H. WILLIAM BURGESS #833
2299C Round Top Drive
Honolulu, Hawai`i 96822
Telephone: (808) 947-3234
Fax: (808) 947-5822

PATRICK W. HANIFIN #2716
IM HANIFIN PARSONS, LLLC
1001 Bishop Street
Pacific Tower, Suite 2475
Honolulu, Hawai`i 96813
Telephone: (808) 585-0335
Fax: (808) 585-0336

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EARL F. ARAKAKI, et al., Plaintiffs, v. BENJAMIN J. CAYETANO et al., State Defendants, HAUNANI APOLIONA, et al., OHA Defendants, RAYNARD C. SOON, et al., HHCA/DHHL Defendants, THE UNITED STATES OF AMERICA, and JOHN DOES 1 through 10, Defendants.	CIVIL NO. 02-00139 SOM/KSC

Dated: Honolulu, Hawaii this 4th day of March, 2002.

_____

H. WILLIAM BURGESS
PATRICK W. HANIFIN
Attorneys for Plaintiffs

TABLE OF CONTENTS

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FORTEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

TABLE OF AUTHORITIES

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT
OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

In this reply memorandum, Plaintiffs will address three issues raised by Defendants in their oppositions: (1) standing; (2) likelihood of prevailing on the merits because strict scrutiny is the proper standard; and (3) irreparable harm.

I. Plaintiffs Have Standing as Taxpayers and Beneficiaries of the Public Land Trust

Plaintiffs have standing on two independent grounds: (1) as taxpayers of the State of Hawai`i; and (2) as beneficiaries of the federally created public land trust (sometimes referred to as the ceded lands trust). The Ninth Circuit has determined that both grounds suffice for standing to challenge OHA's and DHHL's race-based programs.

A. Plaintiffs Have Taxpayer Standing.

1. Plaintiffs Satisfy the *Hoohuli* Test for Injury in Fact.

Generally, to have standing plaintiffs must show that (1) they have suffered an injury in fact—an invasion of a legally protected interest that is (a) concrete and particularized; and (b) actual or imminent; (2) the injury is fairly traceable to the conduct they complain about; and (3) the injury is likely to be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 –61 (1992). In the context of taxpayer standing, while federal taxpayers generally can bring only Establishment Clause cases, see *Flast v. Cohen*, 392 U.S. 83 (1968), the standing rules for municipal taxpayers and state taxpayers are more liberal. See *Frothingham v. Mellon*, 262 U.S. 447, 486-87 (1923) (municipal taxpayers generally have standing); *Doremus v. Bd. of Education of the Borough of Hawthorne*, 342 U.S. 429, 434 (1952) (state taxpayer standing for "good-faith pocketbook action"); *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1179 (9th Cir. 1984).

(recognizing distinction between standing requirements for state and federal taxpayers).[1] Thus, Defendants' reliance on federal taxpayer standing precedents is misplaced.

The Ninth Circuit has held that to establish the particularized and actual "injury in fact" element of standing state taxpayers must meet the test set forth in *Hoohuli*, which is "the leading case" and "controlling Circuit precedent" on state taxpayer standing. *Cammack v. Waihee*, 932 F.2d 765, 769, 770 n. 9 (9th Cir. 1991). Far from implicitly overruling *Hoohuli*, as OHA suggests, the Ninth Circuit in *Cantrell v. City of Long Beach*, 241 F.3d 674, 683 (9th Cir. 2001) quoted *Hoohuli* as the source of the state taxpayer standing test. Therefore a claim that satisfies the *Hoohuli* test is not a mere "generalized grievance," but meets the first element of standing: injury in fact.

