Excerpt from Ch. 2, "Public Land Trust" by Melody Kapilialoha MacKenzie, in *Native Hawaiian Law: A Treatise* (2015), a collaborative project of the Native Hawaiian Legal Corporation, Ka Huli Ao Center for Excellence in Native Hawaiian Law at the William S. Richardson School of Law, and Kamehameha Publishing. Copyright © 2015 by the Native Hawaiian Legal Corporation & Ka Huli Ao Center for Excellence in Native Hawaiian Law. All rights reserved.

I. INTRODUCTION

In 1898, based on a Joint Resolution of Annexation (Joint Resolution) enacted by the U.S. Congress, the Republic of Hawai‘i transferred approximately 1.8 million acres[2] of Hawaiian Government and Crown Lands to the United States.[3] Kamehameha III had set aside the Government Lands in the 1848 Māhele for the benefit of the chiefs and people. The Crown Lands, reserved to the sovereign, provided a source of income and support for the crown and, in turn, were a resource for the Hawaiian people.[4] Although the fee-simple ownership system instituted by the Māhele and the laws that followed drastically changed Hawaiian land tenure, the Government and Crown Lands were held for the benefit of all the Hawaiian people. They marked a continuation of the trust concept that the sovereign held the lands on behalf of the gods and for the benefit of all.[5]

In the Joint Resolution, the United States implicitly recognized the trust nature of the Government and Crown Lands. Nevertheless, large tracts of these lands were set aside by the federal government for military purposes during the territorial period and continue under federal control today. The trust nature of the Government and Crown Lands was clearly articulated in the 1959 Admission Act, which transferred the lands from U.S. control to the State of Hawai‘i.

Although Government and Crown Lands are commonly termed “ceded lands,” this chapter uses the words “public land trust” or “trust lands” to refer to them in order to acknowledge different interpretations of the legal effect of the Joint Resolution. Under current Hawai‘i law, the public land trust is composed of specific categories of lands based on the Admission Act.[6] In this chapter the term will be used more generally to refer to all Government and Crown Lands of the Hawaiian Kingdom that were included in the Joint Resolution. Chapter 1 discussed the evolution of the Government and Crown Lands. This chapter examines legal issues related to the public land trust, primarily those trust lands under state control, and explores the state’s trust duties as interpreted under current law.

II. TRUST LANDS UNDER FEDERAL CONTROL

The Joint Resolution purported to "cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands . . . belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining[.]"[7] Existing federal laws dealing with public lands were not made applicable to lands in Hawai'i; instead, the Joint Resolution stated that Congress would enact "special laws for . . . [the] management and disposition" of Hawai'i's public lands.[8]

Another section of the Joint Resolution provided:

> [A]ll revenues from or proceeds of the . . . [public lands], except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.[9]

In an 1899 opinion, the U.S. attorney general interpreted this language as subjecting the public lands in Hawai'i to "a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the Hawaiian Islands for educational and other purposes."[10] Not surprisingly, the opinion also asserted the absolute authority of Congress "to provide for the management and disposition of these lands."[11]

The Joint Resolution was followed by an Organic Act, approved April 30, 1900.[12] The Organic Act established a territorial government,[13] attempted to remove trust provisions from the Crown Lands and confirmed their cession to the United States,[14] and provided specific laws for the administration of the public lands.[15] Section 91 of the Organic Act stated:

> [T]he public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation . . . shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii.[16]

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Another section of the Organic Act provided that the proceeds from the Territory's sale, lease, or other disposition of these lands were to be applied to "such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation[.]"[17]

Consequently, in the period between annexation and Hawai'i's admission as a state of the United States in 1959, although the United States asserted title to the Government and Crown Lands, the Territory of Hawai'i maintained administrative control and use of the lands. Moreover, funds received from disposition of the lands were to be used for the benefit of Hawai'i's people. Although the Republic of Hawai'i had ceded its asserted title to the Crown and Government Lands to the United States, both the Joint Resolution and the Organic Act recognized that these lands were impressed with a special trust under the federal government's proprietorship. In fact, it could be argued that Hawai'i's Government and Crown Lands never became part of the federal public domain; the United States received "legal" title to the lands, while beneficial title rested with the inhabitants of Hawai'i.[18]

Undoubtedly, one of the reasons for annexing Hawai'i was to strengthen U.S. military defenses.[19] Many annexationists had argued that Hawai'i was needed to protect the West Coast of the United States and to maintain U.S. military presence in the Pacific.[20] No site in the Pacific area was better suited for refueling ships, storing munitions, and quartering troops than Pearl Harbor. Since the United States now controlled Hawai'i's public lands, Congress and the president had the power to use those lands. Under the provisions of the Organic Act, lands could be formally "set aside" by presidential executive orders for use by the United States. Thus, large tracts of land were set aside.[21] Other lands, although not formally "set aside," were used by the United States under permits or licenses or by permission from the territorial government.[22]

By 1959, 287,078.44 acres of Hawai'i's public lands had been set aside for federal government use. Of this acreage, 227,972.62 acres were located in national parks, with most of the remainder utilized for military purposes.[23] In addition, the federal government had permits and licenses for an additional 117,412.73 acres of land.[24] Finally, the United States had acquired the fee interest, through purchase or condemnation, of 28,234.73 acres.[25]

The unique status of the Government and Crown Lands, as well as the special relationship between the federal government and Native Hawaiians, was recognized in 1921 with the passage of the Hawaiian Homes Commission Act (HHCA).[26] The act effectively withdrew approximately 203,500 acres of public land, including Crown Lands, and brought them under the jurisdiction of the Hawaiian Homes Commission to be leased to Native Hawaiian beneficiaries at a nominal fee for ninety-nine years.[27]

In the act, an eligible Native Hawaiian beneficiary was defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."[28]

III. 1959 ADMISSION ACT

In 1959, the U.S. Congress passed the Admission Act.[29] Through the Admission Act, the Government and Crown Lands were transferred to the State of Hawai'i, which assumed the role of trustee.

