No. 08-16769

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES I. KUROIWA, JR.; et al.,

Plaintiffs - Appellants

v.

LINDA LINGLE, in her official capacity as Governor of the State of Hawaii; et al.,

Defendants – Appellees

HAUNANI APOLIONA, in her official capacity as Office of Hawaiian Affairs Chair; et al.,

Defendants – Appellee.

On Appeal from the United States District Court
for the District of Hawaii
Honorable J. Michael Seabright, District Judge

KUROIWA PLAINTIFF-APPELLANTS' OPENING BRIEF

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INTRODUCTION

Kuroiwa Plaintiffs-Appellants James I. Kuroiwa, Jr., Patricia A. Carroll, Toby M. Kravet, Garry P. Smith, Earl F. Arakaki and Thurston Twigg-Smith (hereinafter collectively referred to as "*Kuroiwas*") are citizens of the United States and the State of Hawaii. They are all registered voters, homeowners and long-time residents of Hawaii. Although they are of diverse ancestries and some have lived in Hawaii for generations, none of these six are "Hawaiian" or "native Hawaiian" under the definitions in the Office of Hawaiian ("OHA") laws or the Akaka bill.[1]

The district court held it was bound by *Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. February 9, 2007) to rule that the United States is an indispensable party to any challenge to the expenditure of Ceded Lands Trust revenues, and yet,

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1. In this brief, the term "native Hawaiian" (with a small "n") means "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778," the definition used in the Hawaiian Homes Commission Act "HHCA" and incorporated into the OHA laws. The term "Hawaiian" as used in the OHA laws and the term "Native Hawaiian" (with a capital "N") as used in the Akaka bill, mean anyone with at least one ancestor indigenous to the Hawaiian Islands. The term "Akaka bill" refers to the current version of that bill, S. 310/H.R. 505, Native Hawaiian Government Reorganization Act of 2007, now pending before Congress.

Kuroiwa Plaintiffs cannot establish standing to sue the United States as trust beneficiaries. (ER 2, at 8 and 9.)

Kuroiwas acknowledge the trial court's judgment is now the law of this case. They present the issues, claims and contentions in this brief and pursue this appeal as warranted by a non-frivolous argument for modifying or reversing that existing law or for establishing new law.

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), 2202 (declaratory judgment) and 1367 (supplemental jurisdiction when state and federal claims form part of the same case and it would ordinarily be expected they would be tried in the same proceeding).

This court has jurisdiction under 28 U.S.C. § 1291, as the district court entered final judgment on the pleadings in favor of all Defendants on July 3, 2008. (ER 1 and 2.) All *Kuroiwas*, i.e. all Plaintiffs, filed their notice of appeal on July 30, 2008. (ER 17 Dkt # 93.) The appeal is timely under FRAP 4(a)(1)(A).

ISSUES PRESENTED FOR REVIEW

1. Whether the United States is an indispensable party to a suit for breach of trust brought by individual beneficiaries of Hawaii's federally-created

Ceded Lands Trust, challenging the distributions and expenditures of trust revenues by the responsible officials of the Trustee, State of Hawaii, and the Trustees of the Office of Hawaiian Affairs ("OHA"), a State agency; and, if so,

a. Whether, under F.R.Civ.P. 19(a)(2) the court must order that the United States be made a party; or

b. Whether, since the United States, being fully informed and having considered the question at the highest levels, has officially informed the court it has decided not to intervene at this time, should the action, under F.R.Civ.P. 19(b) "in equity and good conscience, proceed among the existing parties"; or

c. Whether such beneficiaries can sue the United States for non-monetary relief challenging § 5(f) of the Admission Act to the extent it is construed or applied as causing, requiring, authorizing, permitting, encouraging, aiding, abetting or assisting the State or its officials, or the OHA Trustees, in their breach of the Ceded Lands Trust or to the extent the United States is acting in concert with such officials or Trustees in the breach;

2. Whether, since the Ceded Lands Trust has never, since Hawaii joined the Union in 1959, produced annual net income from which, under basic trust law principles, distributions to trust beneficiaries could lawfully be made,

a. Should control of the hundreds of millions of dollars and assets derived from improper past distributions still held or controlled by the OHA Trustees be re-vested in the State for *all* the people of Hawaii; and

b. Should the court permanently enjoin any further distributions from the Ceded Lands Trust to OHA unless and until the Ceded Lands Trust generates annual from which the State as Trustee may, under basic trust law principles, lawfully make impartial distributions to or for beneficiaries; and the court, after notice and opportunity to be heard to affected beneficiaries, authorizes the State, as Trustee, to do so;

3. Whether State officials and OHA Trustees may, without violating basic trust law principles and the Fourteenth Amendment, continue to discriminate between trust beneficiaries on the basis of race; and

4. Whether OHA or its Trustees may, without violating basic trust law principles or the Fourteenth Amendment or without depriving or threatening to deprive *Kuroiwas* and other citizens similarly situated, of equal protection of the laws and equal privileges and immunities under the laws, continue to spend Ceded Lands Trust funds to lobby for or otherwise support the Akaka bill or any other legislation for the purpose of creating or "reorganizing" a Native Hawaiian governing entity; or supporting *Kau Inoa* or any other racially restricted registry of persons eligible to participate in elections.

STATEMENT OF THE CASE

Kuroiwas filed this action for breach of trust and deprivation of civil rights (ER 16) and moved for a temporary restraining order and preliminary injunction (ER 15) on April 3, 2008.

Their complaint calls into question the constitutionality of an act of Congress to the extent that it is construed or applied in a way that would make it unconstitutional. Paragraph 50 of the complaint alleges that redress for defendants' breaches of trust requires:

> in addition to the relief sought against Defendants, declaratory judgment that the reference to the "betterment of the conditions of native Hawaiians" in §5(f) of the Admission Act, *is unconstitutional to the extent that it is construed* as requiring or authorizing that native Hawaiians be given any pro rata portion of the income or proceeds or other benefit, right title or interest in the ceded lands trust not given equally to the other beneficiaries." (Emphasis added.)

Paragraph 51 then requests,

> Since the constitutionality of an act of Congress (§5(f) of the Admission Act) is thus called into question *to the extent it is so construed*, these Six Non-ethnic Hawaiians ask pursuant to 28 U.S.C. §2403(a), that the Clerk of this Court certify that fact to the Attorney General so that the United States may intervene if it wishes. (Emphasis added.)

