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,	No. 08-16769 D.C. No. 1:05-CV-0069-SOM-BMK

[CAPTION CONTINUED ON NEXT PAGE]

APPELLEES OHA DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF-APPELLANT JAMES I. KUROIWA, JR., ET AL.'S MOTION FOR INJUNCTION PENDING APPEAL [CASE NO. 08-16769] AND PLAINTIFF-INTERVENOR-APPELLANT WENDELL MARUMOTO'S JOINDER IN MOTION FOR INJUNCTION PENDING APPEAL [CASE NO. 08-16668]

APPENDICES "A"–"C"

CERTIFICATE OF SERVICE

MCCORRISTON MILLER MUKAI MACKINNON LLP

ROBERT G. KLEIN 1192-0
klein@m4law.com
LISA W. CATALDO 6159-0
cataldo@m4law.com
BECKY T. CHESTNUT 7756-0
chestnut@m4law.com
Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard
Honolulu, Hawai`i 96813
Telephone: (808) 529-7300
Facsimile: (808) 524-8293

Attorneys for Defendants-Appellees
OHA Defendants

and

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

Defendants-Appellees.

VIRGIL E. DAY, et al.,

Plaintiffs,

and

WENDELL MARUMOTO,

Plaintiff-Intervenor-Appellant,

v.

HAUNANI APOLIONA, et al.

Defendants-Appellees,

and

STATE OF HAWAI`I,

Defendant-Intervenor-Appellee.

No. 08-16668
D.C. No. 1:08-CV-00153 JSM-KSC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

APPELLEES OHA DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF-APPELLANT JAMES I. KUROIWA, JR., ET AL.'S MOTION FOR INJUNCTION PENDING APPEAL [CASE NO. 08-16769] AND PLAINTIFF-INTERVENOR-APPELLANT WENDELL MARUMOTO'S JOINDER IN MOTION FOR INJUNCTION PENDING APPEAL [CASE NO. 08-16668]

I. INTRODUCTION

Defendants/Appellees Haunani Apoliona, Walter M. Heen, Rowena Akana, Donald B. Cataluna, Robert K. Lindsey, Jr., Colette Y. Machado, Boyd P. Mossman, Oswald Stender and John D. Waihe`e IV, in their official capacities as trustees of the Office of Hawaiian Affairs ("OHA Defendants"), oppose Kuroiwas' Motion for Preliminary Injunction Pending Appeal, filed March 12, 2009 ("Motion").

As an initial matter, the Motion, which was filed well after the briefs in the appeal were filed, simply regurgitates the arguments that Plaintiffs have already made to this Court in their Opening Brief, filed November 19, 2008—now more than four months ago. As early as July 2008, Plaintiffs could properly have appealed the District Court's denial of their motion for preliminary injunction, and therefore could have obtained an expedited review pursuant to Ninth Circuit Rule 3-3, but they did not. See, e.g., Opening Brief, filed November 19, 2008, at 2-4 (omitting from the "Issues Presented for Appeal" section any mention of the denial of the motion for preliminary injunction in the District Court). Those facts, and the fact that Plaintiffs complain of the status quo that they repeatedly say has exceeded

"three decades," see Motion at 2, 3, 18, 20, 29, 31, disproves any suggestion of the urgency needed to support a motion for injunctive relief.

Although Plaintiffs vociferously complain about the status quo and plainly seek an alteration to it pending this Court's decision, Plaintiffs have not so much as acknowledged, much less addressed, the heightened standard that applies here, where the movant seeks to disrupt the status quo through the imposition of mandatory injunctive relief. Under any standard, however, the Motion should be denied. The Motion fails completely to demonstrate that, in light of the controlling precedent set out by this Court in Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007), Plaintiffs have any possible chance of success on the merits, as recognized by the District Court below. See Order Denying Plaintiffs' Motion for Reconsideration of Order Denying Plaintiffs' Motion for Temporary Restraining Order, filed April 25, 2008 ("Order Denying Reconsideration"), attached hereto as Appendix "A."

