United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

January 16, 2025

M-37083

Memorandum

To: Secretary
From: Solicitor
Subject: Trust Relationship between the United States and the Native Hawaiian Community, and Administration of the Hawaiian Home Lands

This Opinion describes the continuing relationship between the United States and the Native Hawaiian people. After reviewing relevant aspects of the political history and the effect of Hawai‘i statehood, the Opinion describes the legal baseline supporting the Department of the Interior's (Department) work with the Native Hawaiian Community.

The Department's activities are guided by Congress's 1993 Apology Resolution.[1] That Resolution acknowledged the involvement of the United States in the illegal overthrow of the Kingdom of Hawai‘i and the suppression of the inherent sovereignty of the Native Hawaiian people. Congress passed the Apology Resolution to provide a foundation for reconciliation between the United States and the Native Hawaiian people under federal law.[2] Congress subsequently directed the Department to "effectuate and implement the special legal relationship between the Native Hawaiian people and the United States" and to "continue the process of reconciliation with the Native Hawaiian people."[3] As described by Senator Daniel Akaka, "[r]econciliation is a means for healing, enabling an ongoing dialogue that empowers us to address the political status and rights of Native Hawaiians."[4] This Opinion provides legal

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[1] Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, and to Offer an Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, §§ 1, 3, 107 Stat. 1510, 1513-14 (1993) [hereinafter Apology Resolution].

[2] U.S. DEP'T OF THE INTERIOR & U.S. DEP'T OF JUST., FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY, REPORT ON THE RECONCILIATION PROCESS BETWEEN THE FEDERAL GOVERNMENT AND NATIVE HAWAIIANS 3 (Oct. 23, 2000) [hereinafter REPORT ON RECONCILIATION]; *see also* Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, 81 Fed. Reg. 71,278 (Oct. 14, 2016).

[3] Consolidated Appropriations Act, Pub. L. No. 108-199, div. H, § 148, 118 Stat. 3, 445 (2004) (establishing the Office of Native Hawaiian Relations). Congress mandated that the Office shall (1) effectuate and implement the special legal relationship between the Native Hawaiian people and the United States; (2) continue the process of reconciliation with the Native Hawaiian people; and (3) fully integrate the principle and practice of meaningful, regular, and appropriate consultation with the Native Hawaiian people by assuring timely notification of and prior consultation with the Native Hawaiian people before any Federal agency takes any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands." *Id.* § 148(b)(1)-(3).

[4] *Native Hawaiian Government Reorganization Act: Hearing Before the S. Comm. On Indian Affs.*, 111th Cong. 4 (2009) (statement of Sen. Daniel K. Akaka); *see also* REPORT ON RECONCILIATION, *supra* note 2, at i ("[T]he authors of this Report, have accepted Senator Akaka's definition of 'reconciliation' as a 'means for healing,' and in

guidance as the Department continues that dialogue and implements congressional direction provided in other statutes.

Among the Department's most significant responsibilities is administering the Hawaiian Home Lands Trust in conjunction with the State of Hawai'i for the benefit of native Hawaiians.[5] The Home Lands Trust was established to protect Native Hawaiian interests by providing a land base and opportunities for homesteading. As Congress recognized in the Apology Resolution, "the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land."[6] The Home Lands Trust provides homestead parcels to native Hawaiians for nominal rent. While thousands of families have received homesteads, there remains a waitlist of more than 29,000 individuals, including some who have waited more than thirty years for an award.[7]

In addition to its Hawaiian Home Lands Trust responsibility, the Department has an ongoing political relationship with Native Hawaiians manifested in hundreds of federal statutes and administrative programs. This government-to-government relationship supports establishment of a Native Hawaiian government with status akin to federally recognized tribes in the other states.[8] Pursuant to regulations adopted in 2016, the Department would process a petition by Native Hawaiians should they choose to form a representative government, including reestablishing a formal government-to-government relationship with the United States. Regardless of that potential decision to form a government, meaningful consultation with the Native Hawaiian

addition believe . . . 'a "reconciliation" requires something more than being nice or showing respect. It requires action to rectify the injustices and compensation for the harm.'").

[5] The term ''Native Hawaiian" with an upper case "N" means an individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i. *See, e.g.*, 12 U.S.C. § 1715z–13b(a)(6); 25 U.S.C. § 3001(10); 25 U.S.C. § 4221(9); 42 U.S.C. § 254s(c); 42 U.S.C. § 11711(3). When spelled with a lowercase "n," the term "native Hawaiian" means an individual who meets the definition of ''native Hawaiian" in the Hawaiian Homes Commission Act, and thus has at least 50 percent Native Hawaiian ancestry. Hawaiian Homes Commission Act, Pub. L. No. 67-34, § 201(a)(7), 42 Stat. 108, 108 (1921).

[6] Apology Resolution, *supra* note 1, 107 Stat. at 1512. *See also Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp.*, 177 Haw. 174, 214 (Haw. 2008), *rev'd on other grounds sub nom., Hawaii v. Off. of Hawaiian Affs.*, 556 U.S. 163 (2009) (fourth alteration in original) ("'Aina or land, is of crucial importance to the [N]ative Hawaiian [P]eople—to their culture, their religion, their economic self-sufficiency, and their sense of personal and community well-being. 'Aina is a living and vital part of the [N]ative Hawaiian cosmology, and it is irreplaceable. The natural elements—land, air, water, ocean—are interconnected and interdependent. To [n]ative Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians. The aina is part of their ohana, and they care for it as they do for other members of their families. For them, the land and the natural environment is alive, respected, treasured, praised, and even worshiped.").

[7] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 13.02[4][b] (N. Newton ed., 2024) [hereinafter COHEN'S HANDBOOK]. *See also* DEPARTMENT OF HAWAIIAN HOME LANDS, 2023 ANNUAL REPORT 2 ("The department is responsible for 203,981 acres of trust lands, 10,045 homestead leases, and 47,086 lease applications by 29,451 native Hawaiian beneficiaries.").

[8] Procedures for Reestablishing a Government-to-Government Relationship with the Native Hawaiian Community, 81 Fed. Reg. 71,278 (Oct. 14, 2016); COHEN'S HANDBOOK, *supra* note 7, § 13.02[3]. At times, this is referred to as a government-to-sovereign relationship. *See* 81 Fed. Reg. at 71278; Department of the Interior Policy on Consultation with the Native Hawaiian Community, 513 DM 1, § 1.1 (Jan. 2025).

Community[9] is essential to carrying out the Department's ongoing trust and programmatic duties to Native Hawaiians.

I. Historical Background and Legal Foundation

A. The Native Hawaiian People and the Kingdom of Hawai'i

Hawai'i is an archipelago of 137 islands with a combined land area of 6,423 square miles (4,110,720 acres) in the north central Pacific Ocean about 2,400 miles west of the continental United States. There are eight major islands: Ni'ihau, Kaua'i, O'ahu, Moloka'i, Lāna'i, Maui, Kaho'olawe, and Hawai'i. Native Hawaiians are the aboriginal, Indigenous people who settled the Hawaiian Islands at least 1,200 years ago.[10] For centuries before the arrival of Europeans, "the Native Hawaiian people lived in a highly organized, self-sufficient subsistence social system based on a communal land tenure system with a sophisticated language, culture, and religion."[11]

More than twenty nations entered into treaties recognizing the Kingdom of Hawai'i as a sovereign nation during the 19th century.[12] The United States extended complete diplomatic recognition to the Hawaiian government, and beginning in 1826, entered into four treaties or conventions with Hawai'i covering friendship, commerce, and navigation.[13] Although the United States Senate never ratified the 1826 treaty, it was treated as "in full force" by the King and Americans in Hawai'i.[14] It was "at all times scrupulously enforced by the Hawaiians," and likely

