H. WILLIAM BURGESS #833
2299C Round Top Drive
Honolulu, Hawaii 96822
Telephone:(808) 947-3234
Fax: (808) 947-5822
Email: hwburgess@hawaii.rr.com
Attorney for Plaintiffs-Appellants KUROIWA, et al
and Plaintiff-intervenor-Appellant MARUMOTO

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES I. KUROIWA, JR., et al, Plaintiffs-Appellants v. LINDA LINGLE, ET AL, State Defendants-Appellees, and HAUNANI APOLIONA, OHA Defendants-Appellees.	No. 08–16769 D.C. No. 1:05-CV-00649-SOM-BMK KUROIWAS' MOTION FOR INJUNCTION PENDING APPEAL; DECLARATION OF COUNSEL; EXHIBITS 1–4;
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.	No. 08–16668 D.C. No. 1:08-CV-00153 JMS-KSC WENDELL MARUMOTO'S JOINDER IN MOTION FOR INJUNCTION PENDING APPEAL; CERTIFICATE OF SERVICE

SEVEN NON–ETHNIC HAWAIIANS' MOTION FOR INJUNCTION PENDING APPEAL

James I. Kuroiwa, Jr. et al[1] joined by Wendell Marumoto[2] (collectively "Seven Non-Ethnic Hawaiians") move pursuant to FRAP 8(a)(2) and FRAP 27 for an injunction pending both the above captioned appeals.

Introduction and summary of reasons for an injunction.

The State of Hawaii as trustee of the federally-created Ceded Lands Trust holds 1.2 million acres of ceded lands for *all* the people of Hawaii, not just for native Hawaiians. For three decades, under color of State law, State officials have

[1] James I. Kuroiwa, Jr., Patricia A. Carroll, Toby M. Kravet, Garry P. Smith, Earl F. Arakaki and Thurston Twigg-Smith (collectively "Kuroiwa") are the Plaintiffs-Appellants in No. 08-16769, *Kuroiwa v. Lingle*. All six of them are citizens and registered voters of U.S and the State of Hawaii and beneficiaries of Hawaii's ceded lands trust. Although they are of diverse ancestries, none are "native Hawaiian" ("any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778 as defined by the Hawaiian Homes Commission Act") or "Hawaiian" as defined in HRS § 10-2 ("Any descendant of the aboriginal peoples inhabiting the Hawaiian Islands … in 1778 …"). Plaintiffs' declarations, (ER 15 in No. 08-16769 at 232 - 251, *Kuroiwa v. Lingle*) in support of motion for TRO and PI in Civ. No. 08-00153 JMS-KSC. Garry P. Smith was not a party in *Arakaki v. Lingle*.

[2] Wendell Marumoto is the Plaintiff-intervenor-Appellant in No. 08-16668, *Day v. Apoliona.* He is a citizen and registered voter of the United States and the State of Hawaii and a beneficiary of Hawaii's ceded lands trust. 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 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. Decl. & Statement, Doc. # 147 6/16/2008 in D.C. Civ. No. 05-00649 SOM-BMK. Wendell Marumoto was not a party in *Arkaki v. Lingle.*

been diverting Ceded Lands Trust receipts exclusively to the Office of Hawaiian Affairs "OHA" as the "income and proceeds from that pro rata portion" of the trust for "native Hawaiians" as defined in the Hawaiian Homes Commission Act "HHCA": "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." But an ersatz definition of "Native Hawaiian" (with a large 'N") to mean anyone descended from a pre-1778 aboriginal Hawaiian, has prevailed in practice from the beginning at OHA and appears in the 1993 Apology resolution and the Akaka bill since 2000. The diversions are continuing and escalating but OHA has used them, not for the betterment of "native Hawaiians" whose numbers naturally diminish by intermarriage and eventually lead to equal protection and privileges for everyone, but in large part for lobbying and other advocacy on behalf the ever-expanding number of persons with even one drop of Hawaiian ancestry.

The State recently revealed that the Ceded Lands Trust had no annual net income or proceeds since 1959. During that period the State, in violation of basic trust law principles, diverted approximately $400 million to OHA. About 95% of those diversions to OHA, and the earnings and appreciation on them, were and are equitably owned by these Seven Non-Ethnic Hawaiians and the other trust beneficiaries similarly situated. OHA has lost or wasted significant amounts that belongs to all the people and the remainder is at risk. Three decades of plunder is

enough. This motion seeks an injunction to halt the looting and to prevent further irreparable losses until final judgment.

Specific injunctive relief sought pending the appeals.