The prayer of the complaint, at paragraph A.3., page 28 (ER 16) seeks declaratory judgment,

> To the extent that § 5(f) of the Admission Act has been or is construed or applied to require or authorize the State of Hawaii or its officials to

> give persons of Hawaiian ancestry any right, title or interest in the ceded lands trust, or the income or proceeds there from, or any other rights not given equally to other citizens of Hawaii, it violates the common law of trusts applicable to federally created trusts and the Equal Protection component of the Fifth Amendment to the Constitution of the United States; and is invalid.

A status conference was held April 8, 2008. Attorney General Mark J. Bennett argued first.

> "… it's our belief that it's clear beyond argument that the Ninth Circuit's decision in *Arakaki* "absolutely, completely and wholly bars this complaint on any fair reading. That they make it absolutely clear that complaints which have as their heart the contention that any part of the Admission Act is unconstitutional, cannot be brought in this circuit without the U.S. as a party." (ER 14, Tr. 4/8/2008 at 4 & 5.)

Within a few minutes the district court demonstrated it was very familiar with *Arakaki*; a copy of *Arakaki* was open on the desk before it; the court read the applicable language and after exchanges with counsel, concluded, "Now, I do find that I am bound by the Ninth Circuit's decision in *Arakaki versus Lingle*. I see no basis under Rule 54 or any other rule to suggest to me that Arakaki is not a binding decision on me, even though it was remanded back to Judge Mollway, as the Ninth Circuit did." The Court then continued for several pages of the transcript to articulate clearly his analysis of *Arakaki* and its applicability to this case, denied the TRO and scheduled the hearing on motions to dismiss to be filed by both sets of defendants. (ER14, Tr. 4/8/2008 7-24.)

The motion for TRO had sought, pending final judgment, to restrain the OHA Trustees from further spending to lobby for the Akaka bill and related activities; and to restrain the State from further transfers to OHA and related activities). The reasoning expressed by the court for denying the motion went as follows: *Arakaki v. Lingle* is binding; Under *Arakaki*, any challenge to the expenditure of trust revenue brought by an alleged trust beneficiary must challenge the substantive terms of the trust in the Admission Act; the United States is an indispensable party to any challenge to the Admission Act; Plaintiffs have no standing to sue the United States; and therefore, they have no likelihood of success on the merits. (ER 14, Tr. at 21-23; order denying TRO, 4/08/2008 ER 13; See also ER 8, Order denying motion to reconsider.)

After announcing the decision, the court said its ruling on the TRO at that stage of the case was "without prejudice, Mr. Burgess, to you making every effort to show I'm incorrect on this." (ER 14, Tr. 4/8/2008 at 24.)

On April 10, 2008 in compliance with F.R.Civ.P 5.1(a), *Kuroiwas* filed and served their Notice of Constitutional Question to the Attorney General of the United States (ER 12, Dkt # 28),

> Please take notice, pursuant to F.R.Civ.P. 5.1(a), that this action draws into question the constitutionality of a federal statute (§5(f) of the Hawaii Admission Act of March 18, 1959, Pub L 86-3, 73 Stat 4) *to the extent that §5(f) is construed or applied* to authorize or require that the State of Hawaii give "native Hawaiians" or "Hawaiians" any right, title

> or interest in Hawaii's ceded lands trust, or the income or proceeds there from, not given equally to other citizens of Hawaii. (Emphasis added.)

On April 17, 2008, the *Kuroiwas* requested, pursuant to F.R.Civ.P. 5.1(b) that the clerk of district court certify to the Attorney General of the United States that a statute has been questioned, enclosing a draft of a proposed form of certification (ER 11, 12, Dkt # 30.)

On April 22, the district court certified to the Attorney General of the United States a Constitutional Challenge To A Federal Statute. (ER 9 Dkt # 33.) The court's certification omitted the language limiting the extent of *Kuroiwas*' challenge to §5(f).

On June 4, 2008 the United States requested an additional 45 days "in which to decide whether to intervene in this case." (ER 6, Dkt # 60.) The request by the United States stated:

> The certifications and complaint in this case have been forwarded to various components of the Department of Justice for their review. The matter is presently being evaluated by the Solicitor General's Office, the Civil Division's Appellate Section, the Environmental Natural Resources Division, and by the Department of the Interior.

The district court on the same day granted the United State's request for additional time "in which to decide whether to intervene in this case." (ER 5, Dkt # 61.) On June 6, 2008, the United States filed "notice that it does not intend to intervene at this time." (ER 4, Dkt # 64.)

On July 3, 2008 the district court granted defendants' motions for judgment on the pleadings (ER 1 Judgment and ER 2 Order) as to Count I for the same lack-of-standing-to sue-indispensable-party reason that it had denied the TRO. As to Count III the district court ruled that the absence of a section 1983 deprivation of rights precludes a section 1985 conspiracy claim predicated on the same allegations. As to the remaining Count II, a supplemental state law claim, the district court declined to exercise jurisdiction. (ER 3 at 15.) The district court also denied plaintiffs' motion for leave to amend the complaint to include the United States as a party. (ER 3 at 16.)

As noted under the Statement of Jurisdiction above, *Kuroiwas* then timely appealed.

STATEMENT OF FACTS

The facts of this case, including the legal history of the Ceded Lands Trust, are stated in considerable detail in the complaint (ER 16), paragraphs 13 – 60, and in the motion for temporary retraining order and preliminary injunction and declarations and exhibits in support of that motion (ER 15). Additional facts are established by the State of Hawaii's pleadings in two related cases, true copies of which were included in the Hearing Notebook, (SER 1) provided to the court and counsel and used in oral argument at the hearing on July 1, 2008.

For purposes of reviewing the district court's ruling[2], the following facts, among the many others alleged in the complaint and *Kuroiwas'* other pleadings, are taken as true and construed in favor of *Kuroiwas*.

The Trustee-State's distributions of trust funds and lands only for the favored few.

OHA's most recently published Annual Financial Report shows, as of June 30, 2007, net assets of $452.7 million from the Public Land Trust. (ER 7, Dkt. # 43 pp 64-66, Ex. 1, Dec. Girard Lau Deputy Attorney General, filed May 9, 2008) This presumably represents the total amount received by OHA from the State of Hawaii from 1978 through June 30, 2007 plus earnings and appreciation on and less disbursements from those funds by OHA up to then.

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2 "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." *Graham v. FEMA,* 149 F.3d 997, 1001 (9th Cir.1998) (*quoting Warth v. Seldin,* 422 U.S. 490, 501 (1975)).

A motion for judgment on the pleadings is evaluated according to virtually the same legal standard as a motion to dismiss under Rule 12(b)(6). *See McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 810 (9th Cir.1988); *Luzon v. Atlas Ins. Agency,* 284 F.Supp.2d 1261, 1262 (D.Haw.2003). "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.' " *Ventress v. Japan Airlines,* 486 F.3d 1111, 1114 (9th Cir.2007) (quoting *Fajardo v. County of L.A.,* 179 F.3d 698, 699 (9th Cir.1999)).

