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 PLAINTIFFS-APPELLANTS' REPLY TO OHA'S AND STATE'S ANSWERING BRIEFS

H. WILLIAM BURGESS (HI #833)
2299C Round Top Drive
Honolulu, Hawaii 96822
Telephone: (808) 947-3234
Facsimile: (808) 947-5822
Email: hwburgess@hawaii.rr.com
Attorney for Plaintiffs – Appellants

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INTRODUCTION

Kuroiwa Appellants ("Kuroiwas") and their attorney acknowledge that the district court, believing it was bound by *Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. February 9, 2007), ruled against them and in favor of Defendants-Appellees State of Hawaii ("State") and Office of Hawaiian Affairs ("OHA"). Kuroiwas and their attorney respectfully present the issues, claims and contentions in this reply brief and pursue this appeal as warranted by non-frivolous arguments for modifying or reversing that existing law of this case or for establishing new law.

This brief replies to the answering briefs submitted by OHA December 31, 2008 and the State January 2, 2009.

ARGUMENT

Generally both the State's and OHA's answering briefs avoid engaging the substance of Kuroiwa's arguments. They present what can be fairly characterized as "straw man" arguments.[1] In this reply brief, Kuroiwas will identify the arguments they advance as to each of the issues raised in the answering briefs and endeavor to clarify the debate for the Court's consideration.

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[1] A "straw man fallacy" is committed when one refutes a position that is not the same as the one the other disputant has advanced but some weaker substitute for it *THE TRIVIUM:* The Liberal Arts of Logic, Grammar, and Rhetoric. Sister Miriam Joseph, Paul Dry Books Edition, 2002

I. THE "DICTA ISSUE." Kuroiwas' position: *Arakaki* is not good law and should not be relied upon because, among other reasons[2], in considering plaintiffs' trust beneficiary claims challenging distributions to OHA, it took out of context and relied without analysis on dicta in *Carroll*.

OHA's Answering Brief at page 25 argues,

> Plaintiffs also attempt to convince this Court that the holding in Carroll, 342 F.3d 934, on which Arakaki relied, is "dicta with no precedential application to the issues of this case," because the plaintiff in Carroll challenged Article XII of the Hawai`i Constitution to the extent it created the Hawaiian Homes Commission, not the Admission Act itself. OHA Opening Brief at 31-33.

The State's Answering Brief at pages 20-22 argues its slightly different but equally flawed "dicta" argument under the heading,

> E. The *Carroll* case's holding was not dicta; in any event, the indispensable party ruling in *Arakaki* was certainly not dicta; it is binding precedent.

Kuroiwas' *dicta* argument is more narrowly focused and stronger than that.[3] Patrick Barrett, one of the two plaintiffs in the consolidated Carroll-Barrett case, is a non-Hawaiian who, among other things, sought a Hawaiian Homestead lease. Kuroiwas' position is that the *Carroll* decision, in its adjudication of Barrett's

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[2] Kuroiwas believe *Arakaki* is not good law binding on this court or the district court, not only because it relied on dicta, but because it was never embodied in a final judgment; and it was based on the mistaken notion that OHA controls the 1.2 million acres in the Ceded Lands Trust.

[3] See Kuroiwas' Opening Brief at 33, "Since sections 4, 5 and 6 [of Haw. Const. Art. XII] were not at issue in *Carroll*, no adjudication as to those sections was necessary to decide the *Carroll* case."

claim for a Hawaiian Homestead lease, should be considered *dicta* as to any statement or holding beyond those relating to the three "HHC" Sections 1, 2 and 3 of Article XII of the Hawaii Constitution. Only those sections of the Hawaii Constitution were at issue as to Barrett's claim for a Hawaiian Homestead lease.