Section 5 of the Admission Act provides the key to understanding the status of the trust lands and the state's responsibilities in relation to those lands.[30] Section 5(a) names the State of Hawai'i as successor in title to the lands and properties held by the Territory.[31] Section 5(b) of the act states:

> Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union.[32]

Section 5(g) defines public lands and other public property as the "lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation . . . or that have been acquired in exchange for lands or properties so ceded."[33]

Section 5(c) of the Admission Act specifically omitted from the lands to be transferred to the state any lands that had been set aside for federal use pursuant to an act of Congress, executive order, presidential proclamation, or gubernatorial proclamation. According to section 5(c), such lands were to remain the property of the federal government.[34]

Furthermore, section 5(d) gave the federal government five years to set aside any lands it was using under permit, license, or permission of the Territory immediately prior to statehood. Once set aside, those lands also would become the property of the United States.[35]

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Section 5(e) provided some relief, however, from the federal government's ability to retain trust lands. Under section 5(e), land and property unnecessary for federal needs could be conveyed "freely to the State of Hawaii."[36] This provision required federal agencies to assess their needs for the lands and report to the president. It set a five-year deadline for reporting and conveying lands to the state. According to section 5(e), after August 21, 1964, five years from the date on which Hawaiʻi formally entered the union, title to public lands retained by federal agencies vested permanently in the United States.[37]

State officials had high hopes that substantial portions of federally held lands would be transferred.[38] At the end of the five-year period, however, of the 287,078.44 acres set aside for the federal government, only 595.41 were transferred to Hawaiʻi.[39] Furthermore, the federal government chose to retain control of virtually all of the 117,412.73 acres it had held under lease, permit, or license prior to statehood.[40] Of this number, under the provisions of section 5(d), 87,236.55 acres were subsequently added to the lands set aside for federal use.[41] The remaining 30,176.18 acres became the property of the state, but under pressure from federal officials who threatened to set aside the lands permanently to the United States, these lands were leased to the federal government for sixty-five years for a dollar.[42] Consequently, as the five-year deadline approached, the federal government retained title to 373,719.58 acres and leased an additional 30,176.18 acres.[43]

Table 1

Lands Retained by U.S. under §§ 5(c) and 5(d) of Admission Act

CATEGORY	ACRES
Lands set aside for U.S. during territorial period and retained by U.S. under § 5(c)	287,078.44
Lands returned under § 5(e)	– 595.41
TOTAL	286,483.03
Additional lands set aside by U.S. under § 5(d)	+ 87,236.55
TOTAL lands retained by U.S.	**373,719.58**
Lands leased to U.S. for 65-year term at $1.00	**30,176.18**

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Hawaiʻi's political leaders objected to the five-year deadline set on the transfer of lands under federal use.[44] They contended that Hawaiʻi had a unique claim to these lands and property since they were originally given to the United States by the Republic and were held as a trust for the people of Hawaiʻi.[45] On December 23, 1963, Congress passed Public Law 88-233 (P.L. 88-233), which abolished the five-year deadline in section 5(e). This meant that the federal government could relinquish section 5(c) and 5(d) lands to the state at any time.[46] There was a trade-off, however. All lands that had been set aside for national parks, monuments, and reservations (227,972.62 acres) became the fee-simple property of the federal government.[47] Thus, under the provisions of P.L. 88-233, approximately 145,746.96 acres (58,510.41 acres of section 5(c) lands and 87,236.55 acres of section 5(d) lands) became eligible for transfer to Hawaiʻi.

According to a 2012 inventory of public lands maintained by the State Department of Land and Natural Resources, 31,247.29 acres have been transferred to the State of Hawaiʻi pursuant to P.L. 88-233, including the approximately 28,776.70 acres of the island of Kahoʻolawe.[48]

Table 2

Lands Eligible for Return after Passage of P.L. 88-233

CATEGORY	ACRES
Lands set aside for U.S. during territorial period and retained by U.S. under § 5(c)	287,078.44
Lands returned under § 5(e)	– 595.41
TOTAL	286,483.03
Additional lands set aside by U.S. under § 5(d)	+ 87,236.55
TOTAL lands retained by U.S.	373,719.58
National parks, monuments, and reservations (fee-simple property of U.S. after passage of P.L. 88-233)	– 227,972.62
Lands eligible for return to state after passage of P.L. 88-233	145,746.96
Lands returned to state under P.L. 88-233 (including Kahoʻolawe)	– 31,247.29
Lands currently eligible for return to state	**114,499.67**

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The number of acres of Government and Crown Lands currently under federal control is not clearly established, especially given the varying definitions of "ceded" lands used by federal agencies. According to a February 1993 inventory, the Department of Defense held a total of 141,579.17 acres of "ceded" lands, which at that time included Kahoʻolawe, under its jurisdiction.[49] A separate 1993 inventory for "ceded" lands under the control of U.S. civilian agencies listed 418,543.68 acres of trust lands *and water*.[50] The National Park Service held 163,567.990 acres, most of it at Hawaiʻi Volcanoes National Park, while the Fish and Wildlife Service managed 254,418 acres of trust land *and water* in the extreme western extension of the Hawaiian archipelago.[51]