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[9] Pursuant to the regulations, the term "Native Hawaiian Community" means "the distinct Native Hawaiian indigenous political community that Congress, exercising its plenary power over Native American affairs, has recognized and with which Congress has implemented a special political and trust relationship." 43 C.F.R. § 50.4.
[10] COHEN'S HANDBOOK, *supra* note 7, § 13.02[2]. *See* S. REP. NO. 111-162, at 2-3 (2010).
[11] Native Hawaiian Education Act, 20 U.S.C. § 7512(2).
[12] Digitized copies of treaties with Australia, Austria, Belgium, Bremen, China, Denmark, France, Germany, Great Britain, Hong Kong, Italy, Japan, Netherlands, Portugal, Prussia, Russia, Samoa, Spain, Sweden and Norway, Switzerland, and the United States may be viewed courtesy of the University of Hawai'i at Mānoa William S. Richardson School of Law, Ka Huli Ao Center for Excellence in Native Hawaiian Law, at *Legal Archives Collection*, PUNAWAIOLA, http://www.punawaiola.org/treaties.html (last visited Jan. 6, 2025). *See also* REPORT ON RECONCILIATION, *supra* note 2, at 22; DAVIANNA PŌMAIKA'I MCGREGOR & MELODY KAPILIALOHA MACKENZIE, MO'OLELO EA O NĀ HAWAI'I: HISTORY OF NATIVE HAWAIIAN GOVERNANCE IN HAWAI'I 39 n.53 (2015) [hereinafter MO'OLELO EA O NĀ HAWAI'I].
[13] *See* United States Department of State, *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Hawai'i*, OFF. OF THE HISTORIAN, https://history.state.gov/countries/hawaii (last visited Jan. 6, 2025) (summarizing the (1) Treaty of Friendship, Commerce, and Navigation Between the United States and the Sandwich Islands (Hawaii) (December 23, 1826); (2) Treaty of Friendship, Commerce, and Navigation and Extradition (December 20, 1849); (3) Treaty of Reciprocity (January 30, 1875); and (4) Reciprocity Convention (December 6, 1884), "which was an extension of the 1875 Treaty of Reciprocity"). *See also* Apology Resolution, *supra* note 1, 107 Stat. at 1510-11 (discussing Kingdom of Hawai'i treaties and their breach during the 1893 overthrow).
[14] Robert H. Stauffer, *The Hawai'i-United States Treaty of 1826*, 17 HAWAIIAN J. HIST. 40 53-54 (1983). *See also* REPORT ON RECONCILIATION, *supra* note 2, at 22 ("The 1849 Friendship Treaty had an initial life of ten years with extensions that allowed either party to extinguish the treaty with one year's notice. In addition, the 1875 Reciprocity Treaty between the United States and the Kingdom of Hawai'i provided for sale of duty-free goods in both directions. The Reciprocity Treaty was renewed and revised to cede exclusive use of Pearl Harbor to the United States in 1887. These treaties were still in effect when the Hawaiian Monarchy was overthrown.").

obtained status as "customary law" having been recognized by other powers in the region.[15] In an 1894 review of diplomatic relations between the United States and the Kingdom of Hawai'i, the State Department concluded that "although it was never ratified by this Government, certain of its stipulations appear to have embodied friendly views and purposes of the United States which were considered morally binding by both parties."[16]

Between 1778 and 1850, tens of thousands Native Hawaiians died from disease epidemics and other causes, resulting in the loss of more than two-thirds of the population.[17] This period also saw dramatic changes in the Indigenous culture and land tenure system under the increasing influence of Westerners.

In 1839, King Kamehameha III, who reigned from 1825 to 1854, promulgated a Declaration of Rights that protected "the persons of all the people; together with their lands, their building lots, and all their property."[18] Prince Jonah Kūhiō Kalaniana'ole, who was in the line of succession to the throne and an important Native Hawaiian political leader, called it "the Hawaiian Magna Charta" and wrote that it was especially significant because it:

> was not wrung from an unwilling sovereign by force of arms, but the free surrender of despotic power by a wise and generous ruler, impressed and influenced by the logic of events, by the needs of his people, and by the principles of the new civilization that was dawning on his land.[19]

The 1839 Declaration, with certain revisions, served as the preamble to the 1840 Constitution, which created a legislative body comprising both a "House of Nobles" and a representative body.[20] Organic Acts passed in the 1840s established the laws of Hawai'i and organized the government into executive, legislative, and judicial branches.[21]

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[15] Stauffer, *supra* note 14, at 59. *See also* Harold W. Bradley, *Thomas ap Catesby Jones and the Hawaiian Islands, 1826–1827*, *in* THIRTY-NINTH ANNUAL REPORT OF THE HAWAIIAN HISTORICAL SOCIETY 25 (1930) (concluding that although the 1826 treaty was the first treaty Hawai'i made with a foreign power, because the United States Senate did not ratify the treaty "for more than a decade, . . . American officials and residents of the Hawaiian Islands were seeking to impress upon the perplexed chiefs the sanctity of this agreement which the government of the United States had refused to accept.").

[16] Stauffer, *supra* note 14, at 53 (quoting FOREIGN RELATIONS OF THE UNITED STATES, at app. II (1894), https://history.state.gov/historicaldocuments/frus1894app2/d2a).

[17] REPORT ON RECONCILIATION, *supra* note 2, at 46. *See also Ka Imi Pono: Threats to the Native Populace*, THE KING KAMEHAMEHA V JUDICIARY HIST. CTR., www.jhchawaii.net/ka-imi-pono (last visited Jan. 6, 2025). The population before 1778 is commonly estimated to have been between 400,000 and 800,000. Some estimates place the pre-contact population between 300,000 and 1,000,000. *See* OFF. OF HAWAIIAN AFFS., NATIVE HAWAIIAN POPULATION ENUMERATIONS IN HAWAI'I 22 (2017) [hereinafter NATIVE HAWAIIAN POPULATION ENUMERATIONS].

[18] *See* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 386 (2008).

[19] Prince J.K. Kalanaiana'ole, *The Story of the Hawaiians*, 21 MID-PACIFIC MAG. 117, 124 (1921). *See also* VAN DYKE, *supra* note 18, at 26.

[20] MO'OLELO EA O NĀ HAWAI'I, *supra* note 12, at 193, 223.

[21] *Id.* at 235-37.

During this time, "the laws passed by the Kingdom of Hawai‘i protected the traditional rights of the common people to use the lands."[22] Some of these laws remain in effect today. For example, Hawai‘i Revised Statutes section 7-1, "a statute initially passed in 1851 and continued in [Hawai‘i's] law since that time without substantial modification" protects gathering rights as well as rights to access land and water.[23] In Article 12, Section 7 of the Constitution of the State of Hawai‘i: "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778. . . ."[24] Voters in the State approved this provision in 1978 to provide additional protection for Native Hawaiian traditional and customary rights.[25]

B. The United States' Increasing Influence in Hawai‘i and Annexation of Hawai‘i as a Territory

In the mid-1800s, a small, but expanding, non-Native population sought to limit the power of the Hawaiian monarchy and secure control of Hawaiian lands.[26] The establishment of private land ownership occurred through the 1848 Ka Māhele, a process where the Hawaiian Government divided the lands as follows: approximately 1.6 million acres to the Ali‘i, or Chiefs, 1.5 million acres to the government of Hawai‘i ("Government Lands"), and 1 million acres reserved to the King and his successors ("Crown Lands").[27] The lands granted under the Māhele "were granted subject to the rights of the tenants, in a continuation of the trust concept inherent in the traditional land tenure system."[28] A law enacted in 1850 permitted foreigners to own land, an issue of "great concern to both natives and foreigners."[29] At that time, Hawai‘i had a population

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[22] REPORT ON RECONCILIATION, *supra* note 2, at 23. *See also Pub. Access Shoreline Hawaii v. Hawai'i Cnty. Planning Comm'n*, 79 Haw. 425, 443 (1995) (alteration in original) (citation omitted) (quoting *Reppun v. Bd. of Water Supply*, 65 Haw. 531, 542 (1982)) ("In 1840 the first constitution of the Kingdom of [Hawai‘i] proclaimed that although all property belonged to the crown 'it was not his private property. It belonged to the Chiefs and the people in common, of whom [the King] was the head, and had the management of the landed property.' Thus, prior to the [Mahele], all land remained in the public domain.").

[23] *See Kalipi v. Hawaiian Trust Co*., 66 Haw. 1, 7-8 (1982) (opining that "lawful occupants of an ahupuaa may, for the purposes of practicing native Hawaiian customs and traditions, enter undeveloped lands within the ahupuaa to gather those items enumerated in the statute."); *Pele Def. Fund v. Paty*, 73 Haw. 578, 619 (1992) (interpreting Kalipi as having "upheld the rights of native Hawaiians to enter undeveloped lands owned by others to practice continuously exercised access and gathering rights necessary for subsistence, cultural or religious purposes so long as no actual harm was done by the practice").

[24] HAW. CONST. art. XII, § 7; s*ee also Traditional and Customary Access and Gathering Rights*, *in* NATIVE HAWAIIAN LAW: A TREATISE (Melody Kapilialoha MacKenzie ed., 2015).

[25] *Traditional and Customary Access and Gathering Rights*, *supra* note 24, at 786.

[26] "The history of Hawai‘i is a history of lands moving from the Native Hawaiian People into the hands of others." VAN DYKE, *supra* note 18, at 1. *See also* S. REP. NO. 107-66, at 7-9 (2001).

[27] VAN DYKE, *supra* note 18, at 42. Van Dyke discusses the difference between the Crown Lands and the Government Lands, the latter being "public lands" as that term is generally understood. *Id.* at 9. Crown Lands were "a resource designed to support the Hawaiian Monarchs, who embodied the Native Hawaiian culture and spirit. The Monarchs understood that these ‘Āina (lands) were a collective resource and should be used to support the common Hawaiians." *Id.* at 9-10.

[28] REPORT ON RECONCILIATION, *supra* note 2, at 24.