Those three sections were imposed on the new State of Hawaii in 1959 by Admission Act Sections 4 and 7(b) as a condition of the Territory of Hawaii joining the Union.[4] Those sections, among their other racial restrictions, prohibit issuance of Hawaiian Homestead leases to non-Hawaiians. Barrett, in a deposition apparently said that, no, he was not suing the United States and he did not challenge the constitutionality of the Admission Act. Therefore, the court reasoned, the Department of Hawaiian Home Lands could not issue a Homestead lease to Barrett without the consent or presence of the United States; and his claim for a Homestead lease was therefore not redressable. This Court said of Barrett in *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003),

> His claim, on its own, presented without the United States as a party and never challenging the constitutionality of the Admissions Act renders his claim not redressable. …
>
> We also affirm the district court's holding that Barrett's claim challenging the HHC homestead lease program is not redressable because he failed to join the United States or challenge the Admissions Act.

[4] See also Haw. Const. Art. XII, Sec. 2, "The State and its people do hereby accept, as a compact with the United States, or as conditions or trust provisions *imposed by the United States*, relating to the management and disposition of the Hawaiian Home lands …" (Emphasis added.)

Unlike the "HCC" sections, the three "OHA" sections of the Hawaii Constitution, Art. XII, Sections 4, 5 and 6, were not at issue as to Barrett's claim for a homestead lease in *Carroll*[5] and they were not imposed by the Admission Act or by any other federal law. They were created by the State of Hawaii in 1978 under State law providing for amendments to the State Constitution. The OHA sections of the State Constitution affect the 1.2 million or so acres of the Ceded Lands Trust (also referred to as the "§5(f) trust" and the Public Land Trust) administered by the State of Hawaii, as Trustee, separate from the 200,000 or so acres of ceded lands designated as "available lands" administered by the Hawaiian Homes Commission. They are not mandated by federal law. Under federal law, the 1.2 million acres are for *all* the people of Hawaii.

As this Court said in *Day v. Apoliona*,[6] "the lands ceded in the Admission Act are to benefit '*all* the people of Hawaii,' not simply Native Hawaiians." And

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[5] (Barrett did challenge Haw. Const, Sec. 7, "Traditional and Customary Rights" and he did apply for a $10,000 loan from OHA to start a copy business. The district court found, and this Court affirmed, that Barrett failed to demonstrate any deprivation of traditional and customary rights or an injury in fact from the OHA loan program. Because Barrett lacked injury in fact, the first prong of standing, the decision as to those claims played no part in the analysis of his claim for a Homestead lease, which was denied for lack of the third prong, redressability.)

[6] Citing Justice Breyer's concurring opinion 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." (Emphasis in original.)

nothing in this Court's prior case law 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. *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.

None of those three "OHA" sections of the Hawaii Constitution were at issue in Barrett's claim for a Homestead lease. None of them were analyzed, discussed or applied; and no adjudication as to any of them was necessary to adjudicate Barrett's claim for a Homestead lease. Thus, by definition, a ruling in *Carroll* to the effect that "Article XII of the Hawaiian Constitution cannot be declared unconstitutional without holding Section 4 of the Admissions Act unconstitutional"[7] would be *dicta* as to Article XII, Sections 4, 5 or 6. Those sections were not mandated by the Admission Act or any other federal law and

[7] *Arakaki*, 477 F.3d at 1060 citing that single sentence from *Carroll*, 342 F.3d at 944. The full context in *Carroll* however makes it clear that the sentence refers only to the lessee qualification. "Article XII of the Hawaiian Constitution cannot be declared unconstitutional without holding this provision of the Admissions Act unconstitutional. Section 4 of the Admissions Act, federal legislation that Barrett fails to challenge, expressly reserves to the United States that no changes in the qualifications of the lessees may be made without its consent." *Carroll*, *Id.*

were not even added to Article XII until nineteen years after the Admission Act brought Hawaii into the Union. Requiring the United States to be a party to challenge those sections would make no sense. The general statement in *Carroll* as to Article XII, taken out of context by the *Arakaki* opinion[8], made in passing without analysis of the unintended effect on the three OHA sections, is obviously inadvertent.