Seven Non-Ethnic Hawaiians for themselves and the million or so other citizens of the State of Hawaii and the United States similarly situated, seek an order as follows:

1. **Enjoining the State of Hawaii,** Defendant-intervenor-Appellee in No. 08-16668; **and Linda Lingle, in her official capacity** as Governor of the State of Hawaii; **and the other State officials in their official capacities**, Defendants-Appellees in No. 08-16769, (**collectively "State Appellees") and each of them** from:

Any further distributions, payments, or transfers of money or property from the Ceded Lands Trust (also known as the "§ 5(f) trust" and sometimes also referred to as the "Public Land Trust") to the Office of Hawaiian Affairs "OHA" or to any of the OHA Defendants-Appellees in No. 08-16769 or No. 08-16668 (collectively "**OHA Appellees**");[3]

[3] Since 1979 the State has distributed some $400 million to OHA as "income and proceeds from that pro rata portion of the [Ceded Lands] trust … for native Hawaiians" (with a small"n") as defined in the Hawaiian Homes Commission Act

2. **Enjoining OHA Appellees and each of them from:**

Any further expenditures, payments, distributions, grants, or transfers of any kind of Ceded Lands Trust funds or assets, and any gains and earnings on such funds or assets, held or controlled by OHA;

3. **Enjoining State Appellees and OHA Appellees and each of them from:**

Any further spending of funds from any source to:

(a) lobby, advertise, advocate for or otherwise support enactment of the "Akaka bill" (S.381/H.R.862 introduced Feb. 4, 2009 and now pending in the 111th Congress), Ho'oulu Lahui Aloha or any other bill or proposed legislation, federal, state or local, for the purpose, directly or indirectly, of creating or "reorganizing" a Native Hawaiian governing entity or "nation"; or

(b) support *Kau Inoa* or any other racially restricted registry of persons eligible to participate in elections in which public officials are to be elected or public issues decided;

"HHCA", i.e., "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." § 201(a)(7), 42 Stat. 108; See Ex. 3 to declaration attached hereto. However, both the Apology resolution (Act of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510) and the Akaka bill (S. 381/H.R. 862 in the current Congress) define the term "Native Hawaiian" (with a large 'N") to mean anyone descended from a pre-1778 aboriginal Hawaiian. Admission Act Section 5(f) does not recognize such a broad-based category of beneficiaries.

4. **Similarly restraining also** the agents, assistants, successors, employees, attorneys and all persons acting in concert with or under the direction or control of State Appellees and/or OHA Appellees, or any of them; and

5. **Appointing a receiver** or requiring OHA Defendants to post a bond sufficient to safeguard the ceded lands trust funds held by OHA during the time the injunction remains in effect.

FRAP 8(a)(2)(A)(ii). Kuroiwa et al moved for preliminary injunction but the district court failed to afford the relief requested.

James I. Kuroiwa, Jr. and his fellow plaintiffs in District Court Civil No. 08-00153 JMS/KSC, *Kuroiwa v. Lingle* (collectively "**Kuroiwas**"), moved April 3, 2008 for a temporary restraining order and preliminary injunction, ER 15 in No. 08-16769. On April 8, 2008 the district court denied the TRO reasoning that *Arakaki v. Lingle*, 477 F.3d 1048, 1066 (9th Cir. 2007) involved most of the same plaintiffs[4], the same plaintiffs' counsel and similar claims; and held that "Plaintiffs cannot prevail on their trust beneficiary theory of standing because the United States remains an indispensable party to a suit challenging the trust, and Plaintiffs have no standing to sue the United States." ER 13 in No. 08-16769. See also ER 8 in No. 08-16769, April 25, 2008 Order denying Plaintiffs' motion for reconsideration of order denying TRO, page 3.

---

4. One of the plaintiffs in *Kuroiwa,* Garry P. Smith, was not a plaintiff in *Arakaki*.

At the hearing July 1, 2008 the district court granted Defendants' motions for judgment on the pleadings, based on *Arakaki*, because the United States is an indispensable party who has not consented to suit; and "Denied as Moot" Plaintiffs' motion for preliminary injunction. Docket # 81 July 1, 2008 in Civil No. 08-00153 JMS/KSC. See also ER 2 in No. 08-16769, July 3, 2008 Order (1) Granting State Defendants' Motion For Judgment on the Pleadings, and (2) Granting OHA Defendants' Motion for Judgment on the Pleadings, slip copy, 2008 WL 2622816 (D.Hawai'i). A true copy of the July 3, 2008 order granting judgments on the pleading is Exhibit 1 to the Declaration attached hereto.

Thus, under FRAP 8(a)(2)(ii), Kuroiwas qualify to seek injunction pending appeal in this court because they moved in the district court for preliminary injunction but that court failed to grant the relief requested.

FRAP 8(a)(2)(A)(i). Motion by Wendell Marumoto in the district court would be impracticable.

Wendell Marumoto, on June 16, 2008 moved to intervene in the district court in *Day v. Apoliona*, D.C. No. 1:05-CV-00649 SOM-BMK to assert, for himself and other Hawaii citizens and ceded lands trust beneficiaries similarly situated, a claim against Defendants for breach of trust and other relief similar to the complaint in *Kuroiwa v. Lingle*. ER 3 in No. 08-16668.

On June 20, 2008, the district court granted summary judgment in favor of the OHA Defendants in *Day v. Apoliona*, noting at page 34, "This order also

renders moot Wendell Marumoto's motion to intervene." and entered final judgment. ER 2 in No. 08-16668. A true copy of the June 20, 2008 order granting summary judgment is Exhibit 2 to the Declaration attached hereto.

