to match federal, state, or county funds available for the same purposes and to that end, enter into an undertaking, agree to conditions, transfer funds therein available for expenditure, and do and perform other acts and things, as may be necessary or required, as a condition to securing matching funds for the department's projects or works;

(2) Loan or guarantee the repayment of or otherwise underwrite any authorized loan or portion thereof to lessees in accordance with section 215;

(3) Loan or guarantee the repayment of or otherwise underwrite any authorized loan or portion thereof to a cooperative association in accordance with section 215;

(4) Permit and approve loans made to lessees by government agencies or private lending institutions, where the department assures the payment of these loans; provided that upon receipt of notice of default in the payment of the assured loans, the department may, upon failure of the lessee to cure the default within sixty days, cancel the lease and pay the outstanding balance in full or may permit the new lessee to assume the outstanding debt; and provided further that the department shall reserve the following rights:

(A) The right of succession to the lessee's interest and assumption of the contract of loan;

(B) The right to require that written notice be given to the department immediately upon default or delinquency of the lessee; and

(C) Any other rights enumerated at the time of assurance necessary to protect the monetary and other interests of the department;

(5) Secure, pledge, or otherwise guarantee the repayment of moneys borrowed by the department from government agencies or private lending institutions and pay the interim interest or advances required for loans; provided that the State's liability, contingent or otherwise, either on moneys borrowed by the department or on departmental guarantees of loans made to lessees under this paragraph and paragraphs (2), (3), and (4) of this subsection, shall at no time exceed $100,000,000; the department's guarantee of repayment shall be adequate security for a loan under any state law prescribing the nature, amount, or form of security or requiring security upon which loans may be made;

(6) Use available loan fund moneys or other funds specifically available for guarantee purposes as cash guarantees when required by lending agencies;

(7) Exercise the functions and reserved rights of a lender of money or mortgagee of residential property in all direct loans made by government agencies or by private lending institutions to lessees the repayment of which is assured by the department. The functions and reserved rights shall include but not be limited to, the purchasing, repurchasing, servicing, selling, foreclosing, buying upon foreclosure, guaranteeing the repayment, or otherwise underwriting, of any loan, the protecting of security interest, and after foreclosures, the repairing, renovating, or modernization and sale of property covered by the loan and mortgage;

(8) Pledge receivables of loan accounts outstanding as collateral to secure loans made by government agencies or private lending institutions to the department, the proceeds of which shall be used by the department to make new loans to lessees or to finance the development of available lands for purposes permitted by this Act; provided that any loan agreement entered into under this paragraph by the department shall include a provision that the money borrowed by the

department is not secured directly or indirectly by the full faith and credit or the general credit of the State or by any revenues or taxes of the State other than the receivables specifically pledged to repay the loan; provided further that in making loans or developing available lands out of money borrowed under this paragraph, the department may establish, revise, charge, and collect fees, premiums, and charges as necessary, reasonable, or convenient, to assure repayment of the funds borrowed, and the fees, premiums, and charges shall be deposited into the Hawaiian home trust fund; and provided further that no moneys of the Hawaiian home loan fund may be pledged as security under this paragraph; and

(9) Notwithstanding any other provisions of this Act to the contrary, transfer into the Hawaiian home trust fund any available and unpledged moneys from any loan funds, the Hawaiian loan guarantee fund, or any fund or account succeeding thereto, except the Hawaiian home loan fund, for use as cash guarantees or reserves when required by a federal agency authorized to insure or guarantee loans to lessees. [Am L 1962, c 14, §3; am L 1963, c 207, §2; am L 1969, c 259, §2; am L 1972, c 76, §2; am L 1978, c 229, §2; am L 1979, c 209, §2; am L 1981, c 90, §5 and c 203, §2; am L 1986, c 85, §1 and c 249, §3; am L 1987, c 283, §1; am L 1989, c 28, §1; am L 1996, c 232, §1; am L 2011, c 114, §1]

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§215. Conditions of loans. *[See also amendment of section below.]* Except as otherwise provided in section 213 (c), each contract of loan with the lessee or any successor or successors to the lessee's interest in the tract or with any agricultural, mercantile, or aquacultural cooperative association composed entirely of lessees shall be held subject to the following conditions whether or not stipulated in the contract loan:

(1) At any time, the outstanding amount of loans made to any lessee, or successor or successors in interest, for the repair, maintenance, purchase, and erection of a dwelling and related permanent improvements shall not exceed fifty per cent of the maximum single residence loan amount allowed in Hawaii by the United States Department of Housing and Urban Development's Federal Housing Administration (FHA), for the development and operation of a farm, ranch, or aquaculture operation shall not exceed $200,000, except that when loans are made to an agricultural or aquacultural cooperative association for the purposes stated in section 214(a)(4), the loan limit shall be determined by the department on the basis of the proposed operations and the available security of the association, and for the development and operation of a mercantile establishment shall not exceed the loan limit determined by the department on the basis of the proposed operations and the available security of the lessee or of the organization formed and controlled by lessees; provided that upon the death of a lessee leaving no relative qualified to be a lessee of Hawaiian home lands, or the cancellation of a lease by the department, or the surrender of a lease by the lessee, the department shall make the payment provided for by section 209(a), the amount of any such payment shall be considered as part or all, as the case may be, of any such loan to the successor or successors, without limitation as to the above maximum amounts; provided further that in case of the death of a lessee, or cancellation of a lease by the department, or the surrender of a lease by the lessee, the successor or

successors to the tract shall assume any outstanding loan or loans thereon, if any, without limitation as to the above maximum amounts but subject to paragraph (3).

(2) The loans shall be repaid in periodic installments, such installments to be monthly, quarterly, semiannual, or annual as may be determined by the department in each case. The term of any loan shall not exceed thirty years. Payments of any sum in addition to the required installments, or payment of the entire amount of the loan, may be made at any time within the term of the loan. All unpaid balances of principal shall bear interest at the rate of two and one-half per cent a year for loans made directly from the Hawaiian home loan fund, or at the rate of two and one-half per cent or higher as established by law for other loans, payable periodically or upon demand by the department, as the department may determine. The payment of any installment due shall be postponed in whole or in part by the department for such reasons as it deems good and sufficient and until such later date as it deems advisable. Such postponed payments shall continue to bear interest on the unpaid principal at the rate established for the loan.

(3) In the case of the death of a lessee the department shall, in any case, permit the successor or successors to the tract to assume the contract of loan subject to paragraph (1). In case of the cancellation of a lease by the department or the surrender of a lease by the lessee, the department may, at its option declare all installments upon the loan immediately due and payable, or permit the successor or successors to the tract to assume the contract of loan subject to paragraph (1). The department may, in such cases where the successor or successors to the tract assume the contract of loan, waive the payment, wholly or in part, of interest already due and delinquent upon the loan, or postpone the payment of any installment thereon, wholly or in part, until such later dates as it deems advisable. Such postponed payments shall, however, continue to bear interest on the unpaid principal at the

rate established for the loan. Further, the department may, if it deems it advisable and for the best interests of the lessees, write off and cancel, wholly or in part, the contract of loan of the deceased lessee, or previous lessee, as the case may be, where such loans are delinquent and deemed uncollectible. Such write off and cancellation shall be made only after an appraisal of all improvements and growing crops or improvements and aquaculture stock, as the case may be, on the tract involved, such appraisal to be made in the manner and as provided for by section 209(a). In every case, the amount of such appraisal, or any part thereof, shall be considered as part or all, as the case may be, of any loan to such successor or successors, subject to paragraph (1).

(4) No part of the moneys loaned shall be devoted to any purpose other than those for which the loan is made.

(5) The borrower or the successor to the borrower's interest shall comply with such other conditions, not in conflict with any provision of this Act, as the department may stipulate in the contract of loan.

(6) The borrower or the successor to the borrower's interest shall comply with the conditions enumerated in section 208, and with section 209 of this Act in respect to the lease of any tract.

(7) Whenever the department shall determine that a borrower is delinquent in the payment of any indebtedness to the department, it may require such borrower to execute an assignment to it, not to exceed, however, the amount of the total indebtedness of such borrower, including the indebtedness to others the payment of which has been assured by the department of all moneys due or to become due to such borrower by reason of any agreement or contract, collective or otherwise, to which the borrower is a party. Failure to execute such an assignment when requested by the department shall be sufficient ground for cancellation of the borrower's lease or interest therein. [Am Feb. 3,

1923, c 56, §3, 42 Stat 1222; Jul. 10, 1937, c 482, 50 Stat 505; Nov. 26, 1941, c 544, §5, 55 Stat 785; Jun. 14, 1948, c 464, §§4, 5, 62 Stat 392; Jul. 9, 1952, c 615, §§3, 4, 66 Stat 514; am L 1962, c 14, §4 and c 18, §2; am L 1963, c 207, §§2, 3; am L 1968, c 29, §2; am L 1972, c 76, §3; am L 1974, c 173, §1; am L 1976, c 72, §2; am L 1981, c 90, §6, c 112, §3, and c 203, §3; am L 1982, c 274, §3; am L 1987, c 36, §2; am L 1989, c 28, §2; am L 1997, c 197, §8; am L 2008, c 85, §1]

Revision Note

"Section 213(c)" substituted for "section 213(a)(2)".