Since then, on information and belief based on Act 178, SLH 2006, the State has distributed another $15.1 million more annually in equal quarterly installments to OHA.

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

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, Dec. SPB Ex. A, OHA Annual Report 2007, page 49.)

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.

Between March 20, 2007 and April 27, 2007 Plaintiffs' attorney 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, EX. P, Q, R & S, DKT # 5 Dec. SPB filed April 3, 2008.)

OHA'S expenditure of trust funds for the Akaka bill.

Between 2003 and November 2006, OHA spent over $2 million of funds on its congressional lobbying efforts for the Akaka bill (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, DKT # 5, Dec. SPB filed April 3, 2008.)

At no time before, during or after those years have OHA or the State distributed any Ceded Lands Trust funds as the pro rata portion for non-ethnic Hawaiian trust beneficiaries to lobby against the Akaka bill or for any other purpose.

Akaka bill would disenfranchise non-ethnic Hawaiians

The Akaka bill (available online at the Library of Congress website, http://thomas.loc.gov/ and type in H.R.505 PCS, Placed on Calendar in Senate) would sponsor creation of a Native Hawaiian "tribe" or "governing entity"

where none now exists; and do so using a test virtually identical to that which *Rice v. Cayetano*, 528 U.S. 495, 514-516 (2000) held to be racial.

To create the native Hawaiian governing entity, the Akaka bill calls for:

- 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.

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."

The Akaka bill does not require that the new Native Hawaiian government be republican in form or that it be subject to the Equal Protection component of the Fifth or Fourteenth Amendments or all of the other protections for individual persons in the U.S. Constitution. Since the avowed purpose of the bill is to insulate Hawaiian entitlements and privileged status from Constitutional challenge, it can be expected that the new Native Hawaiian government will *not* be republican in form and *not* required to provide Equal Protection of the laws to all persons subject to its jurisdiction.

Under §7(c)(6) of the Akaka bill, once the officials of the new government are elected and certified, the U.S. is deemed to have automatically recognized it as the "representative governing body of the Native Hawaiian people." The bill in §8(b) then calls for the State and Federal governments to negotiate with the new government for the breakup and giveaway of land, natural resources, and other assets, governmental power and authority and civil and criminal jurisdiction. The transfers go only one way, *from* the State and/or the Federal government and *to* the Native Hawaiian government; and are not limited in magnitude or duration.

OHA'S expenditures of trust funds for the *Kau Inoa* racial registry.

OHA has committed $10 Million from the for *Kau Inoa*, OHA's registry of persons eligible to participate in the elections to create the new government contemplated by the Akaka bill and/or by "Plan B", OHA's alternate track at the state level, Ho'oulu Lahui Aloha (To Raise a Beloved Nation). (Ex. C, ER 15, DKT # 5 Dec. SPB filed 4/3/2008, OHA's Plan B, Ho'oulu Lahui).

***Kuroiwas* all applied for Kau Inoa registry**

To secure their right to vote, each of the *Kuroiwas* has applied to register with OHA's *Kau Inoa*. (Ex. D, J, K, L & M, ER 15, DKT # 5 Dec. SPB; also ER 15 Plaintiffs' Declarations filed 4/03/2008) They have sought but not received from OHA assurance that they will be permitted to vote in such elections. The Akaka bill and *Kau Inoa* literature specify that only Native Hawaiians will be eligible.

SUMMARY OF ARGUMENT

The premise asserted by defendants and adopted by the trial court (that *Kuroiwas* challenge the substantive terms of § 5(f) or the Admission Act itself) is incorrect. *Kuroiwas* complain not about the substantive terms of § 5(f), but about the way defendants construe and apply it. There is no reason to require the United States to be a party to this case. Courts routinely interpret and apply federal statutes without the United States as a party.

Dicta is not precedent. Patrick Barrett, a non-Hawaiian who wanted a Hawaiian Homes lease, was a plaintiff in the *Carroll* case. He challenged Article XII of the State of Hawaii Constitution "insofar as it creates the Hawaiian Homes Commission." It was not necessary to the decision in his case to rule on the other sections of Article XII, such as Section 4 which covers the Ceded Lands Trust. The court's "holding" as to the non-HHC sections, being unnecessary to the decision on Barrett's claim, was mere dicta. The trial court in this case relied entirely on *Arakaki*. The *Arakaki* panel relied entirely on *Carroll*. The ruling in *Carroll* was mere dicta as to the sections at issue in this case. Dicta has no precedential value.

The established law of this circuit is that basic trust law principles apply to Hawaii's federally-created Ceded Lands Trust; and individual beneficiaries have standing to sue State officials and OHA Trustees when they breach the trust. With the greatest of respect to the district court and this court, the *Arakaki* opinion is anomalous, it would bar substantially all beneficiary cases, even by those of Hawaiian ancestry, based on sovereign immunity. That would profoundly alter this circuit's established trust law.

On June 4, 2008 in the related *Day v. Apoliona* case, the State, apparently for the first time in history, publicly accounted for, at least in part, and acknowledged that the Ceded Lands Trust costs the State many times more

annually that the 1.2 million acres bring in. The State also acknowledged that this has been so for every year since Statehood. This means there was never any annual net income from which distributions could lawfully be made to beneficiaries. Income beneficiaries are entitled to, and only to, net income after expenses. This in turn means that the hundreds of millions of trust revenues the State has distributed to OHA for native Hawaiian beneficiaries over the last three decades have been illegal. This is one of the misapplications of the Ceded Lands Trust revenues that *Kuroiwas* challenge in this case.

ARGUMENT

I. The United States is not a required or indispensable party.

A. Standard of review.

The trial court's interpretation of Rule 19, Required Joinder of Parties, and any legal conclusions the trial court makes in the process of applying Rule 19 are reviewed de novo. *E.E.O.C. v. Peabody Western Coal Co*., 400 F.3d 774, 778 (9th Cir. 2005).

> 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 (C.A.9 (Hawaii), 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,* 98 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).

At the hearing July 1, 2008 the trial court said, "I'm granting the motion for judgment on the pleadings. That doesn't entail any evidence. As a result of my granting those motions, the motion for preliminary injunction is denied as moot. So I don't think there's any need for any adoption of any testimony of any sort in reference to the 12C motions that were filed. … If you go from here to the Ninth Circuit, it will be a legal issue that you will be addressing to the Ninth Circuit based on my granting the motion for judgment on the pleadings." (ER 3, Tr. 7/1/2008, pp 32 and 33.)