In our circuit, statements made in passing, without analysis, are not binding precedent. *See, e.g., United States v. Johnson,* 256 F.3d 895 (9th Cir. 2001). *In re Magnacom Wireless, LLC*, 503 F.3d 984, 993-995 (9th Cir. 2007).

II. Do Kuroiwas challenge the constitutionality of the Admission Act? Kuroiwas' position: Absolutely not. They are beneficiaries of the Admission Act and it is the basis for their suit. They challenge the interpretation and application of § 5(f) not its substantive terms.

The State's Answering Brief argues beginning at page 8, "Plaintiffs are necessarily challenging the constitutionality of the Admission Act; the United States is therefore an indispensable party to their suit."

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[8] 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. *Arakaki v. Lingle*, 477 F.3d at 1060.

OHA's Answering Brief, beginning at page 14 chimes in, "Plaintiffs Challenge Substantive Terms of the Admission Act, Making the United States an Indispensable Party Under Controlling Precedent."

Neither the State nor OHA submitted any evidence to support their claim that Kuroiwas are actually challenging something more than the misinterpretation and misapplication of §5(f). The district court made no findings of fact and, indeed, when Kuroiwas made an offer of proof supported by declarations of each of the Kuroiwa plaintiffs plus the declaration with multiple public documents (ER 15), the court disavowed that its order granting judgment on the pleadings entailed "any evidence." (ER 3 at 50-51, Transcript of hearing July 1, 2008.) 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, (ER 16) and must construe the complaint in favor of the complaining party. *Graham v. F.E.M.A.*, 149 F.3d 997, 1001 (9th Cir. 1998).

The State's and OHA's assertions are simply not so. Kuroiwas call into question the constitutionality of a federal statute, §5(f) of the Hawaii Admission Act,

> "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.

See, for example, ER 11 pages 158-159, the draft form Kuroiwas submitted to the Clerk of the District Court to certify to the United States Attorney General. Both answering briefs strive vigorously to refute what some straw man may argue, but Kuroiwas do not. See also the Complaint ER 16 at p. 405 ¶20; p. 418 at ¶ 50; p. 419 at ¶ 51; and p. 425 Prayer ¶ 3 showing similar language limiting the extent of Kuroiwas' challenge to the interpretation or application of §5(f).

The only promise exclusively to native Hawaiians in the Admission Act is in §4 which required the new State of Hawaii to adopt the HHCA and use the 200,000 or so acres set aside as "available" lands for HHCA *only* in carrying out the HHCA; and forbids amendment, repeal of the HHCA, encumbrance or reduction of the Hawaiian home-loan fund, the Hawaiian home-operating fund or the Hawiian home-development fund or changes to qualifications of lessees without the consent of the United States. That promise is not at issue in this case.

The remaining 1.2M acres of the ceded lands are for *all* the people of Hawaii, including but not limited to native Hawaiians. Justice Breyer interpreted it that way in his concurring opinion in *Rice v. Cayetano* and this court also saw it the same way in *Day v. Apoliona*.

Section 5(f) of the Admission Act covers all of the **1.4** million acres of the ceded lands returned to Hawaii at Statehood, including the 200,000 or so acres set aside for the HHCA, and permits the use of the **1.4** million acres for *one or more* of

the five purposes. If those permitted purposes had not included "for the betterment of the conditions of native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended," §5(f) would have contradicted §4 and vitiated or eliminated the HHCA. For the first almost two decades after Statehood it was understood that native Hawaiians were the exclusive beneficiaries of the HHCA and each of them shared, no more and no less than every other beneficiary, in the benefits of the remaining 1.2 million acres of the Ceded Lands Trust.

In 1978, at the Constitutional Convention of Hawaii, in Standing Committee Report No. 59, the Committee on Hawaiian Affairs proposed to add new Sections 4, 5 and 6, among others, to then-Article XI of the Hawaii Constitution. These three "OHA sections" are now Article XII, Section 4, 5 and 6 of the Hawaii Constitution. The Committee Report "justified" the proposed amendments by stating, among other assertions,

> "Section 5(f) of the Admission Act created a trust of these public lands separate and apart from the lands defined as "available lands," by Section 203 of the HHCA, 1920. Your Committee found that the Section 5(f) trust created two types of beneficiaries and several trust purposes one of which is native Hawaiians of the half-blood."

