No. 08-16668

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGIL E. DAY, et al.,
Plaintiffs
and

WENDELL MARUMOTO,
Plaintiff-intervenor – Appellant

v.

HAUNANI APOLIONA, ET AL.,
Defendants – Appellees
and

STATE OF HAWAII,
Defendant-intervenor – Appellee.

On Appeal from the United States District Court
for the District of Hawaii
Honorable Susan Oki Mollway, District Judge

WENDELL MARUMOTO'S OPENING BRIEF

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WENDELL MARUMOTO'S OPENING BRIEF

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 (federal question), 1343(3) and 1343(4) (civil rights) and 2202 (declaratory judgment).

On June 16, 2008 Wendell Marumoto, a citizen of the State of Hawaii and the United States and a beneficiary of Hawaii's federally-created Ceded Lands Trust, who is not of Hawaiian ancestry, for himself and other citizens similarly situated, moved to intervene in this case as a plaintiff to assert claims for declaratory and injunctive relief similar to the complaint in *Kuroiwa v. Lingle,* Civil No. CV 08-00153 JMS-KSC.[1] (SER A.)

This court has jurisdiction under 28 U.S.C. § 1291, as the district court entered final judgment in this case in favor of defendants on June 20, 2008. The Order Granting Second Motion for Summary Judgment entered

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1. The *Kuroiwa* plaintiffs, under 42 U.S.C. §1983, allege that state officers acting in their official capacities under color of state law violate Kuroiwa plaintiffs' constitutional and other rights, including their rights under the common law of trusts applicable to the federally-created Ceded Lands Trust; and conspiracy to deprive them of equal protection, privileges and immunities contrary to 42 U.S.C. §1985 and the common law it codifies. CV 08-00153 JMS-KSC Docket # 1 Complaint seeking declaratory and injunctive relief, not damages, was filed 4/03/2008. An appeal of the *Kuroiwa* case is also now pending before this court in CA9 08-16769.

on that date provided at page 34, "This order also renders moot Wendell Marumoto's motion to intervene." (ER 2.) Wendell Marumoto filed his notice of appeal on July 15, 2008. (ER 1.) The appeal is timely under FRAP 4(a)(1)(A).

ISSUES PRESENTED FOR REVIEW

1. Whether Wendell Marumoto is entitled to intervene as of right;

2. Whether, since the State of Hawaii's federally-created Ceded Lands Trust has never produced annual net income from which distributions to trust beneficiaries could lawfully be made, should control of the hundreds of millions of dollars of improper past distributions still held by the Office of Hawaiian Affairs ("OHA") be restored to the State for *all* the people of Hawaii; and

3. Whether the State, Trustee of the Ceded Lands Trust, or its agency, OHA, may, without violating basic trust law principles and the Fourteenth Amendment, continue to discriminate between trust beneficiaries on the basis of race.

STATEMENT OF THE CASE

On August 7, 2007 this court entered its decision, *Day v. Apoliona*, 496 F.3d 1027 (9th Cir. 2007). A little over two months later, on October 11,

2007 this court granted the State of Hawaii's motion to intervene and ordered filed the State's petition for rehearing and rehearing *en banc*.

> The State of Hawaii was amicus curiae in this matter in proceedings before the district court and on appeal. It presented an argument that was potentially dispositive of this case, namely, that plaintiffs do not have individual rights under § 5(f) of the Hawaiian Admission Act that are enforceable through 42 U.S.C. § 1983. Defendants, including the state Office of Hawaiian Affairs (OHA), took no position with regard to that question.

Day v. Apoliona, 505 F.3d 963, 964 (9th Cir. 2007)

In effect, by its argument that the *Day* plaintiffs have no rights enforceable under § 1983, the State of Hawaii sought to permanently close the door of the federal courts to *all* beneficiaries of Hawaii's federally-created Ceded Lands Trust. The federal judiciary would provide no redress for breach of that federally-created trust by the Trustee State of Hawaii or by its agency, OHA.

Concerned at this threat to fundamental rights of trust beneficiaries, Six Non-Hawaiians on November 13, 2007 moved in this court to intervene "on their own behalf and on behalf of the over one million Hawaii citizens similarly situated" to oppose the State's petition for rehearing. On November 30, 2007 this court denied the State's petition for rehearing and rejected the State's petition for *en banc* rehearing. (ER 10.) By a separate order also on November 30, 2007, this court denied the Six Non-Hawaiians'

motion to intervene "without prejudice to renewal before the district court on remand." (ER 9.)

After remand, OHA Defendants moved again in the district court for summary judgment. On May 5, 2008 the undersigned attorney wrote to the Hawaii Attorney General demanding that "some capable attorney free of conflict, inform the Trustee State of Hawaii and its Governor and other responsible officials of their fiduciary duties to all the beneficiaries; and vigorously oppose the OHA motion." (Exhibit A in ER 8.)

The State Attorney General did not reply to the May 5th letter. The docket entry of May 22, 2008 indicated that, instead of opposing OHA Defendant's motion, the State supported summary judgment in favor of all Defendants. (ER 13.)

On May 29, 2008 Six Non-Ethnic Hawaiians' moved for consolidation of briefing and hearings (ER 8.) arguing that, without consolidation of this case and *Kuroiwa v. Lingle,* CV 08-00153 JMS-KSC in the briefing and hearings as to the two issues of "standing" and "expenditure of trust funds to support the Akaka bill": Inconsistent rulings would be likely; and the interests of Ceded Lands Trust beneficiaries who do not meet the definition of "Hawaiian," that is, about 80% of the citizens of Hawaii, would not be represented in this case. On May 30, 2008, the district courts

in both *Day v. Apoliona*, CV 05-00649 SOM-BMK and *Kuroiwa v. Lingle* 08-00153 JMS-KSC denied the motion to consolidate. (ER 7.)

On June 4, 2008, the State of Hawaii moved for summary judgment on a theory that (as it said) it had never previously advanced in either the district court or this circuit: that as a factual matter "in every year since Statehood, the State has spent far more on permissible section 5 (f) purposes than it has received in public land trust income.." (ER 5, Memorandum in Support of State of Hawaii's Motion for Summary Judgment at 4 and 5 and 9.)

On June 20, 2008, the district court granted OHA's summary judgment motion and entered final judgment in favor of all defendants, mooting both the State's motion for summary judgment and Wendell Marumoto's motion to intervene. (ER 2.) As feared by Wendell Marumoto, the district court in its order granting OHA's motion for summary judgment turned a blind eye to his interests and the interests of those other beneficiaries who do not meet the definition of "Hawaiian.".

STATEMENT OF FACTS

WENDELLL MARUMOTO is a citizen and registered voter of the United States and the State of Hawaii. He was born and raised and has lived in Hawaii all his life except for the years at college and graduate school and

employment in San Francisco for two years following graduation. He is of Japanese ancestry, the third generation of his family in Hawaii, and has three grandchildren with a modicum of Hawaiian ancestry. (ER 3.)

As beneficiaries of Hawaii's Ceded Lands Trust, he and his family members are among the equitable owners of the trust fund which is the source of the money and land and power at issue in this suit. His declaration and personal statement (ER 3) attest to the progression from the HHCA, generally accepted during his teen years as fair because it was limited in scope and duration; to the trend in recent decades, exemplified by the defendants' position in this suit, to make the special treatment permanent and extend it to an ever-increasing number of persons, including those with only one drop of the favored ancestor's blood. This trend now threatens the just and prosperous society and government of the State of Hawaii to whose development his ancestors and the others contributed after coming to Hawaii from more than 150 years ago.