[29] VAN DYKE, *supra* note 18, at 50; *An Act to Abolish the Disabilities of Aliens to Acquire and Convey Lands in Fee Simple*, *in* PENAL CODE OF THE HAWAIIAN ISLANDS, PASSED BY THE HOUSE OF NOBLES AND REPRESENTATIVES ON THE 21ST OF JUNE, A.D. 1850, at 146-47 (1850).

of 84,165, 98% of whom were Native Hawaiians.[30] The Māhele destroyed the traditional communal system of land tenure and resulted in a dramatic concentration of land ownership in plantations, estates, and ranches owned by non-Native peoples.[31] "Ultimately, the 2,000 westerners who lived on the islands obtained much of the profitable acreage from the commoners and chiefs."[32]

The United States government's influence grew at this time as well. The United States competed with European powers for control in the Pacific and viewed Pearl Harbor and other sites in Hawai'i as important to its defense.[33] In the 1840s, President John Tyler amended the Monroe Doctrine to include the Hawaiian Islands, "saying that the United States would oppose 'the adoption of an opposite policy by any other power.'"[34] As Hawai'i's political and economic relations with the United States expanded,[35] "the Hawaiian King and people [became] bitter about the loss of their lands to foreigners and were hostile . . . to the tightening bond with the United States . . . ."[36] These conflicts increased as King Kalākaua, who served from 1874 to 1891, supported "the growing Hawaiian nationalism led by native political leadership in the Legislature," and sought "to maintain the Kingdom's independence and to restore Hawaiian culture . . . ."[37]

In January 1893, however, "the United States Minister assigned to the sovereign and independent Kingdom of Hawaii conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the Indigenous and lawful Government of Hawaii."[38] That group, known as the Committee of Safety, installed a Provisional Government,[39] and sought annexation by the United States.

After failing to achieve annexation, on July 4, 1894, the Provisional Government proclaimed itself the Republic of Hawai'i and asserted control over the Crown and Government lands of the Kingdom of Hawai'i.[40]

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[30] *See* NATIVE HAWAIIAN POPULATION ENUMERATIONS, *supra* note 17, tbl. 7, at 14.
[31] COHEN'S HANDBOOK, *supra* note 7, § 13.02[2].
[32] S. REP. NO. 107-66, at 9 (2001). *See also* ANDREW LIND, AN ISLAND COMMUNITY: ECOLOGICAL SUCCESSION IN HAWAII 51 (1968) ("At the time of annexation, fifty years after the Mahele, approximately one-half of the original government land area [1,495,000 acres] was permanently alienated by the state, and much valuable land still retained was covered by long term leases.").
[33] REPORT ON RECONCILIATION, *supra* note 2, at 23.
[34] VAN DYKE, *supra* note 18, at 154. *See also* REPORT ON RECONCILIATION, *supra* note 2, at 22-23.
[35] *See* THEODORE MORGAN, HAWAI'I, A CENTURY OF ECONOMIC CHANGE, 1778-1876, at 206 (1948) ("Economic power, political authority, and social prestige moved into the hands of the white invaders as the century progressed. . . . By 1876 the haole merchants and planters and missionaries had reformed the Island economic structure essentially after their own image.").
[36] S. REP. NO. 107-66, at 10 (2001).
[37] VAN DYKE, *supra* note 18, at 118-20.
[38] Apology Resolution, *supra* note 1, 107 Stat. 1510. *See also Rice v. Cayetano*, 528 U.S. 495, 504-05 (2000).
[39] *Rice*, 528 U.S. at 505. *See also* MO'OLELO EA O NĀ HAWAI'I, *supra* note 12, at 399.
[40] REPORT ON RECONCILIATION, *supra* note 2, at 1.

By 1897, newly elected President McKinley and representatives of the Republic of Hawai‘i signed a treaty of annexation, which was submitted to the United States Senate for approval.[41] It was rejected. Undaunted, annexation proponents in Congress enacted a Joint Resolution (the "Newlands Resolution") by a simple majority vote, annexing the Hawaiian Islands as a territory of the United States over the objections of Native Hawaiians and without following customary constitutional treaty procedure.[42] Under the Newlands Resolution, the Republic of Hawai‘i purported to cede sovereignty of the islands and convey title to approximately 1,800,000 acres of the Government and Crown Lands to the United States. Congress subsequently defined these lands, together with lands later acquired by the State and subject to some exceptions, as "public lands."[43]

Although the Newlands Resolution asserted United States ownership of Hawaiian public lands, it also subjected the public lands to a special trust. In the Newlands Resolution, the United States accepted the cession of the 1.8 million acres from the Republic subject to a proviso that "all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States . . . shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purpose."[44] The United States Attorney General interpreted this language in 1899, concluding that "[t]he effect of this clause is to subject the public lands in Hawaii to a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the Hawaiian Islands for educational or other public purposes."[45]

The Organic Act, which "established the Territory of Hawaii, asserted United States control over the ceded lands, and put those lands 'in the possession, use, and control of the government of the Territory of Hawai‘i . . . until otherwise provided for by Congress.'"[46] The Organic Act, like the Newlands Resolution, recognized the trust status of the ceded lands and provided that: "All funds arising from the [Territory's] sale or lease or other disposal of such lands shall be . . . applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation . . . ."[47]

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[41] MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING A TREATY FOR THE ANNEXATION OF THE REPUBLIC OF HAWAII TO THE UNITED STATES, SIGNED AT WASHINGTON, BY THE PLENIPOTENTIARIES OF THE PARTIES, JUNE 16, 1897, S. EXEC. DOC. E, 55th Cong., 1st Sess. (1897).

[42] Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750 (1898) [hereinafter Newlands Resolution].

[43] Five exceptions were included in the amended Organic Act: (1) the Hawaiian Home Lands, (2) lands reserved by Executive order by the President, (3) lands set aside by the territorial governor, (4) sites for public buildings, roads, parks, etc., and (5) lands to which the United States relinquished the absolute fee and ownership. An Act to Provide a Government for the Territory of Hawaii, ch. III, § 73, 31 Stat. 141, 154-55 (1900) [hereinafter Organic Act].

[44] Newlands Resolution, *supra* note 42, at 30 Stat. at 750. *See* COHEN'S HANDBOOK, *supra* note 7, § 13.02[4][a]. Today, these are commonly referred to as the "ceded lands."

[45] 22 Op. Atty. Gen. 574, 576 (1899).

[46] *Rice v. Cayetano*, 528 U.S. 495, 505 (2000) (quoting Organic Act, *supra* note 43, § 91).

[47] Organic Act, *supra* note 43, § 73. In 1896 there were 109,020 inhabitants of the Hawaiian Islands, including 39,504 Native and part Native Hawaiians, 3,086 Americans, 4,161 Europeans, 15,191 Portuguese, 24,407 Japanese, 21,616 Chinese, and 1,055 other nationalities. DEP'T OF PUB. INSTRUCTION, REPORT OF THE GENERAL SUPERINTENDENT OF THE CENSUS tbl.IV, at 34 (1896). "[A]bout 25,000 Japanese and 21,500 Chinese resided in the Islands, but only 700 of the Chinese and virtually none of the Japanese were citizens." VAN DYKE, *supra* note 18, at 224 n.69.

C. Hawaiian Homes Commission Act

The need to set aside lands for Native Hawaiian people became especially important as the Native Hawaiian population continued to decline and conflict over land intensified. The 1890 census showed that "of a total population of approximately 90,000 fewer than 5,000 people actually owned any land."[48] Westerners, who were relatively few in number, owned more than one million acres, or fifty-six percent of the privately owned land in the Islands.[49]

In the years following the overthrow, Native Hawaiians suffered from "mortality, disease, economic deprivation, social distress, and population decline" and the continued suppression of their culture and language.[50] Prince Kūhiō and other Native Hawaiian leaders sought to protect the interests of the Native Hawaiian people and believed such protection would be best accomplished by setting aside lands for homesteading opportunities for Native Hawaiians. They presented a plan for the rehabilitation of Native Hawaiians to the House Committee on Territories, which was sympathetic. Its Chairman, Charles F. Curry, urged the proponents to demonstrate the plan's constitutionality.[51] Chairman Curry said, "we want to do something for the Hawaiian people, and we want to do it constitutionally, so that when we are through with it the courts will uphold what we have done . . . ."[52] Secretary of the Interior Franklin K. Lane supported the Hawaiian Home Lands program. He provided Congress with a Solicitor's opinion that concluded Congress could constitutionally set apart a limited area of the public lands of the Territory of Hawaii for lease to and occupation by Native Hawaiians, citing "numerous congressional precedents for such action."[53]

In 1921, Congress enacted the Hawaiian Homes Commission Act, 1920 (HHCA) to provide a homesteading program for native Hawaiians, placing approximately 203,500 acres of land (known as the Hawaiian Home Lands) into the Hawaiian Home Lands Trust.[54] While the