Plaintiffs also have not suggested any irreparable harm to them if injunctive relief is not granted and, conversely, have not acknowledged the harm that would be caused to OHA programs—and to the individuals and entities who rely upon them—in the event the requested injunctive relief is granted. Because Plaintiffs have failed completely to meet any of the requirements to support mandatory preliminary injunctive relief, the Motion should be denied.

Finally, to the extent the Motion purports to be supported by a joinder by Wendell Marumoto, the joinder should be stricken as improper as Marumoto is not a party to this case, and Marumoto's appeal in Day v. Apoliona, 08-16668, is limited to the issue of whether the denial of Marumoto's motion to intervene in that case (on grounds of mootness) was correct. He has no standing to join in the Motion.

II. BACKGROUND

The relevant historic background is set out in Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007) and in the Order (1) Granting State Defendants' Motion for Judgment on the Pleadings and (2) Granting OHA Defendants' Motion for Judgment on the Pleadings, entered July 3, 2008 ("Order Granting Judgment on the Pleadings"), attached as Exhibit "1" to the Motion. For the Court's convenience, however, following is a brief summary.

A. The Hawaiian Homes Commission Act

In response to its concern over the condition of the native Hawaiian people, Congress in 1921 enacted the Hawaiian Homes Commission Act ("HHCA"), which provided more than 200,000 acres of ceded public land for the rehabilitation of native Hawaiians. See HHCA, Pub. L. No. 67-34, 42 Stat. 108 (1921). The HHCA created programs for loans and long-term leases for native Hawaiians,

which the HHCA defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Id.

B. The Admission Act

As a condition of its statehood, Congress required the new State of Hawai`i to adopt the HHCA as part of its own constitution, and granted to the State the approximately 200,000 acres set aside under the HHCA. See Admission Act of March 18, 1959 § 4, Pub. L. No. 86-3, 73 Stat. 4 ("Admission Act"). The United States, however, reserved to itself the power to enforce the trust created by the HHCA, and the right to consent to any amendment or repeal of the HHCA, or to any change in the qualifications of lessees under the program. See id. § 4. Article XII, section 1 of the Hawai`i Constitution adopts the HHCA as a law of the State, and recognizes that the consent of the United States is required for the HHCA's amendment or repeal. See also Haw. Const. Art. XII § 2 (accepting the terms of the HHCA as a compact with the United States).

Also under the Admission Act, the United States granted Hawai`i title to all public lands in the State, except for those reserved for the use of the federal government. Admission Act § 5(b)-(d). The Act declared that these public lands, together with the proceeds from their income or their sale or other disposition, would be held by the State as a public trust (the "Ceded Lands Trust") for one or more of five public purposes, which include "the betterment of the conditions of

native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended." Id. § 5(f). Section 5(f) also provides that use of the public lands "for any other object shall constitute a breach of trust for which suit may be brought by the United States."

C. The Office of Hawaiian Affairs

In 1978, a Constitutional Convention was held in Hawai`i. As a result, the State's trust obligations to native Hawaiians were clarified. Article XII, section 4 of the Constitution now provides that the lands granted to the State of Hawai`i by section 5(b) of the Admission Act, except for the lands conveyed under the Hawaiian Homes Commission Act, "shall be held by the State as a public trust for native Hawaiians and the general public." Article XII, section 5 created OHA and charged it with managing the property and funds designated for the benefit of native Hawaiians.

Hawai`i Revised Statutes ("HRS") section 10-13.5 provides: "Twenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by [OHA] for the purposes of this chapter."

D. Plaintiffs' Claims

On April 3, 2008, Plaintiffs filed their Complaint, along with a motion for a preliminary injunction and temporary restraining order. See Docket at #1 and #5. On April 8, 2008, the District Court denied Plaintiffs' motion for a temporary

restraining order, and Plaintiffs moved for reconsideration of that order, which the Court also denied. See Order Denying Reconsideration, Appendix "A." The Court's Order Denying Reconsideration held that, in denying the temporary restraining order, it had found "Arakaki controlled, and Plaintiffs could not bring this action without the United States as a party. Accordingly, Plaintiffs had no likelihood of success on the merits." Order Denying Reconsideration at 2. The Court also held:

> Arakaki dispenses of Plaintiffs' argument that the United States is not an indispensable party to this action. With regard to standing to challenge Office of Hawaiian Affairs programs, Arakaki stated 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."