B. *Kuroiwas* challenge the interpretation and application of § 5(f), not its substantive terms.

The premise that *Kuroiwas* in this suit, challenge the substantive terms of § 5(f) or seek to declare the Admission Act itself or any provision of it

unconstitutional,[3] is incorrect. Some straw man somewhere may make that claim but *Kuroiwas* in this case do not.

As *Kuroiwas'* counsel said at the July 1, 2008 hearing, (ER 3, Tr. at 25-26),

> Your Honor, I'm not challenging the constitutionality of Section 5F. Mr. Bennett said that I was, but that's not the case. We're challenging only to the extent that that provision has been misunderstood or misconstrued or misinterpreted. I make that very clear in the complaint, I made it clear in the notice that we sent to the United States attorney as provided by Section 5.1 of the Rules of Civil Procedure, and I've tried to make it very clear in every appearance or in every paper I've sent or filed in this court.
>
> We're not challenging the constitutionality of the public land trust. We are beneficiaries of it. That's the basis for our lawsuit.
>
> But for the first 10 years after statehood, it was the general understanding that the ceded lands trust, the 1.2 million acres of the ceded lands trust, was not held for the benefit of native Hawaiians as different – as distinguished from them being as part of the general public. And that's why, instead of making special distributions for native Hawaiian beneficiaries, the state simply, by and large, sent the income from the ceded lands to the extent that there was any to the Department of Education where it benefited people of all ancestries, including native Hawaiians who make up at that time, and I think it's

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3. Order granting motions for judgment on the pleadings 7/3/2008 at 8, "By challenging the expenditure of trust revenue, Count I challenges the substantive terms of the Admission Act and makes the United States an indispensable party for this claim." Also, see Tr. of Hrng 7/1/2008 at 4, Att'y Gen. Bennett, "plaintiffs' complaint in this case sets out to ask this court to declare provisions of the Admission Act are unconstitutional." Again at 6 and again at 7, he refers to "their claim that the Admission Act is unconstitutional."

> still true, roughly 26 percent of the enrollment of the student body of the public schools.
>
> And that was the understanding. It wasn't until 1978 at the Con-Con and the committee of Hawaiian Affairs came up with the idea that Section 5F creates two types of beneficiaries: native Hawaiians and the rest of the people. And that was what led to the adoption of the constitutional change to the state constitution which created the Office of Hawaiian Affairs.
>
> But the understanding, after statehood again, was that the part of the ceded lands, which would be used only for native Hawaiians, was the Hawaiian Homes Commission part, the two hundred thousand acres. That's not part of this suit. That's not an issue. We do think that Section 4 of the Admission Act, which does have the compact under which the U.S. required the State of Hawaii to adopt the Hawaiian Homes Commission Act, we do think that that's unconstitutional. But that's for another case and another time. That's not before this court at this time.

Thus, *Kuroiwas* ask the district court merely to do something federal courts routinely do of necessity in every "Federal Question" civil case in federal court whether the United States is or is not a party: interpret and apply federal law. The *Kuroiwas* challenge the misinterpretation of § 5(f) of the Admission Act which began at the 1978 Con-Con and has led the State and its agency, OHA, to violate basic trust law principles and the United States Constitution since then.

> A statute, of course, is to be construed, if such a construction is fairly possible, to avoid raising doubts of its constitutionality. *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932); *Machinists v. Street*, 367 U.S. 740, 749-750, 81 S.Ct. 1784, 1789-90, 6

L.Ed.2d 1141 (1961); *United States v. Clark*, 445 U.S. 23, 27, 100 S.Ct. 895, 899, 63 L.Ed.2d 171 (1980).

St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 780 (1981)

A judgment fully in favor of *Kuroiwas* (construing § 5(f) as it was understood for the first almost two decades after statehood) would not require invalidation or change of even one word of § 5(f) or any other part of the Admission Act. Under the factors in F.R.Civ.P. Rule 19(a)(1), there would be no practical reason to join the United States in this case. In the absence of the United States, complete relief can be accorded among existing parties. Leaving federal law unchanged and construing it as it was apparently understood (judging by the course of conduct of the state and federal governments) for the first almost 20 years of Statehood, cannot be said as a practical matter to impair or impede any interest of the United States. Nor would any existing party be left subject to multiple or inconsistent obligations.

C. Supreme Court: United States not indispensable party to action challenging constitutionality of state law adopted in accordance with federal law.

Even if § 5(f) or some other federal law required the State to violate basic trust law principles or the Fourteenth Amendment in administering the Ceded

Lands Trust, it would appear that the *Kuroiwas*, as trust beneficiaries would have standing and the district court would have jurisdiction to adjudicate their statutory and Constitutional claims against the State officials and OHA Trustees, and the United States would not be an indispensable party.

In *California v. Grace Brethren Church*, the Supreme Court held that the federal government was not an indispensable party to an action by the Grace Brethren Church and a number of affiliated parochial schools challenging the constitutionality of the Federal Unemployment Tax Act which established a cooperative federal-state scheme to provide benefits to unemployed workers. The State of California appealed from the judgment of the United States District Court for the Central District of California which ruled that application of unemployment insurance tax statutes to certain religious schools was unconstitutional. The Supreme Court, Justice O'Connor, held that: (1) Tax Injunction Act applies to a request for declaratory relief, and (2) schools had a plain, speedy, and efficient state remedy for presenting their claims.

> FN38. The state defendants also argue that because the Federal Government is an indispensable party to this action, and could not be compelled to submit to state-court jurisdiction, the state courts could not afford the appellees complete relief. Consequently, the state defendants reason, the Tax Injunction Act does not deprive the District Court of jurisdiction. See Brief for Appellants State of California et al. 35. The error in this argument is its premise; as *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 101 S.Ct. 2142, 68 L.Ed.2d 612 (1981), demonstrates, the Federal Government need not be a party in

> order for the appellees to litigate their statutory and constitutional claims.
>
> ….
>
> Accordingly, we vacate not only the District Court's judgment with respect to the appellees' state claims, but also its judgment regarding the constitutionality of FUTA.

California v. Grace Brethren Church, 457 U.S. 393, 417 (1982)

This circuit made a similar point in *Green v. Dumke*, 480 F.2d 624, 628 (9th Cir. 1973). The Supreme Court has repeatedly found federal jurisdiction for challenges to the activities of state agencies administering federal programs under 42 U.S.C. §1983 combined with 28 U.S.C. §1343. It has not mattered a jurisdictional whit that the agency was enforcing federal statutes, as well as pursuing state ends. At 480 F.2d 629, the court continued, "When the violation is the joint product of the exercise of a State power and a non-State power then the test under the Fourteenth Amendment and §1983 is whether the state or its officials played a 'significant' role in the result."