§215. Conditions of loans. *[Text of section as amended subject to consent of Congress. L 2000, c 107, §3. For current provisions, see above.]* Except as otherwise provided in section 213(c), each contract of loan with the lessee or any successor or successors to the lessee's interest in the tract or with any agricultural, mercantile, or aquacultural cooperative association composed entirely of lessees shall be held subject to the following conditions whether or not stipulated in the contract loan:

(1) At any1 time, the outstanding amount of loans made to any lessee, or successor or successors in interest, for the repair, maintenance, purchase, and erection of a dwelling and related permanent improvements shall not exceed fifty per cent of the maximum single residence loan amount allowed in Hawaii by the United States Department of Housing and Urban Development's Federal Housing Administration (FHA), for the development and operation of a farm, ranch, or aquaculture operation shall not exceed $50,000, except that when loans are made to an agricultural or aquacultural cooperative association for the purposes stated in section 214(a)(4), the loan limit shall be determined by the department on the basis of the proposed operations and the available security of the association, and for the development and operation of a mercantile establishment shall not exceed the loan limit

determined by the department on the basis of the proposed operations and the available security of the lessee or of the organization formed and controlled by lessees; provided that upon the death of a lessee leaving no relative qualified to be a lessee of Hawaiian home lands, or the cancellation of a lease by the department, or the surrender of a lease by the lessee, the department shall make the payment provided for by section 209(a), the amount of any such payment shall be considered as part or all, as the case may be, of any such loan to the successor or successors, without limitation as to the above maximum amounts; provided further that in case of the death of a lessee, or cancellation of a lease by the department, or the surrender of a lease by the lessee, the successor or successors to the tract shall assume any outstanding loan or loans thereon, if any, without limitation as to the above maximum amounts but subject to paragraph (3).

(2) The loans shall be repaid in periodic installments, such installments to be monthly, quarterly, semiannual, or annual as may be determined by the department in each case. The term of any loan shall not exceed thirty years. Payments of any sum in addition to the required installments, or payment of the entire amount of the loan, may be made at any time within the term of the loan. All unpaid balances of principal shall bear interest at the rate of two and one-half per cent or higher as established by rule adopted by the department, payable periodically or upon demand by the department, as the department may determine. The payment of any installment due shall be postponed in whole or in part by the department for such reasons as it deems good and sufficient and until such later date as it deems advisable. Such postponed payments shall continue to bear interest on the unpaid principal at the rate established for the loan.

(3) In the case of the death of a lessee the department shall, in any case, permit the successor or successors to the tract to assume the contract of loan subject to paragraph (1). In case of the cancellation

of a lease by the department or the surrender of a lease by the lessee, the department may, at its option declare all installments upon the loan immediately due and payable, or permit the successor or successors to the tract to assume the contract of loan subject to paragraph (1). The department may, in such cases where the successor or successors to the tract assume the contract of loan, waive the payment, wholly or in part, of interest already due and delinquent upon the loan, or postpone the payment of any installment thereon, wholly or in part, until such later dates as it deems advisable. Such postponed payments shall, however, continue to bear interest on the unpaid principal at the rate established for the loan. Further, the department may, if it deems it advisable and for the best interests of the lessees, write off and cancel, wholly or in part, the contract of loan of the deceased lessee, or previous lessee, as the case may be, where such loans are delinquent and deemed uncollectible. Such write off and cancellation shall be made only after an appraisal of all improvements and growing crops or improvements and aquaculture stock, as the case may be, on the tract involved, such appraisal to be made in the manner and as provided for by section 209(a). In every case, the amount of such appraisal, or any part thereof, shall be considered as part or all, as the case may be, of any loan to such successor or successors, subject to paragraph (1).

(4) No part of the moneys loaned shall be devoted to any purpose other than those for which the loan is made.

(5) The borrower or the successor to the borrower's interest shall comply with such other conditions, not in conflict with any provision of this Act, as the department may stipulate in the contract of loan.

(6) The borrower or the successor to the borrower's interest shall comply with the conditions enumerated in section 208, and with section 209 of this Act in respect to the lease of any tract.

(7) Whenever the department shall determine that a borrower is delinquent in the payment of any indebtedness to the department, it may require such borrower to execute an assignment to it, not to exceed, however, the amount of the total indebtedness of such borrower, including the indebtedness to others the payment of which has been assured by the department of all moneys due or to become due to such borrower by reason of any agreement or contract, collective or otherwise, to which the borrower is a party. Failure to execute such an assignment when requested by the department shall be sufficient ground for cancellation of the borrower's lease or interest therein. [Am Feb. 3, 1923, c 56, §3, 42 Stat 1222; Jul. 10, 1937, c 482, 50 Stat 505; Nov. 26, 1941, c 544, §5, 55 Stat 785; Jun. 14, 1948, c 464, §§4, 5, 62 Stat 392; Jul. 9, 1952, c 615, §§3, 4, 66 Stat 514; am L 1962, c 14, §4 and c 18, §2; am L 1963, c 207, §§2, 3; am L 1968, c 29, §2; am L 1972, c 76, §3; am L 1974, c 173, §1; am L 1976, c 72, §2; am L 1981, c 90, §6, c 112, §3, and c 203, §3; am L 1982, c 274, §3; am L 1987, c 36, §2; am L 1989, c 28, §2; am L 1997, c 197, §8; am L 2000, c 107, §1]

Note

The L 2008, c 85, §1 amendment to this section shall not be repealed when L 2000, c 107 takes effect with the consent of Congress. L 2008, c 85, §3.

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§216. Insurance by borrowers; acceleration of loans; lien and enforcement thereof. (a) The department may require the borrower to insure, in such amount as the department may prescribe, any livestock, aquaculture stock, swine, poultry, fowl, machinery, equipment, dwellings, and permanent improvements purchased or constructed out of any moneys loaned or assured by the department; or, in lieu thereof, the department may directly take out such insurance and add the cost thereof to the amount of principal payable under the loan.

(b) Whenever the department has reason to believe that the borrower has violated any condition enumerated in paragraph (2), (4), (5), or (6) of section 215 of this Act, the department shall give due notice and afford opportunity for a hearing to the borrower or the successor or successors to his interest, as the case demands. If upon such hearing the department finds that the borrower has violated the condition, the department may declare all principal and interest of the loan immediately due and payable notwithstanding any provision in the contract of loan to the contrary.

(c) The department shall have a first lien upon the borrower's or lessee's interest in any lease, growing crops, aquacultural stock, either on his tract or share in any collective contract or program, livestock, swine, poultry, fowl, aquaculture stock, machinery, and equipment purchased with moneys loaned by the department, and in any dwellings or other permanent improvements on any leasehold tract, to the amount of all principal and interest due and unpaid and of all taxes and insurance and improvements paid by the department, and any other indebtedness of the borrower, the payment of which has been assured by the department. Such lien shall have priority over any other obligation for which the property subject to the lien may be security.

(d) The department may, subject to this Act and procedures established by rule, enforce any lien by declaring the borrower's interest in the property subject to the lien to be forfeited, any lease held by the borrower canceled, and shall thereupon order such leasehold premises vacated and the property subject to the lien surrendered within a reasonable time. The right to the use and occupancy of the Hawaiian home lands contained in such lease shall thereupon revest in the

department, and the department may take possession of the premises covered therein and the improvements and growing crops or improvements and aquaculture stock thereon; provided that the department shall pay to the borrower any difference which may be due him after the appraisal provided for in section 209 has been made. [Am Jul. 10, 1937, c 482, 50 Stat 506; Jun. 14, 1948, c 464, §6, 62 Stat 393; am L 1962, c 14, §5; am L 1963, c 207, §2; am L 1967, c 146, §4; am L 1978, c 229, §3; am L 1981, c 90, §7]

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§217. Ejectment, when; loan to new lessee for improvements. In case the lessee or borrower or the successor to an interest in the tract, as the case may be, fails to comply with any order issued by the department under the provisions of section 210 or 216 of this title, the department may:

(1) Bring action of ejectment or other appropriate proceeding; or

(2) Invoke the aid of the circuit court of the State for the judicial circuit in which the tract designated in the department's order is situated. Such court may thereupon order the lessee or the lessee's successor to comply with the order of the department. Any failure to obey the order of the court may be punished by it as contempt thereof. Any tract forfeited under the provisions of section 210 or 216 of this title may be again leased by the department as authorized by the provisions of section 207 of this title, except that the value, in the opinion of the department, of all improvements made in respect to such tract by the original lessee or any successor to an interest therein shall constitute a loan by the department to the new lessee. Such loan shall be subject to the provisions of this section and sections 215, except paragraph (1), and 216 to the same extent as loans made by the department from the Hawaiian loan fund. [Am L 1963, c 207, §§2, 5 (a); am L 1997, c 197, §9]

Case Notes

Cannot be construed to authorize seizure of lessee's property without service of summons, time to answer, and opportunity to present evidence and be heard. 68 H. 466, 719 P.2d 397.

§218. REPEALED. L 1967, c 146, §5.

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§219. Agricultural and aquacultural experts. The department is authorized to employ agricultural and aquacultural experts at such compensation and in such number as it deems necessary. It shall be the duty of such agricultural and aquacultural experts to instruct and advise the lessee of any tract or the successor to the lessee's interest therein as to the best methods of diversified farming and stock raising and aquaculture operations and such other matters as will tend successfully to accomplish the purposes of this title. [Am L 1963, c 207, §2; am L 1981, c 90, §8; am L 1982, c 275, §1]

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§219.1. General assistance. (a) The department is authorized to carry on any activities it deems necessary to assist the lessees in obtaining maximum utilization of the leased lands, including taking any steps necessary to develop these lands for their highest and best use commensurate with the purposes for which the land is being leased as provided for in section 207, and assisting the lessees in all phases of farming, ranching, and aquaculture operations and the marketing of their agricultural [or] aquacultural produce and livestock.