Under FRAP 8(a)(2)(A)(i), since that case was closed before his motion for intervention had been acted upon, it would be impracticable for him to move for an injunction in the district court. Marumoto joins in this motion for an injunction pending these appeals because he and his family members, and others similarly situated, are among the equitable owners of the 1.2 million acres of ceded lands at issue in these appeals; he and others similarly situated are most affected by the misapplication of the ceded lands revenues that are the subject of these appeals; and it is they, not the *Day* plaintiffs, who are threatened with disenfranchisement by the Akaka bill, Hoo'ulu Lahui Aloha, Kau Inoa and the related programs to create, by racially restricted elections, a separate sovereign governing entity or "nation." See ER 3 in No. 08-16668 beginning at page 50, Declaration and Personal Statement of Wendell Marumoto. Mr. Marumoto was not a plaintiff or in privity with any plaintiffs in *Arakaki*.

Standard of Review for Stay or Injunction Pending Appeal

As with preliminary injunctions, the nature of the showing required to justify a stay pending appeal may vary with the circumstances presented. If the balance of hardships tips decidedly in favor of the party seeking a stay, it may be

sufficient showing on the merits to show the existence of serious legal questions . *Wright, Mille r & Cooper, Federal Practice and Procedure, Jurisdiction 3d*, §3954, Stay or Injunction Pending Appeal, at 298.

> A district court's decision regarding preliminary injunctive relief is subject to limited review. *See Harris v. Board of Supervisors, L.A. County*, 366 F.3d 754, 760 (9th Cir. 2004) ("limited and deferential") Note that review is de novo when the district court's ruling rests solely on a premise of law and the facts are either established or undisputed. *See Harris*, 366 at 754.73

The standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction …. [T]here are two interrelated legal tests …. At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury. … At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor. … '[T]he relative hardship to the parties' is the 'critical element' in deciding at which point along the continuum a stay is justified. ... In addition, in cases such as the one before us [involving restoration of disability benefits to Social Security recipients], the public interest is a factor to be strongly considered." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). In ruling on a request for an injunction pending appeal, the court of appeals must engage in the same inquiry as when it reviews the grant or denial of a preliminary injunction . *Walker v. Lockhart* , 678 F.2d 68 (8th Cir. 1982).

As to the F.R.Civ.P. 12(c) judgment on the pleadings (the only justification advanced for the district court's failure to rule on and afford the preliminary injunctive relief requested) review is *de novo* and all the allegations in the Kuroiwas' pleadings are taken as true and construed in their favor:

> Under Federal Rule of Civil Procedure 12(c), judgment on the pleadings is proper "when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." *Fajardo v. County of Los Angeles,* 179 F.3d 698, 699 (9th Cir.1999). We review de novo a district court's grant of judgment on the pleadings. *Id.*

Ventress v. Japan Airlines, 486 F.3d 1111, 1114 (9th Cir. 2007)

Graham v. FEMA, 149 F.3d 997, 1001 (9th Cir. 1998): For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin,* 422 U.S. 490, 501 (1975); *Federation of African Amer. Contractors v. City of Oakland,* 96 F.3d 1204, 1207 (9th Cir. 1996); see also *Usher v. City of Los Angeles,* 828 F.2d 556, 561 (9th Cir. 1987) (applying this standard to motions to dismiss in general).

Standing, *dicta* and this circuit's long established law.[5] The

[5] As noted in their Opening Brief the Kuroiwa plaintiffs acknowledge the trial court's judgment is now the law of the *Kuroiwa* case. They present the issues, claims and contentions in this motion as warranted by a non-frivolous argument for modifying or reversing that existing law or for establishing new law.

district court in *Kuroiwa* believed it was bound by language based on *dictum* in a decision of this court denying a non-ethnic Hawaiian standing to sue for a Hawaiian Homestead lease, without also suing the United States.[6]

That issue is not presented in these appeals because neither Marumoto nor any of the Kuroiwas seek a homestead lease, nor do they challenge the Hawaiian Homes Commission Act "HCCA" or the use of the 200,000 acres of ceded lands administered by the Department of Hawaiian Home Lands. These Seven Non-Ethnic Hawaiians' claims for declaratory and injunctive relief against State officials and OHA trustees relate only to the 1.2 million acres of ceded lands

---

[6] The *dictum* originated in a single sentence in *Carroll v. Nakatani*, 342 F.3d 934, 944 (9th Cir. 2003) "Article XII of the Hawaii Constitution cannot be declared unconstitutional without holding Section 4 of the Admission Act unconstitutional." Only Haw. Const. Art. XII sections 1, 2 and 3 (relating to the Hawaiian Homes Commission Act "HHCA") were required by Section 4 of the Admission Act and only those sections were relevant to non-ethnic Hawaiian Barrett's demand for a Hawaiian Homestead lease. The other four sections, 4, 5, 6 and 7 of Haw. Const. Art. XII, (the OHA sections and the Traditional and Customary Rights section), were added to the Hawaii Constitution 19 years after admission, do not change or apply to the HHCA and were irrelevant to Barrett's claim for a homestead lease.