Proceedings of the Constitutional Convention of Hawaii of 1978, Volume I, Journal and Documents, pages 643 and 644.

Kuroiwas challenge, not the Admission Act, but that misinterpretation of § 5(f) of the Admission Act, which began with the 1978 ConCon, and since then, has

led the State of Hawaii and its agency, OHA, to escalating violations of basic trust law principles and the United States Constitution and escalating racial tensions. As spelled out more completely in Kuroiwas' Opening Brief at 18 - 21, remedying those violations would not require invalidation of even one word of the Admission Act. Nor would it deprive any Hawaiian or native Hawaiian of his or her same full and equal right to enjoy the benefits of the 1.2 million acres in the Ceded Lands Trust as are enjoyed by each of the other beneficiaries.

III. THE "NET INCOME" ISSUE. Kuroiwas' position: If Ceded Lands Trust beneficiaries are entitled to any distribution, it could only be from net income; and the Trustee has a fiduciary duty to treat beneficiaries impartially. On June 4, 2008 the State revealed for the first time that the Trust has never since statehood generated annual net income.

The State's answering brief, under heading "H." beginning at 25 and continuing to 38, argues that "Plaintiffs' net income theory is invalid" or should be rejected for multiple other independent reasons. OHA's brief does not address the issue except to say, in two sentences at p. 31, that it is irrelevant to the issues on appeal.

First, **as to OHA's argument** that the issue is irrelevant**:** The "NET INCOME" issue is relevant because it dramatically underscores the urgency that each of the State officials, on behalf of the State as Trustee, and each of the OHA Trustees immediately seek, not avoid, a decision on the merits of this case that will

instruct them as to what they as fiduciaries must do or not do about their conflicting duties and interests.

The Uniform Trustee's Powers Act, ("UTPA") HRS 554A-5, and the common law of trusts which it codifies, forbid a trustee whose duties and interests conflict, from exercising trustee powers affected by the conflict, such as the powers to make distributions to beneficiaries and to spend trust funds, without court authorization.

The common law foundation for the UTPA is expressed in Restatement of Trust, Second, § 170,

> *r. Duty of trustee under separate trusts*. Where the trustee is trustee of two trusts if he enters into a transaction involving dealing between the two trusts, he must justify the transaction as being fair to each trust. If the circumstances are such that the interests of the beneficiaries of the different trusts are so conflicting that the trustee cannot deal fairly with respect to both trusts, he cannot properly act without applying to the court for instructions.

The State of Hawaii as trustee of the ceded lands trust has a fiduciary duty to "*all* the people of Hawaii" not simply Native Hawaiians. *Day v. Apoliona*, 496 F.3d 1027, 1034 (9th Cir. 2007) footnote 9, quoting Justice Breyer in *Rice v. Cayetano*. Under color of the State OHA laws the State and its officials have an interest in using ceded lands trust funds and property to better the conditions of native Hawaiians or Hawaiians at the expense of the other beneficiaries. UTPA and the common law of trusts forbid a trustee in such a conflicted position from

exercise of the trust powers, for example, the powers to make distributions to beneficiaries or to spend trust funds, without prior court authorization after notice to the affected beneficiaries.

The OHA Trustees are bound by similar restrictions and have similar conflicting duties and interests. "So long as § 5(f) trust income remained in the hands of the state, as it did when transferred from the § 5(f) corpus to the OHA corpus, the § 5(f) obligations applied." *Price v. Akaka* 928 F.2d 824, 827 (9th Cir. 1990) "Akaka I." Since the § 5(f), i.e., the Ceded Lands Trust funds, continue to be held for *all* the people of Hawaii so long as the funds are in the hands of OHA, the OHA Trustees owe a fiduciary duty to all the people that conflicts with their interest in bettering the conditions of native Hawaiians and Hawaiians at the expense of the other beneficiaries.