(b) Notwithstanding any law to the contrary, the department either alone or together with any other governmental agency, may:

(1) Form an insurance company, association (nonprofit or otherwise), pool, or trust;

(2) Acquire an existing insurance company;

(3) Enter into arrangements with one or more insurance companies; or

(4) Undertake any combination of the foregoing; upon such terms and conditions and for such periods, as the commission shall approve, to provide homeowner protection, including hurricane coverage, for lessees participating in such undertaking. Such undertaking shall be subject to the provisions of chapter 431P, including but not limited to section 431P-10(b), and chapter 431.

(c) The department, if experiencing any of the power as authorized under subsection (b) may:

(1) Issue revenue bonds under and pursuant to part III of chapter 39, Hawaii Revised Statutes, to establish necessary reserves to provide for the payment of claims in excess of reserves and for other related purposes; or to pay any liability incurred that is self-insured or uninsured by the commission including without limitations, liabilities for damage to property, comprehensive liability, environmental, or other losses; and

(2) Invest funds held in reserve, which are not required for immediate disbursement, in property or securities in which savings banks may legally invest funds subject to their control or as the commission may

authorize by resolution. [L 1962, c 14, §6; am imp L 1963, c 207, §2; am L 1981, c 90, §9; am L 1993, c 339, §7]

Revision Note

In subsection (a), "or" substituted for "of".

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§220. Development projects; appropriations by legislature; bonds issued by legislature; mandatory reservation of water. (a) Subject to subsection (d), the department is authorized directly to undertake and carry on general water and other development projects in respect to Hawaiian home lands and to undertake other activities having to do with the economic and social welfare of the homesteaders, including the authority to derive revenue from the sale, to others than homesteaders, of water and other products of such projects or activities, or from the enjoyment thereof by others than homesteaders, where such sale of products or enjoyment of projects or activities by others does not interfere with the proper performance of the duties of the department; provided that roads through or over Hawaiian home lands, other than federal-aid highways and roads, shall be maintained by the county in which the particular road or roads to be maintained are located.

(b) The legislature is authorized to appropriate out of the treasury of the State such sums as it deems necessary to augment the funds of the department and to provide the department with funds sufficient to execute and carry on such projects and activities. The legislature is further authorized to issue bonds to the extent required to yield the amount of any sums so appropriated for the payment of which, if issued for revenue-producing improvements, the department shall provide, as set forth in section 213.

(c) To enable the construction of irrigation projects which will service Hawaiian home lands, either exclusively or in conjunction with other lands served by such projects, the department is authorized, with the approval of the governor, and subject to subsection (d), to:

(1) Grant to the board of land and natural resources, or to any other agency of the government of the State or the United States undertaking the construction and operation of such irrigation projects, licenses for rights-of-way for pipelines, tunnels, ditches, flumes, and other water conveying facilities, reservoirs, and other storage facilities, and for the development and use of water appurtenant to Hawaiian home lands;

(2) Exchange available lands for public lands, as

provided in section 204 of this Act, for sites for reservoirs and subsurface water development wells and shafts;

(3) Request any such irrigation agency to organize irrigation projects for Hawaiian home lands and to transfer irrigation facilities constructed by the department to any such irrigation agency;

(4) Agree to pay the tolls and assessments made against community pastures for irrigation water supplied to such pastures; and

(5) Agree to pay the costs of construction of projects constructed for Hawaiian home lands at the request of the department, in the event the assessments paid by the homesteaders upon lands are not sufficient to pay such costs;

provided that licenses for rights-of-way for the purposes and in the manner specified in this section may be granted for a term of years longer than is required for amortization of the costs of the project or projects requiring use of such rights-of-way only if authority for such longer grant is approved by an act of the legislature of the State. Such payments shall be made from, and be a charge against the Hawaiian home operating fund.

(d) For projects pursuant to this section, sufficient water shall be reserved for current and foreseeable domestic, stock water, aquaculture, and irrigation activities on tracts leased to native Hawaiians pursuant to section 207(a). [Am Jul. 10, 1937, c 482, 50 Stat 507; Nov. 26, 1941, c 544, §6, 55 Stat 786; Jun. 14, 1948, c 464, §7, 62 Stat 393; Aug. 1, 1956, c 855, §1, 70 Stat 915; am L 1963, c 207, §§2, 5(a); am L 1986, c 249, §4; am L 1991, c 325, §2]

Cross References

Bond issues, see Organic Act, §55 and HRS chapters 39, 47, and 49.

Water or irrigation projects, see §§167-13, 167-14; §174-13.

Attorney General Opinions

Lien on lands as security for improvement bonds is not

authorized. Att. Gen. Op. 63-25.

Law Journals and Reviews

Native Hawaiian Homestead Water Reservation Rights: Providing Good Living Conditions for Native Hawaiian Homesteaders. 25 UH L. Rev. 85.

Case Notes

Pursuant to article XI, §§1 and 7 of the Hawaii constitution, subsection (d) of this Act, and §174C-101(a), a reservation of water constitutes a public trust purpose. 103 H. 401, 83 P.3d 664.

Where commission on water resource management failed to render the requisite findings of fact and conclusions of law with respect to whether applicant had satisfied its burden as mandated by the state water code, it violated its public trust duty to protect the department of Hawaiian home lands' reservation rights under the Hawaiian Homes Commission Act, the state water code, the state constitution, and the public trust doctrine in balancing the various competing interests in the state water resources trust. 103 H. 401, 83 P.3d 664.

Where commission on water resource management refused to permit cross examination of water use applicant's oceanography expert regarding the limu population along the shoreline, in effect precluding the commission from effectively balancing the applicant's proposed private commercial use of water against an enumerated public trust purpose, the commission failed adequately to discharge its public trust duty to protect native Hawaiians' traditional and customary gathering rights, as guaranteed by this section, article XII, §7 of the Hawaii constitution, and §174C-101. 103 H. 401, 83 P.3d 664.

§220.5. Development by contract; development by project developer agreement. (a) Notwithstanding any law to the contrary, the department is authorized to enter into and carry out contracts to develop available lands for homestead, commercial, and multipurpose projects; provided that the department shall not be subject to the requirements of competitive bidding if no state funds are to be used in the development of the project.

(b) Notwithstanding any law to the contrary, the department is authorized to enter into project developer agreements with qualified developers for, or in connection with, any homestead, commercial, or multipurpose project, or portion of any project; provided that prior to entering into a project developer agreement with a developer, the department shall:

(1) Set by appraisal the minimum rental of the lands to be disposed of on the basis of the fair market value of the lands;

(2) Give notice of the proposed disposition in accordance with applicable procedures and requirements of section 171-60(a)(3), Hawaii Revised Statutes;

(3) Establish reasonable criteria for the selection of the private developer; and

(4) Determine within forty-five days of the last day for filing applications the applicant or applicants who meet the criteria for selection, and notify all applicants of its determination within seven days of such determination. If only one applicant meets the criteria for selection as the developer, the department then may negotiate the details of the project developer agreement with the developer; provided that the terms of the project developer agreement shall not be less than those proposed by the developer in the application. If two or more applicants meet the criteria for selection, the department shall consider all of the relevant facts of the disposition or contract, the proposals submitted by each applicant, and the experience and financial capability of each applicant and, within forty-five days from the date of selection of the applicants that met the criteria, shall select the applicant who submitted the best proposal. The department then may negotiate

the details of the disposition with the developer, including providing benefits to promote native Hawaiian socio-economic advancement; provided that the terms of the project developer agreement shall not be less than those proposed by the developer in the application.

(c) Any project developer agreement entered into pursuant to this section shall include the following terms and conditions, wherever appropriate:

(1) A requirement that the developer file with the department a good and sufficient bond conditioned upon the full and faithful performance of all the terms, covenants, and conditions of the project developer agreement;

(2) The use or uses to which the land will be put;

(3) The dates on which the developer must submit to the department for approval preliminary plans and final plans and specifications for the total development. No construction shall commence until the department has approved the final plans and specifications; provided that construction on an incremental basis may be permitted by the department;

(4) The date of completion of the total development, including the date of completion of any permitted incremental development;

(5) The minimum requirements for off-site and on-site improvements that the developer must install, construct, and complete by the date of completion of the total development. The department may permit incremental development and establish the minimum requirements for off-site and on-site improvements that must be installed, constructed, and completed prior to the date of completion of the total development; and

(6) Any other terms and conditions deemed necessary by the department to protect the interests of the State and the department.

(d) Any project developer agreement entered into pursuant to this section may provide for options for renewal of the term of the project developer agreement; provided that:

(1) The term of any one project developer agreement shall not exceed sixty-five years;

(2) Any lands disposed of under a project developer agreement shall be subject to withdrawal at any time during the term of the agreement, with reasonable notice; and

(3) The rental shall be reduced in proportion to the value of the portion withdrawn and the developer shall be entitled to receive from the department the proportionate value of the developer's permanent improvements so taken in the proportion that they bear to the unexpired term of the agreement, with the value of the permanent improvements determined on the basis of fair market value or depreciated value, whichever is less; or the developer, in the alternative, may remove and relocate the developer's improvements to the remainder of the lands occupied by the developer.

(e) The project developer agreement may permit the developer, after the developer has completed construction of any required off-site improvement, to assign or sublease with the department's approval portions of the leased lands in which the construction of any required off-site improvement has been completed to a purchaser or sublessee who shall assume the obligations of the developer relative to the parcel being assigned or subleased, including the construction of any on-site improvement. The department may permit a developer to share in the lease rent from the assigned lease for a fixed period in order to recover costs and profit.

(f) Whenever the department enters into a project developer agreement to develop a homestead project, the department shall provide for the purchase of the completed project or that portion of a completed project developed for disposition to native Hawaiians, and shall dispose of the lands in accordance with this Act; provided that the project developer agreement shall not encumber any existing homestead lease in the project area.