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[48] HOROWITZ, L. VARGIA, I. FINN, & J. CEASER, PUBLIC LAND POLICY IN HAWAII: MAJOR LANDOWNERS 4 (1967).
[49] *Id*.
[50] REPORT ON RECONCILIATION, *supra* note 2, at 1 ("As a result of the overthrow, laws suppressing Hawaiian culture and language, and displacement from the land, the Native Hawaiian people suffered mortality, disease, economic deprivation, social distress, and population decline."). *See Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827, 831 (9th Cir. 2006) ("Laws were then enacted suppressing the Hawaiian culture and language and allowing for the displacement of Native Hawaiians from their lands. From 1896 to 1986, almost a full century, the Hawaiian language was banned as a medium of instruction in schools.").
[51] *Proposed Amendments to the Organic Act of the Territory of Hawaii: Hearings Before the H. Comm. on the Territories*, 66th Cong. 80 (1920) [hereinafter 1920 House Committee Hearings] (statement of Rep. Charles F. Curry, Chairman, H. Comm. On the Territories).
[52] *Id*.
[53] *Id*. at 130-31 ("The act of Congress approved February 8, 1887, as amended by the act of February 28, 1891 (26 Stat. 794), authorizes public lands which have been set apart as Indian reservations by order of the President to be surveyed and 80 acres of land therein to be allotted to each Indian located upon the reservation, or where the lands are valuable for grazing to be allotted in areas of 160 acres. Another section of the same act authorizes any Indians entitled to allotment to make settlement upon any public lands of the United States, not otherwise appropriated, and to have same allotted to them.").
[54] Hawaiian Homes Commission Act, Pub. L. No. 67-34, 42 Stat. 108 (1921). COHEN'S HANDBOOK, *supra* note 7, §§ 13.02[2], 13.02[4][b]. *See* VAN DYKE, *supra* note 18, at 237-47 (discussing purpose of the HHCA as the need to stop the precipitous decline of Native Hawaiians). *See also*, 1920 House Committee Hearings, *supra* note 51, 39 (statement of John H. Wise, Member of the Senate of the Territory of Hawai'i) ("The Hawaiian people are a farming

Hawaiian Home Lands are part of the ceded lands, they are not considered "public lands" as that term is defined under both federal and state law.[55] Home Lands may be leased to "native Hawaiians," defined as persons with at least fifty percent Hawaiian blood, for ninety-nine year terms.[56] During the Territorial period, the Hawaiian Home Lands were managed by the Hawaiian Homes Commission, whose members were appointed by the Territorial Governor. No federal funds were to be made available to support the program.[57] Instead, funding for the program would come from a portion of the proceeds from leases of public lands dedicated to a fund to provide loans to native Hawaiian lessees.

The approximately 203,500 acres of land ultimately made available to the program were inferior for homesteading purposes. They "lacked water for irrigation or domestic use" and "[m]ost of the lands were rough, rocky, and dry. Barren lava covered 55,000 acres. Another 7,800 acres were the steep parts of mountains."[58] The inferior quality of the land, the absence of federal funding to support the program, and the extensive leasing of available lands to non-native Hawaiians for non-homesteading purposes were just a few of the many problems that carried over when the State assumed responsibility for administering the program in 1959, as described in Section II.

D. Hawai‘i Statehood

Between 1933 and 1959, Congress held twenty-two hearings on statehood, producing thirty-four congressional reports and compiling a record of nearly 7,000 pages.[59] From the very start, Congress heard from Native Hawaiians about their need for protection:

> Protect the rights of the Hawaiians of these islands, so that their children will be protected in the future. Protect under the State laws the rights of the Hawaiian Homes Commission, and open up further lands for the Hawaiians who need them and who should be protected, so that solicitors, exploiters, and carpetbaggers will not play upon our ignorance and get the best of us.[60]

Noa Webster Aluli, a Native Hawaiian lawyer and also a proponent of the HHCA, appeared at a 1935 hearing, testifying that it was crucial that "protections be given to the natives before

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people, and fisherman, out-of-door people, and when they were frozen out of their lands and driven into the cities, they had to live in the cheapest places, tenements. That is one of the big reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.").

[55] Organic Act, *supra* note 43, § 73(a)(3). *See* HAW. REV. STAT. ANN. § 171-2 (defining public lands and excluding the Hawaiian Home Lands and several other categories of land).

[56] With the lowercase "n" native Hawaiian refers to individuals who meet the definition of ''native Hawaiian" in HHCA § 201(a)(7), and thus have at least fifty percent Native Hawaiian ancestry.

[57] Davianna Pōmaika‘i McGregor, *‘Āina Ho‘opulapula: Hawaiian Homesteading*, 24 HAWAIIAN J. HIST. 1, 19 (1990).

[58] *Id*. at 31.

[59] H.R. REP. NO. 86-32, apps. B, C (1959).

[60] *Statehood for Hawai'i: Hearings on H.R. 3034 Before the H. Subcomm. on the Territories*, 74th Cong. 280 (1935) (statement of Grace Black Pa).

Statehood is granted to Hawai‘i [and] that the same consideration given to the American Indians under the [Indian Reorganization Act of 1934] . . . .be extended to the native Hawaiians."[61]

The Department of the Interior was deeply involved in the congressional proceedings on statehood. Acting Secretary Oscar L. Chapman made several recommendations regarding the Hawaiian Home Lands and proposed an amendment to the statehood bill, H.R. 49, that required the new state to adopt the HHCA as a law. The amendment was meant to ensure that "the safeguards . . . intended to be afforded the native Hawaiians for whose benefit the [HHCA] was enacted by the Congress would be enforceable . . . ."[62] The Department was concerned that under Supreme Court precedent, in particular *Coyle v. Smith,* challenges to the authority of Congress to impose special obligations on Hawai‘i might arise under the Equal Footing Doctrine.[63] Acting Secretary Chapman proposed that the provision requiring Hawai‘i to adopt the HHCA as a law "be recast into a compact by the State to carry out the purposes of the [HHCA] in such a manner as to prohibit the obligation thus assumed by the State being altered in substantive particulars without the consent of the United States."[64]

The Secretary's proposal was incorporated into the bill, and Hawai‘i became the fiftieth state in the Union in 1959 pursuant to the Hawaii State Admission Act (Admission Act).[65] In addition to the trust responsibilities attached to the Hawaiian Home Lands, the act also attached trust responsibilities to the State's administration of all the ceded lands.[66]

II. Administration of the Hawaiian Home Lands Trust Post Statehood

The Hawaiian Home Lands Trust is a federal law framework implemented through state law and subject to oversight by the United States.[67] For example, Congress reserved the right to amend or

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[61] *Id*. at 20 (statement of Noa Webster Aluli). Aluli was a Native Hawaiian leader who was educated at the University of Michigan and Yale Law School and played a prominent role in helping the Native Hawaiian Community throughout his long career. *See* MO‘OLELO EA O NĀ HAWAI‘I, *supra* note 12, at 505.

[62] *Statehood for Hawaii: Hearings on H.R. 49, H.R. 50, H.R. 51, H.R. 52, H.R. 53, H.R. 54, H.R. 55, H.R. 56, H.R. 579, H.R. 1125, and H.R. 1758 Before the Comm. On Pub. Lands*, 80th Cong. 11 (1947) [hereinafter 1947 Statehood Hearing].

[63] Federal authority to enforce provisions in Hawai‘i's Constitution pursuant to its enabling act and accompanying compact thus arises from the exercise of Congress's Article I powers, its Indian Commerce Clause powers, and its power under Article IV "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. *Coyle v. Smith*, 221 U.S. 559 (1911).

[64] 1947 Statehood Hearing, *supra* note 62, at 11.

[65] An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, § 4, 73 Stat. 4, 5 (1959) [hereinafter Admission Act].

[66] That the State holds the ceded lands as a public trust was affirmed by delegates to the 1978 Consitutional Convention and later ratified by Hawai‘i's citizens. HAW. CONST. art XII, sec. 4 ("The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as 'available lands' by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.").