D. The rules of *res judicata* are applicable only when a final judgment is rendered.

The *Arakaki* opinion expressly disavowed making a final judgment.

> "Although it appears to us that there are no plaintiffs who have standing to challenge the OHA funding, we are unwilling to make that final judgment on this record before us. Accordingly, we remand to the district court for further proceedings."

Arakaki v. Lingle 477 F.3d 1048, 1065 (9th Cir. February 9, 2007).

On remand, District Court Judge Mollway on March 5, 2007 directed the parties to file memoranda stating whether there are issues remaining for adjudication. On April 9, 2007 Plaintiffs filed their statement of issues remaining for the district court's adjudication, including:

> The issue of the harm to plaintiffs as municipal taxpayers caused by the exemption of Hawaiian Homesteaders from real property taxes;
>
> The issue of whether Plaintiffs as state taxpayers are suing "simply by virtue of their status as taxpayers"; and
>
> "The holding that the 1959 Admission Act and compact (in which the United States and the State of Hawaii agreed to carry out the explicitly racial HHCA in violation of both the Constitution and their fiduciary duties under federal trust law) in effect immunizes either of them from liability, cannot, at least in Plaintiffs' view, stand. Plaintiffs intend to pursue it until it is corrected. (ER 10, Ex B.)

On April 16, 2007, a status conference was held. After Plaintiffs' counsel said he would be filing a motion for leave to file an amended complaint and objected to dismissal without allowing him to do so, Judge Mollway, among other things, said,

> It wouldn't be dismissing of the case, actually. ... So, if I find that there isn't any such plaintiff who has standing, it's not a dismissal of the case. (ER 10 at 145.)

> Why can't you just file a whole new lawsuit? (ER 10 at 147.)
>
> That seems to me so much easier to achieve what you claim is your goal. I don't see any prejudice to your filing a whole new lawsuit. I don't see what is to be gained by amending the complaint. (ER 10 at 148.)
>
> I'm not going to enter a new judgment because it's not a new judgment. It's not an amendment of anything. I'm not dismissing your case. (ER 10 at 151.) "… you know, you can take an appeal but why? Just bring a new lawsuit. (ER 10 at 152.)

On May 1, 2007, the same day it was filed, Judge Mollway denied Plaintiffs' motion for leave to amend complaint. Her written order (ER 10 at 133) provided:

> This order *does not foreclose Plaintiffs* from filing a new case under a different civil number. Of course, any such case will be randomly assigned to a judge in this district. The court understands that Plaintiffs may seek to appeal the denial of their motion to amend their Complaint. Although Plaintiffs have a right to file such an appeal, Plaintiffs should consider whether they can receive a quicker determination of the merits of their *proposed* claims by filing a new case. (Emphasis added.)

On May 17, 2007, Judge Mollway entered a minute order closing the case file, noting that "The closing of the case file is an administrative action that does not affect any appeal deadline." (ER 10 beginning at 153.) The docket shows no final judgment and no further entries.

If the Court had entered a final judgment in favor of Defendants as to all claims and all parties, that would necessarily have included the Ninth Circuit's

Opinion as to Plaintiffs' trust beneficiary claims which would thereby have been extinguished. Plaintiffs in turn would have had the right to appeal to seek reversal. Instead, the district court *sua sponte* disavowed entering any judgment and merely confirmed in writing what she had said at the status conference, that plaintiffs' proposed claims were *not* foreclosed by her order. That left plaintiffs as a practical matter with nothing to appeal. The only option to plaintiffs, if they wished to receive their equal pro rata ceded lands trust distributions from the 1.2 million acres of the Ceded Lands Trust, for themselves and all the people of Hawaii, was to file a new lawsuit as expressly allowed by the court.

The requirement of finality. "The rules of *res judicata* are applicable only when a final judgment is rendered. § 13 Restatement of the Law, Judgments 2d 1982. Even a valid and final judgment does not bar another action by the plaintiff if the court directs that the action be dismissed without prejudice. Id. § 20.

> In order to invoke res judicata or collateral estoppel, Fernhoff must, at the least, show that an issue involved in the present action was finally and conclusively resolved in his favor. *See, e.g., City of Reno v. Nevada First Thrift,* 100 Nev. 483, 686 P.2d 231, 234 (1984); *Paradise Palms Community Association v. Paradise Homes,* 89 Nev. 27, 505 P.2d 596, *cert. denied,* 414 U.S. 865, 94 S.Ct. 129, 38 L.Ed.2d 117 (1973).[FN8] Fernhoff's criminal conviction was reversed solely because of an erroneous jury instruction, and no determination on the merits was ever made. The County's civil action was dismissed without any judgment on the merits. Fernhoff's civil action was also dismissed-in accordance with a stipulation by the parties. The terms of that stipulation did not purport

to resolve any issue pertinent to this action in Fernhoff's favor. Because none of the three suits resulted in a final resolution of any pertinent issue in favor of Fernhoff, the doctrines of res judicata and collateral estoppel are clearly inapplicable. *See City of Reno,* 686 P.2d at 234; *Paradise Palms Community Association,* 505 P.2d at 599.

Fernhoff v. Tahoe Regional Planning Agency, 803 F.2d 979, 986 (9th Cir. 1986).

E. *Stare decisis*, a principle of policy, not an inexorable command or mechanical formula.

Stare decisis is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." **2610 *Helvering v. Hallock,* 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940). This is particularly true in constitutional cases, because in such cases "correction through legislative action is practically impossible." *Burnet v. Coronado Oil & Gas Co., supra,* 285 U.S., at 407, 52 S.Ct., at 447 (Brandeis, J., dissenting).

Payne v. Tennessee 501 U.S. 808, 828, 111 S.Ct. 2597, 2609 - 2610 (U.S.Tenn.,1991)

Controlling authority has much in common with persuasive authority. Using the techniques developed at common law, a court confronted with apparently controlling authority must parse the precedent in light of the facts presented and the rule announced. Insofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis. Courts occasionally must reconcile seemingly inconsistent precedents and determine whether the current case is closer to one or the other of the earlier opinions. *See, e.g., Mont. Chamber of Commerce v. Argenbright,* 226 F.3d 1049, 1057 (9th Cir.2000).