LEGAL HISTORY OF HAWAII'S CEDED LANDS TRUST

The Ceded Lands Trust (also known as the "Public Land Trust" and as the "§5(f) trust") originated in 1898 with the Annexation Act. The Republic of Hawaii ceded all its public lands (about 1.8 million acres formerly called the Crown lands and Government lands of the Kingdom of Hawaii) to the

United States with the requirement that all revenue from or proceeds of these lands except for those used for civil, military or naval purposes of the U.S. or assigned for the use of local government "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes". *Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States,* Resolution No. 55, known as the *Newlands Resolution,* approved July 7, 1898*;* Annexation Act, 30 Stat. 750 (1898) (SER I).

As part of the Annexation Act, "The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars." At the end of 1892, the last full year of the Kingdom of Hawaii, its bonded debt was $2,314,000. (Schmitt, Historical Statistics of Hawaii, *supra* Table 25.13.) The bonded debt of the Republic of Hawaii at the end of 1897, the last full year before annexation, was $4,489,000. The bonded debt of the Territory of Hawaii in 1901 was $940,000 (*Id.*) suggesting that the United States may have paid off something over $3.5 million of the public debt accumulated by the Kingdom and Republic.

The Organic Act of April 30, 1900, c 339, 31 Stat. 141 reiterated that "All funds arising from the sale or lease or other disposal of public land 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 approved July 7, 1898."

The *Newlands Resolution* established the ceded lands trust. Such a special trust was recognized by the Attorney General of the United States in Op. Atty. Gen. 574 (1899). It has also been recognized several times by the Hawaii Supreme Court.

> The federal government has always recognized the people of Hawaii as the equitable owners of all public lands; and while Hawaii was a territory, the federal government held such lands in 'special trust' for the benefit of the people of Hawaii. *State v. Zimring*, 58 Hawaii 106, 124, 566 P.2d 725 (1977).
>
> Excepting lands set aside for federal purposes, the equitable ownership of the subject parcel and other public land in Hawaii has always been in its people. Upon admission, trusteeship to such lands was transferred to the State, and the subject land has remained in the public trust since that time. *Id* at 125.

Yamasaki, 69 Haw. 154. 159, 737 P.2d 446, 449 (1987); see also Hawaii Attorney General Opinion 95-03 July 7, 1995 (SER G) to Governor Benjamin J. Cayetano from Margery S. Bronster, Attorney General,

> Section 5 [Admission Act] essentially continues the trust which was first established by the Newlands Resolution in 1898, and continued by the Organic Act in 1900. Under the Newlands Resolution,

Congress served as trustee; under the Organic Act, the Territory of Hawaii served as Trustee.

The insistence of the Republic of Hawaii in 1898 that the United States hold the ceded lands solely for the benefit of the inhabitants of Hawaii was based on historic precedent and had significant, long-reaching consequences for the future State of Hawaii. The United States had held a similar trust obligation as to the lands ceded to it by the original thirteen colonies. Once those new states were established, the United State's authority over the lands would cease. Other future states, Nevada for example, did not have such an arrangement. As this court held in *U.S. v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997), citing *Light v. United States*, 220 U.S. 523, 536, 31 S.Ct. 485, 488, 55 L.Ed. 570 (1911), the United States still owns about 80% of the lands in Nevada and may sell or withhold them from sale or administer them any way it chooses.

In 1921, the United States, holding title as Trustee of the ceded lands, adopted the Hawaiian Homes Commission Act, 1920 (Act of July 9, 1921, c 42, 42 Stat. 108) ("HHCA"). The HHCA designated some 200,000 acres of the ceded lands as "available lands" for lease to "native Hawaiians" (defined in the HHCA as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778") at rent of $1 per year for 99 years renewable for an additional 100 years.

The adoption of the HHCA for the first time injected partiality and race into the previously impartial and race-neutral Ceded Lands Trust. In 1920, prior to the adoption of HHCA, each of the then 255,912 citizens of the Territory of Hawaii[2] would have equitably owned about 5.471 acres as his or her pro rata portion of the approximately 1.4 million acres (the area remaining from the original 1.8 million acres after deducting the about 400,000 acres used for civil, military or naval purposes of the U.S.). Immediately upon enactment of HHCA and designation of some 200,000 acres of the ceded lands trust corpus as "available lands" for the exclusive benefit of "native Hawaiians", the pro rata portion equitably owned by each of the native Hawaiian beneficiaries would have increased to approximately 9.48 acres; and the pro rata portion equitably owned by each of the other beneficiaries decreased to approximately 4.689 acres.[3]

In 1959, upon the admission of the Territory of Hawaii into the Union as a state, the Admission Act continued the Ceded Lands Trust as changed

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2. *Historical Statistics of Hawaii*, Schmitt, 1977, U. of Hawaii Press at 25.

3. The number of native Hawaiians, i.e., persons of 50% or more Hawaiian ancestry, is not reported by Schmitt or otherwise available. For 1920, Schmitt reports 23,723 as Hawaiian and 18,027 as Part Hawaiian. The calculations for 1920 assume that all 41,750 are native Hawaiians. It is highly probable that the actual number is less, and the pro rata acreage equitably owned by each native Hawaiian as a result of HHCA is probably higher.

by the HHCA. The compact in Admission Act § 4 required that the new State of Hawaii adopt the HHCA as a provision of the State Constitution, "subject to amendment or repeal only with the consent of the United States" and "(3) that all proceeds and income from the 'available lands', as defined by said Act, shall be used only in carrying out the provisions of said Act."

Admission Act § 5(f) provided that the ceded lands, including the 200,000 acres designated as "available lands" under the HHCA, "together with 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 one or more of five purposes, "for the support of public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians as defined in the" HHCA 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."

In the first decades following admission, the State apparently continued to administer the lands that had been set aside under the Hawaiian Homes Commission Act for the benefit of native Hawaiians. The income from the balance of the public lands is said to have "by and large flowed to the department of education." Hawaii Senate Journal, Standing Committee

Rep. No. 784, pp. 1350, 1351 (1979). *Rice v. Cayetano,* 528 U.S. 495, 508 (2000). This course of action for those first 20 years of statehood suggests an understanding that the words in Admission Act § 5(f) "for the betterment of the conditions of native Hawaiians as defined in the" HHCA referred only to the use of the 200,000 acres set aside for the HHCA; and that the remaining 1.2 million acres were to be held in a public trust for all the people of Hawaii including but with no special preference for native Hawaiians or for any other class.

In 1978, at the recommendation of the Constitutional Convention, Hawaii's State Constitution was amended, among other ways, to add what is now Art. XII, Section 5, to establish OHA, and Section 6 to enumerate the powers of the OHA Board of Trustees. Those powers include, "to manage and administer … all income and proceeds from that pro rata portion of the trust referred to in Section 4 of this article for native Hawaiians." (The new Section 4 of Art. XII refers to the approximately 1.4 million acres of the ceded lands returned to Hawaii by §5(b) but excludes the approximately 200,000 acres of "available lands" designated for native Hawaiians in the HHCA.) Section 4 then provides that those remaining ceded lands, i.e., the about 1.2 million acres, "shall be held by the State as a public trust for native Hawaiians and the general public.") Undisclosed publicly at the time the

proposed amendments were submitted to voters for ratification, the effect of this amendment was apparently intended to change the understanding that had prevailed for the previous 20 years.