[67] The HHCA, 42 Stat. 108, remains in effect as a federal law, consistent with existing law and made evident by congressional action. When the State adopted the HHCA as a provision of its constitution, the HHCA was deleted from the United States Code, but Congress did not repeal the statute. This makes it one of many federal laws that are not fully published or codified in the United States Code. "Unless Congress affirmatively enacts a title of the United States Code into law, that title is only 'prima facie' evidence of the law, *see* 1 U.S.C. § 204(a) (1982); 'the very

repeal provisions of the HHCA, and the State must obtain United States consent for "any amendments to the act that may alter the qualifications or diminish the benefits of the program to its beneficiaries."[68] The Secretary of the Interior also must "approve any land exchanges involving Hawaiian Home Lands."[69] Over time, Congress has confirmed this unique legal framework as well as the ongoing responsibilities of the United States concerning the State's administration of the Trust.[70]

A. The Admission Act and the Home Lands

Section 4 of the Admission Act required the new State to adopt the HHCA as a provision of the State Constitution and established a compact between the State and the federal government concerning the Hawaiian Home Lands Trust. Section 4 reads in part:

> As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of [Hawai'i] . . . subject to amendment or repeal only with the consent of the United States, and in no other manner . . . .[71]

In addition to the requirement that the United States consent to any amendment or repeal of the HHCA, Section 4 expressly requires United States consent for other actions affecting the Home Lands and beneficiaries. These include any new, increasing or third-party encumbrances on Hawaiian Home Lands and any dilution of the rights of beneficiaries.[72]

Interpreting the HHCA and its evolution, the Hawai'i Supreme Court declared that the State's conduct relating to the management of the Hawaiian Home Lands Trust "should . . . be judged by the most exacting fiduciary standards."[73] The court noted that the State and its people reaffirmed the compact with the United States "by adding another provision to the Constitution [Art. XII, §

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meaning of "prima facie" is that the Code cannot prevail over the Statutes at Large when the two are inconsistent.'" *Preston v. Heckler*, 734 F.2d 1359, 1367 (9th Cir. 1984) (quoting *Stephan v. United States*, 319 U.S. 423, 426 (1943) (per curiam)). *Contra Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216, 1226 (9th Cir. 1978), *cert. denied*, 444 U.S. 826 (1979) ("[I]t is undisputable that the Commission Act program together with its rights and duties are, for all practical purposes, elements of Hawaiian law."); *Han v. U.S. Dep't of Justice*, 45 F.3d 333, 339 (9th Cir. 1995) (emphasis added) (citing *Keaukaha*, 588 F.2d at 1227) ("Claims under the Commission Act, which has been expressly incorporated in the Hawaii Constitution, arise *exclusively* under state law.").

[68] COHEN'S HANDBOOK, *supra* note 7, § 13.02[4][b].

[69] *Id.*

[70] Congress enacted the Hawaiian Home Lands Recovery Act, Pub. L. No. 104-42, tit. II, 109 Stat. 353, 357 (1995), and directed the Secretary to "advance the interests of the [native Hawaiian] beneficiaries" in the administration of "the responsibilities of the United States under [the Recovery Act] and the Hawaiian Homes Commission Act[.]" The Recovery Act defines the term 'Hawaiian Homes Commission Act' by reference to "the Hawaiian Homes Commission Act, 1920 (42 Stat. 108 et. seq., chapter 42)." *Id.* § 205(5).

[71] Admisson Act, *supra* note 65, § 4.

[72] *Id.*

[73] *Ahuna v. Dep't of Hawaiian Home Lands*, 64 Haw. 327, 339 (1982) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)). The Hawai'i Supreme Court has reaffirned this principle repeatedly. *See, e.g.*, *Kalima v. State* (*Kalima I*), 111 Haw. 84, 91 (2006); *Kalima v. State* (*Kalima II*), 148 Haw. 129 (2020).

2] whereby they accepted specific trust obligations relating to the management of the Hawaiian home lands imposed by the federal government."[74]

In Section 5(b) of the Admission Act, Congress transferred to the State the United States' title to the public lands and the Hawaiian Home Lands,[75] while retaining title to lands "set aside pursuant to law for the use of the United States."[76] In Section 5(f) of the Admission Act, Congress mandated that the transferred lands, including both the public lands and the Hawaiian Home Lands, "together with the proceeds from the sale or other disposition of any such lands and income therefrom, shall be held by said State as a public trust" for five specific purposes. One of the purposes is "the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended . . . ."[77] Section 5(f) provides:

> The lands granted to the State of Hawaii . . . together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust *for which suit may be brought by the United States*.[78]

The State administers the Hawaiian Home Lands Trust separately from the public lands, consistent with Section 4 of the Admission Act, pursuant to federal and state law. Significantly,

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[74] *Ahuna*, 64 Haw. at 337. *See generally* COHEN'S HANDBOOK, *supra* note 7, § 13.02[4][b].

[75] Admission Act, *supra* note 65, § 5(b)*, amended by* Pub. L. No. 86-624, § 41, 74 Stat. 411, 422 (1960). *See also* H. Rep. No. 86-1564, at 19 (1960) (In 1960, Congress made several amendments to the Admission Act, including an amendment to Section 5(b) to clarify that the "lands made available to the Hawaiian Homes Commission . . . the 'available lands' . . . have been transferred to Hawaii . . . .").

[76] *Id.* § 5(c) ("Any lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawaii shall remain the property of the United States subject only to the limitations, if any, imposed under (1), (2), (3), or (4), as the case may be."). *See* COHEN'S HANDBOOK, *supra* note 7, § 13.02[4][a] (describing that 1.4 million acres transferred to the State with 203,500 acres designated for homesteading under the HHCA, while 345,000 acres were retained by the United States as military installations and national parks).

[77] Admission Act, *supra* note 65, § 5(f); *see also* VAN DYKE, *supra* note 18, at 257-58 (explaining that the State of Hawai'i received fee title to these Public Lands, "along with the fiduciary responsibilities of a trustee").

[78] Admission Act, *supra* note 65, 5(f) § (emphasis added).

the United States reserved the right to sue the State for breaches of trust under Section 5(f).[79] This authority extends to both the Hawaiian Home Lands Trust and the public lands trust.[80]

B. Early State Administration of the Home Lands Trust and Actions to Comply with Congressional Consent Requirements

Following statehood, the day-to-day administration of the Trust was vested in the State Department of Hawaiian Home Lands, overseen by the State Hawaiian Homes Commission. For decades, there were numerous problems with the Department of Hawaiian Home Lands' administration of the Trust.[81] Federal and State investigations in the 1980s and 1990s scrutinized the State's administration of the HHCA, resulting in several negative investigatory reports.[82] The reports were consistent in their conclusions about the problems with the implementation of the HHCA.[83] The Federal-State Task Force Report on the Hawaiian Homes Commission Act (Task Force) made 134 recommendations for changes. For example, Home Lands were being "used for purposes which directly benefit the general public rather than beneficiaries;" there were problems with the identification of the Trust's assets, and the State had "not at all times accounted accurately for revenues associated with trust lands;" financial records and statements were not maintained appropriately; and the State "ha[d] entered into conveyances and encumbrances of Hawaiian Home lands that have not been authorized by law."[84]

The Task Force also identified that the State had not complied with the requirement in Section 4 of the Admission Act that the State obtain congressional consent for amendments to the HHCA.[85] The HHCA reserves to Congress the right to amend or repeal the HHCA and prohibits

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[79] *Id.* During joint hearings on the administration of the Hawaiian Home Lands, Senator Daniel K. Inouye called attention to Section 5(f), stating that "the power to enforce the trust, and the fact that the United States reserved this power to itself, . . . provides the strongest evidence that the United States Congress intended a continuing Federal role in overseeing, monitoring, and enforcing the trust responsibility that was created for the benefit of Native Hawaiians." *Administration of Native Hawaiian Home Lands: Joint Hearings Before the S. Sel. Comm. on Indian Affs. and the Comm. on Interior and Insular Affs.*, 101st Cong., pt. 1, 2-3 (1989).

[80] *See Ahuna v. Dep't of Hawaiian Home Lands*, 64 Haw. 327 (1982); *Day v. Apoliona*, 616 F.3d 918, 921-22 (9th Cir. 2010) (citations omitted) ("The Admission Act granted to the State of Hawaii title to most of the federal government's public land within the state. Section 5(f) of the Admission Act requires the state to hold much of that land and profits from it in 'public trust' (the '§ 5(f) trust') for five enumerated purposes. One such purpose is 'for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act.' The other purposes—for public schools, development of farm and home ownership, public improvements and the provision of land for public use—are not limited to native Hawaiians.").

[81] *Kalima I*, 111 Haw. 84, 91 (2006); *Kalima II*, 148 Haw. 129, 143 (2020) ("It is undisputed that the State breached its duties to keep and render accounts, to exercise reasonable care and skill, to administer the trust, and to make the trust property productive, to the significant detriment of the Native Hawaiian people for whom the Trust was created.").

[82] *See, e.g.*, THE HAW. ADVISORY COMM., BREACH OF TRUST? NATIVE HAWAIIAN HOMELANDS (1980); FEDERAL-STATE TASK FORCE ON THE HAWAIIAN HOMES COMMISSION ACT, REPORT TO UNITED STATES SECRETARY OF INTERIOR AND THE GOVERNOR OF THE STATE OF HAWAII (1983); NATIVE HAWAIIANS STUDY COMM'N, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS, PURSUANT TO PUBLIC LAW 96-565, TITLE III (1983) [hereinafter TASK FORCE]; THE HAW. ADVISORY COMM., A BROKEN TRUST, THE HAWAIIAN HOME LANDS PROGRAM: SEVENTY YEARS OF FAILURE OF THE FEDERAL AND STATE GOVERNMENTS TO PROTECT THE CIVIL RIGHTS OF NATIVE HAWAIIANS (1991).

