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Russell A. Suzuki, Esq.
Acting Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

Via email and U.S. mail

Dear Mr. Suzuki:

Re: Act 15, SLH 2012, Relating to the Public Land Trust

Thank you for the prompt reply to my June 18, 2012 message.

In preparing my next step, I have reviewed the Brief For Petitioners, State of Hawaii *et al* dated December 4, 2008 by Mark J. Bennett, Esq., then-Attorney General, State of Hawaii, to the Supreme Court of the United States in *Hawaii v. OHA*, No. 07-1372. In that brief, your office brilliantly and correctly argues that, the Newlands Resolution (1898) and Organic Act (1900) “extinguished” and “foreclosed” any Native Hawaiian or other claims over the ceded lands that preexisted the date of annexation. “For decades after Hawaii was admitted to the Union, the State had undisputed authority to dispose of the ceded lands as it deemed appropriate so long as it satisfied its “public trust” obligations, which run to *all* the citizens of Hawaii, not just to Native Hawaiians.”

The Court agreed. On 3/31/2009 the U.S. Supreme Court, in *Hawaii v. OHA*, 129 S.Ct. 1436, 1439-1444 (2009) reversed the Hawaii Supreme Court’s Injunction against sale or transfer of any ceded lands until claims of Native Hawaiians against ceded lands are resolved. The decision by Justice Alito for the *unanimous* Court held to this effect:

The operative clauses of the 1993 Congressional Apology Resolution did not change the legal landscape and restructur[e] the rights and obligations of the State. The Hawaii Supreme Court’s conclusion (that the Apology Resolution’s 37 “whereas” clauses clearly recognize native

Hawaiians’ “unrelinquished” claims over the ceded lands) is wrong. The 37 “whereas” clauses would “raise grave constitutional concerns” if they purported to cloud the State of Hawaii’s absolute title to the ceded lands.

Pursuant to the Newlands Resolution (1898) the Republic of Hawaii ceded and transferred to the U.S. “absolute fee and ownership” of all public, Government and Crown lands “without reserve.” The 1900 Organic Act reiterated that the U.S. acquired absolute fee, and declared that on effective date of Newlands Resolution, and prior thereto, the Crown lands were property of the Hawaiian government “free and clear from any trust of or concerning the same, and from all claim of any nature whatsoever.”

This landmark unanimous decision of the high Court has now finally adjudicated this major issue. Native Hawaiians have no claim over the ceded lands arising out of events before Annexation in 1898. The ceded lands are held by the State of Hawaii in trust for *all* the people of Hawaii, including but not limited to Native Hawaiians.

Doesn’t that make untenable the Hawaii Supreme Court’s 2001 language on which you rely? In other words, since:

1. The State’s “public trust” obligations run to *all* the citizens of Hawaii, not just to Native Hawaiians;” and
2. The Newlands Resolution (1898) and Organic Act (1900) “extinguished” and “foreclosed” any Native Hawaiian or other claims over the ceded lands that preexisted the date of Annexation;
3. Native Hawaiians have never since Annexation in 1898 had any special claim, greater than other beneficiaries, over the ceded lands,
4. Nothing is, or can be, owed from the Ceded Lands Trust to OHA for Native Hawaiians beneficiaries for past periods; and
5. Since 1980, the State has distributed over \$400 Million of trust revenues and properties to OHA exclusively for Native Hawaiian beneficiaries, but has distributed no trust cash or properties exclusively for the other beneficiaries; and

therefore:

6. OHA should promptly refund to the State for the benefit of all Hawaii's citizens the funds and properties it has received from the trust and still holds, plus earnings and appreciation.

I do not expect you to write a brief in response to this message. I lay out some of my analysis in the hope that you will put on your hat as attorney for the Trustee of a public land trust in a position of serious conflict; and consider how we might agree to bringing these long-standing civil issues to a just, speedy and inexpensive determination. Rule 1, Hawaii Rules of Civil Procedure.

The Uniform Trustee's Powers Act HRS § 554A-5(b) (which applies to any trust with a *situs* in Hawaii, whenever established) and the common law which it codifies, forbid a trustee whose duties and interests conflict, from exercising a trust power affected by the conflict without court authorization. Hawaii Probate Rule 42, Conflicts of interest, imposes a duty on an attorney for a trustee to notify beneficiaries of activities of the fiduciary actually known to be illegal that threaten the security of the trust assets or the interests of the beneficiaries; and gives the Probate Court the power and authority to impose sanctions upon any attorney who fails to properly carry out the attorney's duties to the fiduciary, the beneficiaries or ward, or the court.

As you know, the Supreme Court of Hawaii has original jurisdiction, if it consents, to receive case arising under writs of mandamus directed to public officials to compel them to fulfill the duties of their officer. HRS 602-5.

Hawaii Rules of Appellate Procedure 21(b) "Writs of mandamus directed to a public officer," establishes the requirements for the petition and the procedure, if the court entertains the petition.

I'm thinking of filing a petition to the Hawaii Supreme Court for a writ of mandamus directed to the Governor, and other responsible State officers, to compel them to fulfill their duties, before implementing Act 15 SLH 2012, to first seek and receive instructions from the Supreme Court of Hawaii with respect to their conflicting interests and fiduciary duties.

I'm proposing that we both agree to submit the petition on agreed facts and stipulate that, pending final judgment, Act 15, SLH 2012 will not be implemented in any way.

I know that some may object but would think that in this election year and considering the State's current economic crisis, a temporary hold on giving away public lands worth \$200 Million is unlikely to cause a public uproar. Judging by comments I hear, I would expect even a long delay in implementing Act 15 to be highly popular.

I suggest that, whatever the final decision on Act 15, the review by the Hawaii Supreme Court and, perhaps then by the Supreme Court of the United States, would minimize public discord.

Please let me have your response or any suggestions as soon as possible.

Very truly yours,

/s/ H. William Burgess
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