Hart v. Massanari, 266 F.3d 1155, 1172 (9th Cir. 2001)

The distinction without a difference. The decisions of both the district court here, and the Ninth Circuit panel in *Arakaki* on which the district court relied, insufficiently parse "the precedent in light of the facts presented and the rule announced." For example, this circuit's numerous prior decisions upholding beneficiary standing, are brushed off "easily" as "suits to enforce the express terms of the trust, this suit, by contrast, asks the court to prohibit the enforcement of a trust provision."[4]

That "distinction" is nowhere to be found in trust law. Violation of any duty a trustee owes to a beneficiary is a breach of trust. Restatement 2d of Trusts, § 201. Under § 166 Illegality,

> (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.

Under Restatement of the Law, Third, Trusts: § 29,

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4 *Arakaki v. Lingle* 477 F.3d 1048, 1058 (9th Cir. February 9, 2007).

> 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.

Under Restatement 3d Trusts § 28, Charitable Purposes, Commentary

> *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.
>
> ….
>
> Provisions of these types in charitable trusts are not valid if they involve *invidious* discrimination.
>
> ….
>
> 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 omission of a Rule 19 Joinder analysis. F.R.Civ.P. 19 governs Required Joinder of Parties. A Rule 19 Joinder analysis requires a rather elaborate three-step process.

> Applying these two parts of Rule 19, there are three successive inquiries. *Bowen,* 172 F.3d at 688 (describing Rule 19's "three-step process"). First, the court must determine whether a nonparty should be joined under Rule 19(a). We and other courts use the term "necessary" to describe those "[p]ersons to [b]e [j]oined if [f]easible." Fed.R.Civ.P. 19(a); *see also Disabled Rights Action Committee v. Las Vegas Events, Inc.,* 375 F.3d 861, 867 n. 5 (9th Cir.2004) (explaining that the term "necessary" is a "term [ ] of art in Rule 19 jurisprudence"); *Bowen,* 172 F.3d at 688. If understood in its ordinary sense, "necessary" is too strong a word, for it is still possible under Rule 19(b) for the case to proceed without the joinder of the so-called "necessary" absentee. In fact, Rule

> 19(a) "defines the persons whose joinder in the action is *desirable* " in the interests of just adjudication. Fed.R.Civ.P. 19 Advisory Committee Note (1966) (emphasis added); *see also Bowen,* 172 F.3d at 688. Absentees whom it is desirable to join under Rule 19(a) are "persons having an interest in the controversy, and who ought to be made parties, in order that the court may act [.]" *Shields v. Barrow,* 58 U.S. (17 How.) 130, 139, 15 L.Ed. 158 (1854).
>
> If an absentee is a necessary party under Rule 19(a), the second stage is for the court to determine whether it is feasible to order that the absentee be joined. Rule 19(a) sets forth three circumstances in which joinder is not feasible: when venue is improper, when the absentee is not subject to personal jurisdiction, and when joinder would destroy subject matter jurisdiction. *See* Fed.R.Civ.P. 19(a); *see also Tick v. Cohen,* 787 F.2d 1490, 1493 (11th Cir.1986) (listing the three factors that may make joinder unfeasible).
>
> Finally, if joinder is not feasible, the court must determine at the third stage whether the case can proceed without the absentee, or whether the absentee is an "indispensable party" such that the action must be dismissed. As the Advisory Committee*780 Note explains, Rule 19 uses "the word 'indispensable' only in a conclusory sense, that is, a person is 'regarded as indispensable' when he cannot be made a party and, upon consideration of the factors [in Rule 19(b)], it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it." Fed.R.Civ.P. 19 Advisory Committee Note (1966). Indispensable parties under Rule 19(b) are "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields,* 58 U.S. at 139.

E.E.O.C. v. Peabody Western Coal Co., 400 F.3d 774, 779 -780 (9th Cir. 2005)

Thus, the 7/03/2008 Order granting motions for judgment on the pleadings (ER 1) erroneously analyzed the "apparently controlling" *Arakaki*

Opinion under basic trust law principles; and it completely omitted the mandatory Rule 19 joinder analysis. The order does not mention Rule 19. Instead, it simply concludes, apparently based on little more than a reading of the complaint and *Arakaki,* "*Arakaki* controls." at page 8 and at 13, "*Arakak*i is binding law on this court."

Dicta is not precedent. In *Arakaki* 477 F.3d at 1058-1059, Part III.A.2. under the heading, "The United States as an Indispensable Party," the panel opinion1 provides,

> We have recently held that in any challenge to the enforceability of the lease eligibility requirements, the United States ***1059** is an indispensable party. In *Carroll v. Nakatani,* 342 F.3d 934 (9th Cir.2003), a non-native Hawaiian citizen challenged the homestead lease program administered by DHHL/ HHC. The plaintiff sued the relevant state actors, but failed to sue the United States. We held that Section 4 of the Admissions Act "expressly reserves to the United States that no changes in the qualifications of the lessees may be made without its consent." *Carroll,* 342 F.3d at 944. We reasoned that because the qualifications for the DHHL/HHC leases cannot be modified without the United States' approval, the United States is an indispensable party to any lawsuit challenging the DHHL/HHC leases, and the Plaintiff's failure to sue the United States meant that his injury was not redressable. *Id.* at 944.

Then, at 1060,

> We held in *Carroll,* however, that "Article XII of the Hawaiian Constitution cannot be declared unconstitutional without holding [Section 4] of the Admissions Act unconstitutional." *Carroll,* 342 F.3d at 944. Our decision in *Carroll* effectively holds that any challenge to Article XII is a challenge to Section 4 of the Admission Act, and no challenge to the Admission Act may proceed without the presence of the United States as a defendant.

Then, 477 F.3d at 1061,

> Finally, we conclude, as we did in the prior section, 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.

Then at 1065,

> For the reasons we explained in Part III.A.2, *supra,* the United States is an indispensable party to any challenge to the Admission Act. Accordingly, although the United States is not an indispensable party with respect to challenges to OHA's expenditure of *tax* revenue, it remains indispensable with respect to challenges to the expenditure of *trust* revenue.

The legal authority cited for each of the above quoted conclusions is *Carroll*. The language quoted from *Carroll* is accurate. However, omitted and obviously overlooked is that Barrett's challenge to Hawaii's Article XII was only "insofar as it creates the Hawaiian Homes Commission":

> Redressability
>
> Barrett challenges Hawaii's Article XII insofar as it creates the Hawaiian Homes Commission. In his complaint, he broadly challenges the HHC and all the state laws, regulations and governmental rules that authorize the HHC to provide government benefits on the basis of race. One of the laws he singles out is the Hawaiian Homes Commission Act.

Carroll v. Nakatani 342 F.3d 934, 943 (9th Cir. 2003)

Barrett challenged Article XII of Hawaii's Constitution "insofar as it creates the Hawaiian Homes Commission." Only sections 1-3 of Article XII apply to the HHC.

