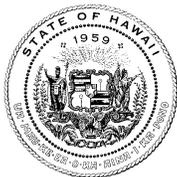


LINDA LINGLE  
GOVERNOR



MARK J. BENNETT  
ATTORNEY GENERAL

LISA M. GINOZA  
FIRST DEPUTY ATTORNEY GENERAL

**STATE OF HAWAII**  
**DEPARTMENT OF THE ATTORNEY GENERAL**  
425 QUEEN STREET  
HONOLULU, HAWAII 96813  
(808) 586-1500

April 14, 2009

Ms. Molly Dwyer  
Clerk of the Court  
United States Court of Appeals  
for the Ninth Circuit  
P.O. Box 193939  
San Francisco, CA 94119

RE: State Defendants'<sup>1</sup> and their attorneys' Response to  
Plaintiffs' 28(j) letter in Kuroiwa v. Lingle, No. 08-17287

Dear Ms. Dwyer:

Pursuant to FRAP 28(j), State Defendants and their attorneys respond to Plaintiffs' 28(j) letter filed 4/5/09. The Supreme Court's Hawaii v. Office of Hawaiian Affairs ruling ("OHA"), has no relevance to the issues in this case, and raises no doubts as to the correctness of the decision below.

OHA ruled that the federal Apology Resolution, 107 Stat. 1510 (1993), did not strip the State of Hawaii of its ability to sell its §5(f) ceded lands. It did not

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<sup>1</sup> "State Defendants" consist of Defendants-Appellees Linda Lingle, in her official capacity as Governor of the State of Hawaii, Georgina Kawamura, in her official capacity as Director of the Department of Budget and Finance, Russ K. Saito, in his official capacity as State Comptroller, and Director of the Department of Accounting and General Services, Laura H. Thielen, in her official capacity as Chairman of the Board of Land and Natural Resources, Sandra Lee Kunimoto, in her official capacity as Director of the Department of Agriculture, Theodore E. Liu, in his official capacity as Director of the Department of Business, Economic Development and Tourism, and Brennon Morioka, in his official capacity as Director of the Department of Transportation.

undermine the fact that §5(f) of the federal Admission Act, by its plain language, authorizes the State of Hawaii to use the ceded lands for "one or more" of five purposes, including the betterment of the conditions of native Hawaiians. The ruling also said nothing to question the constitutionality of the Admission Act's authorizing the State of Hawaii to use the ceded lands for the separate benefit of native Hawaiians, the constitutional challenge that forms the heart of plaintiffs' case. The constitutional issue discussed briefly in OHA dealt with an entirely different issue: whether Congress, having given the State title to the ceded lands upon its admission, could subsequently cloud that title. Slip Op. at 11-12.

Moreover, the district court below sanctioned Plaintiffs' counsel because he denied the stare decisis impact of the Ninth Circuit's Arakaki v. Lingle decision, barring plaintiffs from pursuing their primary claim on the merits because the United States is an indispensable party to that claim. Nothing in OHA addresses, much less undermines, Arakaki, nor, therefore, the propriety of the sanctions against plaintiffs' counsel, nor the denial of sanctions against defendants and their attorneys.

Finally, the doctrine of constitutional avoidance only applies as to "competing **plausible** interpretations." OHA, Slip Op. at 11-12; Salinas v. U.S., 522 U.S. at 59-60 (1997). The Admission Act cannot plausibly be construed as not authorizing use of ceded lands for the separate benefit of native Hawaiians, when its plain language -- "one or more," "betterment of the conditions of native Hawaiians" -- so dictates. See also Answ.Br. (No. 08-16769) at 9-10 n.4. Plaintiffs thus necessarily challenge the Admission Act, and thereby trigger Arakaki.

Sincerely,

/s/ Girard D. Lau

Girard D. Lau  
Charleen M. Aina  
Deputy Attorneys General  
Attorneys for State Defendants-Appellees  
and their attorneys

cc: all counsel, via the appellate CM/ECF system