Hoohuli allowed state taxpayers to challenge Hawai`i's "disbursement of funds to a particular class of native inhabitants" through OHA. *Doe v. Madison School District No. 321*, 177 F.3d 789, 794 (9th Cir. en banc 1999). Hoohuli argued that while programs specially benefiting "Native Hawaiians" were constitutional, the State could not constitutionally extend the benefits to "Hawaiians" as defined in HRS § 10-2. He sought to enjoin the defendant state officials "from spending tax monies from the state general fund for the benefit of the racial class" of Hawaiians. *Hoohuli*, 741 F.2d at 1172. Interpreting the standing requirements for a "good-faith pocketbook action" under

[1] Defendant State Officials cite Justice Kennedy's opinion in *ASARCO Inc. v. Kadish*, 490 U.S. 605, 612-617 (1989), as if it were the opinion of the Supreme Court. State Defendants Br. at 1-3. However, as the Ninth Circuit noted in *Cammack v. Waihee*, 932 F.2d 765, 770 n.9 (9th Cir. 1991), in that "portion of the opinion, which was otherwise written for an unanimous eight-justice Court, Justice Kennedy was able to garner only four votes; the other four justices expressly disavowed Justice Kennedy's discussion of the injury aspect of state taxpayer standing." The Ninth Circuit itself rejected Justice Kennedy's views as taking "a dimmer view of the breadth of state taxpayer standing than this court" and adhered to its own *Hoohuli* decision. 932 F.2d at 770.

Doremus, the Ninth Circuit held that Hoohuli and the other plaintiffs had met the three-part test for standing for state taxpayers: (1) "Each of the individual plaintiffs have set forth their status as a taxpayer." (2) They challenged "the 'appropriating, transferring and spending . . . of taxpayers' money from the General Fund of the State Treasury.'" (3) "The pleadings set forth with specificity amounts of money appropriated and spent for allegedly unlawful purposes." *Hoohuli*, 741 F.2d at 1180.

If plaintiffs meet these three tests, it does not matter how many other persons are similarly situated. In *Rice v. Cayetano*, 941 F.Supp. 1529, 1538 (D. Haw. 1996), this Court applied the *Hoohuli* test to hold that both non-Hawaiian and Hawaiian taxpayers had standing to seek to enjoin spending state funds for a race-based program (a plebiscite with voting restricted to Hawaiians). It would be absurd to say that the government can violate constitutional rights as long as it violates the rights of many people.

Here, Plaintiffs have "set forth the relationship between taxpayer, tax dollars and the allegedly illegal government activity." *Hoohuli v. Ariyoshi*, 741 F.2d at 1178.

First, each Plaintiff has "set forth his or her status as a taxpayer." *Id.* at 1180. Complaint ¶¶ 9, 54, ¶ 62(c). These allegations are supported by ¶ 1 of each of their declarations. *Hoohuli* does not require that plaintiffs detail their tax returns in their complaints.

Second, Plaintiffs challenge the appropriating, transferring and spending of taxpayers' money from the general fund of the State Treasury. Plaintiffs challenge the appropriation of money from the State's general fund and its transfer to special funds that OHA and DHHL administer exclusively for the benefit of these racially defined classes. As this Court noted in the remand of *Hoohuli*, 631 F.Supp. 1153, 1155 (1986),

"programs are funded primarily by legislative appropriations which are held in trust" for these classes. OHA "does, in fact, give preference to both 'Hawaiians' and 'native Hawaiians' based solely on ancestral lineage, and the definitions specifically refer to such terms as 'races'" *Id.* at 1159. The same is true of DHHL regarding "native Hawaiians." HHCA § 201(7) (definition of "native Hawaiian").

Specifically, Plaintiffs challenge:

- The appropriations and transfers of funds under Act 14 of 1995 and Hawaiian Homes Commission Act § 213.6 which established Hawaiian home lands trust fund and require the State to pay $600 million to this fund, administered by the HHC Defendants. Complaint ¶¶ 2(d), 57.

- The transfer in 1993 of over $130 million from the state general fund into a segregated OHA fund for the exclusive benefit of native Hawaiians. Complaint ¶¶ 38, 40 ¶52

- The threatened injury to Plaintiffs by passage of a bill pending in legislature that would appropriate an additional $17 million in state general funds to OHA trust fund for exclusive use and benefit of native Hawaiians. Complaint ¶ 52.

- The threatened injury by passage of a new version of Act 304, which, like its invalidated predecessor, would require the State to pay OHA hundreds of millions of dollars from the general fund. Complaint ¶¶ 42, 43, and 52.