Therefore, to the extent that the *Carroll* decision is applied to the OHA sections, it is *dicta*, unnecessary to that judgment, unintended and of no value as precedent.

That same sentence was taken out of context by *Arakaki v. Lingle*, 477 F.3d 1048, 1060-61 (9th Cir. Feb. 9, 2007) and applied to dismiss the plaintiffs' trust beneficiary claims; and, in turn, adopted as binding by the district court in this case April 8, 2008 ("the United States remains an indispensable party to a suit challenging the trust, and Plaintiffs have no standing to sue the United States." ER 2 at 9 in No. 08-16769) denying the temporary restraining order and on July 3, 2008 in entering judgment on the pleadings mooting Kuroiwas' motion for a preliminary injunction.

administered separately by the State as Trustee for *all* the people of Hawaii; and are redressable without the consent of the United States or changing a word of the Admission Act or any other federal law. This court is not bound by *dicta. Dicta* has no value as precedent. *See Best Life Assurance Co. v. Comm'r*, 281 F.3d 828, 834 (9th Cir. 2002).

As this court said in *Day v. Apoliona*, 496 F.3d 1027, fn 2 (9th Cir. August 7, 2007) "We are bound by the two *Price* cases on the standing issue, and so do not consider the matter further." The United States was not a party in either of the *Price* cases, and both challenged the expenditures of trust funds. *Price v. Hawaii,* 764 F.2d 623 (9th Cir.1985) and *Price v. Akaka,* 928 F.2d 824, 826-27 (9th Cir.1991) (" *Akaka I* "). The two *Price* cases and numerous other decisions of this court in the 24 years since 1985 have applied basic trust law principles to uphold the standing of individual beneficiaries to bring suit in federal court against State officials and OHA trustees who breach Hawaii's Ceded Lands Trust.

Moreover, Marumoto was not a plaintiff in *Arakaki v. Lingle* so could not, in any event, be considered barred by *res judicata* even if a final judgment had been entered in *Arakaki v. Lingle*.[7] Nor could Garry P. Smith who is one of the

---

[7] As detailed in Kuroiwas' Opening Brief in 08-16769 at 23-27, the rules of *res judicata* apply only when a final judgment is rendered; and the district court in *Arakaki v. Lingle*, on remand, declined to enter judgment, said she was not dismissing the case and that she did not see any prejudice to Arakaki plaintiffs

Kuroiwa plaintiffs but was not a plaintiff in *Arakaki v. Lingle*.

The probability of success on the merits. This court on August 7, 2007 held, "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 (9th Cir. 2007) (emphasis in original), citing Justice Breyer's concurring opinion with whom Justice Souter joined in *Rice v. Cayetano*, 528 U.S. 495, 525 (2000), "But the Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii." At 496 F.3d 1034, FN 9 this court explained,

> 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.

The Hawaii Supreme Court has recognized the same princiiple:

> 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

---

filing a whole new lawsuit. The district court's written order (ER 10 at 133) provided, "This order does not foreclose Plaintiffs from filing a new case under a different civil number." The district court then closed the *Arakaki* case file without entering a final judgment.

> 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.

Just over three months ago, on December 4, 2008, the State of Hawaii acknowledged in its merits Brief for Petitioners by Seth P. Waxman, counsel of record, to the United States Supreme Court in No. 07-1372, *State of Hawaii v. Office of Hawaiian Affairs* at 26,

> For decades after Hawaii was admitted to the Union, the State had undisputed authority to dispose of the ceded lands as it deemed appropriate so long as it satisfied its "public trust" obligations, which run to *all* the citizens of Hawaii, not just to Native Hawaiians. *See* Admission Act, § 5(f); *Rice*, 528 U.S. at 525 (Breyer, J. concurring) ("[T]he Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii.") (emphasis in original).
>
> [T]he Admission Act required the State to use the ceded lands, and the proceeds from their sale or other disposition, to promote one or more of the five trust objectives listed in Section 5(f). Again, in its description of those objectives, "the Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii," not just Native Hawaiians. *Rice*, 528 U.S. at 525 (Breyer, J. concurring) (emphasis in original). *Id*. at 38.
>
> In short, this Court's precedent forecloses any *legal* theory that, like respondents', assumes that Congress acted wrongfully or "illegally" (J.A. 115a) when it took absolute title to the ceded lands for the United States, a measure that necessarily extinguished any competing Native Hawaiian claims to the same lands. *Id.* at 44.
>
> In any event, the Hawaii Supreme Court's injunction rests on a legal premise foreclosed by federal law: namely, that Native Hawaiian claims to the ceded lands may have survived Hawaii's annexation to the United States and that the lands should thus be preserved pending

> resolution of that title dispute. This premise contradicts multiple congressional enactments from the Newlands Resolution to the Admission Act, and any state court decision resting on that premise violates the Supremacy Clause. *Id.* at 18.