Section 4, covers the 1.2 million acres which are held and administered by the State separate from the HHCA. Section 5 covers OHA; and Section 6 covers the powers of the OHA Board, also separate from HHCA. Since sections 4, 5 and 6 were not at issue in *Carroll*, no adjudication as to those sections was necessary to decide the *Carroll* case. Such dicta by courts (i.e. a holding or statement that is not necessary to decide the case before them) do not constitute binding precedent.[5]

Thus, the district court in this case relied entirely on *Arakaki*; *Arakaki* relied entirely on *Carroll*; and *Carroll* is dicta with no precedential application to the issues in this case.

F. *Arakaki* would, on sovereign immunity grounds, bar substantially all trust beneficiary suits in any forum, and significantly change the established law of the Ninth Circuit.

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5. *See Best Life Assurance Co. v. Comm'r,* 281 F.3d 828, 834 (9th Cir.2002) (defining *dictum* as "a statement 'made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential ...' ") (quoting *Black's Law Dictionary* 1100 (7th ed.1999)).

Brand X Internet Services v. F.C.C., 345 F.3d 1120, 1130 (9th Cir. 2003)

The effect of the *Arakaki* Opinion, if it is good law, would be to establish a new and very different precedent: It would bar beneficiaries of Hawaii's Ceded Lands Trust from challenging the trust or expenditures of trust revenues, because the United States is an indispensable party to any such suit, and Trust beneficiaries have no standing to sue the United States. The bar would exclude substantially all beneficiaries, even those of Hawaiian ancestry;[6] and it would effectively deprive them of any forum for redress, because the United States may not be sued in State Court. It would leave state officials, generally free to use as they wish 1.2 million acres of public lands equitably owned by *all* the people of Hawaii. The power of state officials carrying out the trust duties of the State would be substantially unchecked. They could, for example, manage the lands to discriminate between beneficiaries based on race, spend trust revenues to lobby for a separate government of, by and for one race, and commit the innumerable other kinds of mischief that follow almost absolute power.

The *Arakaki* opinion, and the precedent it would set, is irreconcilable with the established law of the Ninth Circuit, which, since 1985 or earlier, has upheld the standing of beneficiaries of the 5(f) trust to bring suit when the trustees are in breach.

The most recent chapter in the legal history of Hawaii's ceded lands trust

6. Three of the *Arakaki* plaintiffs are of Hawaiian ancestry.

was written by the United States Court of Appeals for the Ninth Circuit August 7, 2007 when the court said, "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 the 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.

This court specifically addressed the question of standing.

A considerable line of precedent in this circuit holds that Native Hawaiians, as beneficiaries of the § 5(f) trust, have a right under the Admission

Act that is enforceable by § 1983. …we cannot agree that there is a conflict sufficient to justify a district court or a three-judge panel of this court disregarding well-established precedent. We therefore reverse the district court's dismissal of the case and, without expressing any opinion of the merits of Day's allegations, remand for further proceedings.[FN2]

> FN2. No standing issue has been raised. We do, of course, have an obligation to consider Article III standing independently, as we lack jurisdiction when there is no standing. *See* *Bernhardt v. County of L.A.*, 279 F.3d 862, 868 (9th Cir.2002). Day's allegations, however, are analogous to those in *Price v. Hawaii*, 764 F.2d 623 (9th Cir.1985), in which we concluded that Native Hawaiians alleging a breach of the § 5(f) trust for failure to spend funds for the betterment of Native Hawaiians had standing to do so. *Id.* at 630;*see also* *Price v. Akaka*, 928 F.2d 824, 826-27 (9th Cir.1991) ("*Akaka I* "). We are bound by the two *Price* cases on the standing issue, and so do not consider the matter further.

The Ninth Circuit, being still bound on August 7, 2007 by the two *Price* cases on the standing issue, the first in 1985 and the second (*Akaka I*) in 1991, both without the United States as a party, suggests that beneficiary standing to sue State fiduciaries, with or without the United States as a party, has been firmly established in this circuit for at least 22 years.

At the July 1, 2008 hearing, the trial court said it was bound by *Arakaki* to rule that the United States is an indispensable party but plaintiffs lack standing to sue the United States. This dialogue ensued: (ER 3, Tr. JMS 7/01/2008 beginning at 27.)

MR. BURGESS:

….

And contrary, the language in Arakaki said that they don't have standing to sue the United States. But plaintiffs have standing to sue anybody who aids the trustee in breaching the trust, even a third party. And of course the United States itself, up until statehood, was the trustee.

THE COURT: But that's not what Arakaki says. Arakaki says there's no standing to sue the United States.

MR. BURGESS: Right. But where did that come from?
What's the basis for that?

THE COURT: But again you're asking me to simply ignore binding Ninth Circuit precedent.

MR. BURGESS: Well, I'm asking you to follow the established law of the Ninth Circuit which says that you do have the right -- you, beneficiaries, do have the right to come in here in federal court and have your rights adjudicated. That's what I'm asking. And it's not that decision that's
binding, Your Honor. It's the established law of the Ninth Circuit from both before and after the Arakaki decision.

THE COURT: All right. Thank you, Mr. Burgess.

MR. BURGESS: Thank you, Your Honor.

At 496 F.3d 1031, under the heading, **Breach of trust actions under the Admission Act**, this court "set the scene by describing our existing case law regarding the enforcement of the § 5(f) trust by beneficiaries in some detail."

At 496 F.3d 1033 this court explained why § 5(f) created an enforceable right by citing to *Akaka I:*

> ***1033** 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. We have accordingly held that "allowing Price to enforce § 5(f) is consistent with the common law of trusts, in which one whose status as a beneficiary depends upon the discretion of the trustee nevertheless may sue to compel the trustee to abide by the terms of the trust." *Akaka I*, 928 F.2d at 826-27.

At 496 F.3d 1033, this court explained, *Akaka II*'s reliance on trust law was not unique. Unifying most of our § 5(f) case law is the understanding that because they are designated as a "public trust," § 5(f) funds are governed by a set of trust law principles that have procedural as well as substantive implications. *Akaka I*'s discussion of standing, quoted earlier, drew on the funds' status as a trust.[FN9]

At footnote 10 on page 1034,

> Courts have frequently looked to the common law of trusts to guide resolution of two sets of related claims: those concerning the federal government's management of Indian assets for which the government has a fiduciary duty, and those related to states' management of land granted to them in trust by the United States, (Internal citations omitted.)

At 496 F.3d 1034, this court concluded the analysis of **Breach of trust actions under the Admission Act,** "Thus, *Akaka II* constitutes an integral part of our § 5(f) jurisprudence. A change in its holding would have substantive, as well as procedural, impact".