(g) As used in this section, the following words and terms shall have the following meanings unless the context indicates another or different meaning or intent:

"Commercial project" means a project or that portion of a multipurpose project, including single-family or multiple-family residential, agricultural, pastoral, aquacultural, industrial,

business, hotel and resort, or other commercial uses designed and intended to generate revenues as authorized by this Act;

"Developer" means any person, partnership, cooperative, firm, nonprofit or for-profit corporation, or public agency possessing the competence, expertise, experience, and resources, including financial, personal, and tangible resources, required to carry out a project;

"Homestead project" means a project or that portion of a multipurpose project, including residential, agricultural, pastoral, or aquacultural uses designed and intended for disposition to native Hawaiians under this Act; provided that this term shall also include community facilities for homestead areas;

"Multipurpose project" means a combination of a commercial project and a homestead project;

"Project" means a specific undertaking to develop, construct, reconstruct, rehabilitate, renovate, or to otherwise improve or enhance land or real property;

"Project developer agreement" means any lease, sublease, conditional leasing agreement, disposition agreement, financing agreement, or other agreement or combination of agreement, entered into under this section by the department, for the purpose of developing one or more projects.

(h) The department is authorized to adopt rules in accordance with chapter 91, Hawaii Revised Statutes, to implement and carry out the purposes of this section. [L 1986, c 84, §1; am L 1993, c 146, §1]

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§221. Water. (a) When used in this section:

(1) The term "water license" means any license issued by the board of land and natural resources granting to any person the right to the use of government-owned water; and

(2) The term "surplus water" means so much of any government-owned water covered by a water license or so much of any privately owned water as is in excess of the quantity required for the use of the licensee or owner, respectively.

(b) All water licenses issued after the passage of this Act shall be deemed subject to the condition, whether or not stipulated in the license, that the licensee shall, upon the demand of the department, grant to it the right to use, free of all charge, any water which the department deems necessary adequately to supply the livestock, aquaculture operations, agriculture operations, or domestic needs of individuals upon any tract.

(c) In order adequately to supply livestock, the aquaculture operations, the agriculture operations, or the domestic needs of individuals upon any tract, the department is authorized (1) to use, free of all charge, government-owned water not covered by any water license or covered by a water license issued after the passage of this Act or covered by a water license issued previous to the passage of this Act but containing a reservation of such water for the benefit of the public, and (2) to contract with any person for the right to use or to acquire, under eminent domain proceedings similar, as near as may be, to the proceedings provided in respect to land by sections 101-10 to 101-34, Hawaii Revised Statutes, the right to use any privately owned surplus water or any government-owned surplus water covered by a water license issued previous to the passage of this Act, but not containing a reservation of such water for the benefit of the public. Any such requirement shall be held to be for a public use and purpose. The department may institute the eminent domain proceedings in its own name.

(d) The department is authorized, for the additional purpose of adequately irrigating any tract, to use, free of all charge, government-owned surplus water tributary to the Waimea river upon the island of Kauai, not covered by a water license

or covered by a water license issued after July 9, 1921. Any water license issued after that date and covering any such government-owned water shall be deemed subject to the condition, whether or not stipulated therein, that the licensee shall, upon the demand of the department, grant to it the right to use, free of all charge, any of the surplus water tributary to the Waimea river upon the island of Kauai, which is covered by the license and which the department deems necessary for the additional purpose of adequately irrigating any tract.

Any funds which may be appropriated by Congress as a grant-in-aid for the construction of an irrigation and water utilization system on the island of Molokai designed to serve Hawaiian home lands, and which are not required to be reimbursed to the federal government, shall be deemed to be payment in advance by the department and lessees of the department of charges to be made to them for the construction of such system and shall be credited against such charges when made.

(e) All rights conferred on the department by this section to use, contract for, or acquire the use of water shall be deemed to include the right to use, contract for, or acquire the use of any ditch or pipeline constructed for the distribution and control of such water and necessary to such use by the department.

(f) Water systems in the exclusive control of the department shall remain under its exclusive control; provided that the department may negotiate an agreement to provide for the maintenance of the water system and the billing and collection of user fees. If any provision or the application of that provision is inconsistent with provisions contained in this section, this section shall control.

Water systems include all real and personal property together with all improvements to such systems acquired or constructed by the department for the distribution and control of water for domestic or agricultural use. [Am Aug. 1, 1956, c 855, §§2, 3, 70 Stat 915; am L 1963, c 207, §§2, 5(b); am Const Con 1978 and election Nov. 7, 1978; am L 1981, c 90, §10; am L 1984, c 36, §1; am L 1990, c 24, §1]

Cross References

Board of land and natural resources empowered to prepare irrigation plans, see §§174-5, 174-6.

Law Journals and Reviews

Native Hawaiian Homestead Water Reservation Rights: Providing Good Living Conditions for Native Hawaiian Homesteaders. 25 UH L. Rev. 85.

Case Notes

Although the Hawaii administrative rules denominate aquifer-specific reservations of water to the department of Hawaiian home lands, such a limitation for purposes of water resource management does not divest the department of its right to protect its reservation interests from interfering water uses in adjacent aquifers. 103 H. 401, 83 P.3d 664.

Insofar as the commission on water resource management, as the agency authorized to administer the state water code, determines the contents of the Hawaii water plan, which includes the designation of hydrologic units and sustainable yields, and the commission's "interpretation of its own rules is entitled to deference unless it is plainly erroneous or inconsistent with the underlying legislative purpose", it is within the commission's authority to limit reservations of water to specific aquifers. 103 H. 401, 83 P.3d 664.

Where commission on water resource management failed to render the requisite findings of fact and conclusions of law with respect to whether applicant had satisfied its burden as mandated by the state water code, it violated its public trust duty to protect the department of Hawaiian home lands' reservation rights under the Hawaiian Homes Commission Act, the state water code, the state constitution, and the public trust doctrine in balancing the various competing interests in the state water resources trust. 103 H. 401, 83 P.3d 664.

Where commission on water resource management's findings supporting its conclusion that the proposed use of water would not interfere with department of Hawaiian home lands' reservation rights under this section failed to address whether the proposed user had adduced sufficient evidence with respect to the impact of the proposed use on the department's

reservation in the adjacent aquifer system, commission erred in concluding that proposed user had met its burden under §174C-49 to obtain a water use permit. 103 H. 401, 83 P.3d 664.

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§222. Administration. (a) The department may make such expenditures and shall adopt rules in accordance with chapter 91, Hawaii Revised Statutes, as are necessary for the efficient execution of the functions vested in the department by this Act. All expenditures of the department and all moneys necessary for loans made by the department, in accordance with the provisions of this Act, shall be allowed and paid upon the presentation of itemized vouchers approved by the chairman of the commission or the chairman's designated representative. The department shall make an annual report to the legislature of the State upon the first day of each regular session and such special reports as the legislature may from time to time require. The chairman and members of the commission shall give bond as required by law. The sureties upon the bond and the conditions thereof shall be approved annually by the governor.

(b) When land originally leased by the department in accordance with chapter 171, Hawaii Revised Statutes, is, in turn, subleased by the department's lessee or sublessee, the department shall submit, upon the first day of the convening of any regular session, a written report to the legislature which shall cover the sublease transactions occurring in the fiscal year prior to the regular session and shall contain the names of the persons involved in the transaction, the size of the area under lease, the purpose of the lease, the land classification of the area under lease, the tax map key number, the lease rental, the reason for approval of the sublease by the department, and the estimated net economic result accruing to the department, lessee, and sublessee. [Am Nov. 26, 1941, c 544, §7, 55 Stat 787; Jun. 14, 1948, c 464, §8, 62 Stat 394; am L 1963, c 207, §4; am L 1972, c 173, §1; am L 1977, c 174, §2; am L 1986, c 249, §5; am L 2001, c 110, §1]

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§223. [Right of amendment, etc.] The Congress of the United States reserves the right to alter, amend, or repeal the provisions of this title.

Cross References

Amendment, see state const. art. XII.

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The Lum Court and Native Hawaiian Rights. 14 UH L. Rev. 377.

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§224. Sanitation and reclamation expert. The Secretary of the Interior shall designate from his Department someone experienced in sanitation, rehabilitation, and reclamation work to reside in the State and cooperate with the department in carrying out its duties. The salary of such official so designated by the Secretary of the Interior shall be paid by the department while he is carrying on his duties in the State. [Add Jul. 26, 1935, c 420, §2, 49 Stat 505; am imp L 1963, c 207, §5 (a); am L 1976, c 120, §1]

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§225. Investment of funds; disposition. (a) The department shall have the power and authority to invest and reinvest any of the moneys in any of its funds, not otherwise immediately needed for the purposes of the funds, in such bonds and securities as authorized by state law for the investment of state sinking fund moneys.

(b) (1) The department may receive, manage, and invest moneys or other property, real, personal or mixed, or any interest therein, which may be given, bequeathed, or devised, or in any manner received from sources other than the legislature or any federal appropriation, for the purposes of the Act.

(2) All moneys received by or on behalf of the department shall be deposited into the state treasury to be expended according to law and for purposes in accordance with the terms and conditions of the gift. All moneys shall be appropriated for purposes enumerated in such gifts and if no specific purpose is enumerated, shall be appropriated to the Hawaiian home trust fund.

(3) The department is authorized to sell, lease, or in any way manage such real, personal, or mixed property or any interest therein, in the manner and for the purposes enumerated in the gift. If no conditions are enumerated, the gift may be sold, leased, managed, or disposed of and the income or proceeds therefrom shall be deposited into the Hawaiian home trust fund.

(4) The real property or any interest therein received by the department through contributions or grants shall not attain the status of Hawaiian home lands as defined in section [201(a)].

(5) The department shall cause to be kept suitable books of account wherein shall be recorded each gift, the essential facts of the management thereof, and the expenditure of income.