[83] *See* REPORT ON RECONCILIATION, *supra* note 2, at 35.

[84] TASK FORCE, *supra* note 82, at 22.

[85] *Id.* at 23.

the State from placing additional encumbrances on Hawaiian Home Lands without congressional consent.[86] This is true even though the operative HHCA is the state law adopted by Hawai‘i as required by its enabling act. Proposed legislative changes are measured against the federal version of the HHCA so that any inconsistencies proposed to the state law must be approved by Congress.

The consent requirement helps ensure that the interests of the native Hawaiian beneficiaries are protected and was first proposed by the Territory of Hawai‘i’s Statehood Commission in 1950. The Statehood Commission Chairman wrote to the Chair of the Senate Committee on Interior and Insular Affairs in 1950 stating that the statehood legislation enacted by the Territorial Legislature “requires that the constitution of the proposed State of Hawaii shall incorporate in its provisions the [HHCA], as amended, as a part thereof, not subject to change by the Legislature of the State of Hawaii, except in minor particulars, without the consent and approval of the United States.”[87] Congress confirmed this limitation:

> While the new State will be able to make changes in the administration of the act without the consent of Congress, it will not be authorized, without such consent, to impair by legislation or constitutional amendment the funds set up under it or to disturb in other ways its substantive provisions to the detriment of the intended beneficiaries.[88]

Between 1960 and 1986, the State failed to submit any proposed amendments to the HHCA to the United States for review and approval.

In 1985, Representative Daniel Akaka introduced legislation to approve the proposed amendments to the HHCA enacted by the State between 1959 and 1985.[89] Congress duly enacted Public Law No. 99-557, approving fifty-three State proposed amendments to the HHCA in 1986.[90] Congress also encouraged the Secretary and the Governor of Hawai‘i “to enter into consultations regarding the manner in which such amendments will be brought to the attention of Congress.”[91] The Secretary consulted with the Governor and informed Congress that they had “agreed upon a procedure that will, in our view, satisfy the statutory consent requirement in a reasonably efficient manner.”[92] In 1989, under the newly adopted procedures, the Department submitted six proposed amendments the State had enacted in 1986 and 1987 to the Senate for

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[86] HHCA § 223 provides: “The Congress of the United States reserves the right to alter, amend, or repeal the provisions of this title.”

[87] *Hawaii Statehood*: *Hearings on H.R. 49, S. 156, and S. 1782 Before the S. Comm. On Interior and Insular Affairs*, 81st Cong. 464 (1950) (letter from Samuel Wilder King, Chairman, Hawaii Statehood Comm’n).

[88] H. REP. NO. 86-32, at 19 (1959).

[89] H.R.J. Res. 17, 99th Cong. (1985).

[90] Pub. L. No. 99-557, 100 Stat 3143 (1986).

[91] H. REP. NO. 99-473, at 4-5 (1986).

[92] *See* Memorandum from the Assistant to the Secretary and Director of External Affairs to the Secretary of the Interior, Proposed Procedure for Obtaining the Consent of the United States to Amendments to the Hawaiian Homes Commission Act (Aug. 21, 1987), *reprinted in* SUSAN JAWOROWSKI, ELECTED HAWAIIAN HOMES COMMISSIONERS? WEIGHING THE OPTIONS AFTER RICE, app. C (2000); *see also* S. REP. NO. 103-393 (1994) (statement of I. Michael Heyman, Counselor to Secretary of the Interior and Deputy Assistant Secretary for Policy).

consent by Congress.[93] In transmitting the materials, the Department explained that "[i]t is often difficult to be certain, given the language of section 4 of the Statehood Act, whether a particular amendment requires United States consent."[94] The Department's position was—and still is—that where a particular change to the HHCA proposed by the State arguably "could result in at least a minor diminution of benefits to some native Hawaiians," obtaining consent from Congress is necessary. As the Solicitor wrote over 30 years ago, "if there is doubt, it should be overcome by seeking consent."[95]

C. Congress Takes Action

Congress held joint hearings in Hawai'i in 1989 on the administration of the Hawaiian Home Lands.[96] In the years that followed, Congress took decisive action, both with respect to the Hawaiian Home Lands and the interests of the larger Native Hawaiian Community. The 1993 Apology Resolution was enacted by Congress and signed by President Clinton in recognition of the 100-year anniversary of the overthrow of the Kingdom of Hawai'i. The Apology Resolution "endorsed the official view of the Federal Government: the United States' officers were wrongly involved in the overthrow of a legitimate and independent government in Hawai'i and the deprivation of the rights of Native Hawaiians to self-determination."[97] Congress also expressed support for the reconciliation efforts between the Native Hawaiian people and the United States.[98]

The United States Supreme Court would later address the narrow question of whether the 1993 Apology Resolution affected the State's authority to manage and dispose of the ceded lands.[99] The Court was reviewing the Hawai'i Supreme Court's decision that the Apology Resolution and certain state laws barred alienation of the ceded lands before resolution of the unresolved claims of Native Hawaiians.[100] Justice Alito, writing for a unanimous court, reversed the Hawai'i Supreme Court, holding that it "incorrectly held that Congress, by adopting the Apology Resolution, took away from the citizens of Hawaii the authority to resolve an issue that is of great importance to the people of the State."[101]

As described in Section IV of this opinion, in the thirty years following the 1993 Apology Resolution, Congress enacted more than 100 statutes protecting and advancing Native Hawaiian

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[93] *See* Letter from Ralph W. Tarr, Solicitor, to J. Danforth Quayle, President of the Senate (May 31, 1989), *reprinted in Hawaiian Homes Commission Act: Hearing Before the S. Comm. On Energy and Nat. Res.*, 102d Cong. 588-90 (1992).
[94] *Id.* at 589.
[95] *Id.*
[96] *Administration of Native Hawaiian Home Lands: Joint Hearings Before the S. Sel. Comm. on Indian Affs. and the Comm. on Interior and Insular Affs.*, 101st Cong., pt. 1-5 (1989).
[97] REPORT ON RECONCILIATION, *supra* note 2, at 51.
[98] Apology Resolution, *supra* note 1, § 1(4), 107 Stat. at 1513.
[99] *Hawaii v. Off. of Hawaiian Affs.*, 556 U.S. 163 (2009).
[100] *Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp.*, 177 Haw. 174 (2008), *rev'd sub nom. Hawaii v. Off. of Hawaiian Affs.*, 556 U.S. 163 (2009).
[101] *Hawaii*, 556 U.S. at 177.

interests. These included the Hawaiian Home Lands Recovery Act, which Congress passed in 1995 in response to challenges with Home Lands administration.[102]

In the Recovery Act, Congress clarified the respective roles of the Secretary and the State regarding amendments to the HHCA.[103] The Recovery Act also settled certain claims the State had asserted against the federal government for mismanagement of the Trust lands.[104] The Secretary has a lead role in implementing both parts of the Recovery Act.[105] As described further in the next section, Congress assigned the Secretary the substantive duty to review proposed State amendments to the HHCA and determine whether congressional approval is required before such amendments may become effective.

The land mismanagement claims arose out of alleged violations of the HHCA relating to "available lands," that is, lands available for homesteading purposes by native Hawaiians.[106] The State alleged two kinds of violations: the wrongful removal of "available lands" for use by the federal government, and the wrongful removal of "available lands" for use by the territorial government and, in some instances, third parties.[107] The Recovery Act established a process to allow the continued retention of certain lands initially designated "available lands" by the federal government in exchange for the transfer of federal lands to the Department of Hawaiian Home Lands to be held as "available lands" under the Trust.[108] The Secretary and the Department of Hawaiian Home Lands executed a Memorandum of Agreement in 1998 to implement the exchange provisions of the Recovery Act.[109] The exchange process has been substantially implemented.[110]

These efforts towards reconciliation were paralleled by the efforts of individual native Hawaiian beneficiaries and beneficiary groups to secure their rights through federal and state courts. Litigation to enforce the trust responsibility embodied in the Hawaiian Home Lands Trust may be brought by individuals under 42 U.S.C. § 1983, and directly against the State by the United States in federal court. "While the management and disposition of the home lands was given over to the state of Hawaii with the incorporation of the Commission Act into the state constitution, the trust obligation is rooted in federal law, and power to enforce that obligation is contained in

[102] Pub. L. No. 104-42, tit. II, 109 Stat. 353, 357.
[103] Hawaiian Home Lands Recovery Act § 204.
[104] The Recovery Act established requirements for the exchange of lands and the Department promulgated regulations for such exchanges in 2016. *Id.* § 203; s*ee* 43 C.F.R Part 47.
[105] The Recovery Act required the Department to identify lands that were part of the 200,000 acres in the HHCA and return them to the Home Lands Trust or compensate the Department of Hawaiian Home Lands with exchanged lands or remuneration. The process is nearly complete and is overseen by the Office of Native Hawaiian Relations.
[106] "Available lands" are lands described in Section 203 of the HHCA: "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'. . . ."
[107] S. REP. NO. 103-393, at 4-6 (1994) (statement of I. Michael Heyman, Counselor to Secretary of the Interior and Deputy Assistant Secretary for Policy).
[108] Hawaiian Home Lands Recovery Act § 203(a)-(c).
[109] Memorandum of Agreement Among the United States, the State of Hawai'i, and the Department of Hawaiian Home Lands (Aug. 31, 1998).
[110] The Memorandum of Agreement was modified in 2000 and the Department of Hawaiian Home Lands has a $16.9 million credit toward future acquisitions.

federal law."[111] The Ninth Circuit would later explain, "we have established the broad contours of Native Hawaiians' right to sue for breach of the state's § 5(f) trust obligations and held that § 5(f) . . . does create a right enforceable via 42 U.S.C. § 1983."[112] Although individuals have litigated in federal court,[113] the United States has not to date brought a suit to enforce the trust.