Thus, the State Defendants and the OHA defendants each have a fiduciary duty to *all* the people of Hawaii, under UTPA and the common law of trusts, to immediately cease further distributions or expenditures of ceded lands trust moneys and properties; and immediately apply to the court for instructions as to their conflicting duties and interests.

Thus, the "NET INCOME" issue is highly relevant to the relief sought by Kuroiwas in this appeal including injunctive relief against further distributions from the Ceded Lands Trust to OHA and against OHA's expenditure of funds it

already holds, (See Kuroiwas' Op. Brief at 55 and 56) and to the related question of whether the trial court should have issued the temporary restraining order and preliminary injunction. Review of the order denying the temporary restraining order (ER 13) and the order denying reconsideration of that order (ER 8) are included in the appeal (ER 01) of the final judgment (ER 1) and order (ER 2) which mooted the motion for preliminary injunction.

> *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 374, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981) (alteration in original) (quoting *Cobbledick v. United States,* 309 U.S. 323, 325, 60 S.Ct. 540, 84 L.Ed. 783 (1940)); *accord Digital Equipment Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 868, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994) (holding that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated").
>
> A necessary corollary to the final judgment rule is that a party may appeal interlocutory orders after entry of final judgment because those orders merge into that final judgment. *See Worldwide Church of God v. Philadelphia Church of God, Inc.,* 227 F.3d 1110, 1114 (9th Cir.2000) (noting that prior interlocutory orders are "merged into final judgment"); *898 *Munoz v. Small Business Administration,* 644 F.2d 1361, 1364 (9th Cir.1981) (noting that "an appeal from the final judgment draws in question all earlier non-final orders and all rulings which produced the judgment").
>
> In the present case, the December 1, 1998 judgment was the final judgment in the case; it is therefore effective as to all interlocutory orders.

American Ironworks & Erectors, Inc. v. North American Const. Corp. 248 F.3d 892, 897-898 (9th Cir. 2001)

The "NET INCOME" issue has been long simmering; and the struggle to

obtain information from the Trustee, State of Hawaii, about the income and expenses of the Ceded Lands Trust of little avail. See SER Tab 5, 88-91, Hawaii Bar Journal *The Ceded Lands Case*, by H. William and Sandra Puanani Burgess, July 2001,

> It is important to know the actual revenues that the State, as trustee of the public land trust, receives from the ceded lands, as well as the expenses the state incurs in connection with those lands and in generating those revenues before making or agreeing to any "pro rata" distribution to any beneficiaries. Under general trust law, beneficiaries are only entitled to receive shares of net income, not gross.
>
> We have asked for this information. But the State has declined to furnish it, saying the negotiations are confidential. *Id.* at 90.

Also SER Tab 4 at 82, State Defendants' Answers to Interrogatories in *Arakaki v. Cayetano*, April 11, 2002,

> 14.d. During that same period [July 1, 1994 to the then-present, about February 2002], did the public land trust break even, or operate at a profit, or operate at a loss?
>
> Objection, irrelevant: [with three paragraphs of objections but no answer.]

The State's revelation filed June 4, 2008 (SER Tabs 2 and 3) was, to the best of Kuroiwas' knowledge, the first public disclosure by the State of Hawaii assembled in one place of significant and useful accounting information as to the approximate revenues and expenses of the Ceded Lands Trust. The State acknowledged in its June 4, 2008 memorandum in support of summary judgment

(SER Tab 2 at page 39) that,

> "First, the State has never previously made the instant argument, and so neither this Court nor 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., that 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) is irrelevant – the State has never presented the *facts* justifying this essentially fact-based summary judgment motion before."

Had this dispositive information been known to *Arakaki* Plaintiffs' attorney during the five years of litigating *Arakaki v. Lingle*, he would have vigorously pursued it and the outcome in that case might have been different.