In 1980, the Hawaii Legislature enacted Section 10-13.5 H.R.S. to provide that, "Twenty per cent of all funds derived from the public land trust shall be expended by the Office of Hawaiian Affairs for the betterment of the conditions of native Hawaiians." In terms of equitable ownership, the effect of this statute would have been to increase the pro rata portion equitably owned by each native Hawaiian even more than it had already been enlarged by the HHCA in 1921; and to further *decrease* the pro rata equitable ownership of each non-Hawaiian beneficiary.[4]

In 1987 in *OHA v. Yamasaki,* 69 Haw. 154 (1987) the Hawaii Supreme Court held that Section 10-13.5 H.R.S. law provided "no judicially discoverable standard" for determining the amount payable to OHA as the pro rata share of the income or proceeds from the trust for native Hawaiians.

The legislature then revised Section 10-13.5 to calculate the 20% for OHA for native Hawaiian beneficiaries on "revenues." Then, after several

4. After the 1980 legislation setting 20% as the pro rata portion for native Hawaiians, using Schmitt's total population of 964,691and assuming 40,000 native Hawaiians, the approximate pro rata portion of the Ceded Lands Trust corpus equitably owned by each native Hawaiian beneficiary had increased to over 11.9 acres; and the approximate pro rata portion equitably owned by each of the other beneficiaries had decreased to slightly under 1 acre.

years, in *OHA v. State*, 96 Haw. 388 (2001), the Hawaii Supreme Court held that the replacement law was repealed by its own terms. This revived the 1980 version of Section 10-13.5 HRS which, as the Hawaii court had held, provided "no judicially discoverable" standards to resolve the dispute. The State Legislature took no action to establish a new mechanism for determining the amount payable to OHA for native Hawaiian beneficiaries; and the State's payments of 20% of "revenue" to OHA were discontinued by Governor Cayetano as of the first quarter in fiscal year 2002.

Defendant Linda Lingle was elected Governor of the State of Hawaii in November 2002 and inaugurated in January 2003. On February 11, 2003, she issued Executive Order 03-03 directing all state departments to pay OHA quarterly 20% of all "receipts" for the use of parcels of ceded land. (SER E.)

Wendell Marumoto has closely observed many of these historical events since Statehood. Here is his perspective in his own words. (ER 3):

> It is my understanding that this suit does not challenge the Hawaiian Homes Commission Act ("HHCA") or the use of the approximately 200,000 acres of ceded lands set aside as "available lands" for the HHCA.
>
> My recollection from early teen-age years is that people in Hawaii generally accepted the HHCA as fair because it was limited in scope and duration: It gave a hand to "native Hawaiians" (descendants of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778, as defined in the HHCA) those

> most affected by the Hawaii's joining the World; and their numbers would naturally decrease as they voluntarily intermarried and assimilated. They would then participate equally without special treatment in the pursuit of happiness like all the other people in Hawaii.
>
> The trend I have observed in recent decades, exemplified by the Defendants' position in this suit, has been to make the special treatment permanent and extend it to an ever increasing number of persons, including those with only one drop of the favored ancestry's blood.
>
> I want to intervene here to ask this Honorable Court to preserve the just and prosperous society and government of the State of Hawaii to whose development my ancestors and the others contributed after coming to Hawaii from more than 150 years ago.
>
> With all due respect, I believe the Sovereignty movement, Akaka bill, Ho'oula Lahui Aloha, To Raise a Beloved Nation, Kau Inoa, and the demands for special privilege, money, lands and power based solely on a smidgen of favored ancestry, have brought Hawaii to the brink of self-destruction. Only the judiciary can save Hawaii now, and I pray that it will do so.

The most recent chapter in the legal history of Hawaii's Ceded Lands Trust was written by this court August 7, 2007, "the lands ceded in the Admission Act are to benefit '*all* the people of Hawaii,' not simply Native Hawaiians." *Day v. Apoliona*, 496 F.3d 1027, 1034, FN 9 (9th Cir. 2007) (emphasis in original):

> Our discussions of standing, rights of action, and the scope of the § 5(f) restrictions have arisen in cases brought by Native Hawaiian individuals and groups. But neither our prior case law nor our discussion today suggests that as a matter of federal law § 5(f) funds must be used for the benefit of Native Hawaiians or Hawaiians, at the expense of other beneficiaries. *Id*.

At 496 F.3d 1033 this court reaffirmed the basic trust law principle that each individual beneficiary has the right to maintain a suit to compel the trustee to perform his duties as trustee; to enjoin the trustee from committing a breach of trust; and to compel the trustee to redress a breach of trust.

> The instant case involves a public trust, and under basic trust law principles, beneficiaries have the right to "maintain a suit (a) to compel the trustee to perform his duties as trustee; (b) to enjoin the trustee from committing a breach of trust; [and] (c) to compel the trustee to redress a breach of trust." Restatement 2d of the Law of Trusts, § 199; *see also id.* § 200, comment a.

In the closing paragraph, at 496 F.3d 1039 and 1040, this court said,

> Cases related to the OHA's expenditure of funds for Native Hawaiians have reached our court on numerous prior occasions, but we and the district court have shed little light on the merits of § 5(f) claims. *See generally* *Arakaki v. Lingle,* 477 F.3d 1048, 1052-53 (9th Cir.2007) (citing cases). Absent further foundational issues with Day's claim, today's affirmance of our existing precedent should permit much-needed elucidation of the substance of § 5(f).

Two recent actions by the State of Hawaii offer encouragement that the hoped-for elucidation of the substance of § 5(f) may be forthcoming:

(1) In April of this year, the State of Hawaii filed a petition for *certiorari* seeking U.S. Supreme Court review of the January 31, 2008 decision of the Supreme Court of the State of Hawaii.[5] In that decision the Hawaii Supreme Court construed the 1993 Congressional Apology

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5 *Office of Hawaiian Affairs, et al v. Hawaii*, *et al*, 117 Haw. 174, 177 P.3d 884 (Jan. 31, 2008)

Resolution as "dictating" that no ceded lands (i.e., the same 1.2 million acres which are the subject of this action) be sold, exchanged or transferred until the claims of native Hawaiians to those lands are resolved. The U.S. Supreme Court accepted the case for review on October 1, 2008. One sentence from the State's petition echoing this court's August 7, 2007 holding that "the lands ceded in the Admission Act are to benefit '*all* the people of Hawaii,' not simply Native Hawaiians." *Day v. Apoliona*, 496 F.3d 1027, 1034, FN 9 (9th Cir. 2007) (emphasis in original):

> Though the Apology Resolution contains no such clear statement, the Hawaii Supreme Court found that Congress intended not just to regulate, but to eliminate, the State's preexisting and explicit right to transfer, exchange, or sell these lands *for the benefit of all the people of Hawaii* in accord with the purposes set forth in the Admission Act. (Emphasis added.)