III. The Secretary's Home Lands Administration

Congress directed the Secretary to "advance the interests of the beneficiaries" in the administration of the HHCA and the Recovery Act.[114] The Recovery Act requires the Chairman of the Commission (appointed and administered by the State) to submit proposed amendments to the Secretary for a determination whether the consent of the United States would be necessary for enactment.[115] The Chairman is required to explain the nature of the change that would be made by the amendment and provide an opinion on whether the approval of Congress is required under Section 4 of the Admission Act.[116] The Secretary reviews the State's submission and makes a determination whether the consent of the United States is required. If so, the Secretary submits the proposed amendment to Congress along with a draft joint resolution approving the amendment, a description of the change, and a recommendation on the advisability of approving the proposed amendment.[117]

Congress thus recognized the benefit of an independent federal determination whether a proposed amendment requires the consent of the United States, appreciating that the interests of the Trust and its beneficiaries may not always coincide with the interests of the State. The Department promulgated regulations governing amendments to the HHCA pursuant to the Recovery Act in 2016.[118] These regulations track informal procedures agreed to by the Secretary and the Governor in 1987.[119]

Since 2021, the Department has twice considered state laws that would amend the HHCA and affect the rights of current beneficiaries. These two examples demonstrate the need for continued diligence by the Department to ensure compliance with the Secretary's statutory obligations to see that the Home Lands are properly managed, and that any potential dilution of beneficiary rights is the subject of consultations with the community and brought forward to Congress.

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[111] *Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467, 1472 (9th Cir. 1984) (citation omitted).
[112] *Day v. Apoliona*, 496 F.3d 1027, 1031 (9th Cir. 2007) (citations omitted) (citing and discussing *Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216 (9th Cir. 1979); *Price v. Akaka*, 3 F.3d 1220 (9th Cir. 1993); *Keaukaha*, 739 F.2d 1467)).
[113] *See e.g., Napeahi v. Paty*, 921 F.2d 897, 901 n.2 (9th Cir. 1990) (citing *Price v. Akaka*, 915 F.2d 469, 471-72 &n.2 (9th Cir. 1990)) (describing the Plaintiff "as a native Hawaiian and beneficiary of this public trust, [who] does have standing to enforce its provisions."). Beneficiaries have had significant success in litigation against the State for breach of trust in State court. *See, e.g., Ahuna v. Dep't of Hawaiian Home Lands*, 64 Haw. 327 (1982); *Kalima I*, 111 Haw. 84, 86 (2006); *Kalima II*, 148 Haw. 129 (2020); *Nelson v. Hawaiian Homes Comm'n*, 127 Haw. 185, 187 (2012).
[114] Hawaiian Home Land Recovery Act § 206.
[115] *Id*. § 204(a).
[116] *Id.*
[117] *Id.* §§ 204(b), (c).
[118] 43 C.F.R. Part 48.
[119] *See* discussion *supra* notes 91-93 and accompanying text.

Consultations are important to exchange information with the Native Hawaiian Community and allow the Secretary to understand the community's substantive views regarding proposed changes to the HHCA.[120] Consultation also is critical to ensure Congress becomes aware of the views of trust beneficiaries before it acts to ratify or reject any proposed amendments. Because the United States is authorized to file suit to enforce the terms of the trust, consultation may also assist in developing the information needed to determine whether and when resort to the federal courts is necessary and appropriate.

The first state law the Department recently considered, known as Act 80, would lower the blood quantum requirements for receiving benefits under the HHCA. As I stated in a letter to the Hawai'i House delegation in Congress, the statutes governing the trust:

> define a beneficiary of the Trust as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." With respect to the Trust, the Department uses the Congressionally defined terms "native Hawaiian" and "beneficiary" interchangeably. The Department maintains the distinction among beneficiaries (native Hawaiians who may or may not hold a lease), beneficiary lessees (native Hawaiians who hold leases), and lessees (persons who hold leases who may or may not be native Hawaiian). Currently, section 209 of the HHCA permits a surviving sibling of a deceased lessee to succeed to decedent's lease if they have at least one-half (1/2) Hawaiian blood. A similar but reduced blood quantum requirement applies to surviving spouses, children, or grandchildren, each of whom needs only one-quarter (1/4) Hawaiian blood to succeed. If approved by Congress, Act 80 would reduce existing blood quantum requirements for all such successors to one-thirty-second (1/32). As a result, previously ineligible descendants in some families will be allowed to keep lease awards within their family for up to three to four additional generations.[121]

Although the statutes use the dated language of blood quantum, the federal government's relationship with Native Hawaiians is political in nature, and descendancy can play a legitimate role in determining membership in the recognized political class.[122] Because the State's actions would significantly dilute the rights of current beneficiaries, the Department recommended against approving and enacting Act 80, in favor of further consultation with the State, the Native Hawaiian Community, and the beneficiaries, before making a recommendation to Congress.

A second recent example is provided by a 2021 Hawai'i law known as Act 236. That Act would allow the extension of home land lease terms to non-beneficiaries beyond the term provided by existing law. Like Act 80, such extensions would dilute the rights of beneficiaries to the Home

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[120] *See* 43 C.F.R. § 48.20(b); *see generally* 513 DM 1.

[121] Letter from Robert T. Anderson, Solicitor, to Representative Ed Case and Representative Kaiali'i Kahele 2 (Dec. 2, 2022).

[122] *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (upholding hiring preference for those of ¼ Indian blood who were also tribal members). *See also* COHEN'S HANDBOOK, *supra* note 7, § 4.03[4] (quoting *Mancari*, 417 U.S. at 555) ("The Supreme Court has upheld Indian definitions that include a blood quantum requirement so long as they can be rationally tied to the federal government's 'unique obligation towards the Indians.'").

Lands by maintaining encumbrances on Home Land property. In my letter to the Hawaii Attorney General, I stated:

> Paramount among the limitations imposed on the State's management of the Hawaiian home lands is the prohibition against increasing encumbrances on home lands without congressional approval. Act 236, as the State acknowledges, would have the effect of authorizing [Department of Hawaiian Home Lands] and the Commission to increase encumbrances on Hawaiian home lands. Accordingly, Act 236 must be reviewed by the Secretary and approved by Congress.[123]

Both of these examples demonstrate the importance of adhering to the process set out by statute and regulation in order to fulfill the Department's responsibilities under the HHCA and the Recovery Act. These duties should be undertaken in the context of the United States' general trust obligation to Native Hawaiians as outlined in this Opinion. Congress has acknowledged this trust obligation through the many statutes discussed in the following section. In addition to the normal rules governing private trusts, the United States has taken on the obligation to act in the best interest of the Native peoples in the administration of programs designed, here, for the benefit of Native Hawaiians. Given the complexity of certain decisions, especially in administering the HHCA, the Department can only effectively fulfill this obligation through early and thorough consultation with the Native Hawaiian Community, including the beneficiaries.[124]

IV. The Relationship between the United States and the Native Hawaiian Community

Along with its actions regarding the Home Lands, Congress has legislated to preserve and protect Native Hawaiian interests in more than 250 separate instances since 1910 on a wide range of substantive policy areas. Congress was deeply attentive to matters relating to the Territory of Hawai'i: it enacted the HHCA in 1921 and followed with a series of Hawaiian Home Land amendments over the years. In 1938, Congress authorized leases to Native Hawaiians in Hawai'i Volcanoes National Park and also recognized Native Hawaiian fishing rights in the park.[125] Congress enacted the Native American Programs Act of 1974,[126] the first of many statutes that would explicitly extend to the Native Hawaiians many of "the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities . . . ."[127]

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[123] Letter from Robert T. Anderson, Solicitor, to Attorney General Holly T. Shikada 2 (Oct. 13, 2022).
[124] *See* 513 DM 1. *See also* Consolidated Appropriations Act, Pub. L. No. 108-199, div. H, § 148, 118 Stat. 3, 445 (2004), establishing the Office of Native Hawaiian Relations and mandating that the Office "fully integrate the principle and practice of meaningful, regular, and appropriate consultation with the Native Hawaiian people by assuring timely notification of and prior consultation with the Native Hawaiian people before any Federal agency takes any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands." *Id.* § 148(b)(3).
[125] Pub. L. No. 75-680, § 3, 52 Stat. 781, 784 (1938).
[126] Pub. L. No. 93-644, § 801, 88 Stat. 2291, 2324 (1975).
[127] Native Hawaiian Health Care Improvement Act, 42 U.S.C. § 11701(19); *accord* Native Hawaiian Education Act, 20 U.S.C. § 7512(13); *accord* Hawaiian Homelands Homeownership Act of 2000, Pub. L. No. 106-568, tit. II, V, 114 Stat. 2872, 2874-75, 2968-69.