The public and the courts have been left in the dark for too long. And bad things have happened. Hundreds of millions that should have been used to improve the ceded lands for *all* the people have been diverted. This Court said in *Day*, it is time for some much-needed elucidation.

As to the **State's points** on the "NET INCOME" issue, the State Attorney General's office now, by unsupported assertions, would discredit its own Separate And Concise Statement of Facts (SER TAB 3) supported by the Declaration of Georgina K. Kawamura, Director of Finance and head of the State Department of Budget and Finance (beginning at SER Tab 3, page 49); Exhibits A – H; and the Declaration of Arthur J. Buto, State Land Information Systems Manager (beginning at SER 71) who is the project leader for the Act 178 ceded land

reporting project citing detailed reports posted on the official website of the State DLNR.

The State Answering Brief at 29 argues that the State's submissions in the *Day v. Apoliona* case do not establish that "the Ceded Lands Trust costs the State many times more annually than the 1.2 million acres bring in." This claim, the State now argues, "is patently false."

> In addition, there is nothing in the material plaintiffs cite to prove that even those expenditures that could properly be characterized as improving or maintaining land were necessarily accomplished on ceded lands, as opposed to non-ceded lands.

The ceded lands are the only lands at issue in *Day*. The State made its June 4, 2008 motion for summary judgment "to urge an interpretation of § 5(f) that the other parties to this action have not made." (SER Tab 2 p. 29, fn 1.) The State's memo in support concludes by saying, "The Court should find, as a matter of undisputed fact, that because the State does spend far more on permissible section 5(f) purposes than the total amount it receives in public land trust income, no person can make out a § 5(f) claim based on public land trust income spending." (SER 43-44.) Mr. Buto, leader of the Act 178 ceded land reporting project, separates out the receipts from non-ceded lands. (SER 73, paragraph 6.) Director of Finance Kawamura, in her declaration (SER 51) describes Exhibit H as the table of historical debt service for various capital improvement projects prepared by her

staff from official statements.

The following table calculates the ceded lands receipts and interest expense for fiscal year 2007 based on the State's June 4, 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 affrdble hsng	-$4,800,000
Corrected total receipts	$60,280,573
Interest expense Capital Impr Bonds	$237,494,513

Interest expense alone almost 4 times total receipts

If any of the interest expense was not for capital improvements to ceded lands, as the State now suggests it might be, the State should provide the specifics. However, the magnitude of the Ceded Lands Trust annual deficit dwarfs any impact that capital improvement projects on the State's comparatively much smaller total acreage of non-ceded lands could possible have. The overwhelming majority of state-owned lands are ceded lands. Legislative Reference Bureau Notes No. 02-03, *Ceded Lands* July 29, 2002. The State of Hawaii just about a month ago in December 2008 in its brief to the U.S. Supreme Court in No. 07-1372, *State of Hawaii v. Office of Hawaiian Affairs,* referred to the ceded lands as

"1.2 million acres of state land – 29 percent of the total land area of the State and *almost all* the land owned by the State." (Emphasis added.) In the absence of an inventory, it is generally understood by those interested in the subject that the total area of the ceded lands held by the State and counties is about 1.2 million acres not counting the estimated 200,000 acres of ceded lands set aside by the HHCA in 1921; and that, as the State said last month in its brief to the U.S. Supreme Court, almost all the land owned by the State is ceded land. As the above table shows, even if the ceded lands were only half of the State's total, the interest expense alone for capital improvements to the ceded lands would still be almost twice the total receipts.

IV. Brief replies to other State arguments.

a. State Ans. Brf. 31. "Nothing in the language of 5(f) suggests that only "net income" from the ceded lands be used for the five purposes."