Thus, the State itself has firmly acknowledged that as trustee it holds the 1.2 million acres for *all* the people of Hawaii, not just Native Hawaiians; and that the Annexation Act, Organic Act and Admission Act foreclose any legal claim to those lands by Native Hawaiians (other than the same full and equal beneficial interest in the Ceded Lands Trust each Native Hawaiian citizen of Hawaii enjoys in common with each and every other citizen of Hawaii).

The State's "No net income revelation. " On June 4, 2008 in the related *Day v. Apoliona* case, the State of Hawaii, apparently for the first time in history, publicly accounted for, at least in part, and revealed 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 trust 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.

SER 2 in No. 08-16769 is the State's motion for summary judgment filed June 4, 2008, together with the accompanying memorandum in support; SER 3 in No. 08-16769 is the concise statement of facts and declarations by Georgina K. Kawamura, Director, Department of Budget and Finance, State of Hawaii, and

Arthur J. Buto, State Land Information Systems Manager.

The State's memorandum in support (SER 2 beginning at page 28) summarizes the new disclosure as follows:

At SER 2 page 31,

> 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 39,

> 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 Budget and Finance Director Kawamura's Declaration (SER 3 page 70) shows interest paid on bonds for various capital improvement projects for the five most recent fiscal years. Mr Buto's declaration reports total receipts from the § 5(f) lands for those years. (SER 3 at 72 and 73.) The following illustrates ceded lands receipts and interest expense for one year based on the declarations of those two high financial officers and the State's June 3, 2008 Separate and Concise Statement of Facts:

	FYE 2007
Receipts from 5(f) ceded lands	$128,480,573
less airports	-$41,800,000

less non-ceded	-$21,600,000
less affordable housing	-$4,800,000
Corrected total receipts	$60,280,573
Interest expense, Capital Improvement Bonds	$237,494,513

Interest expense alone almost 4 times total receipts.

As the State Attorney General correctly argued to the Hawaii Supreme Court May 2, 1997 (SER F in No. 08-16769 beginning at page 254) referring to the State's obligation under State law to make distributions from the Ceded Lands Trust to OHA, "Income" "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."

That basic trust law principle is corroborated by the Uniform Principal and Income Act, HRS 557A-102 and Restatement of the Law, 2d, Trusts, §233. Even under the laws of the Kingdom, after 1865, only the income less expenses from the Crown lands was used to support the monarch.

> Since 1865, so far as the record before us discloses, the character of the crown lands has not been changed; they have passed to the succeeding monarch. The income, less expense of management, has been used to support the royal office and treated as belonging to the Crown. *Liliuokalani v. U.S.*, 45 Ct.Cl. 418, page 7(1910).

The June 4, 2008 filing by the State acknowledges as undisputable fact that the Ceded Lands Trust has never since statehood in 1959 generated any annual net

income. The State's argument to the Hawaii Supreme Court in 1977 acknowledges as undisputable law, corroborated by current basic law principles, that no distributions could lawfully have been made from the Ceded Lands Trust to any beneficiaries, whether to OHA exclusively for native Hawaiian beneficiaries or exclusively to or for any other beneficiaries. This means the State's distributions of trust funds and property exclusively to OHA over the last three decades purportedly as "income and proceeds from that pro rata portion of the trust ... for native Hawaiians" (Hawaii Constitution, Art. XII, Section 6), while making **NO** distributions exclusively to or for the rest of the beneficiaries, have breached the federally-created Ceded Lands Trust. (Because the funds are still in state hands, § 5(f)'s restrictions apply to the use or disposal of the income *by OHA*. *Price v. Akaka* 928 F.2d 824, 827 (9th Cir. 1990).)

Thus, the highest financial and legal officials of the State of Hawaii itself have shown both by undisputable facts and undisputable trust law principals, a high probability that these Seven Non-Ethnic Hawaiians will prevail in these appeals.

The possibility of irreparable injury

The magnitude of the Trustee-State's distributions of trust funds and trust property only to OHA exclusively for the favored few.

Exhibit 3 to the declaration filed herewith is a spreadsheet listing State of

Hawaii payments to OHA as shown in OHA's financial statements for each fiscal year from June 30, 1981 through June 30, 2008. They show, among other things, total receipts by OHA from the Public Land Trust (i.e., the Ceded Lands Trust also known as the "§ 5(f) Trust") of $384.7 million during those years. These represent distributions to OHA of "income and proceeds from that pro rata portion of the" Ceded Lands Trust "for native Hawaiians" under color of state law, Art. XII Haw. Const. Sec. 6.