(The State's petition for certiorari, as well as OHA's opposition, the State's reply and the *amici* briefs by 29 other state attorneys general and Pacific Legal Foundation in support of the State of Hawaii's petition are assembled and available online at www.inversecondemnation.com .)

and

(2) The State's motion for summary judgment and accompanying papers filed in this case June 4, 2008 (ER 5 and ER 6) acknowledging for the first time, that the Ceded Lands Trust at issue in this case, costs the State many times more annually than the 1.2 million acres bring in.

The potentially decisive significance of this second acknowledgment by the State, is spelled out below under the second issue presented for review.

SUMMARY OF ARGUMENT

Intervention as of right. Wendell Marumoto meets all this court's criteria for intervention. He claims an interest as a beneficiary and as one of the equitable owners of the Ceded Lands Trust, and the trust funds that have been and are being distributed by the State and spent and held by OHA that are the subject of this action. He is so situated that the entry of judgment in this action may (and in fact already has) as a practical matter impaired and impeded his ability to protect that interest. The district court decided this case without even considering his interests or the interests of the many other beneficiaries similarly situated. Although an existing party, the State of Hawaii as Trustee, has a fiduciary duty of loyalty to *all* the beneficiaries, including Wendell Marumoto and other beneficiaries similarly situated, the State supported entry of judgment against them.

Forty-four days before the posted motions cut-off date and six months before the date set for trial of this case, his attorney demanded that the State carry out its duty to defend the trust estate. When that and other efforts were of no avail he timely moved to intervene on June 16, 2008, two days before

the motions cut-off date and five months before the date set for trial. No other party could have been unduly prejudiced by the minimal postponement of the hearing date that would have been entailed by his intervention; and no change in the main events on the schedule would have been required.

No net income ever produced. The trust distributions of "income" to OHA for native Hawaiian beneficiaries for almost three decades have all been illegal. During all those years, the trust has never generated any annual net income from which distributions could lawfully be made to any beneficiaries.

Invidious discrimination. The State as Trustee and its agency, OHA, and the OHA Trustees violate basic trust law principles and the Fourteenth Amendment by their invidious discrimination between trust beneficiaries on the basis of race.

ARGUMENT

I. Intervention as of right.

A. Standard of review.

A district court's denial of a motion to intervene is reviewed de novo. *See United States v. Alisal Water Corp.,* 370 F.3d 915, 918 (9th Cir.2004). *DBSI/TRI IV Ltd. Partnership v. U.S.* 465 F.3d 1031, 1037 (9th Cir. 2006)

We construe Rule 24(a) liberally in favor of potential intervenors. *Sw. Ctr. for Biological Diversity v. Berg,* 268 F.3d 810, 818 (9th Cir.2001). *California ex rel. Lockyer v. U.S.,* 450 F.3d 436, 440 (9th Cir. 2006)

B. The criteria for intervention as of right.

Under FRCP Rule 24(a)(2) "the court must permit anyone to intervene who claims an interest" (Wendell Marumoto claims an interest as a beneficiary and one of the equitable owners of the Ceded Lands Trust) "relating to the property or transaction that is the subject of the action" (the approximately 1.2 million acres of the Ceded Lands Trust , and distributions by the State and expenditures by OHA of the trust income and proceeds) "and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect that interest" (the district court impaired and impeded Wendell Marumoto's ability to protect his interest by deciding this case without even considering his interests or the interests of the other beneficiaries similarly situated). Although an existing party (the State of Hawaii as Trustee) had a fiduciary duty of loyalty to *all* the beneficiaries, including Wendell Marumoto and other beneficiaries similarly situated, the State supported entry of judgment adverse to them. (State of Hawaii's motion for summary judgment and concise statement filed June 4, 2008, ER 5 and ER 6.)

C. Timeliness

> Determination of the timeliness of a motion to intervene depends upon (1) "the stage of the proceeding," (2) "the prejudice to other parties," and (3) "the reason for and length of the delay."

Day v. Apoliona, 505 F.3d 963, 965 (9th Cir. 2007).

(1) Wendell Marumoto appropriately moved to intervene during the motions stage.

Remand of this case from this court to the district court in late December 2007, reset the clock. The new schedule posted on the district court docket 01/03/2008 showed motions due by 6/18/2008, discovery due by 9/19/2008 and Bench Trial set for 11/18/2008.

Forty-four days before the posted motions-cut-off date and six months before the date set for trial, the undersigned attorney demanded (Exhibit A in ER 8) that the State attorney general cause a deputy attorney general

> "or some capable attorney free of conflict, to inform the Trustee State of Hawaii and its Governor and other responsible officials of their fiduciary duties to all the beneficiaries; and vigorously oppose the OHA motion" [for summary judgment].

Because of the presumption that the government, when it is a litigant, will adequately represent the interests of the public generally,[6] it was

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6 Where "the government is acting on behalf of a constituency it represents," as it is here, this court assumes that the government will adequately represent that constituency. *Prete v. Bradbury,* 438 F.3d 949, 956 (9th Cir. 2006); *see also Arakaki v. Cayetano,* 324 F.3d 1078, 1086 (9th Cir.2003). In

appropriate to first ask the attorney general to defend the trust estate from OHA's claims and to represent the interests of trust beneficiaries generally. Defending the trust and the interests of beneficiaries is the duty of the state attorney general as attorney for a fiduciary, the State of Hawaii acting in its role as Trustee of the Ceded Lands Trust for the benefit of all the people of Hawaii, not simply for the Hawaiian beneficiaries.

Under the Hawaii Probate code, Rule 42, Conflict of Interest, attorneys "owe a duty to notify such beneficiaries … of activities of the fiduciary actually known by the attorney to be illegal that threaten the security of the assets under administration or the interests of the beneficiaries." Under Rule 42(c) an attorney for a trust is an officer of the court and shall assist the court in securing the efficient and effective management of the estate and to ensure that required actions such as accountings … are performed timely. The attorney, after prior notice to the fiduciary, shall have an obligation to bring to the attention of the court the nonfeasance of the fiduciary.

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order to overcome this presumption, the would-be intervenor must make a "very compelling showing" that the government will not adequately represent its interest. *Id.* at 1086. *Gonzalez v. Arizona* 485 F.3d 1041, 1052 (9th Cir. 2007)

Under LR83.3 every member of the bar of the U.S. District Court shall be governed by and shall observe the standards of professional and ethical conduct required of members of the Hawaii State Bar.

The attorney general did not respond to the demand. The undersigned then moved to consolidate the briefings and hearings in this case and in the *Kuroiwa* case on the common issues of "standing" and "expending trust funds for the Akaka bill." (ER 8.) The purpose of asking for consolidation was to achieve consistent rulings by the two district court judges considering identical issues in the separate cases. Both district court judges on May 30, 2008 denied the requested consolidation (which would have obviated intervention). (ER 7.)

Wendell Marumoto timely filed his motion to intervene on June 16, 2008, (ER 3) two days before the motions cut-off date and five months before the date set for trial.

(2) Wendell Marumoto's intervention would have caused no undue prejudice to the other parties.

Neither the State nor OHA Defendants could have been prejudiced by the postponement entailed in permitting Wendell Marumoto's intervention. Because of their conflicting duties and interests, the State as Trustee and OHA Trustees themselves had a fiduciary duty to the court and to all the

beneficiaries to bring their conflicts to the attention of the court and seek instructions.