Order Denying Reconsideration at 6-7.[1] The same analysis again precludes the relief Plaintiffs seek, and precludes a determination that Plaintiffs have any chance of success on their appeal.

III. STANDARD

A. Preliminary Injunction

The standard for issuance of a preliminary injunction is well settled:

[1] On April 22, 2008, pursuant to Rule 5.1(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 2403, the district court certified to the Attorney General of the United States that Plaintiffs have raised the constitutionality of § 5(f) of the Admission Act. On June 6, 2008, the United States provided notice that it did not intend to intervene at that time. See Order Granting Judgment on the Pleadings at 5.

> Under our preliminary injunction precedents, a moving party must show either "a combination of probable success on the merits and the possibility of irreparable harm" or "serious questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits." . . . At "an irreducible minimum, the moving party must demonstrate a fair chance of success on the merits."

Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506, 409 F.3d 1199, 1207 (9th Cir. 2005) (internal citations omitted); Arcamuzi v. Cont'l Air Lines, Inc., 819 F.2d 935, 937 (9th Cir. 1987); Ralph Rosenberg Court Reporters, Inc. v. Fazio, 811 F. Supp. 1432, 1435 (D. Haw. 1993) (the moving party must show "(1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions on the merits are raised and the balance of hardships tips sharply in its favor."). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." Arcamuzi, 819 F.2d at 937 (citations omitted).

If the plaintiff shows no chance of success on the merits, the injunction should not issue. Arcamuzi, 819 F.2d at 937; see also Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 753 (9th Cir. 1982) ("The 'irreducible minimum,' . . . is that the moving party demonstrate 'a fair chance of success on the merits' or 'questions . . . serious enough to require litigation.' 'No chance of success at all . . . will not suffice.'") (citation omitted).

If the moving party demonstrates at least a fair chance of success on the merits, that party must also demonstrate a "significant threat of irreparable injury." Arcamuzi, 819 F.2d at 937. Finally, a plaintiff must do more than merely allege imminent harm sufficient to establish standing; he or she must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief. Assoc. Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity, 950 F.2d 1401, 1410 (9th Cir. 1991).

B. Mandatory Preliminary Injunction

Where a party "seeks mandatory preliminary relief that goes well beyond the status quo *pendent lite*, courts should be extremely cautious about issuing a preliminary injunction." Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1319 (9th Cir. 1994) (quoting Martin v. Int'l Olympic Comm., 740 F.2d 670, 674-75 (9th Cir. 1984)). When a mandatory preliminary injunction is requested, the court should deny relief "unless the facts and law clearly favor the moving party." Katie A., ex rel. Ludin v. Los Angeles County, 481 F.3d 1150, 1156 (9th Cir. 2007) (quoting Stanley, 13 F.3d at 1320) (in turn quoting Anderson v. United States, 612 F.2d 1112, 1114 (9th Cir. 1979)).

IV. ANALYSIS

A. Plaintiffs Improperly Seek a Preliminary Injunction Where their Actions Belie any Claimed Urgency

As an initial matter, the Motion should be denied because it does not seek to prevent any harm to Plaintiffs, imminent or otherwise, but is instead a belated and transparent attempt to repeat their failed arguments, yet again, after the briefing in this appeal has been completed. In the District Court below, Plaintiffs moved for a temporary restraining order and a preliminary injunction, both of which were denied.[2] Plaintiffs did not pursue an expedited appeal—or any appeal—of that denial under Ninth Circuit Rule 3-3, as they could have; instead, they waited until well after briefing had been completed in the appeal of the orders granting judgment on the pleadings in favor of defendants, and only then filed for a "preliminary" injunction pending appeal. This timing, combined with their repeated complaint that the status quo has exceeded "three decades," Motion at 2, 3, 18, 20, 29, 31, belies any suggestion of the urgency that would be necessary to support preliminary injunctive relief here.