(6) Any action to be taken with respect to gifts shall be made in a public meeting where any pertinent information and reasons for any decisions shall be fully disclosed. [Add Nov. 26, 1941, c 544, §8, 55 Stat 787; Jun. 14, 1948, c 464, §9, 62 Stat 394; am L 1963, c 207, §5(a); am L 1965, c 30, §1; am L 1978, c 229, §4; am L

1981, c 192, §2; am L 1983, c 143, §2]

Revision Note

In subsection (a)(4), reference to "201(a)" substituted for "201(a)(5)".

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§226. Qualification for federal programs. The department shall be qualified to participate in any federal program that renders assistance in program areas that the department is mandated by the Act to implement. [L 1978, c 204, §1]

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§227. Enterprise zones. The department is authorized to participate in any federal or state program that permits the establishment of one or more enterprise zones on available lands, provided that participation in the program will result in economic benefits to native Hawaiians. The administration of the program shall be governed by rules adopted by the department in accordance with chapter 91, Hawaii Revised Statutes. [L 1986, c 16, §2; ree L 1997, c 197, §10]

Cross References

State enterprise zones, see chapter 209E.

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[§228.] Commercial and multipurpose project leases; extension of term. (a) Notwithstanding any law to the contrary, the procedures under this section shall apply to commercial and multipurpose projects under section 204 or 220.5, and shall be in addition to any other procedures required by law.

(b) Prior to the disposition of available land through a request for proposals for an initial lease for a commercial or multipurpose project, the department shall consult with beneficiaries of the trust in the master planning of the available lands. The process of beneficiary consultation shall be as established by the department and shall:

(1) Engage beneficiaries and beneficiary-serving organizations;

(2) Provide for the timely dissemination of information about the proposed project and the gathering of input; and

(3) Allow for a reasonable time and reasonable access to relevant information for evaluation and consideration.

(c) Notwithstanding section 220.5(d)(1), the department may extend the term of a lease of Hawaiian home lands for commercial or multipurpose projects and with the approval by the department of a written agreement proposed by the lessee, or the lessee and developer, to:

(1) Make improvements to the leased property; or

(2) Obtain financing for the improvement of the leased lands.

The extension of the lease pursuant to this section shall be based upon the improvements made or to be made, shall be no longer than twenty years, and shall be granted only once.

(d) Before the written agreement is approved, the lessee, or the lessee and developer, shall submit to the department the plans and specifications for the proposed development. The department shall review the plans, specifications, and the written agreement and determine:

(1) Whether the development is of sufficient value and meets the priorities of the commission to justify an extension of the lease;

(2) The estimated time needed to complete the

improvements and expected date of completion of the improvements; and

(3) The minimum revised annual rent based on the fair market value of the lands to be developed, as determined by an appraiser for the department, and percentage rent where gross receipts exceed a specified amount.

The commission shall adopt and publish a policy pursuant to chapter 91, Hawaii Revised Statutes, which shall be used to evaluate any request for a lease extension, including the terms of the lease, prospective payments, and renegotiation, and shall be used by the commission for any final determination on a lease extension request.

(e) Upon the extension of a lease term pursuant to subsection (c), the department shall deposit fifteen per cent of all revenues generated from the lease from the time the lease extension is granted, into the native Hawaiian rehabilitation fund under section 213(i).

(f) The department shall submit an annual report to the legislature and the United States Department of the Interior, no later than twenty days prior to the convening of each regular session, beginning with the regular session of 2011, of all leases of available lands for commercial and multipurpose projects, including the following:

(1) The total number of leases;

(2) Acreage of each lease;

(3) Terms of each lease;

(4) Whether the lessee is a beneficiary or beneficiary controlled organization; and

(5) Whether the lease was for retained available lands not required for leasing under section 207(a), and was negotiated with a native Hawaiian, or organization or association owned or controlled by native Hawaiians, under section 204(a)(2).

(g) As used in this section, "improvements" means any renovation, rehabilitation, reconstruction, or construction of the property, including minimum requirements for off-site and on-site improvements. [L 2010, c 187, §6]

Note

Deposits of revenue into lands trust fund and rehabilitation fund. L 2010, c 187, §9.

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TITLE 3: AMENDMENTS TO HAWAIIAN ORGANIC ACT

[See the Organic Act.]

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TITLE 4: MISCELLANEOUS PROVISIONS

§401. All Acts or parts of Acts, either of the Congress of the United States or of the State of Hawaii, to the extent that they are inconsistent with the provisions of this Act, are hereby repealed.

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§402. If any provision of this Act, or the application of such provision to certain circumstances, is held unconstitutional, the remainder of the Act and the application of such provision to circumstances other than those as to which it is held unconstitutional shall not be held invalidated thereby.

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TITLE 5: HOMESTEAD GENERAL LEASING PROGRAM

§§501 to 516. REPEALED. L 1986, c 75, §2.

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HAWAIIAN HOMES COMMISSION ACT, 1920

(Act of July 9, 1921, c 42, 42 Stat 108)

Note

This Act is now part of the State Constitution and is subject to amendment or repeal as prescribed in Article XII of the Constitution.

Consent of Congress

Consent of Congress, see Pub. L. 99-557 (October 27, 1986); H. J. Res. 32, 105th Cong. 1st Sess., Pub. L. No. 105-21, 111 Stat. 235 (June 27, 1997), for §§209 and 219.1; and S.J. Res. 23, 102nd Cong. 2nd Sess., Pub. L. No. 102-398, 106 Stat. 1953 (October 6, 1992), for §§202, 203, 204, 208, 209, 213, 214, 215, 220, 221, 222, and 227.

Law Journals and Reviews

The Native Hawaiian Trusts Judicial Relief Act: The First Step in an Attempt to Provide Relief. 14 UH L. Rev. 889.

Title 1: Definitions

Title 1A: Purpose

Title 2: Hawaiian Homes Commission

Note

Amendment of Act and funding for Native Hawaiian roll commission. L 2011, c 195, §§3, 4.
Public land trust information system. L 2011, c 54.

Cross References

Native Hawaiian recognition, see chapter 10H.

Attorney General Opinions

Threatened and endangered plants are protected on Hawaiian home lands under the provisions of chapter 195D, as well as under the provisions of the federal Endangered Species Act of 1973, to the same extent that the plants are protected elsewhere in Hawaii. Anyone who "takes" threatened or endangered plants on Hawaiian home lands is subject to state and federal civil and criminal penalties. Att. Gen. Op. 95-5.

Law Journals and Reviews

Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue. 16 UH L. Rev. 1.

Native Hawaiian Homestead Water Reservation Rights: Providing Good Living Conditions for Native Hawaiian Homesteaders. 25 UH L. Rev. 85.

Case Notes

Claims under Act arise exclusively under state law; hence, Eleventh Amendment bars federal court from deciding claims against state officials based solely on this Act. 45 F.3d 333.

Appellant who claimed article XII's (of the state constitution) implementation of this Act violated the Fourteenth Amendment because government benefits, leases to public lands, are available only to native Hawaiians, lacked standing. 342 F.3d 934.

Lessee defendants' motion to dismiss granted, where plaintiffs claimed native Hawaiian lessee defendants violated this Act, as well as plaintiffs' rights under 42 U.S.C. §1983 by subleasing Hawaiian home lands to non-native Hawaiians. 824 F. Supp. 1480.

To the extent plaintiffs sought redress for violations of the Hawaii constitution or this Act, the Eleventh Amendment barred the state law claims; thus, state defendants' motion for summary judgment granted on all state law claims against state officials brought in their official capacities; state defendants sued in personal capacities were entitled to qualified immunity. 824 F. Supp. 1480.

Association that included native Hawaiian beneficiaries asserted viable claim under 42 U.S.C. §1983 alleging breach of trust duties by appellees under this Act via Admission Act. 78 H. 192, 891 P.2d 279.

Act is part of Hawai‘i constitution and does not constitute federal law; thus, federal preemption principles did not apply to case where there was no relevant federal law at issue and conflict between Act and state statute was matter of state constitutional law. 87 H. 91, 952 P.2d 379.

Chapter 343 does not conflict with this Act, has only

incidental impact on Hawaiian home lands, and is not inconsistent with interests of the beneficiaries; thus, chapter applies to Hawaiian home lands. 87 H. 91, 952 P.2d 379.

For Hawaiian home lands, the department of Hawaiian home lands is the accepting authority for applicant proposals under §343-5 (c); because the governor is not involved, there is no conflict with this Act. 87 H. 91, 952 P.2d 379.

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ACT 395 H.B. NO. 37

A Bill for an Act Relating to Right to Sue by Native Hawaiian and Hawaiian Individuals and Organizations.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. **Findings and purpose.** (a) On July 9, 1921, the Congress of the United States enacted the Hawaiian Homes Commission Act, 1920, to provide for the social and economic self-sufficiency of native Hawaiians, defined under section 201(a)(7) of the Act.

The legislature finds that pursuant to section 4 of the Admission Act, the provisions of the Hawaiian Homes Commission Act, 1920, as amended, have been adopted and incorporated into the Constitution of the State of Hawaii.

(b) Section 5(f) of the Admission Act provides that certain "lands, proceeds, and income shall be managed . . . in such manner as the constitution and laws of said State may provide, . . ." thereby allowing for the establishment of the office of Hawaiian affairs.

(c) The legislature finds that in the creation of a public trust the right to enforce the public trust by the beneficiaries should be granted.

(d) The purpose of this Act is to provide native Hawaiian individuals and their successors to homestead leases (as provided in section 209 of the Act) the right to sue in the courts of the State of Hawaii to enforce the provisions of the Hawaiian Homes Commission Act, as amended.