A 1991 report by the Office of the Governor examining controversies related to the public land trust noted that "federal agencies have exercised latitude to use these [section 5(c) and 5(d)] lands for a wide array of functions."[52] The report states:

> In some cases, there appears to be no rationale for the size of ceded lands, given the intended use. Lighthouses range from 0.1 acres to 277 acres; fire control stations from .881 acres to 39.128 acres. . . . [T]he entire island of Molokini (18.5 acres) has been set aside for lighthouse purposes.[53]

One concern for Native Hawaiians and other Hawaiʻi citizens has been the U.S. military's use of large areas of trust land and its abuse of that land.[54] Although the bombing of the island of Kahoʻolawe[55] may be the most extreme example of such abuse, there are certainly others. On Oʻahu, Mākua Valley on the Waiʻanae coast has been used for live-fire training and combined arms maneuver training, the subject of significant litigation brought by Native Hawaiians and environmentalists.[56] Over 3,200 acres of Mākua are lands set aside by the federal government and retained under section 5(d) of the Admission Act; the federal government leases an additional 722 acres from the state for a nominal fee.[57] Other lands, such as portions of Bellows Air Force Base on the windward side of Oʻahu, do not appear to be put to any significant use by the federal government, and many believe that these lands could readily be returned to general public use.[58]

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IV. TRUST LANDS UNDER THE STATE'S ADMINISTRATION

The state's primary responsibilities with regard to the Government and Crown Lands are established in section 5(f) of the Admission Act, which provides:

> The lands granted to the State of Hawaii . . . and public lands retained by the United States . . . and later conveyed to the State . . . 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 the support of the public schools and other public educational institutions, *for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended,* for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use.[59]

Section 5(f) also states that these lands, proceeds, and income shall be managed and disposed of for one or more of the five trust 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."[60]

Unfortunately, a definitive study of the legislative history of the Admission Act has not been undertaken, so there is little information to provide insight into the trust language of section 5(f). One source indicates that this language originated in deliberations on a 1947 bill for Hawai'i's statehood; the Department of the Interior suggested amendments to the bill, including the trust language contained in section 5(f).[61] The House Committee on Public Lands adopted the amendments, and the trust language was carried forward into every subsequent statehood bill.[62]

Although there is no detailed guidance on the meaning of the section 5(f) trust language, it is clear that the welfare of Native Hawaiians was of specific concern to Congress. Looking to the considerations that earlier had guided Congress in enacting the HHCA, several factors stand out. First, there was a fear that Hawaiians were dying out as a race; their economic, social, and physical conditions were dismal, and their continued existence was at risk.[63] Second, Congress recognized that with the drastic economic and political changes brought by Western contact, Native Hawaiians had been displaced from native lands, and their rights in such lands had not been adequately protected. It is fair to assume that these same concerns prompted the inclusion of the section 5(f) language on the betterment of conditions of Native Hawaiians. Thus

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section 5(f), in part, can be viewed as a further safeguard of the continued existence of Native Hawaiians and additional protection of land rights.

Significantly, before Hawai'i could become a state, a plebiscite had to be taken in Hawai'i affirming, among other things, that "the terms or conditions of the grants of lands or other property [in the Admission Act] made to the State of Hawaii are consented to fully by said State and its people."[64] Professor Jon Van Dyke concludes that "Hawai'i would not have become a state if the people of Hawai'i had not agreed by vote to the requirement that the revenues from the [public land trust] be used, in part, for the 'betterment of conditions of native Hawaiians.'"[65] Hawai'i's state constitution, originally drafted in 1950, also contained language specifically accepting trust provisions that the federal government might impose on the lands, stating:

> Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation.[66]

The 1950 constitution was reviewed and approved by the U.S. Congress as noted in section 1 of the Admission Act.[67] Thus, it is clear from this history that the federal government, the people of Hawai'i, and the state itself entered into a compact relating to the trust lands.

Under Hawai'i law, the Department of Land and Natural Resources (DLNR) is charged with the administration of the public land trust.[68] A 1979 audit of the DLNR showed, however, that the DLNR had failed to properly dispose of the revenue and income from the trust.[69] Hawai'i law established a public land trust fund for the receipt of funds derived from the sale, lease, or other disposition of trust lands.[70] A separate special land and development fund was created to receive all proceeds from the disposition of non-trust lands—lands that the state may have acquired by condemnation, purchase, or other means.[71] This second fund was established for the maintenance and development of all public lands. These two funds were intended to serve different purposes: moneys deposited in the public land trust fund were to come from the disposition of trust lands and were to be used as directed in section 5(f) of the Admission Act. Moneys deposited in the special land and development fund were to come from the disposition of non-trust lands (lands not subject to the section 5(f) trust) and were to be used to maintain and develop all public lands.[72]

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The 1979 audit revealed, however, that the DLNR had failed to make this distinction between the two funds and instead had deposited moneys from the leases of all public lands into the public land trust fund and moneys from the sale of all public lands into the special land and development fund.[73] Thus, in depositing money in the two funds, the DLNR had ignored the distinction between trust lands and non-trust lands; instead, it had deposited moneys on the basis of a lease/sale dichotomy. One reason given for the failure to conform to the mandate of section 5(f) of the Admission Act was even more disturbing: no inventory of public lands existed, and the DLNR was unable to distinguish between trust and non-trust public lands.[74]