[2] The motion for preliminary injunction was to be heard immediately after the motions for judgment on the pleadings and, because the motions for judgment on the pleadings were granted, the preliminary injunction motion was denied as moot. See Docket at #81.

B. Plaintiffs Unjustifiably Seek a Mandatory Injunction to Disrupt the Status Quo

Plaintiffs ask this Court for a preliminary injunction to bring to a complete and abrupt halt the operations and programs of OHA, and implicitly to disrupt the lives of individuals and the operations of entities depending upon OHA's programs, despite OHA's constitutional and statutory mandates and despite Plaintiffs' own recognition that such programs have existed for years. See, e.g., HRS chapter 10 and Hawai`i Constitution, Article XII, section 5. Despite the sweeping and immediate relief they request, Plaintiffs do not so much as acknowledge, much less attempt to satisfy, the heightened standard associated with mandatory injunctions.

Specifically, Plaintiffs ask the Court to restrain OHA from "[a]ny further expenditures, payments, distributions, grants or transfers of any kind of Ceded Lands Trust funds or assets, and any gains and earnings on such funds or assets, held or controlled by OHA." Motion at 5. Similarly, Plaintiffs ask the Court to restrain the State from "[a]ny further distributions, payments, or transfers of money or property from the Ceded Lands Trust . . . to [OHA] . . . ." Motion at 4. Plaintiffs ask the Court to enjoin both OHA and the State from spending funds, regardless of source, for the Akaka Bill or any related activity, and to appoint a receiver for OHA assets. Motion at 6.

Remarkably, Plaintiffs do not so much as mention the likely repercussions of such an injunction, the omission of which itself illustrates the need for courts to be "extremely cautious" in granting such relief, and justifies the axiom that mandatory injunctions are "particularly disfavored" in law. Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa County, 550 F.3d 770, 776 (9th Cir. 2008).

C. Plaintiffs have Not Shown a Likelihood of Success on the Merits

As noted above, when issuing a preliminary mandatory injunction, the court must find that the facts and the law *clearly* favor the moving party. Katie A., 481 F.3d at 1156 (quoting Stanley, 13 F.3d at 1320) (emphasis added). Here, the law of this very Court—as set out in Arakaki—completely *precludes* Plaintiffs' claims, as it establishes that Plaintiffs have no standing to bring them. Plaintiffs in Arakaki[3] challenged the same terms of the section 5(f) trust that they challenge here[4] and, in Arakaki, this Court held that "the United States remains an indispensable party to a suit challenging the trust, and Plaintiffs have no standing to sue the United States." Arakaki, 477 F.3d at 1061.

---

[3] Counsel for Plaintiffs here was also counsel for Plaintiffs in Arakaki and, with a single exception, all the plaintiffs here were plaintiffs in Arakaki.

[4] In Arakaki, the plaintiffs, as beneficiaries of a public lands trust and as taxpayers, claimed they were injured by diversions of land and revenues to the Department of Hawaiian Homelands OHA, and that various related programs violate the Equal Protection Clause of the Fourteenth Amendment. See Arakaki, 477 F.3d at 1055.

> We have previously held that the expenditure of trust revenue is governed by the Admission Act. Price v. Akaka, 928 F.2d 824, 827 (9th Cir. 1990). Any challenge to the expenditure of trust revenue brought by alleged trust beneficiaries must challenge the substantive terms of the trust, which are found in the Admission Act. 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, . . . the United States . . . remains indispensable with respect to challenges to the expenditure of trust revenue.

Arakaki, 477 F.3d at 1065.

Despite the clear holding of Arakaki with respect to claims identical to those here, Plaintiffs' Motion (like their briefs) does not attempt to demonstrate how they have standing to assert any claims, with the exception of arguing merely that Arakaki is not controlling because it relied upon dicta. See Motion at 10-11;[5] see also Opening Brief at 16. Indeed, in their section entitled "The Probability of Success on the Merits," Plaintiffs do not so much as mention the threshold issue of standing. However, if a plaintiff lacks standing to make the claims asserted, there exists no case or controversy, as required by Article III, section 2 of the Constitution. See White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000) (stating that standing pertains to a federal court's subject matter jurisdiction). Here, because Plaintiffs lack standing, their claims are not justiciable. See Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997).