The Uniform Trustees' Powers Act, HRS § 554A-5(b) and the common law it codifies allow a trustee to exercise a trust power, such as the power to "to effect distributions of money and property," § 554A-3(c)(22), "only by court authorization" "if the duty of the trustee and the … trustee's interest as trustee of another trust, conflict in the exercise of a trust power." The State's duty to all the people of Hawaii as trustee of the Ceded Lands Trust conflicts with its interest under the OHA laws in bettering the conditions of native Hawaiians and Hawaiians at the expense of the other beneficiaries. Yet, without court authorization, the State has distributed hundreds of millions (SER C and D) in ceded lands trust funds and properties to OHA exclusively for native Hawaiians and/or Hawaiians but has distributed no ceded lands trust funds or properties to or exclusively for all the rest of the beneficiaries. OHA still held $4.5M as of 6/30/07. (SER B.)

The same considerations apply to the OHA defendants. Under *Price v. Akaka*, 928 F.2d 824, 827 (9th Cir. 1991) (*Akaka I)*, so long as § 5(f) trust income remained in the hands of the state, as it did when transferred from

the § 5(f) corpus to the OHA corpus, the § 5(f) obligations applied. …

Since the § 5(f) trust funds, continue to be held for *all* the people of Hawaii so long as the funds are in the hands of OHA, the OHA Trustees have a fiduciary duty to all the people that conflicts with their interest in bettering the conditions of native Hawaiians and Hawaiians at the expense of the other beneficiaries.

In *Kapiolani Park Preservation Society v. City & County*, 69 Haw. 569, 572 (1988), the Hawaii Supreme Court held that, where a governmental agency is the trustee of a charitable trust and

> will not seek instructions of the court as to its duties, even though there is a genuine controversy as to its power to enter into a particular transaction and where the attorney general as *parens patriae* has actively joined in supporting the alleged breach of trust, the citizens of this State would be left without protection, or a remedy, unless we hold, as we do, that members of the public, as beneficiaries of the trust, have standing to bring the matter to the attention of the court.

The Hawaii Supreme Court later cited that ruling with approval in *Pele Defense Fund v. Paty*, 73 Haw. 578, 594, 837 P.2d 1247 (1992), a suit to enforce the State's compliance with the 5(f) trust provisions. In the decision by Justice Klein, (now counsel for the OHA Trustees in this case), he said, "Additionally, unless members of the public and native Hawaiians, as beneficiaries of the trust, have standing, the State would be free to dispose of the trust res without the citizens of the State having any recourse."

The doctrine of *parens patriae* has also been expanded in the United States, for example, to permit the attorney general of a state to commence litigation for the benefit of state residents for federal antitrust violations (15 U.S.C.A. § 15c).

(3) The interests of non-Hawaiian beneficiaries had already been injected into this case.

In allowing the State to intervene in this case after final judgment at the trial stage and after final decision on appeal, this court mentioned as one of the relevant factors,

> Although prejudice to a party exists when " 'relief from longstanding inequities is delayed,' " *id.* at 922 (citations omitted), granting the State of Hawaii's Motion to Intervene will not create delay by "inject[ing] new issues into the litigation,"

Day v. Apoliona, 505 F.3d 963, 965 (9th Cir. 2007).

The same reasoning applies to Wendell Marumoto's motion to intervene to defend the interests of non-Hawaiian citizens as beneficiaries of the Ceded Lands Trust. This court itself admirably injected that issue into this case by holding on August 7, 2007, "the lands ceded in the Admission Act are to benefit '*all* the people of Hawaii,' not simply Native Hawaiians." *Day v. Apoliona*, 496 F.3d 1027, 1034, FN 9 (9th Cir. 2007) (emphasis in original):

> Our discussions of standing, rights of action, and the scope of the § 5(f) restrictions have arisen in cases brought by Native Hawaiian individuals and groups. But neither our prior case law nor our discussion today suggests that as a matter of federal law § 5(f) funds must be used for the benefit of Native Hawaiians or Hawaiians, at the expense of other beneficiaries. *Id*.

Non-Hawaiian beneficiaries followed up promptly by opposing the State's petition for rehearing or *en banc* rehearing; by demanding that the State Attorney General carry out his duty to defend the trust and protect their interests; by moving to consolidate briefings and hearing; and finally, when those reasonable, inexpensive and less time-consuming steps did not succeed, Wendell Marumoto moved to intervene. As with the State's intervention, the fact that Wendell Marumoto filed his motion June 16th, rather than earlier in the proceedings, does not cause prejudice to Day and the other plaintiffs, since the practical result of his intervention - challenging the use of Ceded Lands Trust funds for the benefit of Native Hawaiians and Hawaiians, at the expense of other beneficiaries - would have occurred whenever a spokesperson for those interests joined the proceedings.

(4) Reason for and length of delay.

The compelling reason for first asking the existing party, the State of Hawaii, to carry out its duty to beneficiaries, has been covered. The State's non-response, leaving open the possibility that it might do so, added uncertainty and did not move the case forward. When it became clear that

the State would not step up to the plate, it was reasonable to ask for consolidated hearing and briefing on the common issues in *Kuroiwa* and this case. That would have "killed two birds with one stone," made intervention unnecessary and could have been accomplished with a one-sentence order.

Wendell Marumoto's June 16, 2008 motion to intervene would not have required any change in the posted case schedule, which contemplated that motions might be made through June 18th. One further hearing on OHA's dispositive motion could easily have been set to allow briefing on the important issues raised by both Wendell Marumoto, on behalf of himself and other non-Hawaiian beneficiaries, and the State's June 4, 2008 "bombshell" acknowledging for the first time that the Ceded Lands Trust had never since Statehood in 1959 generated any annual net income. Both these events are potentially dispositive of the most important issue facing Hawaii. A hearing even 60 days later (far more than needed) would have left the existing schedule intact. Settlement conference set for 8/25/2008; Discovery due by 9/19/2008; Final Pretrial Conference set for 10/07/2008 and Bench Trial set for 11/18/2008 all would have remained unchanged.

In short, nothing on June 20, 2008 called for a rush to judgment. Rather, the stage was set for the much-needed elucidation of the substance of § 5(5) hoped for by this court in the closing words of the August 2007

decision in *Day*. The district court should have allowed Wendell Marumoto to intervene and heard his claims.

D. Relief sought. Reverse and remand with instructions to allow Wendell Marumoto to intervene as a plaintiff and file a complaint as requested. Alternatively, if this court also reverses the related *Kuroiwa* decision, both cases could, efficiently and inexpensively, be remanded with instructions to consolidate further proceedings.

II. The Ceded Lands Trust generates no net income from which distributions to beneficiaries may lawfully be made.

A. Standard of review. Since, under basic trust law principles cited below, the State of Hawaii, as Trustee, has no discretion to distribute income when there is no net income, the standard of review should be de novo. Because the Trustee-State of Hawaii itself has shown as an indisputable fact that the trust has never since Statehood had any annual net income, the district court's judgment should be reversed as a matter of law.

B. The State's June 4, 2008 revelation.

On June 4, 2008 in this case, the State of Hawaii, apparently for the first time in history, publicly accounted, at least in part, for and acknowledged that the Ceded Lands Trust costs the State many times more annually than the 1.2 million acres bring in. The State also acknowledged

that this disparity between trust expenses and receipts has occurred in every year since statehood; and that the State has never before disclosed this information to the district court or to this court.