Reply: Nor do Kuroiwas suggest that. § 5(f) continues the Ceded Lands Trust first established by the Annexation Act in 1898. It does not set out the law of trusts. Under basic trust law principles as Kuroiwas understand them, if Ceded Lands Trust beneficiaries are entitled to any distribution, it could only be from net income; and the Trustee has a fiduciary duty to treat beneficiaries impartiality and not to comply with illegal trust terms. The State violated and continues to violate those trust law principles by distributing trust revenue to OHA for a favored few

beneficiaries, instead of using the revenue to pay trust costs and expenses including interest on moneys borrowed to make the ceded lands useful.

b. State Ans. Brf. 33. "In short, the State can pay for improving or maintaining the ceded lands any way it chooses, and distribute receipts from the ceded lands any way it chooses."

Reply: As Kuroiwas understand basic trust law principles, the State in its use of receipts from the trust and in all its conduct that affects the ceded lands must act as a fiduciary and cannot act "any way it chooses." That is particularly so with respect to distributions or payments to beneficiaries. Such distributions and payments are different from paying trust expenses. The State, as Trustee, must use trust receipts first to pay trust expenses. As explained above, if Ceded Lands Trust beneficiaries have any right to distributions, it could only be from net income; and the Trustee has a fiduciary duty to treat beneficiaries impartiality and not to comply with illegal trust terms.

c. State Ans. Brf. 33-34. "Indeed, the imposition of a net income theory, which would severely cabin the State's discretion in managing 5(f) ceded land proceeds etc."

Reply: As Kuroiwas understand basic trust law principles, as applied in *Price v. State*, 929 F. 3d 950, 955-56 (9th Cir. 1990) and the several ceded lands cases since then, because of the vast quantity of land in the trust, the State "need

not be held to strict trust administration standards" but "that does not mean that the State can do what it likes with the property and the income. Rather the federal courts must ultimately determine whether the property has been diverted from section 5(f) purposes." (See State's Ans. Brf at 34.)

On page 35-36 the State posits that the State sets aside a parcel of ceded land for a park and spends $1 million per year for maintenance of the park. The "NET INCOME" theory would not come into play because, in this hypothetical, the State is not making any distribution to selected beneficiaries.

The State then posits that the park generates $200,000 in admission fees per year. The trust law principles applicable to the Trustee's use of the $200,000 would depend on the trust's other income and expenses. If those are like the current Ceded Lands Trust which, according to the State's June 4, 2008 revelation, costs the State about $167 million more per year than the trust brings in, then the Trustee should use the $200,000 first to pay the costs of administration, including the interest. If the Trustee instead has the park manager hold the admission fees and transfers 20% of them quarterly to a favored group of beneficiaries selected on the basis of race, that would be a breach of trust.

CONCLUSION

For the above reasons and the reasons stated in the opening brief, the points raised in the answering briefs are inconsistent with basic trust law principles or other applicable law and should be rejected; and Kuroiwas awarded the relief sought in their opening brief.

DATED: Honolulu, Hawaii January 14, 2009.

/s/ H. William Burgess
H. WILLIAM BURGESS
Attorney for Kuroiwa Plaintiffs-Appellants

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 4,800 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(ii).

DATED: Honolulu, Hawaii, January 14, 2009.

/s/ H. William Burgess
H. WILLIAM BURGESS
Attorney for Kuroiwa Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2009, I electronically filed the foregoing Kuroiwa Plaintiffs-Appellants' Reply to OHA's and State's Answering Briefs with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

ROBERT G. KLEIN, ESQ.
LISA W. CATALDO, ESQ.
BECKY THOMAS CHESTNUT, ESQ.
McCorriston Miller Mukai
MacKinnon LLP
Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard
Honolulu, Hawaii 96813

Attorneys for OHA Defendants-Appellees

MARK J. BENNETT, ESQ.
Attorney General of Hawaii
GIRARD D. LAU, ESQ. and
CHARLEEN M. AINA, ESQ.
Deputy Attorneys General,
State of Hawaii
425 Queen Street,
Honolulu, Hawaii 96813

Attorneys for State Defendants-Appellees

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/s/ H. William Burgess
H. WILLIAM BURGESS
Attorney for Kuroiwa Plaintiffs-Appellants