[5] To be clear, Plaintiffs do not argue that the District Court applied dicta from Arakaki in holding that they were without standing; they argue instead that Arakaki relied on dicta from Carroll v. Nakatani, 342 F.3d 934, 944 (9th Cir. 2003). See Motion at 10-11 and n.6.

To the extent Plaintiffs also somewhat obliquely suggest that the district court improperly applied res judicata, that is not the case; the district court *explicitly* did not rely on the doctrine. In its Order Granting Judgment on the Pleadings, Exhibit "1" to the Motion, at page 14, the court observed that it "need not . . . consider whether Arakaki has preclusive effect on the instant case; instead the court *applies the holding* in Arakaki and determines that Plaintiffs lack standing to bring Count I." Exhibit "1" to Motion, at 13. Plaintiffs therefore cannot demonstrate that they are likely to prevail on the merits in this case.

D. Plaintiffs have Not Shown Irreparable Harm Absent Injunctive Relief

Because Plaintiffs can show no likelihood of success on the merits, the Court is not required to consider the respective hardships. See Sports Form, 686 F.2d at 753 (affirming denial of injunctive relief, without considering balance of hardships, where movant demonstrated no chance of success on the merits). Nonetheless, even if the Court were to reach this analysis, the analysis would soundly support denial of the Motion.

When requesting preliminary injunctive relief, a plaintiff must do more than merely allege imminent harm sufficient to establish standing; he or she must demonstrate *immediate threatened injury* as a prerequisite to such relief. Assoc. Gen. Contractors, 950 F.2d at 1410. In a section entitled, significantly, "The *possibility* of irreparable injury," (emphasis added) Plaintiffs go on for pages citing

amounts of funds that have been transferred or will, they assert, potentially be transferred to OHA, and complaining about support for the Akaka Bill and, for example, that the Akaka Bill—which has not yet passed—does not, for example, "ban hostile military forces." Motion at 18-29. *Tellingly, not once in those twelve pages do Plaintiffs even suggest any specific harm to them, much less harm that is imminent or irreparable*. Such generalized allegations do not remotely satisfy the requirement of demonstrating "immediate threatened injury" to support injunctive relief.

Conversely, Plaintiffs fail to address the harm that would result from disruption of programs on which others depend. For this reason as well, Plaintiffs have failed to carry their burden to demonstrate entitlement to mandatory injunctive relief.

E. Marumoto has No Standing to Join in the Motion

Marumoto's purported joinder should be stricken because Marumoto is not a party to this appeal. Counsel for Marumoto, who is counsel for Plaintiffs here, is well aware that persons may not file papers in a case in which they are not parties unless they have been granted leave to do so. See Order Re: State of Hawaii's Motion to Strike Marumoto's Brief is Granted, Day v. Apoliona, 08-16704, entered December 30, 2008, attached hereto as Appendix "B." Moreover, this Court has previously denied his motion to consolidate Marumoto's appeal with this appeal.

See Order, filed October 3, 2008, attached hereto as Appendix "C." Even if the joinder could be construed as a separate motion, Marumoto has not attempted to overcome the fatal deficiencies precluding preliminary injunction noted above. Finally, the joinder is superfluous because Plaintiffs here purport to seek injunctive relief for themselves and all others similarly situated, which Marumoto purports to be. See Motion at 3 and 1 n.2. The joinder is improper and therefore should be stricken.

V. CONCLUSION

For the foregoing reasons, the OHA Defendants respectfully request that the Court deny Plaintiffs' Motion, and strike Marumoto's joinder as improper.

DATED: Honolulu, Hawai`i, March 24, 2009.