The State's motion for summary judgment filed June 4, 2008, together with the accompanying memorandum in support are (ER 5, Docket #142); the concise statement of facts and declarations by Georgina K. Kawamura, Director of Finance of the State of Hawaii, and Arthur J. Buto, State Land Information Systems Manager are (ER 6, # 143).

The State's memorandum in support summarizes the new disclosure as follows:

At page 1, "We show in this memorandum that every year the State has spent billions for at least two of section 5(f)'s purposes – 'the support of the public schools and other public educational institutions' and 'the making of public improvements.'"

At page 9, "First, the State has never previously made the instant argument, and so neither this Court not the Ninth Circuit has had to pass upon it. Second, that as a factual matter the State would have prevailed on summary judgment had it made this argument (i.e, in every year since Statehood, the State has spent far more on permissible section 5(f) purposes than it has received in public land trust income.)"

Exhibit H to Ms. Kawamura's Declaration (ER 6) shows interest paid on bonds for various capital improvement projects for the five most recent fiscal years. As an example, the interest paid for FYE 2007 was $237,494,513. Mr Buto's declaration reports total receipts from the § 5(f) lands for that year as $128,480,574, less airports receipts of $41.8 million, also less affordable housing developments receipts of $4.8 million, also less reimbursements and pass-throughs of $21.6 million for the adjusted total receipts from the ceded lands of $60,280,573. (To this effect, see also the State's memorandum at page 12 and footnote 10.) Thus, the interest expense of $237.48M paid by the State for capital improvement bonds alone (presumably for capital improvements to the ceded lands) for FYE 2007 was almost four times the $60.28M total ceded lands receipts.

Therefore, as the State memorandum (in ER 5) correctly argues at page 5, footnote 4, since the State has spent far more than the total trust receipts for permissible trust purposes, beneficiaries seeking damages (as the *Day* plaintiffs here do) cannot show they have suffered a loss from any alleged misspending of trust funds.

To putative Intervenor and Appellant Wendell Marumoto, who seeks, not damages, but declaratory and injunctive relief to stop the distributions for a favored few at the expense of the other beneficiaries, this new evidence

has a greater significance: It proves that the Ceded Lands Trust has never since statehood generated annual net income from which distributions could lawfully be made to any beneficiaries, whether to OHA for native Hawaiian beneficiaries or to or for any other beneficiaries.

C. Trust law as to distributions to income beneficiaries.

In *Day* at 496 F.3d 1033 this court reaffirmed that basic trust law principles apply to the Ceded Lands Trust.

(1) Uniform Principal and Income Act, "UPIA" HRS 557A-102, Definitions:

"Beneficiary" includes, … in the case of a trust, an income beneficiary and a remainder beneficiary."

"Income beneficiary" means a person to whom a trust's net income is or may be payable.

"Income interest" means an income beneficiary's right to receive all or part of the net income, whether the terms of a trust require it to be distributed or authorize it to be distributed at the trustee's discretion.

"Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period.

Under UPIA, HRS 557A-103, Fiduciary duties; general principles

(a) In allocating receipts and disbursements to or between principal and income, … a fiduciary: …

(3) Shall administer a trust … in accordance with this chapter if the terms of the trust … do not contain a different provision or do not give the fiduciary a discretionary power of administration; and …

(b) In exercising … a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries.

UPIA, HRS § 557A-201 "Determination and distribution of net income," has no provision permitting distribution to income beneficiaries when there is no net income.

(2) The Restatement of the Law, Second, Trusts, 1959, puts it this way:

§ 233 Allocation of Receipts and Expenses to Principal or Income.

(1) Except as otherwise provided by the terms of the trust, if property is held in trust to pay the income to a beneficiary for a designated period and thereafter to pay the principal to another beneficiary,

(a) the former beneficiary is entitled to, and only to, the net income during such period, and

(b) the latter beneficiary is entitled to the principal on the expiration of such period.

(2) The net income is ascertained by subtracting expenditures allocable to income from receipts allocable to income.

(3) State: Beneficiaries only entitled to net income.

The State of Hawaii in its May 2, 1997 Appellant's Amended Opening Brief in *OHA v. State*, Civ. No. 94-0205-1 before the Hawaii Supreme Court made the same point beginning at (SER F page 254):

> "Revenue" Includes Only Net Income. Not Gross Receipts.
>
> Even if OHA's 20% share were to be calculated on a basis that included income from improvements as well as from the land, the partial summary judgments for OHA would still be inappropriate. Under Act 304, "Revenue' means all proceeds, fees, charges, rents, or other income or any portion thereof, derived from [various specified sources]." Thus, "revenue" refers to types of "income." A treatment consistent with the delineation of the trust in Section 5(f) of the Admission Act as consisting of the "lands and the income there from." And the word "income," although not specifically defined in the statute, has a settled meaning in the law generally and in the law of trusts in particular.
>
> "Income" – and therefore "revenue" – does not mean gross receipts, as the Circuit Court apparently assumed. To the contrary, it is a well-established principle of the law of trusts that beneficiaries are entitled only to the net income from the trust. *In re Bernice P. Bishop Estate,* 36 Haw. 403, 427 (1943) (Kemp, C.J.) (noting that "'annual income' clearly refers to the net annual income"): *id* at 464 ("[t]he word 'income' as employed in the will *unquestionably* means net income") (Peters, J., concurring in part and dissenting in part: emphasis added).
>
> 2A SCOTT & FRATCHER, THE LAW OF TRUSTS § 182, at 550 (4th ed. 1987) (trustee's duty to pay income to beneficiary is limited to

paying "the net income, after deducting from the gross income the expenses properly incurred in the administration of the trust").

Thus, where the trust consists of an on-going business enterprise, the trustee's duty to pay income to the beneficiaries relates only to the net income, *i.e.,* the income remaining after the trust has paid for the costs of goods and services needed to operate the business or administer the trust. See *In re Sulzer's Estate,* 185 A. 793, 796 (Pa. 1936); *Smith v. Jones,* 162 So. 496, 498 (Fla. 1935); *Woodard v. Wright,* 22 P. 1118, 1119 (Cal. 1889): 3A SCOTT & FRATCHER, *supra,* § 244, at 324-325 ("[i]t is obcvious that the cost of administering a trust should be borne by the trust estate and not by the trustees personally if those costs are properly incurred"): *id.* at 323.

In addition to operating expenses, net income also takes into account depreciation or amortization of the capital cost of improvements that the State has constructed at taxpayer expense on ceded land. 3A SCOTT & FRATCHER, *supra,* § 244, at 325. There is no dispute that the State had the right to construct improvements upon the ceded land; not even OHA claims that the State had the right to construct improvements upon the ceded land; not even OHA claims that the State breached its fiduciary duties by constructing, say, the Honolulu International Airport, public housing, or hospitals on ceded land.

What this means, then is that OHA is not entitled to 20% of the gross receipts of the Hilo Hospital or the public housing, but only to 20% of the net income (if any) from those facilities (unless they are sovereign functions, see subpoint C, *infra).* Any other interpretation leads to absurd results. For example, if the State were to operate a race track, a lottery outlet, or even a credit union on ceded lands, OHA's interpretation would entitle it to 20% of the wagers made at the race track, amounts paid for lottery tickets, or deposits made at the credit union.