(e) The purpose of this Act is also to provide native Hawaiians as defined in section 10-2 of the Hawaii Revised Statutes, the right to sue in the courts of the State of Hawaii to enforce the provisions of the public trust created by Article XII, sections 4, 5, and 6 of the State Constitution implementing section 5(f) of the Admission Act.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER
NATIVE HAWAIIAN TRUSTS JUDICIAL RELIEF ACT

§ - **Waiver of immunity.** (a) The State waives its immunity for any breach of trust or fiduciary duty resulting from the acts or omissions of its agents, officers and employees in the management and disposition of trust funds and resources of:

(1) The Hawaiian home lands trust under Article XII, sections 1, 2, and 3 of the Constitution of the State of Hawaii, implementing sections 4 and 5(f) of the Admissions Act (Act of March 18, 1959, Public Law 86-3, 73 Stat. 4); and

(2) The native Hawaiian public trust under Article XII, sections 4, 5, and 6 of the Constitution of the State of Hawaii implementing section 5(f) of the Admission Act;

and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for punitive damages.

(b) This waiver shall not apply to the following:

(1) The acts or omissions of the State's officers and employees, even though such acts or omissions may not realize maximum revenues to the Hawaiian home lands trust and native Hawaiian public trust, so long as each trust is administered in the sole interest of the beneficiaries; provided that nothing herein shall prevent the State from taking action which would provide a collateral benefit to non-beneficiaries, but only so long as the primary benefits are enjoyed by beneficiaries, and the collateral benefits do not detract from nor reduce the benefits enjoyed by the beneficiaries;

(2) Any claim for which a remedy is provided elsewhere in the laws of the State; and

(3) Any claim arising out of the acts or omissions of the members of the board of trustees, officers and employees of the office of Hawaiian affairs, except as provided in section 10-16.

§ - **Right to sue.** (a) Native Hawaiians as defined in section 201(a)(7) of the Hawaiian Homes Commission Act, native Hawaiian organizations, the office of Hawaiian affairs, and Hawaiians defined as any person who is qualified to succeed to a homestead lease under section 209 of the Hawaiian Homes Commission Act 1920, as amended, shall have the right to bring an action in the circuit courts of the State to resolve controversies relating to the Hawaiian home lands trust described in section - (a)(1).

(b) The office of Hawaiian affairs, native Hawaiians as defined in section 10-2, and native Hawaiian organizations shall have the right to bring an action in the circuit courts of the State to resolve controversies relating to the native Hawaiian public trust described in section - (a)(2).

(c) "Native Hawaiian organizations" as used in this chapter means a native Hawaiian homestead organization, or an unincorporated association, or corporation which is duly organized and thereby able to sue and be sued under the laws of this State and whose purpose is to protect and uphold the Hawaiian Homes Commission Act and the Admission Act section 5(f) relating to a public trust for the betterment of the conditions of native Hawaiians, or the social and economic self-sufficiency of native Hawaiians, and which organized body is controlled by native Hawaiians and a majority of its members receives or can receive benefits from the trust.

§ - **Exhaustion of administrative remedies.** Before an action may be filed in circuit court under this chapter, the party filing suit shall have exhausted

all administrative remedies available, and shall have given not less than sixty days written notice prior to filing of the suit that unless appropriate remedial action is taken suit shall be filed. All executive branch departments shall adopt in accordance with chapter 91, such rules as may be necessary to specify the procedures for exhausting any remedies available.

§ - **Scope of relief.** (a) In an action under this chapter the court may only award land or monetary damages to restore the trust which has been depleted as a result of any breach of trust duty and no award shall be made directly to or for the individual benefit of any particular person not charged by law with the administration of the trust property; provided that actual damages may be awarded to a successful plaintiff.

(b) "Actual damages", as used in this section, means direct, monetary, out of pocket loss, excluding noneconomic damages as defined in section 663-8.5 and any consequential damages, sustained by a native Hawaiian or Hawaiian individually rather than the class generally.

§ - **Attorney's fees and costs.** (a) In any action under this chapter, the court shall, upon a specific finding that a non-prevailing party's claim or defense was frivolous, assess against such party and award to the prevailing party, and enter as part of its order or judgment, a reasonable sum for costs and expenses incurred, including reasonable attorney's fee.

(b) In any action brought under this chapter in which there is no finding by the court that the claims pled were frivolous the court may, as it deems just, award to a prevailing plaintiff and enter as a part of its order or judgment, a reasonable sum for costs and expenses incurred, including reasonable attorney's fees.

§ - **Award or judgment as bar.** An award or judgment in an action under this chapter shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the agent, officer, or employee of the State whose act or omission gave rise to the claim.

§ - **Limited remedy.** This chapter shall not be construed to limit or enlarge the scope of rights available under any other claims, proceedings or other actions against the State, its officers and employees, arising under chapter 662 or other provisions of law.

§ - **Proof of liability.** In no action under this chapter shall any liability be implied against the State, and no award shall be made against the State except upon such legal evidence as would establish liability against an individual or corporation.

§ - **Inapplicability to share of office of Hawaiian affairs.** This chapter shall not apply to suits in equity or law brought by or on behalf of the office of Hawaiian affairs in which the matters in controversy involve the proportionate share of ceded land or special fund revenues allocated to the office of Hawaiian affairs by the legislature.

§ - **Limitation on actions; native Hawaiians.** Every claim arising under this chapter shall forever be barred unless the action is commenced within two years after the cause of action first accrues; provided that this statute of limitations shall be tolled until July 1, 1990; provided further that the filing of the claim in an administrative proceeding pursuant to this Act shall toll any applicable statute of limitations, and any such statute of limitations shall remain tolled until ninety days after the date the decision is rendered in the administrative proceeding.

SECTION 3. This Act shall not apply to any cause of action which accrued, rights and duties that matured, penalties that were incurred, or proceedings that were begun, prior to July 1, 1988.

SECTION 4. No action shall be maintained under this Act for any existing projects, programs, or any other governmental activities which are continuing, and which were begun, completed, or established prior to July 1, 1988.

SECTION 5. The governor shall present a proposal to the legislature to resolve controversies which arose between August 21, 1959 and the date of this Act, relating to the Hawaiian home lands trust under Article XII, sections 1, 2, and 3 of the Constitution of the State of Hawaii implementing sections 4 and 5(f) of the Admission Act (Act of March 18, 1959, Public Law 86-3, 73 Stat. 4), and the native Hawaiian public trust under Article XII, sections 4, 5, and 6 of the Constitution of the State of Hawaii implementing section 5(f) of the Admission Act.

If, (1) both of the following occur:
(a) The governor fails to present a proposal to the legislature prior to the convening of the 1991 legislature in regular session; and
(b) No other means of resolving such controversies is otherwise provided by law by July 1, 1991, or
(2) All three of the following occur:
(a) The governor presents a proposal;
(b) A resolution calling for the rejection of the governor's proposal is adopted by two-thirds vote of the house introducing such resolution; and
(c) No other means of resolving such controversies is otherwise provided by law, by July 1, 1991,

then in the event of the occurrence of either (1)(a) and (b) or (2)(a), (b) and (c), notwithstanding sections 3 and 4 of this Act, a claim for actual damages under this Act which accrued between August 21, 1959, and the date of this Act may be instituted no later than June 30, 1993, provided that the filing of a claim for actual damages in an administrative proceeding before June 30, 1993, shall toll the statute of limitations until ninety days after the date the decision is rendered in the administrative proceeding.

SECTION 6. **Severability.** If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 7. This Act shall take effect on July 1, 1988.

(Approved June 17, 1988.)

ACT 14

H.B. NO. 10-S

A Bill for an Act Relating to Hawaiian Home Lands.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. **Findings.** The legislature finds that when the United States Congress passed the Hawaiian Homes Commission Act of 1920 (HHCA) and set aside 203,500 acres, more or less, of public lands as Hawaiian home lands for the rehabilitation of native Hawaiians, the United States reaffirmed the trust responsibility it had assumed toward the Hawaiian people.

The legislature also finds that under the Admission Act, the State of Hawaii assumed the trust responsibility to carry out the mandates of the HHCA.

The legislature further finds that thousands of acres of Hawaiian home lands were allegedly used, disposed of, or withdrawn from the trust by territorial or state executive actions in contravention of the HHCA. In recognition of these allegations and toward their resolution, the legislature enacted Act 395, Session Laws of Hawaii 1988, which, among other actions, provided a limited waiver of sovereign immunity for breaches of the Hawaiian home lands trust from July 1, 1988 forward. Act 395 also required the governor to present a proposal to the legislature prior to the convening of the 1991 Regular Session to resolve controversies which arose between August 21, 1959 and July 1, 1988. The governor's Action Plan to Address Controversies under the Hawaiian Home Lands Trust and the Public Land Trust (governor's Action Plan) was accepted by the legislature pursuant to its adoption of S.C.R. No. 185, H.D. 1, in 1991.

The governor's Action Plan, among other actions, proposed convening a task force of representatives from the department of Hawaiian home lands, the department of land and natural resources, the office of state planning, and the department of the attorney general to accelerate the review process concerning department of Hawaiian home lands' land title and compensation claims. The actions of the task force were to include verifying title claims, determining if improper uses were still in existence and whether these uses should be canceled or continued if authorized by the Hawaiian homes commission, conducting appraisals and determining appropriate compensation for past and continued use of Hawaiian home lands, and pursuing all avenues for return of lands and compensation from the federal government for wrongful actions during the territorial period.

In 1992, the legislature approved the resolution of the first set of claims covering gubernatorial executive orders and proclamations which set aside 29,633 acres of lands for public uses such as forest reserves, schools, and parks. Act 316, Session Laws of Hawaii 1992, provided $12,000,000 to pay verified claims and provide other means to resolve public use controversies.