/s/ Lisa W. Cataldo
ROBERT G. KLEIN
LISA W. CATALDO
BECKY T. CHESTNUT

Attorneys for OHA Defendants Haunani Apoliona, Walter M. Heen, Rowena Akana, Donald B. Cataluna, Robert K. Lindsey, Jr., Colette Y. Machado, Boyd P. Mossman, Oswald Stender and John D. Waihe`e IV in their official capacities as trustees of the Office of Hawaiian Affairs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JAMES I. KUROIWA, JR., PATRICIA A. CARROLL, TOBY M. KRAVET, GARRY P. SMITH, EARL F. ARAKAKI, and THURSTON TWIGG-SMITH, Plaintiffs, vs. LINDA LINGLE, et al. State Defendants, HAUNANI APOLIONA, et al. OHA Defendants.	CIVIL NO. 08-00153 JMS-KSC ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Currently before the court is Plaintiffs' Motion for Reconsideration of this court's April 8, 2008 denial of Plaintiffs' Motion for Temporary Restraining Order ("April 8, 2008 Order"). Pursuant to Local Rule ("L.R.") 7.2(d), this motion can be decided without oral argument. After careful consideration of the issues raised, the court DENIES Plaintiff's Motion for Reconsideration.

APPENDIX "A"

I. BACKGROUND

In 1959, Hawaii became the 50th State in the Union. The United States granted Hawaii title to all public lands within the state, except for a small portion reserved for use of the federal government. Act of March 18, 1959, Pub. L. No. 86-3, § 5(b)-(d), 73 Stat. 5 ("Admission Act"). The Admission Act further declared that the lands, "together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by [the State] as a public trust for the support of the public schools, . . . the conditions of native Hawaiians" and other purposes. *Id.* § 5(f), 73 Stat. 6.

On April 3, 2008, Plaintiffs filed a Complaint titled "Six Non-Ethnic Hawaiians' Complaint for Breach of Trust and Deprivation of Civil Rights and to Dismantle Office of Hawaiian Affairs." Plaintiffs allege that all citizens of the State of Hawaii are beneficiaries of this § 5(f) trust. Plaintiffs contend that distributions from this public trust to specifically benefit persons of Hawaiian ancestry -- as opposed to all citizens of the State of Hawaii -- violate the Fifth and Fourteenth Amendments. Plaintiffs further allege claims titled "breach of state public trust," and "conspiracy to deprive persons of equal protection, privileges and immunities."

Concurrent with their Complaint, Plaintiffs filed a Motion for

Temporary Restraining Order ("Motion for TRO") to prevent § 5(f) trust monies from being distributed to the Office of Hawaiian Affairs or being spent on certain efforts involving Native Hawaiians.

On April 8, 2008, the court held a status conference regarding Plaintiffs' Motion for TRO. Defendants argued that a hearing on Plaintiffs' Motion was unnecessary because *Arakaki v. Lingle*, 477 F.3d 1048, 1066 (9th Cir. 2007), involved the same issues presented here, and found that plaintiffs lacked standing to challenge expenditures of trust revenue because the United States was an indispensable party. In opposition, Plaintiffs argued that they had standing because *Arakaki* had no precedential value where no final judgement was entered.

The court rejected Plaintiffs' argument on standing and denied Plaintiffs' Motion for TRO. The court found that *Arakaki* controlled, and Plaintiffs could not bring this action without the United States as a party. Accordingly, Plaintiffs had no likelihood of success on the merits.

During this April 8, 2008 hearing, the court outlined a briefing schedule for Plaintiffs' Motion for Preliminary Injunction, and Defendants' Motions to Dismiss. A hearing for these motions is set for June 30, 2008.

///

///

II. STANDARD OF REVIEW

A "motion for reconsideration must accomplish two goals. First, a motion for reconsideration must demonstrate reasons why the court should reconsider its prior decision. Second, a motion for reconsideration must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Donaldson v. Liberty Mut. Ins. Co.*, 947 F. Supp. 429, 430 (D. Haw. 1996); *Na Mamo O 'Aha 'Ino v. Galiher*, 60 F. Supp. 2d 1058, 1059 (D. Haw. 1999).