II. Moreover, beneficiaries have standing if necessary to sue the United States.

A. The APA consents to suits for non-monetary relief.

> Many of the indispensability questions concerning the federal government were eliminated in 1976 when Congress enacted a statute providing that a right of review of federal official action exists in suits seeking relief other than money damages and that those actions cannot be dismissed on the ground that the United States is an indispensable party and immune from suit.[FN23]

7 Wright and Miller, Federal Practice and Procedure, § 1617

> The churches contend that the district court erred in holding that their claims for declaratory and injunctive relief against the United States, the Department of Justice, and the INS are barred by sovereign immunity. We reverse the district court on this issue, because we agree with the churches that § 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (1982), waives sovereign immunity for the churches' claims for relief other than money damages.

The Presbyterian Church (U.S.A.) v. U.S., 870 F.2d 518, 524 (9th Cir. 1989)

> Finally, the cases cited by the INS do not support its assertion of the sovereign immunity defense in this case. None is persuasive authority for the proposition that § 702's waiver of sovereign immunity is limited to government conduct that fits within the definition of "agency action" in 5 U.S.C. § 551(13). Indeed, many of them have nothing to do with § 702's waiver of sovereign immunity, but rather are concerned with the definition of "final agency action" reviewable under *§ 704* of the APA, 5 U.S.C. § 704.
>
> As for the *§ 702* cases cited by the INS that suggest § 702's authorization of judicial review is limited to instances of "agency action" as defined by § 551(13), it is noteworthy that these are all district court decisions which rely on *pre-1976* authority.

> In sum, we reverse the district court's decision that sovereign immunity is a bar to the declaratory and injunctive relief sought by the churches against the United States, the Department of Justice, and the INS. (Internal citations omitted.)

The Presbyterian Church, 870 F.2d at 526.

> Under *The Presbyterian Church*, § 702's waiver is not conditioned on the APA's "agency action" requirement. Therefore, it follows that § 702's waiver cannot then be conditioned on the APA's "final agency action" requirement. *See* *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 510 n. 4, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) (Souter, J., dissenting) ("[The waiver of sovereign immunity found in 5 U.S.C. § 702] is not restricted by the requirement of final agency action that applies to suits under the [APA]." (citing *The* *Presbyterian Church,* 870 F.2d at 523-26)).

Gros Ventre v. U.S., 469 F.3d 801, 809 (9th Cir. 2006), noting an intra-circuit conflict between *The Presbyterian Church* and *Gallo Cattle*, but declining to sua sponte call for en banc review since the court could affirm under either standard.

Restatement of the Law, Second, Trusts, 1959, The American Law Institute § 326 Other Dealings with Trustee.

A third person who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust.

B. For purposes of immunity, suits brought directly under the Constitution against federal officials are roughly comparable to suits brought against state officials under §1983.

See *Butz v. Economou*, 438 U.S. 478, 504 (1978) (deeming it "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials").

The Supreme Court has noted that the constitutional injuries made actionable by 42 U.S.C.A. § 1983 are of no greater magnitude than those for which federal officials and agents may be responsible under *Bivens* because the pressures and uncertainties facing decision makers in state government are similar to those affecting federal officials and agents. *Butz v. Economou,* 48 U.S. 478 (1978).

> "it would be 'incongruous and confusing, to say the least' to develop different standards of immunity for state officials sued under § 1983 and federal officers sued on similar grounds under causes of action founded directly on the Constitution." *Economou v. U.S. Dept. of Agricultrue,* 535 F.2d, at 695, n. 7, quoting *Bivens v. six Unknown Fed. Narcotics Agents,* 456 F.2d 1339, 1346-1347 C.A.2 1972 on remand.

Id. at 499

> Accordingly, without congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the constitution against federal officials. The § 1983 action was provided to vindicate federal constitutional rights. That Congress decided, after the passage of the Fourteenth Amendment, to enact legislation specifically requiring state officials to respond in federal court for their failures to observe the constitutional limitations on their powers is hardly a reason for excusing their federal counterparts for the identical constitutional transgressions. To create a system in which the Bill of Rights monitors

> more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.

Id. at 504

III. 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 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 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 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 is the State's motion for summary judgment filed June 4, 2008, together with the accompanying memorandum in support; SER 3 is 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).

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 Ms. Kawamura's Declaration (SER 3 page 70) 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 (SER 3 at 72 and 73), 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 SER 2 page 42 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 correctly argues at SER 2 page 32-35 and 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 do) cannot show they have suffered a loss from any alleged misspending of trust funds.

To *Kuroiwas*, who seek, 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 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. This

can be fairly characterized as a confession of guilt to systematic and massive misappropriation of trust funds over the last three decades.

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. (See SER F beginning at page 254 in the related case, *Day v. Apoliona* now pending before this court in No. 08-16668):

> "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) § 5(f) of the Admission Act. 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" 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." (Emphasis added.) 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.)

IV. 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 *Day v. Apoliona* 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 or other assets 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 and HRS 708-830.5. 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 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 trust 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.

V. Conclusion.

Kuroiwas respectfully request, for themselves and other Hawaii citizens similarly situated, that this court enter judgment as follows:

A. Reverse the July 3, 2008 judgment and order granting motions for judgment on the pleadings;

B. 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 April 3, 2008, (the date Kuroiwas' complaint herein was filed) 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;

C. 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;

D. Permanently enjoin (or reverse and remand to the district court directing it to permanently 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, under basic trust law principles and the Constitution of the United States, may lawfully make impartial distributions to income beneficiaries; and

2. The court, after notice and opportunity to be heard to affected beneficiaries, has instructed or authorized the State as Trustee to do so;

E. Direct the district court to proceed to adjudicate *Kuroiwas*' complaint 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

F. Award *Kuroiwas* their costs, reasonable attorney's fees and such other and further relief as is just.

DATED: Honolulu. Hawaii, November 19, 2008

Respectfully submitted,

/s/ H. William Burgess

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STATEMENT OF RELATED CASES

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

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. With the greatest of respect to the district court, 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.

Day v. Apoliona, CA9 08-16668: Appeal by Plaintiff-intervenor-Appellant Wendell Marumoto of summary judgment in favor of OHA Trustees and State which mooted his motion to intervene. Wendell Marumoto seeks to intervene as a plaintiff to file a complaint similar to the complaint in *Kuroiwa v.*

Lingle and challenges any distributions of Ceded Lands Trust revenues 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 13,715 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

DATED: Honolulu, Hawaii, November 19, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2008, I electronically filed the foregoing Kuroiwa Plaintiffs-Appellants' 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 Kuroiwa Plaintiffs-Appellants' 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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