A. INVENTORY OF TRUST LANDS

The absence of an inventory and the confusion of funds impeded the administration of the section 5(f) public trust in several ways.[75] First, because the DLNR did not use the trust/non-trust distinction in recording receipts, there was no way of ascertaining the accuracy of its figures for each fund or of determining which moneys belonged to which fund. Since most of the income from public lands is derived from trust lands, this failure to distinguish between trust and non-trust lands probably worked to the disadvantage of the public land trust fund. Second, the wrongful deposits may have resulted in expenditures of public trust moneys for the purposes of the special land and development fund and vice versa. Finally, because section 5(f) requires the state to hold the lands separately in trust, the state's failure to identify the lands, like a private trustee's failure to identify and segregate trust assets, constituted an independent breach of its 5(f) obligations.[76]

As a result of the disclosures in the 1979 audit and the 1978 amendments to the state constitution, discussed below, the DLNR began to compile an inventory of all the state-owned public lands for which it was accountable. By September 1981, the DLNR had completed its initial inventory, listing approximately 1,271,652 acres.[77] The department itself conceded, however, that its inventory was not complete.[78] Moreover, the inventory did not include lands under the jurisdiction of other state agencies, including the University of Hawaiʻi and the Hawaiʻi Housing Authority.[79]

In 1982, the legislature appropriated funds for the Office of the Legislative Auditor to complete the inventory of trust lands and to study the legal issues relating to revenues from the trust lands.[80] The legislative auditor issued a progress report in 1983,[81] requesting additional time to complete the task. In December 1986, the

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legislative auditor's final report on the public land trust was issued.[82] With regard to the inventory, the report stated:

> The inventory put together by the DLNR is as precise and complete as can be expected given the circumstances under which it was prepared. The DLNR is the first to admit, however, that the inventory contains inaccuracies. The inaccuracies are in the classification of land as ceded or non-ceded and as trust land or non-trust land and in the acreages of parcels.[83]

The report went on to detail the numerous problems, including survey and title search expenses, involved in compiling a completely accurate and comprehensive inventory.[84] The report suggested that such work be done only for those lands that generated considerable revenues or whose land title history was complex or obscure.[85] Finally, the report recommended that the "ceded" versus "non-ceded" lands distinction be abolished and that all public lands, including all lands that vested in the state as a result of section 5(a) of the Admission Act, be held in the public land trust.[86]

As a result of disputes about the income and proceeds from the public land trust due to the state Office of Hawaiian Affairs (OHA), discussed in detail below, Act 329[87] was passed in 1997. Act 329 established an eight-member committee to study and make recommendations on "all outstanding and anticipated issues . . . currently or potentially relating to the public land trust[,]"[88] including whether lands should be transferred to OHA in partial or full satisfaction of any past or future obligations under the Hawai'i Constitution. The committee was to submit a final report to the legislature in December 1998, but in a November 1998 report to the legislature, the DLNR noted that the inventory had not been completed, ostensibly due to OHA's request to include all Government and Crown Lands in the inventory.[89]

In Act 329, the legislature also appropriated funds to convert the DLNR's Land Division records into a database to assist in managing all public lands.[90] As a status report on the development of the land information system noted, "Historically, most of the work of creating, monitoring and enforcing leases and other dispositions of land was performed manually."[91] Although the DLNR had computerized data systems for certain functions, the systems were not integrated.[92] Consequently, the Land Division had a mixture of manual and computerized systems with inadequate but labor-intensive internal controls. This resulted in unnecessary time spent on inputting identical information into separate systems, an increased risk of inaccurate data due to repeated entries of the same information, and excessive time in processing and tracking requests, lease requirements, and other time-sensitive matters.[93]

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The State Land Information Management System (SLIMS), which became operational in the fall of 2000, integrates information about state lands including the inventory, along with property management and accounts receivable, into one system that identifies property and tracks information such as lease renewal dates and lease receipts.[94] According to the Board of Land and Natural Resources chair, the Land Division spent a total of 2,700 hours on updating and validating the information in SLIMS and individually cross-checked 16,000 State Land Inventory records with 19,700 county tax records to verify data.[95]

SLIMS has a field that indicates the state's title source in reference to section 5 of the Admission Act, P.L. 88-233, or some other source.[96] Lands acquired after statehood, no matter what the means, appear to be designated as "Acquired after 8/59." This could be problematic because, under the Admission Act, lands acquired in exchange for trust lands are subject to the section 5(f) trust.[97] According to information in the SLIMS system as of October 2003, the state's *total* land inventory was 1,302,515 acres, excluding the approximately 203,500 acres of lands held by the Department of Hawaiian Home Lands.[98] This inventory includes lands that are not part of the public land trust that the state may have purchased or condemned or received through other means. In recognition of the fact that SLIMS does not include all trust lands and that the trust status of some lands is not clearly delineated, the 2011 legislature passed and the governor signed Act 54 to further study and clarify the trust status of lands, particularly those to which state agencies other than the DLNR held title.[99]

B. 1978 CONSTITUTIONAL AMENDMENTS

Until 1978, little attention had been given to the trust language of section 5(f) of the Admission Act. At the 1978 Constitutional Convention, however, members of the Hawaiian Affairs Committee examined the Admission Act's trust language as it related to Native Hawaiians.[100] As a result of these deliberations, new sections were added to the state constitution to implement the trust provisions.