In 1993, the legislature approved further means to resolve verified claims. Act 352, Session Laws of Hawaii 1993, extended the period within which to pay compensation, continued the authorization to the State to pursue claims against the

United States for the federal government's wrongful actions, and authorized land exchanges to resolve alienations of Hawaiian home lands.

By these previous acts, the State has resolved all disputed set asides of Hawaiian home lands that remain in the control of the State; paid compensation for uncompensated use of Hawaiian home lands from August 21, 1959 through October 28, 1992; paid fair market rent as set by the Hawaiian homes commission for continuing uses from October 28, 1992 through June 30, 1995; paid fair market rent for the use of lands under Nanaikapono elementary school through April 4, 1996; and initiated land exchanges for Hawaiian home lands held by the federal government under lease for nominal rents of $1 for sixty-five years at Pohakuloa and Kekaha. The legislature also recognizes that in 1994, by a separate administrative initiative, the State initiated the transfer of 16,518 acres of additional useable lands to the department of Hawaiian home lands to be used and administered in accordance with the HHCA.

In 1994, the task force continued to verify and value certain of the claims which remained unresolved, including claims for lands in Lualualei and Waimanalo on Oahu, Anahola, Moloaa, Kamalomalo, and Waimea on Kauai, Puukapu, Keaukaha, Panaewa, and Kawaihae on Hawaii, Kula on Maui, and Kalaupapa on Molokai; and compensation for periods of public use of trust land not already paid. The Hawaiian homes commission's claims to approximately 39,000 acres of such land are disputed due to different interpretations of the HHCA as it describes the lands to be made available for use under the provisions of HHCA. Due to the difficulty of determining the intent of Congress in 1921, it is untenable to administratively prove or disprove the validity of these claims.

The legislature finds that, due to the difficulty, time, uncertainty, disruption of public purposes, impact on the public land trust and private landowners, and expense of judicial resolution of remaining disputed claims, another approach, which results in the repair of the Hawaiian home lands trust and the final resolution of claims against the State, is necessary and in the best interests of the State and the beneficiaries of the trust.

The legislature recognizes and appreciates the hard work and valuable contributions of the task force in reviewing and presenting to the legislature certain recommendations as set forth in the Memorandum of Understanding dated December 1, 1994 (MOU). The legislature notes and expressly finds that the MOU does not bind the legislature and that it is the right and duty of the legislature to exercise its independent judgment and oversight in developing such implementing and related legislation which is in the overall public interest.

In so doing, the legislature finds that the recommendations set forth in the MOU do not bring closure to all matters charged to the task force for review and to all related issues. The legislature by this Act hereby takes these measures to bring the desired closure, to fully effectuate in part the intent of S.C.R. No. 185, H.D. 1, 1991 and the governor's Action Plan, and to fully effectuate the legislature's intent of final disposition of the matters addressed by this Act. The legislature also finds that the disputes surrounding the Hawaiian home lands trust have caused uncertainty in the State with regard to the limited waiver of sovereign immunity contained in Act 395, Session Laws of Hawaii 1988. With respect to all controversies arising between August 21, 1959 and July 1, 1988, excluding individual claims provided for pursuant to chapter 674, Hawaii Revised Statutes, the State hereby affirms that the limited waiver of sovereign immunity permitted by Act 395, Session Laws of Hawaii 1988, is now withdrawn and, to the extent the waiver was not previously withdrawn, it is now fully withdrawn. All claims arising between August 21, 1959 and July 1, 1988, or under any other law enacted in furtherance of the purposes or objectives of Act 395, Session Laws of Hawaii 1988, except those permitted by chapter 674, Hawaii Revised Statutes, are hereby forever barred.

The legislature also finds that the court-appointed independent representative of the beneficiaries of the Hawaiian home lands trust, who is deemed the sole representative of the beneficiary class, has participated in the non-judicial proceedings of the task force as required by Act 352, Session Laws of Hawaii 1993, and as contemplated by Ka'ai'ai v. Drake, First Circuit Civil No. 92-3642.

In passing this Act, it is the intent of the legislature in part to (a) resolve all controversies for the period between August 21, 1959 and July 1, 1988, allowed by Act 395, Session Laws of Hawaii 1988, except those permitted by chapter 674, Hawaii Revised Statutes, (b) resolve all controversies relating to the validity of patents issued after 1920 and prior to July 1, 1988 and affecting any lands covered by or allegedly covered by the HHCA and to all rights arising from or relating to such patents as issued, and (c) make certain other related amendments to chapters 673 and 674, Hawaii Revised Statutes. Additionally, it is the intent of the legislature that if the State is alleged to be liable, for claims of breaches of the Hawaiian home lands trust prior to statehood, this Act shall dispose of and resolve those claims against the State as well.

The legislature also finds that in order to properly utilize Hawaiian home lands, there is a need for a substantial, predictable funding mechanism for the department to appropriately plan for the development of these lands. Therefore, the establishment of a Hawaiian home lands trust fund to provide a steady availability of capital to fund Hawaiian home lands programs is appropriate.

Finally, the legislature acknowledges that generations of beneficiaries and potential beneficiaries have been patient and charitable in their prolonged wait for truth, justice and fair play. The legislature acknowledges the frustration, anxiety and spiritual loss of a class of native people whose culture welcomed strangers and generously shared finite resources. The legislature acknowledges that this Act represents an opportunity to effectuate the purposes of the HHCA.

SECTION 2. **Purpose.** The primary purposes of this Act are to:

(1) Resolve all controversies relating to the Hawaiian home lands trust which arose between August 21, 1959 and July 1, 1988;

(2) Prohibit any and all future claims against the State resulting out of any controversy relating to the Hawaiian home lands trust which arose between August 21, 1959 and July 1, 1988;

(3) Resolve all controversies after 1920 and prior to July 1, 1988 relating to the validity of patents issued and affecting any lands covered by or allegedly covered by HHCA and to all rights arising from or relating to such patents as issued;

(4) Appropriate such funds and provide additional means as may be necessary to accomplish the intent and purpose of this Act;

(5) Establish a trust fund to provide a substantial, secure, and predictable funding source for the department of Hawaiian home lands to use to effectuate the purposes of the HHCA;

(6) Further the public interest by ensuring that claims which have arisen or may arise in the future with respect to the administration of the Hawaiian home lands trust and are brought pursuant to chapters 673 and 674, Hawaii Revised Statutes, are resolved in a fair, complete, and timely manner.

This Act is not intended to replace or affect the claims of beneficiaries with regard to reparations from the federal government. It is however, intended to preclude forever any derivative or other claims of any description which the federal government may attempt to tender to the State.

SECTION 3. **Definitions.**

"Beneficiary" means any person eligible to receive benefits of homesteading and related programs of the Hawaiian home lands trust.

"Commission" means the Hawaiian homes commission.

"Department" means the department of Hawaiian home lands.

"Fair market value" means the definition of that term or, if that term is not defined, the definition of the term "market value", in the then-current edition of the Uniform Standards of Professional Appraisal Practice issued by The Appraisal Foundation or, if that publication is not in publication, then another publication of standard professional appraisal practice recognized by the department of commerce and consumer affairs.

"Governmental agency" or "State" means the State of Hawaii, municipal or county governments, or any department, bureau, division, agency or political subdivision thereof, or any board, commission, or administrative agency thereof.

"Hawaiian home lands" has the same meaning as defined in section 201(a)(5) of the HHCA.

"HHCA" means the Hawaiian Homes Commission Act of 1920, as amended.

"Independent representative" means the independent representative appointed in accordance with Act 352, Session Laws of Hawaii 1993.

"Patent" means any land patent grant, royal patent grant, patent upon award of the land commission, deed, grant, or other similar instrument in regular form duly executed on behalf of the State or its predecessors from and after January 1, 1846.

"Task force" means that task force created pursuant to the Governor's Action Plan to Address Controversies under the Hawaiian Home Lands Trust and the Public Land Trust as acknowledged by the legislature in its adoption of S.C.R. No. 185, H.D. 1, in 1991.

"Trust" means the Hawaiian home lands trust.

"Trust fund" means the Hawaiian home lands trust fund created by this Act and any additions thereto or increment thereon.

SECTION 4. 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.

The passage of this Act shall have the effect of res judicata as to all parties, claims, and issues which arise and defenses which have been at issue, or which could have been, or could in the future be, at issue, which arose between August 21, 1959 and July 1, 1988, whether brought against the State or its officials, directly or indirectly, by subrogation, derivative or third party action, tender, federal action, or by any other means whatsoever.

The passage of this Act shall not replace or affect the claims of beneficiaries against the federal government arising under the HHCA, provided that such claims are barred as against the State to the extent the State is alleged to be derivatively liable on such claims, or if the federal government tenders such claims to the State.

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 Act 395, Session Laws of Hawaii 1988, 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.

SECTION 5. All patents issued and affecting any lands covered by, or alleged to be covered by, the HHCA, from the inception of that Act to July 1, 1988, whether issued by the territory or the State of Hawaii, are hereby confirmed as issued, and no action on such patents may be maintained.