OHA's 2007 Annual Financial Report showed, as of June 30, 2007, net assets of $452.7 million from the Public Land Trust. (ER 7 in No. 08-16769, Doc. # 43 p 65, Ex. 1, Dec. Girard Lau Deputy Attorney General, filed May 9, 2008) This represents the total amount received by OHA from the State of Hawaii from 1978 through June 30, 2007 plus earnings and appreciation and less losses on and disbursements from those funds by OHA up to then. On information and belief based on Act 178, SLH 2006, the State since June 30, 2007 has distributed and continues to distribute another $15.1 million more annually in equal quarterly installments to OHA.[8]

---

[8] OHA has recently posted on the OHA website www.oha.org its unaudited 2008 financial statement which at page 44 shows, as of June 30, 2008, net assets of just under $407 million from the Public Land Trust. The statement of revenues and expenditures on page 45 shows receipt of $15.1 million, loss on investments of $24.58 million and expenditure of over $21 million for "beneficiary advocacy" which probably includes lobbying for the Akaka bill and expenditures for the Kau

In addition, during those 30 years since 1978, native Hawaiians have been entitled to share fully in all public uses of the ceded lands, just as all the rest of the beneficiaries have.

In addition, in fiscal year ended June 30, 2007, the State Department of Land and Natural Resources transferred to OHA the 25,856-acre Wao Kele O Puna rainforest in Puna, County of Hawaii, State of Hawaii. According to OHA's June 30, 2007 Annual Report, which refers to these as "ceded lands," OHA contributed $300,000 to acquire the $12.25 Million (market value) parcel in partnership with the Trust for Public Land, the State Department of Land and Natural Resources and the Federal Forest Legacy Program. (ER 15 in No. 08-16769, Dec. SPB Ex. A, at 266, OHA Annual Report 2007, page 49.)

Also, in FY 2007 OHA completed acquisition of Waimea Valley, an approximately 1,800 acre ahupua'a on the north shore of the island of Oahu. "OHA leveraged $3.9 million in funding to receive fee simple title in the $14 million transaction." *Id.*

During those 30 years since 1978, the State of Hawaii has made *no* separate distributions of income, proceeds or lands from the pro rata portion of the Ceded Lands Trust for *non*-ethnic Hawaiian beneficiaries.

Inoa voter registry.

Between March 20, 2007 and April 27, 2007 the attorney for these Seven Non-Ethnic Hawaiians corresponded with Governor Lingle requesting disbursements and benefits equivalent to those now going to OHA exclusively for native Hawaiians and Hawaiians. The Governor declined the request and declined to clarify how she intended to fulfill in Hawaii the promise of the U.S. Constitution that every person is entitled to the equal protection of the laws." (ER 15 in No. 08-16769, EX. P, Q, R & S, Doc # 5 Dec. SPB filed April 3, 2008.)

Threatened additional transfers to OHA. Currently pending before the Senate of the State of Hawaii is SB995 SD2 whose purpose is officially described as,

> Resolves claims and disputes relating to the portion of income and proceeds from the lands of the public land trust for use by the office of Hawaiian affairs between 11/7/1978 and 7/1/2009; conveys certain parcels of real property in fee simple to the office of Hawaiian affairs.

(See SB995 http://www.capitol.hawaii.gov/site1/docs/docs.asp , type in SB995 and follow instructions for current status, text and committee reports.)

SB995 proposes to convey to OHA yet more trust property for past periods in addition to the over $400 million of trust funds plus other real property already diverted to OHA for the same past periods.

Included in the bill are 5 parcels of land in the Kakaako Park Subdivision in Honolulu; Kahana Valley and Beach Park; La Mariana and submerged lands; accreted peninsula bordered by Kalihi Stream and Moanalua Stream; Heeia Fishpond; most of the summit of Mauna Kea Scientific Reserve almost 14,000 feet above the Pacific, far from cities with bright lights and air pollution, inarguably the best site for astronomy in the northern hemisphere, home of 13 telescopes with investments of over $2 billion, and Mauna Kea Ice Age Nature Area; and State owned fishponds statewide. The bill also requires that OHA "transfer management and control of all parcels in the measure to the sovereign native Hawaiian entity upon its recognition by the United States and the State."

Testimony before the Senate Committee on Water, Land, Agriculture and Hawaiian Affairs, including the undersigned's opposing the bill, is posted at http://www.capitol.hawaii.gov/session2009/Testimony/SB995_TESTIMONY_WTL_02-13-09_LATE.pdf . That committee reported the bill favorably on February 13, 2009 as did the Senate Ways and Means Committee on February 20, 2009. On February 20, 2009 the State of Hawaii House of Representatives reported favorably a similar bill, providing for $200 million worth of State real property to be conveyed to OHA in two phases; as did the House Finance Committee on March 4, 2009.

The Akaka bill would disenfranchise non-ethnic Hawaiians.

The "Akaka bill" also referred to as the Native Hawaiian Government Reorganization Act, was first introduced in Congress in 2000 in response to the February 23, 2000 landmark *Rice v. Cayetano* decision; and has been re-introduced, but failed to pass, in every session since then. The current version, S.381/H.R.862, was introduced February 4, 2009. OHA Chair Haunani Apoliona in her report of the state of OHA in the January 2009 Ka Wai Ola, OHA's monthly newsletter, said,

> Based on previous expressed support for the Akaka bill by President-elect Obama, a smoother and timely passage and enactment of the Native Hawaiian Government Reorganization Act is anticipated.