The first new section provided that the lands granted to the state by section 5(b) of the Admission Act (with the exception of the HHCA's "available lands") were to be held by the state as a public trust for Native Hawaiians and the general public.[101] The second section established OHA, to be governed by a nine-member elected board of trustees that would hold title to all real or personal property set aside or conveyed to it as a trust for "native Hawaiians and Hawaiians."[102] The final provision set out the powers of the board of trustees and made clear that OHA was to hold in trust the

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income and proceeds derived from a pro rata portion of the trust established for lands granted to the state by section 5(b) of the Admission Act.[103] An additional section defined the terms "Hawaiian" and "native Hawaiian," but the Hawai'i Supreme Court subsequently determined that this section had not been validly ratified in the 1978 general election.[104]

A careful reading of the relevant committee reports,[105] as well as the OHA amendments, reveals that the Constitutional Convention structured OHA as the body that would receive and administer the share of the public land trust funds designated for the betterment of the conditions of Native Hawaiians under the Admission Act. Section 5(f) of the Admission Act tied this definition of "native Hawaiian" to the HHCA.[106] Benefits under the HHCA are limited to persons of at least 50 percent Hawaiian ancestry.[107] Thus, although the OHA amendment names two beneficiaries of the OHA trust—Native Hawaiians (persons of at least 50 percent Hawaiian ancestry) and Hawaiians (persons of less than 50 percent Hawaiian ancestry)—OHA's public land trust funds were initially targeted for the benefit of its Native Hawaiian beneficiaries of at least 50 percent Hawaiian ancestry. As discussed later in this chapter, both the federal and state courts have determined that the OHA trustees have broad discretion in utilizing public land trust funds to meet this section 5(f) goal.[108] The constitution does not establish a source of funding for OHA's Hawaiian beneficiaries, although the legislature has consistently appropriated general funds to match trust funds allowing OHA to provide benefits to Native Hawaiians of less than 50 percent Hawaiian ancestry.[109]

The Admission Act did not set a specific formula for allocation of the public land trust proceeds and income among the five trust purposes.[110] Although the OHA constitutional provision stated that the proceeds and income from a pro rata share of the trust should be directed to OHA, the amendment did not define that pro rata share. That determination was left to the state legislature, which initially set OHA's pro rata share at 20 percent.[111]

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V. CONCLUSION

Initial steps to resolve issues surrounding the trust land revenue due to OHA under Hawaiʻi law have provided some financial benefits to Native Hawaiians. Although OHA does not receive a pro rata share of trust revenues as established in the state constitution, OHA does receive a statutorily set amount of $15.1 million annually from trust lands. Moreover, the recent settlement of past-due revenue has resulted in the transfer to OHA of valuable lands in Kakaʻako. How to utilize those lands to benefit the Native Hawaiian community in a manner consistent with Hawaiian values and culture remains a challenge for OHA. In addition, many other difficult issues need to be addressed by the state, particularly relating to use and management of the trust lands. The Admission Act requires that the lands be managed consistently with the trust purposes set forth in the act. The state, however, has not fully embraced this aspect of its trust responsibility.

Although the Hawaiʻi Supreme Court's landmark decision placing a moratorium on the sale or permanent transfer of trust lands was overturned by the U.S. Supreme Court, the litigation itself resulted in a virtual moratorium for a fifteen-year period. Recent action requiring a two-thirds majority legislative approval for the permanent alienation of trust lands is an interim solution that may keep the trust lands intact for the foreseeable future. This solution, however, does not purport to, and indeed could not, address the underlying claim of Native Hawaiians to the Government and Crown Lands.

The federal government retains title to proportionately less of the Government and Crown Lands than does the state, but many of the lands held, such as Mākua Valley, have deep spiritual and cultural significance for Native Hawaiians. To date, the federal government has given very little recognition to Native Hawaiian claims to these lands.

Many Native Hawaiians also advocate for a full inventory of both state and federally controlled trust lands, a step that is vital as the Hawaiian community moves toward greater self-governance. Ultimately, Native Hawaiians seek return of Government and Crown Lands from both the state and federal governments. How such lands would be cared for and managed, who would have jurisdiction over them, and what rights Native Hawaiians could exercise upon them are crucial aspects of Native Hawaiian self-governance and sovereignty.

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NOTES

1 Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai'i (*OHA v. HCDCH I*), 117 Hawai'i 174, 214, 177 P.3d 884, 924 (2008) (citing the trial court) (diacritical marks added, alteration in original omitted).

2 The Hawaiian Commission, appointed pursuant to the Joint Resolution of Annexation, gives a figure of 1,772,640 acres of public land, valued at $5,581,000. U.S. Hawaiian Comm'n., S. Doc. No. 16-55, at 45 (1898). *Compare* Robert H. Horwitz et al., Public Land Policy in Hawaii: An Historical Analysis, Legislative Reference Bureau Report No. 5, at 62 (1969) [hereinafter Historical Analysis] (estimating the acreage to be 1.8 million), *with* Jean Hobbs, Hawaii: A Pageant of the Soil 118 (1935) (citing W.F. Blackmun, The Making of Hawaii 162–64 (1906)) (estimating the acreage to be 1.75 million).

3 See Chapter 1, *supra,* for historical background surrounding the overthrow of the Hawaiian Kingdom and annexation by the United States. As discussed more fully in Chapters 5 and 6, *infra,* questions have been raised about the method by which, and indeed whether, the United States received legal title to the Crown and Government Lands.

4 *See* Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? 9–10 (2008).