Moreover, most businesses – to say nothing of government agencies operating public housing and hospitals for the poor – never achieve a 20% profit. Consequently, OHA's claim to 20% of the gross revenue could be satisfied only by allocating additional taxpayer revenue from the general fund. In the end, a "gross receipts" approach would massively discourage the State from using the ceded lands for any activity that both generated high receipts and incurred substantial expenses, even if such were otherwise the highest and best use of the ceded lands.

Absent compelling evidence of a contrary legislative intent – and there is none – it is untenable to conclude that the Legislature meant in adopting Act 304 to depart from settled principles of trust law and to mandate such a fiscally imprudent state of affairs.

D. The State's distributions of "income and proceeds" to OHA.

(1) Federal Law. The 1959 Admission Act § 5(f) provided that the about 1.4 million acres returned to Hawaii, including the approximately 200,000 acres of HHCA lands, "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 one or more of five purposes, one of which was for "the betterment of the conditions of native Hawaiians, as defined in the" HHCA. (Emphasis added.)

§ 5(f) goes on to say, "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." While this suggests some discretionary latitude within the framework of basic trust law, there is no direction or even permission to make *distributions* to beneficiaries. The words "shall be held … as a public trust" presumably perpetual, militates against distributions of

principal. And certainly there is no direction, except for the HHCA which is not at issue here, to make distributions of income or principal to some beneficiaries at the expense of others. As this court put it in *Day,* 496 F.3d at 1034, FN 9,

> But neither our prior case law nor our discussion today suggests that as a matter of federal law § 5(f) funds must be used for the benefit of Native Hawaiians or Hawaiians, at the expense of other beneficiaries."

(2) State law. OHA was established in 1978 by Hawaii Constitution Art. XII, Sec. 5. The powers of OHA's board of trustees in Art. XII, Sec. 6, include management of "all *income and proceeds* from the pro rata portion of the [Ceded Lands Trust] for native Hawaiians." (Emphasis added.)

In 1979 as amended in 1990, the Hawaii legislature enacted HRS §10-3 providing that a pro rata portion of all funds derived from the public land trust shall be funded in an amount to be determined by the legislature, "and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians." "For the purpose of this chapter, the public land trust shall be all *proceeds and income* from" lands ceded to the United States in 1898 and conveyed to the State by the 1959 Admission Act excluding the HHCA lands. (Emphasis added. Only the quoted portion is verbatim.)

(3) The magnitude of distributions.

In 1980, the legislature enacted §10-13.5 "Use of public land proceeds. Twenty percent of all funds derived from the public land trust, described in section 10-3, shall be expended by the office, as defined in section 10-2, for the purposes of this chapter."

Since 1980, acting under color of the above State of Hawaii constitutional and statutory requirements, the State has been distributing to OHA what the State characterized as "income and proceeds" from the pro rata portion of the 1.2 million acres of the Ceded Lands Trust for the betterment of the conditions of native Hawaiians. The distributions each year beginning with fiscal year ended June 30, 1981 through 2003, as shown on OHA's financial statements, are listed in SER C. The bar graph of OHA's receipts is SER D. The 2007 Unaudited Financial Report of OHA, (the latest available on OHA's web site as of October 23, 2008) showing its Public Land Trust balance of $452,703,266 is SER B. Since July 1, 2006, state agencies that collect receipts from the use of ceded lands have transferred a total of $15.1 million annually to OHA in equal quarterly installments. (Declaration of State Director of Finance in ER 6.)

(4) State of Hawaii departments each earmark ceded lands receipts and transfer 20% directly to OHA quarterly.

Notwithstanding the State's argument that intermingled money is fungible, the distributions to OHA come directly from and are traceable to the ceded lands receipts. Executive Order No. 03-03 signed by Governor Lingle February 11, 2003 requires the Department of Land and Natural Resources and other departments receiving money for the use of ceded lands, to deposit the ceded lands receipts into a "ceded lands proceeds trust holding account" and to accumulate OHA's 20% share. Each department then transfers to OHA its share within ten calendar days of the close of each fiscal quarter. Journal vouchers are sent to OHA and separate files are maintained for each year. (SER E.) A similar practice of quarterly transfers by each department directly to OHA (each separately accounting for its direct transfers to OHA) was in effect in May 1994 under the Waihee administration (SER H). This practice was apparently followed by the Cayetano administration until the first quarter in fiscal year 2002, when it was discontinued as a result of the *OHA v. State* decision by the Hawaii Supreme Court. Governon Lingle resumed the quarterly transfers with Executive Order 03-03 in February 2003.

Bogert's Trusts and Trustees Current through the 2008 Update, Chapter 44 Tracing Trust Funds § 924 Tracing cash or commercial paper.

> In a great majority of the cases which deal with the adequacy of identification in tracing cases the original trust res was cash or

> commercial paper, for example, checks, drafts, or promissory notes. Tracing will be allowed if it is proved that the res is to be found in the cash in the vaults of the bank against which the claim is made, or in a bank account, or in credit with a bank other than the trustee.
>
> ***
>
> "It is not important that the plaintiff's money bore no mark, and cannot be identified. It is sufficient to trace it into the bank's vaults, and find that a sum equal to it (and presumably representing it), continuously remained there until the receiver took it. The modern rules of equity require no more."

E. Relief sought: Declare (or reverse and remand to the district court directing it to enter judgment declaring) that all money and other property and assets held or controlled by OHA as of June 16, 2008, (the date Wendell Marumoto moved to intervene) derived from the Ceded Lands Trust, are held by the State of Hawaii in trust for *all* the people of Hawaii; make such orders as are necessary or appropriate to re-vest control of all such money and other property and assets in the State of Hawaii in trust for all the people of Hawaii; and permanently enjoining any further distributions from the Ceded Lands Trust to OHA.

III. The State's and OHA's partiality & invidious discrimination.

A. Standard of review.

All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

B. The duty of impartiality.

This court in this case on August 7, 2007 reaffirmed that Hawaii's Ceded Lands Trust is for *all* the people of Hawaii, not simply Native Hawaiians; and that basic trust law principles apply.

The Restatement of the Law, Trusts 2d § 183 entitled "Duty To Deal Impartially With Beneficiaries," states: "When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them."

The Hawaii Supreme Court applies this basic law of trusts. The trustee must deal impartially when there is more than one beneficiary. *Ahuna v. Dept. Hawaiian Home Lands*, 64 Haw. 327, 340, 640 P.2d 1161 (1982).

The State of Hawaii has also adopted these uniform trust law principles. The Uniform Principal and Income Act, HRS §557A-103 **Fiduciary duties; general principles,** provides in part, "… a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries."

As established by OHA's own financial statements, the State of Hawaii, since 1980, has been distributing to OHA 20% of all funds derived

from the Ceded Lands Trust as the "income and proceeds from that pro rata portion of the" Ceded Lands Trust "for native Hawaiians," while distributing *no* cash or land for the pro rata portion of the trust for the other beneficiaries. That is the opposite of impartiality

OHA now holds, solely for the betterment of the conditions of native Hawaiian or Hawaiian beneficiaries, some amount (of the $450 million it held 6/30/2007) of Ceded Lands Trust funds. No State of Hawaii agency or any one else holds any Ceded Lands Trust funds solely for the betterment of the conditions of the rest of the beneficiaries. In no sense can that be called impartial.