SECTION 6. The State, while not admitting the validity of any claims, hereby resolves and satisfies all controversies and claims encompassed by this Act by:

(1) The establishment of the Hawaiian home lands trust fund and the requirement that the State make twenty annual deposits of $30,000,000, or their discounted value equivalent, into the trust fund; provided that in lieu of sums deposited hereunder, the State may, with the approval of the Commission, substitute from time to time land or other consideration having the fair market value of such deposit, as mutually agreed by the State and Commission; provided that the State may, at any time, prepay sums due hereunder, without penalty, and that the total amount to be deposited into the trust fund shall be adjusted by such prepayment based on a discount rate per year equal to the then-average weekly investment rate on five year Treasury Bills; and provided further that the payment of funds into the trust fund shall include any interest, as determined by section 478-2, Hawaii Revised Statutes, on the unpaid balance of any funds due but not appropriated by the end of each respective fiscal year;

(2) The transfer of lands and resolution of claims in the Waimanalo, Anahola, Kamalomalo, and Moloaa areas; the compensation for all remaining confirmed uncompensated public uses of Hawaiian home lands; the initiation of a land exchange to remedy uncompensated use of Hawaiian home lands for state roads claims and highways; and the provision of the first selection of up to two hundred acres of land, to be conveyed to the department to fulfill the provisions of claims resolution, upon the return to the State of any ceded lands, comprising all, or a portion of Bellows Air Force Station (TMK: 4-1-15.) Disputes with respect to the transfer of lands and resolution of claims in the Waimanalo, Anahola, Kamalomalo and Moloaa areas, as identified by the task force and approved by the Commission at its meeting on November 4, 1994, are resolved by the exchanges more particularly described in the Commission's action;

(3) The payment of $2,348,558, appropriated herein, for the purpose of paying in advance all rent due for department of Hawaiian home lands license agreement no. 308 for the continued State use of trust lands under Nanaikapono elementary school between April 4, 1996 and October 27, 2002;

(4) The payment of $2,390,000, appropriated herein for the purpose of paying compensation for the State's uncompensated use of Hawaiian home lands between 1959 and 1995; and

(5) The payment of $1,539,000, appropriated herein, for the purpose of payment of moneys owed the department of Hawaiian home lands as its thirty per cent entitlement for the use of Hanapepe, Kauai, public lands formerly under lease of sugarcane cultivation on November 7, 1978, pursuant to section 1 of article XII of the Constitution of the State of Hawaii.

The fair market value of land or other consideration under subsection (1) of this section shall be established by the department of land and natural resources with the approval of the Commission.

Payments made under this Act shall not diminish funds that the department is entitled to under article XII, section 1, of the Constitution of the State of Hawaii.

SECTION 7. The HHCA is amended by adding a new section to be appropriately designated and to read as follows:

"§ - **Hawaiian home lands trust fund.** There is established in the treasury of the State a trust fund to be known as the Hawaiian home lands trust fund, into which shall be deposited all appropriations by the State legislature specified to be deposited therein. Moneys of the Hawaiian home lands trust fund shall be expended by the department as provided by law upon approval by the commission and shall be used for capital improvements and other purposes undertaken in furtherance of the Act. The department shall have fiduciary responsibility toward the trust fund, and shall provide annual reports therefor to the legislature and to the beneficiaries of the trust. Any interest or other earnings arising out of investments from the trust fund shall be credited to and deposited into the trust fund."

SECTION 8. (a) Notwithstanding the provisions of section 201E-207.5, Hawaii Revised Statutes, there is authorized and appropriated from moneys on deposit in the homes revolving fund created by section 201E-207, Hawaii Revised Statutes, $30,000,000 for fiscal year 1995–96 for deposit into the Hawaiian home lands trust fund. The foregoing authorization and appropriation constitutes a legislative reallocation of the moneys in the homes revolving fund and such transfer shall not constitute or be deemed to constitute a loan from the homes revolving fund.

(b) There is authorized and appropriated $30,000,000 in general obligation bond funds of the State of Hawaii for fiscal year 1996–97 for deposit into the Hawaiian home lands trust fund.

SECTION 9. There is appropriated out of the general revenues of the State of Hawaii the sum of $2,348,558, or so much thereof as may be necessary for fiscal year 1995–96, for the purpose of paying in advance all rent due for department of Hawaiian home lands license agreement no. 308, for the continued State use of Hawaiian home lands under Nanaikapono elementary school, for the period of April 4, 1996, through October 27, 2002. The sum appropriated shall be expended by the department of education.

SECTION 10. There is appropriated out of the general revenues of the State of Hawaii the sum of $2,390,000, or so much thereof as may be necessary for fiscal year 1995–96, for the purpose of paying compensation for the State's uncompensated use of Hawaiian home lands for the period of August 21, 1959 through June 30, 1995. The sum appropriated shall be expended by the department of budget and finance upon certification from the office of state planning that a wrongful use has been verified. Compensation may be paid as claims are verified and the amounts of compensation owed are determined.

SECTION 11. There is appropriated out of the general revenues of the State of Hawaii the sum of $1,539,000, or so much thereof as may be necessary for fiscal year 1995–1996, for the purpose of payment of moneys owed the department of Hawaiian home lands as its thirty per cent entitlement for the use of Hanapepe, Kauai, public lands formerly under lease for sugarcane cultivation on November 7, 1978, pursuant to section 1 of article XII of the Constitution of the State of Hawaii. The sum appropriated shall be expended by the department of budget and finance.

SECTION 12. To the extent still available, the limited waiver of sovereign immunity is hereby withdrawn with respect to any claim, cause of action or right of action against the State arising out of an act or omission committed or omitted between August 21, 1959 and July 1, 1988, excluding individual claims under chapter 674, Hawaii Revised Statutes, as first permitted by Act 395, Session Laws of Hawaii 1988, or under any other law enacted in furtherance of the purposes of that Act. Any claim, cause of action or right of action permitted by Act 395, Session Laws of Hawaii 1988, is forever barred except with regard to:

(1) A cause of action accruing after June 30, 1988 as may be permitted by chapter 673, Hawaii Revised Statutes; or

(2) An individual claim as may be permitted by chapter 674, Hawaii Revised Statutes.

SECTION 13. Section 673-10, Hawaii Revised Statutes, is amended to read as follows:

"[[]**§673-10**[]] **Limitation on actions; native Hawaiians.** Every claim arising under this chapter shall forever be barred unless the action is commenced within two years after the cause of action first accrues; provided that this statute of limitations shall be tolled until July 1, 1990; provided[1] that the filing of the claim in an administrative proceeding pursuant to this [[]chapter[]] shall toll any applicable statute of limitations, and any such statute of limitations shall remain tolled until ninety days after the date the decision is rendered in the administrative proceeding;[2] provided further that any cause of action that first accrues after July 1, 1995 shall forever be barred unless the action is commenced within two years after the cause of action first accrues."

SECTION 14. Section 674-2, Hawaii Revised Statutes, is amended by amending the definition of "actual damages" to read:

"'"Actual damages" means direct, monetary out-of-pocket loss, excluding noneconomic damages as defined in section 663-8.5 and consequential damages, sustained by the claimant individually rather than the beneficiary class generally, arising out of or resulting from a breach of trust, which occurred between August 21, 1959, and June 30, 1988, and was caused by an act or omission by an employee of the State with respect to an individual beneficiary in the management and disposition of trust resources."

SECTION 15. Section 674-19, Hawaii Revised Statutes, is amended to read as follows:

"**§674-19 Limitation on actions.** Every claim cognizable under this part shall forever be barred unless the action is commenced by September 30, [1999.] 1998."

SECTION 16. Chapter 674, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"**§674- Preclusion of title-related claims.** Nothing in this chapter shall be construed to affect title, or conveyance of title, or place a cloud upon title, to any lands in the State, including but not limited to lands which were, are, or may have been Hawaiian home lands."

SECTION 17. Notwithstanding any other law to the contrary, the State and its officials, the members of the board, the members of the Commission and the independent representative shall not be subject to suit by any party on any decision relating to the resolution of these claims, except for actions to enforce the provisions of this Act.

SECTION 18. If any portions of chapters 673 and 674, Hawaii Revised Statutes, are inconsistent with any of the provisions of this Act, then the provisions of this Act shall prevail. The Memorandum of Understanding is not binding on the legislature and the State and does not have the force and effect of law. To the extent that the Memorandum of Understanding is inconsistent with the provisions of this Act, then the provisions of this Act shall prevail.

SECTION 19. The 16,518 acres of land conveyed by the State to the department of Hawaiian home lands for the purpose of replenishing the trust corpus shall be treated by the department of Hawaiian home lands in the same manner as those lands originally established in the trust and subject to all the conditions thereon.

SECTION 20. Notwithstanding section 1-23, Hawaii Revised Statutes, if any provision of this Act or the application thereof to any person or circumstance is held invalid in whole or in part, this Act shall be invalid and no other provision shall have the force or effect of law, except that nothing in this section shall operate to (a) invalidate the withdrawal of the limited waiver of sovereign immunity as provided by section 12 of this Act, (b) the confirmation of patents as provided by section 5 of this Act, and (c) the undertakings set forth in sections 9, 10 and 11 of this Act.

SECTION 21. Statutory material to be repealed is bracketed. New statutory material is underscored.[3]

SECTION 22. This Act shall take effect upon its approval; except that sections 8, 9, 10 and 11 shall take effect on July 1, 1995.

(Approved June 29, 1995.)

Notes

1. Prior to amendment "further" appeared here.
2. Semicolon should be underscored.
3. Edited pursuant to HRS §23G-16.5.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served electronically (via the Court's JEFS system), or conventionally via U.S. Mail, upon the following parties:

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DATED: Honolulu, Hawai'i, November 2, 2022.

/s/ Ewan C. Rayner
EWAN C. RAYNER
Deputy Solicitor General

Attorney for State Defendants-Appellees, 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 Nautral Resources; DEPARTMENT OF HAWAIIAN HOME LANDS; HAWAIIAN HOMES COMMISSION; WILLIAM J. AILA, JR., in his cpapcity as the Director of the Department of Hawaiian Home Lands and Chair of the Hawaiian Homes Commission; PATRICIA A. KAHANAMOKU-TERUYA, RANDY K. AWO, PUALINE 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