All of these enactments reflect the special legal and political status of the Native Hawaiian Community.

Congress has identified Native Hawaiians as "a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago,"[128] with whom the United States has a "special trust relationship."[129] Congress enacted statutes to study and preserve Native Hawaiian culture, language, historical sites, and religion,[130] and to require federal departments and agencies to consult with the Native Hawaiian Community.[131] For example, in 1978, Congress established Kaloko-Honokōhau National Historical Park "to provide a center for the preservation, interpretation, and perpetuation of traditional [N]ative Hawaiian activities and culture."[132] Congress directed the Secretary to employ Native Hawaiians at the Park.[133]

In several instances, Congress expressly states that it is exercising its plenary, constitutional authority to legislate with respect to Indian affairs: "The authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii."[134] Legislation enacted by Congress regarding Native Hawaiians, especially since 1974, expressly and repeatedly recognizes and reaffirms that a special legal and political relationship exists between the United States and the Native Hawaiian people because of their status as Indigenous Americans.[135]

Federal court decisions have generally recognized Congress's establishment of a trust relationship with Native Hawaiians and acknowledged legislative acts to further that relationship. For example, the Ninth Circuit noted that Congress, in two separate statutes, gave "an extensive explanation of the historical trust relationship between the federal government and the Native Hawaiian people[,] making clear that the statutes are meant to benefit Native Hawaiians specifically."[136] In *Rice v. Cayetano*, a case involving voting eligibility to elect trustees for the State Office of Hawaiian Affairs, the United States Supreme Court explicitly declined to address

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[128] Native Hawaiian Health Care Improvement Act, 42 U.S.C. § 11701(1).
[129] *Id.* § 11701(12); *see also id.* § 11701(13), (15), (16), (20); Native Hawaiian Education Act, 20 U.S.C. § 7512(12)(B) ("Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship.").
[130] *See, e.g.*, Kaloko-Honokōhau National Park Re-establishment Act, 16 U.S.C. § 396d; Native American Languages Act, 25 U.S.C. §§ 2901-2906; National Historic Preservation Act of 1966, 54 U.S.C. § 302706; American Indian Religious Freedom Act, 42 U.S.C. §§ 1996–1996a.
[131] Hawaiian Home Lands Recovery Act § 203(d); National Historic Preservation Act of 1966, 54 U.S.C. § 302706(b); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3002(c)(2), 3004(b)(1)(B).
[132] Pub L. No. 95-625, tit. V, §§ 505(a), (e), 92 Stat. 3467, 3499 (1978).
[133] *Id.* Congress authorized Native Hawaiian preference and training in the administration of Kalaupapa National Park as well. Pub. L. No. 96-565, §§ 102, 107, 94 Stat. 3321, 3321, 3323 (1980).
[134] Native Hawaiian Health Care Improvement Act, 42 U.S.C. § 11701(17).
[135] Native Hawaiian Education Act, 20 U.S.C. § 7512(13) (citing multiple statutes where Congress has recognized and reaffirmed the political relationshop between the United States and the Native Hawaiian people.).
[136] *Burgert v. Lokelani Bernice Pauahi Bishop Tr.*, 200 F.3d 661, 664 (9th Cir. 2000) (holding that the statutes did not include language conferring judicially enforceable private rights).

"whether Congress may treat the [N]ative Hawaiians as it does the Indian tribes."[137] *Rice* addressed the narrow question of whether a state voting restriction violated the Fifteenth Amendment of the U.S. Constitution.[138] Therefore it does not affect the validity of the many federal statutes providing special treatment to Native Hawaiians under Congress's power over Indigenous affairs.

Additionally, federal agencies manage programs and deliver services to Native Hawaiians in much the same way they do for American Indians and Alaska Natives, consistent with congressional mandates and Executive directives.[139] The Department of the Interior is at the forefront of the relationship between the United States and the Native Hawaiian Community because of its long history with Hawai'i and congressional directives that the Department "effectuate and implement the special legal relationship" and "continue the process of reconciliation" with the Native Hawaiian Community.[140]

The Office of Native Hawaiian Relations (ONHR), formally established by Congress in 2004, discharges certain of the Secretary's responsibilities related to Native Hawaiians and serves as a conduit for the Department's field activities in Hawai'i, including those affecting Native Hawaiian resources, rights, and lands. Its mission is to serve as a liaison with the Native Hawaiian people—and the Department and its bureaus—on issues affecting Native Hawaiians. It does so in a variety of ways, including conducting consultations, ensuring compliance with the Native American Graves Protection and Repatriation Act[141] and the National Historic Preservation Act,[142] and administering programs relating to climate resiliency and Native Hawaiian language, arts, and culture.

Since there is no currently recognized governing entity, the government-to-government relationship is carried out directly with the Native Hawaiian people, and various organizations they have formed.[143] In 2016, the Department promulgated a rule providing a mechanism

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[137] 528 U.S. 495, 518-19 (2000).
[138] *Id.* at 514-17.
[139] *See generally* U.S. Dep't of the Interior, Office of Native Hawaiian Relations, information about federal programs and services, https://www.doi.gov/hawaiian/programs (last visited December 13, 2024).
[140] Consolidated Appropriations Act, Pub. L. No. 108-199, div. H, § 148, 118 Stat. 3, 445 (2004).
[141] 25 U.S.C. §§ 3001-3013.
[142] 54 U.S.C. § 300101 et seq.
[143] Congress requires federal agencies to consult with Native Hawaiians under several federal statutes. Currently, the Department and other federal agencies engage with the Native Hawaiian Community through Native Hawaiian organizations who serve as its informal representatives. *See, e.g.*, the National Historic Preservation Act of 1966, 54 U.S.C. § 302706; the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3002(c)(2), 3004(b)(1)(B). The Secretaries of Interior and Agriculture issued Order No. 3403 on fulfilling the trust responsibility in the management of federal lands and water and engage directly with Native Hawaiian organizations to address matters of mutual interest in the management of federal lands. Order No. 3403, Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters (Nov. 15, 2021). The Department of Defense established a consultation policy specific to Native Hawaiians in October 2011, which applies when proposing actions that may affect property or places of traditional religious and cultural importance or subsistence practices. *See* U.S. Department of Defense Instruction Number 4710.03: Consultation Policy with Native Hawaiian Organizations (2011). The National Park Service maintains "its special political and trust relationship with the Native Hawaiian community by interacting through Native Hawaiian organizations." *See* National Park Service Policy Memorandum 22-03, Fulfilling the National Park Service Trust Responsibility to

document."[144] The process will commence when a request is made by the Native Hawaiian Community to the Secretary.[145] Criteria for recognition are geared toward demonstrating that the request is developed through an open, democratic process. This includes an inclusive referendum by Native Hawaiians to ratify the governing document.[146] The Department has not yet received a request.

In sum, over the past several decades, Congress and the President have routinely reaffirmed and refined the responsibilities the United States bears toward Native Hawaiians. They recognize the Native Hawaiian people not "because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship."[147]

V. Conclusion

This Opinion provides the legal baseline for the Department's relationship with the Native Hawaiian Community. The United States has a trust relationship with Native Hawaiians manifested in trusts related to ceded lands administration and the Hawaiian Home Lands. Federal responsibilities are defined by statute, and the Secretary of the Interior has explicit trust duties spelled out in statutes and regulations. As described above, the Department's responsibilities require consultation with the Native Hawaiian Community and interaction with the State of Hawai'i related to land exchanges, qualifications of beneficiaries, and diminishment of resources provided to trust beneficiaries. In addition, the Department has set out a regulatory path for recognition of a Native Hawaiian government—which has been lacking since the overthrow of the monarchy. Whether to form such a government is a question for the Native Hawaiian people. Nevertheless, the Department has important duties and trust responsibilities to Native Hawaiians and their homeland regardless of their decision respecting their formal governmental status.

Robert T. Anderson

[144] 43 C.F.R. § 50.3.
[145] *Id.* § 50.20.
[146] *Id.* § 50.16.
[147] Native Hawaiian Education Act, 20 U.S.C. § 7512(12)(B).