C. The duty not to comply with trust terms that are illegal or violate public policy.

The Restatement of the Law, Trusts 2d § 166 entitled "Illegality," provides:

(1) The trustee is not under a duty to the beneficiary to comply with a term of the trust which is illegal.

(2) The trustee is under a duty to the beneficiary not to comply with a term of the trust which he knows or should know is illegal, if such compliance would be a serious criminal offense or would be injurious to the interest of the beneficiary or would subject the interest of the beneficiary to an unreasonable risk of loss.

The Trustee, State of Hawaii's officials' distributions of trust receipts to OHA for favored beneficiaries when the trust had no net income, were

and are illegal. Misapplication of entrusted property is a misdemeanor under HRS 708-874; and failure to make required disposition of funds constitutes the felony of theft under HRS 708-830. When sued for prospective relief, a state official in his official capacity is considered a "person' for 1983 purposes." *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007).

The Restatement of the Law, Trusts 3d § 29 entitled "Purposes and Provisions That Are Unlawful or Against Public Policy," states:

An intended trust or trust provision is invalid if:

(a) its purpose is unlawful or its performance calls for the commission of a criminal or tortious act;

(b) it violates rules relating to perpetuities; or

(c) it is contrary to public policy.

Commentary *f. Consistency with law and public policy*. at Restatement of the Law, Trusts 3d § 28, Charitable Purposes, provides:

> *f. Consistency with law and public policy*. Like other trusts, charitable trusts are subject to the rule of § 29 that trust purposes and provisions must not be unlawful or contrary to public policy.
>
> ….
>
> When a scholarship or other form of assistance or opportunity is to be awarded on a basis that, for example, explicitly excludes potential beneficiaries on the basis of membership in a particular racial, ethnic, or religious group, the restriction is ordinarily invidious and therefore unenforceable. Thus, a trust to provide land and maintenance for a playground from which Black children are excluded, or a trust to support a scholarship program for which no

> Roman Catholic may apply, is not enforceable under those terms as a charitable trust. Similarly, although the exclusions are not *explicit*, a trust to provide research grants for which only "white, Anglo–Saxon Protestants" may apply is invidious and noncharitable.

The Supreme Court determined that "Hawaiian" and "native Hawaiian" are racial classifications, and it held that the use of those racial classifications to deny some of Hawaii's citizens the right to vote violated the Fifteenth Amendment. *Rice v. Cayetano*, 528 U.S. 495, 514-517 (2000),

> One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.
>
> The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

The case now before this court simply challenges the same state's use of these same racial classifications to deny equal access by Hawaii's citizens to the distributions the State has been making for almost three decades and

continues to make from the Ceded Lands Trust; and the expenditures OHA has been making and continues to make of those funds.

All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Shaw v. Reno*, 509 U.S. 630, 641 et. seq. (1993). Defendants/Appellees have the burden of showing that allocations of public lands and moneys using these racial classifications survive strict scrutiny.

D. Relief sought. The same as sought in paragraph IIE above and such other declaratory and injunctive relief as is just to redress the invidious discrimination alleged in the *Kuroiwa* complaint.

IV. Conclusion.

In summary**,** Wendell Marumoto respectfully requests, for himself and other Hawaii citizens similarly situated, that this court enter judgment as follows:

A. Declare (or reverse and remand to the district court directing it to enter judgment declaring) that, as a matter of law, all money and other property and assets held or controlled by OHA as of June 16, 2008, (the date

Wendell Marumoto moved to intervene) derived from the Ceded Lands Trust, and all earnings or appreciation of those trust funds, are held by the State of Hawaii in trust for *all* the people of Hawaii;

B. Make such orders (or reverse and remand to the district court directing it to make such orders) as are necessary or appropriate to re-vest control of all such money and other property and assets in the State of Hawaii in trust for all the people of Hawaii;

C. Permanently enjoin (or reverse and remand to the district court directing it to enjoin) any further distributions from the Ceded Lands Trust to OHA unless and until such time as:

1. The Ceded Lands trust generates annual net income from which the State as Trustee may, under basic trust law principles, may lawfully make impartial distributions to income beneficiaries; and

2. The court, after full hearing after notice to affected beneficiaries, has instructed or authorized the State as Trustee to do so;

D. Direct the district court to allow Wendell Marumoto to intervene as a plaintiff and file a complaint similar to that in the *Kuroiwa* case (SER A) and to proceed to adjudicate the Marumoto complaint and any claims of the Day Plaintiffs, applying strict scrutiny to all uses of the racial

classifications, “Hawaiian” and “native Hawaiian” and grant such other and further declaratory and injunctive relief as is just; and

E. Award Wendell Marumoto his costs, reasonable attorney’s fees and such other and further relief as is just.

DATED: Honolulu. Hawaii, October 30, 2008

Respectfully submitted,

/s/ H. William Burgess

H. WILLIAM BURGESS
Attorney for Plaintiff- intervenor-
Appellant, WENDELL MARUMOTO

STATEMENT OF RELATED CASES

The following are related cases under Circuit Rule 28-2.6:

Kuroiwa v. Lingle, CA9 08-16769: The *Kuroiwa* Plaintiffs-Appellants are represented by the same attorney as Wendell Marumoto, Putative Intervenor- Plaintiff-Appellant in this case; and they make breach of trust claims similar to the claims Wendell Marumoto wishes to make against the same or related defendants arising out of the same transactions in the same trust. *Kuroiwa* Appellants appeal the judgment on the pleadings that they lack standing as trust beneficiaries because they did not and cannot sue the U.S. Kuroiwa Plaintiffs-Appellants pursue the appeal by a non-frivolous argument for modifying or reversing existing law as determined by the district court or establishing new law.

Burgess Appellant in *Kuroiwa v. Lingle*, CA9 08-17287: Appeal by attorney of sanctions order for filing and advocating *Kuroiwa v. Lingle* in which the district court determined that Plaintiffs lack standing as trust beneficiaries because they did not and cannot sue the U.S. Burgess pursues the appeal of the sanctions order by a non-frivolous argument for modifying or reversing the existing law as determined by the district court or establishing new law.

Day v. Apoliona, CA9 08-16704: Appeal by *Day* Plaintiffs-Appellants of summary judgment in favor of OHA Trustees and State. *Day* Plaintiffs, native Hawaiians (50% or more Hawaiian ancestry) as beneficiaries of the Ceded Lands Trust challenge OHA spending Ceded Lands Trust money for Hawaiians (at lease one-drop of Hawaiian blood). The district court did not question *Day* Plaintiffs' standing but entered summary judgment holding that OHA trustees have discretion to spend trust funds to benefit Hawaiians. Wendell Marumoto challenges any distributions of Ceded Lands Trust funds to OHA and any expenditures of trust funds by OHA whether to or for native Hawaiian beneficiaries or Hawaiian beneficiaries at the expense of the other beneficiaries.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,100 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii)

DATED: Honolulu, Hawaii, October 30, 2008.

/s/ H. William Burgess
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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2008, I electronically filed the foregoing Wendell Marumoto's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed two copies of the foregoing Wendell Marumoto's Opening Brief by First Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants.

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