5 See Chapter 1, *supra*, for a discussion of the trust concept.

6 Hawai'i statutory law defines the public land trust and income as follows:

> [A]ll proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and returned to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 6), and all proceeds and income from the sale, lease or other disposition of lands retained by the United States under sections 5(c) and 5(d) of the Act and later conveyed to the State under section 5(e) shall be held as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provision of lands for public use.

Haw. Rev. Stat. § 171-18 (2013).

7 Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, J. Res. 55, 55th Cong., 30 Stat. 750 (1898).

8 *Id.*

9 *Id.*

10 Haw.—Pub. Lands, 22 Op. Att'y Gen. 574, 576 (1899).

11 *Id. See also* Haw.—Pub. Lands, 22 Op. Att'y Gen. 627, 631–32 (1899) (noting that Hawai'i's public lands became vested in the United States on signing of the Joint Resolution of Annexation on July 7, 1898, and thus the lands could not be disposed of by the Republic of Hawai'i).

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12 Hawai'i Organic Act, ch. 339, 31 Stat. 141 (1900) [hereinafter Organic Act].

13 *Id.* § 3.

14 One section of the Organic Act provided:

> [t]hat the portion of the public domain heretofore known as Crown land is hereby declared to have been, on the twelfth day of August, eighteen hundred and ninety-eight, and prior thereto, the property of the Hawaiian government, and to be free and clear from any trust of or concerning the same, and from all claim of any nature whatsoever, upon the rents, issues, and profits thereof. It shall be subject to alienation and other uses as may be provided by law.

Id. § 99.

15 *Id.* § 73 (establishing the office of the Commissioner of Public Lands).

16 *Id.* § 91.

17 *Id.* § 73.

18 *See* Cheryl Miyahara, Comment, *Hawaii's Ceded Lands,* 3 U. Haw. L. Rev. 101, 115–18 (1981) (discussing the unique nature of Hawai'i's lands and concluding that "the federal government had become in effect trustee of the lands ceded by Hawaii, holding absolute but 'naked' title for the benefit of the people of Hawaii").

19 *See, e.g.*, William Sulzer, *On the Annexation of Hawaii, in* Sulzer's Short Speeches 174–77 (George W. Blake comp., 1912); Thomas A. Bailey, *The United States and Hawaii During the Spanish-American War,* 36 Am. Hist. Rev. 552, 556–57 (1931).

20 William Adam Russ, Jr., The Hawaiian Republic (1894–98) and Its Struggle to Win Annexation 303 (1992).

21 For a list of executive orders setting aside public lands between annexation and 1955, see *Chronological Notes of Federal Acts Affecting Hawaii, in* Revised Laws of Hawaii 9–12 (1955).

22 Historical Analysis, *supra* note 2, at 68.

23 *Id.* at 74.

24 *Id.* at 68.

25 *Id.*

26 Hawaiian Homes Commission Act of 1921, Pub. L. No. 34, 42 Stat. 108 (1921) [hereinafter HHCA]. The HHCA is set out in full as amended at 1 Haw. Rev. Stat. 261 (2009). See Chapter 4, *infra,* for a thorough discussion of the HHCA and the homesteading program.

27 *Id.* §§ 203, 207, 208.

28 *Id.* § 201(a).

29 Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959) [hereinafter Admission Act]. For a discussion of the controversies surrounding the vote approving Hawai'i's admission as a U.S. state, see Chapter 6, *infra*.

30 Admission Act, *supra* note 29, § 5.

31 *Id.* § 5(a).

32 *Id.* § 5(b).

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33 *Id.* § 5(g).

34 *Id.* § 5(c).

35 *Id.* § 5(d).

36 *Id.* § 5(e).

37 *Id.*

38 Historical Analysis, *supra* note 2, at 68–72.

39 See *id.* at 70–71 for a listing of the parcels transferred to Hawai'i.

40 *Id.* at 73.

41 *Id.* at 75.

42 *Id.*

43 See *id.* at 76 (listing the lands under long-term lease to the federal government).

44 *Id.* at 72.

45 This position was supported by Kermit Gordon, Director, Bureau of the Budget, in a letter to Senate President Lyndon B. Johnson:

> We believe that Hawaii has a unique claim on the lands and property involved since they were originally given to the United States by the Republic or Territory of Hawaii. That claim and the special status of those lands and property have been recognized by the United States for many years. In essence, the proposal would provide for the continuation of a sixty-year practice of returning those lands and property when they were no longer needed by the United States.

See id. (citing letter from Kermit Gordon, Director, Bureau of the Budget, to Lyndon B. Johnson, Senate President (Oct. 28, 1963)).

46 Act of Dec. 23, 1963, Pub. L. No. 88-233, 77 Stat. 472.

47 *Id.* § (a)(i). Lands in national parks are referenced as lands administered pursuant to the Act of Aug. 25, 1916, Pub. L. No. 64-235, 39 Stat. 535, as amended.

48 Dep't of Land & Natural Res., State Land Information Management System—Inventory File (Aug. 29, 2012) (on file with author). For purposes of comparison with earlier information, the acreage from this inventory has been rounded to the nearest thousandth.

49 Charles Blackard & Associates, Inventory of Real Property Owned or Controlled by the United States Under the Custody and Accountability of the Department of Defense in the State of Hawaii 284–85 app. B (1993) [hereinafter Blackard Inventory].