Courts have established only three grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the discovery of new evidence not previously available; and (3) the need to correct clear or manifest error in law or fact in order to prevent manifest injustice. *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1178-79 (9th Cir. 1998); *Great Hawaiian Fin. Corp. v. Aiu*, 116 F.R.D. 612, 616 (D. Haw. 1987), *rev'd on other grounds*, 863 F.2d 617 (9th Cir. 1988); *see also* L.R. 60.1 (providing that reconsideration is only permitted where there is "(a) Discovery of new material facts not previously available;
(b) Intervening change in law; [or] (c) Manifest error of law or fact"). Plaintiffs do not allege the discovery of new facts or any intervening change in law; instead, they appear to argue that the court's denial of their Motion for TRO was a manifest

error of law.

III. ANALYSIS

Plaintiffs assert that prior to the April 8, 2008 status conference, they were not given notice that the court might consider the issue of Plaintiffs' standing and rely on it to deny Plaintiffs' motion. With no notice, Plaintiffs argue that they could not provide the court all relevant facts and applicable laws in support of standing, which they now set forth in their Motion for Reconsideration.

To succeed on their Motion for TRO, Plaintiffs had the burden to demonstrate "either (1) a likelihood of success on the merits and a possibility of irreparable injury, or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in its favor." *Grocery Outlet Inc. v. Albertson's Inc.*, 497 F.3d 949, 951 (9th Cir. 2007). The issue of standing goes directly to the likelihood of success on the merits. In fact, Plaintiffs addressed standing in their Motion for TRO, *see* Pls.' Mot. 2-3, but failed to mention *Arakaki* even though the case involves many of the same Plaintiffs and the same counsel.

Arakaki was discussed, at length, prior to the court's ruling denying the Motion for TRO. In their Motion for Reconsideration, Plaintiffs largely repeat arguments that they previously made regarding the holding in *Arakaki*.

Specifically, they argue that because *Arakaki* was not "pursued" to final judgment, it has no preclusive effect on the instant action.[1] The court, however, did not consider whether *Arakaki* had preclusive effect on the instant case; instead, the court applied the holding in *Arakaki* and determined that Plaintiffs lacked standing in the instant action. To the extent Plaintiffs argue that *Arakaki* is not binding on this court, this argument is foreclosed by *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc).

Arakaki dispenses of Plaintiffs' argument that the United States is not an indispensable party to this action. With regard to standing to challenge Office of Hawaiian Affairs programs, *Arakaki* stated that "Plaintiffs cannot prevail on their trust beneficiary theory of standing because the United States remains an

---

[1] Although not necessary to rule on the instant motion, the court notes that a judgment was entered by the district court in *Arakaki* on January 15, 2004. That judgment was then appealed to the Ninth Circuit, resulting in the published opinion. Plaintiffs have failed to explain why this January 15, 2004 judgment is not, in fact, a final judgment. Indeed, in *Arakaki*, Plaintiffs' attorney admitted that the January 15, 2004 judgment was final:

> THE COURT: . . . First of all, all claims that you stated in the complaint were indeed finally adjudicated by me before the case went up on appeal; correct? Otherwise, it couldn't have gone up on appeal since nobody got 54(b) certification of a partial judgment as final. So everything that you alleged in your complaint had indeed been adjudicated by me before the appeal was taken; right?
> MR. BURGESS: That's correct. It wasn't final, but it had been adjudicated -- well, I guess it was final.
> THE COURT: It had to be final for you to take an appeal; right?
> MR. BURGESS: Yes.

Arakaki v. Lingle, Civ. No. 02-00139 SOM/KSC, Apr. 16, 2007 Status Conference Tr. 4.

indispensable party to a suit challenging the trust, and Plaintiffs have no standing to sue the United States." *Arakaki*, 477 F.3d at 1048.[2]

IV. CONCLUSION

The court DENIES Plaintiffs' Motion for Reconsideration.

IT IS SO ORDERED

DATED: Honolulu, Hawaii, April 25, 2008.

/s/ J. Michael Seabright
J. Michael Seabright
United States District Judge

[2] Plaintiffs appear to claim that the court's 28 U.S.C. § 2403 certification to the Attorney General of the United States that Plaintiffs have raised the constitutionality of § 5(f) of the Admission Act, renders *Arakaki's* holding moot. The court disagrees. Without deciding what future impact § 2403(a) may have on this litigation, the United States is not presently a party to this matter, and § 2403(a) does not require the United States to intervene; instead, the statute provides a mechanism by which the United States may intervene to present evidence "and argument on the question of constitutionality."