The new Akaka bill like the previous versions, would sponsor creation of a Native Hawaiian government where no Native Hawaiian "tribe" or governing entity of any kind now exists; and do so by elections in which eligibility to vote is restricted by race. The test for eligibility to participate in the process and vote in the elections called for by the Akaka bill is virtually identical to that which *Rice v. Cayetano*, 528 U.S. 495, 514-516 (2000) held to be a racial classification and struck down as violating the Fifteenth Amendment.

To create the Native Hawaiian government, the new version S. 381 (a true copy of which is Ex.4 to the attached declaration) would:

Create a privileged class in America by "finding" the U.S. "has a special

trust relationship to promote the welfare of native people of the United States, including Native Hawaiians;" and a "special political and legal relationship" that "arises out of their status as aboriginal, indigenous, native people of the United States". §§1(3), (21) & (22) and §§2(1) & (7);

Define "Native Hawaiian" as anyone with at least one ancestor indigenous to Hawaii, §2(7)(A);

"Reaffirm" that "Native Hawaiians are a unique and distinct aboriginal, indigenous, native people" with "an inherent right" of "self-governance" and to "reorganize a Native Hawaiian government", §3(a)(1) & (4); and

Provide a process (with elections and referenda at which only Native Hawaiians may vote) to create a Native Hawaiian government:

- Election of an Interim Governing Council. Only Native Hawaiians are eligible to be candidates and to vote. Sec. 7(c)(2);

- A referendum to determine the proposed elements of the organic governing documents. Only Native Hawaiians are eligible to vote. Sec. 7(c)(2)(B)(iii)(I);

- A referendum to ratify the organic governing documents prepared by the Interim Governing Council. Only Native Hawaiians are eligible to vote. Sec. 7(c)(2)(B)(iii)(IV);

- Election of the officers of the new government by the persons

specified in the organic governing documents. Sec. 7(c)(5). Given that the new government is to be recognized as the "representative governing body of the Native Hawaiian people", it seems likely that only Native Hawaiians will be eligible to vote.

Automatic recognition of new government. Once the new government is created, the United States is deemed to have officially recognized it as the "representative governing body of the Native Hawaiian people." §7(d)(2).

Negotiations. The bill would then authorize the United States to negotiate with the State of Hawaii and the Native Hawaiian government for the transfer to the Native Hawaiian government of lands, resources, and assets dedicated to Native Hawaiian use under existing law. §9(b).

No requirement for prior consent or later ratification. The bill does not require the prior consent to the process by the people of Hawaii; or that any agreement negotiated for transfers to the new government shall be subject to their (the people's) ratification.

Casinos, traffic, national security and future lawsuits. The bill disclaims any settlement. §10. It does not ban casinos; or protect U.S. military bases or training in Hawaii; or guarantee free flow of traffic on roads or in the air space or territorial waters or utility lines across the territory of the new government. Nor does it ban illegal drugs, illegal immigration or hostile military forces or the

exercise and enforcement of civil and criminal jurisdiction by the new government.

Although the *Kuroiwas* do not support creation of a separate government of any shape or form for Native Hawaiians or any other racial group, they do wish to vote in any election in Hawaii in which important public issues are being considered or public officials are being elected. This is their right under the Fifteenth Amendment. *Terry v. Adams*, 345 U.S. 461, 468-469 (1953) "Clearly the [Fifteenth] Amendment includes any election in which public issues are decided or public officials selected."

OHA's expenditures of trust funds for the Akaka bill and the Kau Inoa racial registry.

Between 2003 and November 2006, OHA spent over $2 million of Ceded Lands Trust funds on its congressional lobbying efforts for the Akaka bill (The then S. 310/H.R. 505, Native Hawaiian Government Reorganization Act of 2007, commonly referred to as the "Akaka bill.". That amount does not include the $900,000 OHA spent to maintain a "Washington Bureau". (Ex. B, ER 15 in No. 08-16769, Doc # 5, Dec. SPB filed April 3, 2008.) Given the importance which OHA places on the Akaka bill as essential to protect itself from Constitutional challenge, it is reasonable to expect the lobbying since November 2006 has continued in at least the same magnitude.

On June 23, 2006 the OHA trustees approved the Ho'oulu Lahui Aloha (To

Raise a Beloved Nation) plan to go forward at the state level without waiting for federal approval. (ER 15 in No. 08-16769, Dec. SPB Ex. C at 272-295.) The proposal would require thousands of Native Hawaiians to sign on. Under the plan, OHA would step up the Hawaiian voter registration effort known as Kau Inoa to boost registration of persons of Hawaiian ancestry nationwide to 118,000 voters. OHA would fund the entire cost of the transition estimated at $7 million to $10 million. The plan is detailed in the Honolulu Advertiser article July 17, 2006 which cites OHA as the source. (ER 15 in No. 08-16769, Dec. SPB Ex. T at 385-390. The estimated $7 million to $10 million price tag is at page 388.)