50 Gen. Services Admin., Office of Gov't-Wide Real Prop. Relations, Executive Summary and Inventory of Real Property Owned or Controlled by the United States of America Under the Custody and Accountability of Federal Civilian Agencies in the State of Hawaii 99 app. B (1993). A new report on federal land ownership indicates that the U.S. government holds a total of 833,786 acres in Hawai'i, with the Department of Defense holding 177,033 acres. Cong. Research Serv., Federal Land Ownership: Overview and Data 4, 11 (CRS Report 42346, Feb. 8, 2012). This information includes lands held by the federal government and administered by the Department of Defense, the Forestry Service, the

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National Park Service, and the Fish and Wildlife Service. *Id*. This total includes *all* lands held by these agencies, including those lands that are not classified as Government and Crown Lands, and may also include lands *and water;* the total figure does not include the 88,647,881 acres of the Papahānaumokuākea Marine National Monument. *Id*. at 13.

51 *Id.* at 29, 99. See Chapter 12, *infra,* for a discussion of Papahānaumokuākea, the Northwestern Hawaiian Islands.

52 Office of the Governor, An Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust 135 (1991).

53 *Id.*

54 *See, e.g.,* Ikaika Hussey et al., *Hawai'i Needs You: An Open Letter to the U.S. Left from the Hawaiian Sovereignty Movement,* The Nation, Apr. 28, 2008, at 29–30, *available at* http://www.thenation.com/article/hawaii-needs-you#.] (last visited Nov. 8, 2012); Jim Albertini, *Protest and Healing Ceremony at Pohakuloa, available at* http://www.dmzhawaii.org/?p=1228 (last visited Apr. 21, 2012).

55 See Chapter 3, *infra,* for a discussion of the military use of Kaho'olawe.

56 Native Hawaiians and environmentalists have sought to require the U.S. Army to complete an environmental impact statement to continue live-fire training in Mākua. *See* Mālama Makua v. Rumsfeld, 136 F. Supp. 2d 1155 (D. Haw. 2001); Mālama Makua v. Rumsfeld, 163 F. Supp. 2d 1202 (D. Haw. 2001).

57 Blackard Inventory, *supra* note 49, at 44–47 (citing Exec. Order No. 11,166 (1964) and Hawaii General Lease No. DA-94-626-ENG-79 (1964)).

58 *See* Eloise Aguiar*, Air Force Plan to Add Rec Cabins at Hawaii Beach Stirs Concern,* Honolulu Advertiser, May 3, 2009*, available at* http://the.honoluluadvertiser.com/article/2009/May/03/ln/hawaii905030378.html.

59 Admission Act, *supra* note 29, § 5(f) (emphasis added).

60 *Id*.

61 Miyahara, *supra* note 18, at 125–26 n.132 (stating that the trust provision in H.R. 49, the 1947 bill on Hawai'i statehood, is "virtually identical to that which was adopted as § 5(f) of the 1959 Admission Act, down to the very wording of the five enumerated trust purposes"). Dr. Davianna Pōmaika'i McGregor, who has studied the extensive legislative history of the Admission Act, concludes that the original intent of the language of section 5(f) relating to the "betterment of the conditions of native Hawaiians" was intended to augment the resources of the Hawaiian Home Lands program but that subsequent discussions expanded that intent to one more broadly benefiting Native Hawaiians by use of the public land trust resources. Personal communication from Davianna Pōmaika'i McGregor, Professor, Ethnic Studies, Univ. of Hawai'i – Mānoa, to author (Nov. 13, 2012).

62 *Id*.

63 *See* Davianna Pōmaika'i McGregor, *'Āina Ho'opulapula: Hawaiian Homesteading,* 24 Hawaiian J. Hist. 1 (1990) (discussing social conditions of Native Hawaiians in the 1900s leading to passage of the HHCA). *See also* Chapter 4, *infra*.

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64 Admission Act, *supra* note 29, § 7(b)(3).

65 Van Dyke, *supra* note 4, at 303.

66 Haw. Const. of 1950, art. XVI, § 8, *amended by* Haw. Const., art. XVI, § 7 ("Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII."). *But see* Kahalekai v. Doi, 60 Haw. 324, 344–45, 590 P.2d 543, 556–57 (1979) (explaining that this amendment may be one of those not validly ratified by the electorate).

67 This provision states, in part:

> [T]he constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Hawaii entitled "An Act to provide for a constitutional convention, the adoption of a State constitution, and the forwarding of the same to the Congress of the United States, and appropriating money therefore," approved May 20, 1949 (Act 334, Session Laws of Hawaii, 1949), and adopted by a vote of the people of Hawaii in the election held on November 7, 1950, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

Admission Act, *supra* note 29, § 1.

68 The Department of Land and Natural Resources (DLNR), headed by the Board of Land and Natural Resources, is charged with managing all of Hawai'i's public lands. *See generally* Haw. Rev. Stat. § 171-3 (2013) and Haw. Rev. Stat. § 26-15 (2013).

69 Legislative Auditor, Financial Audit of the Department of Land and Natural Resources (Audit Report No. 79-1, 1979) [hereinafter Financial Audit].

70 See *supra* note 6 for the statutory definition of the public land trust.

71 *See* Haw. Rev. Stat. § 171-19(a) (2013) (listing the purposes for which the land board may use the special land and development fund).

72 Financial Audit, *supra* note 69, at 31–32.

73 *Id.* at 32–33.

74 *Id.* at 35.

75 Miyahara, *supra* note 18, at 121, 141–42.

76 *Id*. at 143.

77 Legislative Auditor, Final Report on the Public Land Trust 29 (Audit Report No. 86-17, 1986) [hereinafter Final Report].

78 *Id.* at 33.