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGIL E. DAY; et al., Plaintiffs - Appellants and v. HAUNANI APOLIONA, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiian affairs; et al., Defendants - Appellees, STATE OF HAWAII, Defendant-intervenor - Appellee.	No. 08-16704 D.C. No. 1:05-CV-00649-SOM-BMK District of Hawaii, Honolulu ORDER

The State of Hawaii's motion to strike the previously filed brief of Wendell Marumoto is granted. Wendell Marumoto does not appear to be a party to this appeal. The excerpts of record file December 22, 2008 and the brief filed December 23, 2008 are ordered stricken.

For the Court:

MOLLY C. DWYER
Clerk of the Court:

Cathie A. Gottlieb
Deputy Clerk
Ninth Cir. R. 27-7/Advisory Note to Rule 27
and Ninth Circuit 27-10

12.29.08/cag/Pro Mo

APPENDIX "B"

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, UNITED STATES OF AMERICA, Respondent - Appellee.	No. 08-16769 D.C. No. 1:08-cv-00153-JMS-KSC District of Hawaii, Honolulu ORDER

This is a preliminary injunction appeal.

Appellant's motion to consolidate appeal No. 08-16769 with appeal Nos. 08-16668 and 08-16704 is denied. However, to the extent practicable, the Clerk shall calendar these appeals together.

FOR THE COURT:

Molly Dwyer
Clerk of Court

By: Alexius Markwalder
Motions Attorney/Deputy Clerk
9th Cir. R. 27-7
General Orders/Appendix A

AM/MOATT

APPENDIX "C"

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

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, and HAUNANI APOLIONA, in her official capacity as Office of Hawaiian Affairs Chair, *et al.,* Defendants-Appellees.	No. 08-16769 D.C. No. 1:05-CV-0069-SOM-BMK
VIRGIL E. DAY, et al., Plaintiffs, and WENDELL MARUMOTO, Plaintiff-Intervenor-Appellant, v. HAUNANI APOLIONA, et al. Defendants-Appellees,	No. 08-16668 D.C. No. 1:08-CV-00153 JSM-KSC

and)
)
STATE OF HAWAI`I,)
)
Defendant-Intervenor-Appellee.)
)
_____)

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2009, I electronically filed the foregoing 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 whose counsel are registered CM/ECF users will be served by the appellate CM/ECF system.

H. WILLIAM BURGESS, ESQ.
hwburgess@hawaii.rr.com
Attorney for Kuroiwa Plaintiffs-Appellants (Case 08-16769)

WALTER R. SCHOETTLE, ESQ.
papaaloa@umich.edu
Attorney for Plaintiffs-Appellants (Case No. 08-16668)

MARK J. BENNETT
Attorney General
CHARLEEN M. AINA
GIRARD D. LAU
girard.d.lau@hawaii.gov
Deputy Attorneys General
State of Hawaii
Department of the Attorney General
Attorneys for State Defendants-Appellees (Case No. 08-16769)

MARK J. BENNETT
Attorney General
WILLIAM J. WYNHOFF
bill.j.wynhoff@hawaii.gov
Deputy Attorney General
State of Hawai`i
Department of the Attorney General

Attorneys for Amicus Curiae and Intervenor
Defendant-Appellee State of Hawai`i (Case No. 08-16668)

DATED: Honolulu, Hawai`i, March 24, 2009.

/s/ Lisa W. Cataldo
ROBERT G. KLEIN
LISA W. CATALDO
BECKY T. CHESTNUT

Attorneys for OHA Defendants Haunani Apoliona, Walter M. Heen, Rowena Akana, Donald B. Cataluna, Robert K. Lindsey, Jr., Colette Y. Machado, Boyd P. Mossman, Oswald Stender and John D. Waihe`e IV in their official capacities as trustees of the Office of Hawaiian Affairs