OHA's financial statements for FYE June 30, 2007 and 2008 show expenditures from Public Land Trust funds held by OHA of $20,434,489 and $21,056,038 respectively for "Beneficiary advocacy" but provide no detail as to the amounts for lobbying for the Akaka bill or the Hawaiian voter registry.

OHA's statutory purposes explicitly "include: . . . conducting advocacy efforts for native Hawaiians and Hawaiians. " HRS § 10-3(4). The State makes no trust or other public money available to finance advocacy which opposes this invidious discrimination.

Racial distinctions are especially "odious to a free people," *Rice* 528 U.S. at 517 where they undermine the democratic institutions of a free people by instigating racial partisanship. This was the fundamental evil that the *Rice* Court

detected in Hawaii's law: "using racial classifications" that are "corruptive of the whole legal order" of democracy because they make "the law itself . . . the instrument for generating" racial "prejudice and hostility." *Rice*, 528 U.S. at 517. Eliminating OHA's racial restrictions on voting and holding office did not entirely root out this evil. It will remain as long as the OHA Trustees are required to be racial advocates. It "is altogether antithetical to our system of representative democracy" to create a governmental structure "solely to effectuate the perceived common interests of one racial group" and to assign officials the "primary obligation . . . to represent only members of that group." *Shaw v. Reno,* 509 U.S. 630, 648 (1983). *Shaw* quoted Justice Douglas:

> When racial or religious lines are drawn by the State, the multi-racial . . . communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race . . . rather than to political issues are generated; communities seek not the best representative but the best racial . . . partisan. Since that system is at war with the democratic ideal, it should find no footing here.

Wright v. Rockefeller, 376 U.S. 52, 67 (1964) (Douglas, dissenting). In *Shaw*, the racial partisanship was fostered indirectly by gerrymandering legislative districts. By contrast, as in *Rice*, the "structure in this case is neither subtle nor indirect;" Hawaii law specifically directs OHA and its trustees to devote their efforts to the betterment of "persons of the defined ancestry and to no others." *Rice*, 528 U.S. at 514.

To advance "the perceived common interests of one racial group," *Shaw*,

509 U.S. at 648, the OHA Trustees spend public funds and hold public lands. This cannot stand: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." *Lau v. Nichols*, 414 U.S. 563, 569 (1974) (quoting Senator Humphrey during the floor debate on Title VI of the Civil Rights Act of 1964, a provision that is coextensive with the Equal Protection Clause, *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001)). The government is even forbidden to give money to private parties "if that aid has a significant tendency to facilitate, reinforce and support private discrimination." *Norwood v. Harrison*, 413 U.S. 455, 466 (1973). *Norwood* instructed the District Court to enjoin state subsidies for private schools that advocated the "private belief that segregation is desirable" and that "communicated" racial discrimination as "an essential part of the educational message." *Id.* at 469. *A fortiori*, a state agency cannot spend money to itself advocate racial classifications that are "odious to a free people" and "corruptive" of democracy. *Rice*, 528 U.S. at 517.

Summing up.

The State of Hawaii as trustee of the federally-created Ceded Lands Trust holds 1.2 million acres of the ceded lands for *all* the people of Hawaii not just for native Hawaiians. For three decades, State officials have been diverting Ceded Lands Trust receipts exclusively to OHA as the "income and proceeds from that

pro rata portion" of the trust "for native Hawaiians" as defined in the Hawaiian Homes Commission Act despite the fact that, as the State has now revealed, the trust had no net income or proceeds during those years. The approximately $400 million diverted were no longer available for these Seven Non-Ethnic Hawaiians and the other beneficiaries similarly situated and so in fact were at their expense.

Nevertheless, the diversions from the trust are continuing and escalating. OHA is using them, not for the betterment of "native Hawaiians" whose numbers naturally diminish by intermarriage, but in large part to lobby and advocate for the ever-expanding number of persons with even one drop of Hawaiian ancestry. As a result, these Seven Non-Ethnic Hawaiians (and over a million other citizens of the State of Hawaii and the United States similarly situated) face the loss not just of their beneficial interests in the trust but, if the Akaka bill or Ho'oulu Lahui Aloha become law, the loss of the unified State of Hawaii with the unalienable right to life, liberty and the pursuit of happiness as promised by the Admission Act: §2 "The State of Hawaii shall consist of all the [8 major] islands, together with their appurtenant reefs and territorial waters"; and §3 "The constitution of the State of Hawaii shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

Three decades of plunder is enough. It is essential to Wendell Marumoto, James I. Kuroiwa, Jr., Patricia A. Carroll, Toby M. Kravet, Garry P. Smith, Earl F. Arakaki, and Thurston Twigg-Smith and to each and every Citizen of the United States and the State of Hawaii similarly situated to halt the looting and prevent further irreparable losses until final judgment.

Respectfully submitted.

DATED: Honolulu, Hawaii, March 12, 2009.

/s/ H. William Burgess
H. William Burgess
Attorney for Plaintiffs–Appellants KUROIWA, et al
and Plaintiff-intervenor-Appellant MARUMOTO