79 *Id.* at 17–18, 36–41.

80 Act of May 26, 1982, No. 121, 1982 Haw. Sess. Laws 180.

81 Final Report, *supra* note 77, at 1.

82 *Id*.

83 *Id.* at 33.

84 *Id.* at 29–32.

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85 *Id.* at 34.

86 *Id.* at 131–32.

87 Act of June 30, 1997, No. 329, 1997 Haw. Sess. Laws 956 [hereinafter Act 329].

88 *Id.* § 3(a), 1997 Haw. Sess. Laws at 958.

89 Dep't of Land & Natural Res., Report to the Twentieth Legislature, Regular Session of 1999, on the Progress of Completing a Comprehensive Inventory and Map Database of Ceded Lands 3 (1998).

90 Act 329, *supra* note 87, §§ 4–5, 1997 Haw. Sess. Laws at 959.

91 Dep't of Land & Natural Res., Report to the Twenty-First Legislature, Regular Session of 2001, on the Progress Towards the Completion of the State Land Information Management System 1 (Nov. 2000) [hereinafter SLIMS Progress Rep.].

92 *Id.*

93 *Id.* at 1–2.

94 *Id.* at 2.

95 Letter from Gilbert S. Coloma-Agaran, Chairperson, to Marion M. Higa (Mar. 27, 2001), *reprinted in* R.M. Towill Corp., Establishment of a Public Land Trust Information System, Phase One: A Report to the Governor and the Legislature of the State of Hawaii 94 (2001).

96 Dep't of Land & Natural Res., State Land Information Management System—Inventory File (Oct. 2003) (on file with author).

97 *Id.*

98 The inventory file contains lands under the jurisdiction of the DLNR. The Department of Agriculture, the Housing Community Development Corporation of Hawai'i, the University of Hawai'i, and the Hawai'i Community Development Authority are also participating in the inventory process. SLIMS Progress Rep., *supra* note 91, at 4.

A more recent SLIMS Inventory File, dated August 29, 2012, provides a much larger figure—more than 2 million acres—for section 5(b) lands alone. A review of this more recent SLIMS Inventory File indicates multiple listings of the same properties and notes that the listed parcel acreage is "for sorting purposes only." Thus, in order to get a more accurate total figure for any given category of lands, duplicate properties would need to be eliminated. State Land Information Management System—Inventory File, *supra* note 48.

99 Act of May 20, 2011, No. 54, 2011 Haw. Sess. Laws 131.

100 *See, e.g.,* Hawaiian Affairs Comm., Standing Comm. Rep. No. 59, *reprinted in* 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 643–44 (1980) [hereinafter 1 Con. Con. Pro.].

101 The section provides:

> Public Trust.
> The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom

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> lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

Haw. Const. art. XII, § 4.

102 The section reads:

> Office Of Hawaiian Affairs; Establishment Of Board Of Trustees.
> There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members.

Haw. Const. art. XII, § 5.

In 2000, the U.S. Supreme Court struck down the Hawaiian-only voting provision of article XII, section 5, as violating the Fifteenth Amendment to the U.S. Constitution. Rice v. Cayetano, 528 U.S. 495 (2000). Subsequently, the Ninth Circuit Court of Appeals upheld a district court determination that non-Hawaiians should be eligible to run as trustees of the Office of Hawaiian Affairs (OHA). Arakaki v. State, 314 F.3d 1091 (9th Cir. 2002). See Chapter 5, *infra,* for a more extensive discussion of these cases.

103 The section reads:

> Powers Of Board Of Trustees.
> The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the Administrator of the Office of Hawaiian Affairs, who shall be appointed by the board.

Haw. Const. art. XII, § 6.

104 The definitional section in the proposed amendment defined a Hawaiian as "any descendant of the races inhabiting the Hawaiian Islands, previous to 1778" and a Native Hawaiian as "any descendant of not less than one-half of the blood of races inhabiting the Hawaiian Islands

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previous to 1778 as defined by the Hawaiian Homes Commission Act, 1920, as amended or may be amended." *See* Kahalekai v. Doi, 60 Haw. 324, 343, 590 P.2d 543, 555 (1979) (holding that this section was not validly ratified).

Similar definitions, however, were adopted by the legislature in implementing the constitutional amendments. Under current law, a Hawaiian is "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii[,]" and a Native Hawaiian is "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." Haw. Rev. Stat. § 10-2 (2013).

105 Hawaiian Affairs Comm., Standing Comm. Rep. No. 59, *reprinted in* 1 Con. Con. Pro., *supra* note 100, at 643; Comm. of the Whole Rep. No. 13, *reprinted in* 1 Con. Con. Pro., *supra* note 100, at 1017.

106 Admission Act, *supra* note 29, § 5(f).

107 HHCA, *supra* note 26, § 201(a).

108 See *infra* text accompanying notes 232–300 for cases discussing the OHA trustees' discretion in expending public land trust funds.

109 The Hawai'i state legislature has provided OHA with state general funds in order to fund services to Hawaiians of less than 50 percent Hawaiian ancestry. *See, e.g.,* Act of June 22, 2009, No. 140, 2009 Haw. Sess. Laws 393 (providing both trust and general funds to OHA), and discussion of Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007), in Chapter 5, *infra.*

110 Admission Act, *supra* note 29, § 5(f).

111 Act of June 16, 1980, No. 273, 1980 Haw. Sess. Laws 525 (codified as amended at Haw. Rev. Stat. § 10-13.5 (2013)).

* * *