Furthermore, Plaintiffs have challenged the spending of taxpayers' money by OHA and DHHL on their racially restricted programs. Complaint ¶ 62(b) (OHA), ¶ 58(d) (DHHL). "[T]axpayers' money is being spent" for the exclusive benefit of native Hawaiians and Hawaiians. *Hoohuli*, 631 F.Supp. at 1155. Plaintiffs allege that they have been harmed by these expenditures. Complaint ¶¶ 70, 74. Plaintiffs also set forth in their Declarations, ¶¶ 5 and 6, that they have been harmed by the appropriation and transfer of general funds to OHA and DHHL and by those agencies' expenditure of such funds on racially restricted programs.

Third, Plaintiffs have set forth specific amounts of money appropriated and spent for the unconstitutional programs. Plaintiffs have gone far beyond "merely conclusory statements regarding waste of taxpayer monies." OHA Opp. at 8. For instance, Plaintiffs allege that pursuant to Act 14 of 1995, $30 million per year is required to be appropriated annually from the general fund to the Hawaiian home lands trust fund administered by the HHC Defendants. This series of appropriations is to continue for a period of twenty years until $600 million has been paid from the general fund to the Hawaiian home lands trust fund, dedicated to the exclusive use the racial class of native Hawaiians. Complaint ¶¶ 2(d), 57. As of June 30, 2000, State had paid DHHL $158 million into this fund and had appropriated another $15 million for this fund. Complaint ¶ 57. Plaintiffs have alleged that appropriations from the state general fund to DHHL for its race-based programs in Fiscal Year 2001 were at least $7,154,969. 2000 Sess. L. Act 281. Complaint ¶ 58(d). In addition, the Legislature approved $25,000,000 in revenue bonds to fund DHHL's programs. *Id.* Further details of the State's appropriations, payments and commitments are provided in Exhibit C, p. 9, to Dec. SPB in support of Plaintiff's Motion for TRO.

Moreover, Plaintiffs have alleged that over $130 million has been appropriated in 1993 from the general fund to a segregated OHA fund for the exclusive use and benefit of native Hawaiians. Because this money was raised by general obligation bonds, the taxpayers are not only paying the $130 million principal, they are also paying interest on that sum for the remainder of the 20-or-more-year term of the bonds. Complaint ¶¶ 38, 40. Meanwhile, OHA earns interest, dividends and capital gains on these state funds that it holds. According to OHA's Financial Report of November 30, 2001, the segregated

funds held by OHA for its race-based programs now amount to over $304 million in investments and total fund equity of over $337 million. Complaint ¶ 62(a).

In addition, Plaintiffs allege that there is an imminent threat of further injury from the passage of appropriations in the current legislative session. This threat includes the possible passage of a bill that would appropriate $17 million in state general funds to OHA trust fund for exclusive use and benefit of native Hawaiians. There is also a threat that the Legislature will enact a new version of Act 304, which would lead to transferring at least $300 million more to OHA. Complaint ¶¶ 42, 43, 52. Dec. SPB, Exhibit V (OHA newsletter reporting OHA legislative proposals). Plaintiffs allege that these funds cannot be restricted to the benefit of a racial classification and all such funds should be available for the use and benefit of all the people of Hawai`i, including Plaintiffs.

Further details are set out in the OHA's November 30, 2001 Fund Report at p. 17 of Exhibit S to Dec, SPB supporting Motion for TRO. For that year, OHA reported receiving $2,619,663 in general funds. These appropriations were required to be placed in OHA's trust funds. HRS § 10-13. OHA also reported expending $5,002,572 dollars on its programs. By the OHA laws, all of this money was required to be spent to promote the interests of Hawaiians and Native Hawaiians. HRS § 10-3. The OHA laws require OHA to continue to spend money in its trust funds on its race-based programs.

In *Cammack*, this court pointed out that expenditures of as little as $1,365.00 and $20.00 per year of general revenues have been held sufficient to establish taxpayer standing. 573 F.Supp. at 1527-28. *A fortiori*, the hundreds of millions in state general funds being appropriated to OHA and DHHL give Plaintiff taxpayers "a personal stake in

the outcome of the controversy," *Flast v. Cohen*, 392 U.S. at 101, quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962), sufficient to establish standing.

Contrary to Defendants' arguments, the Ninth Circuit holds that the *Hoohuli* test "does not require that the taxpayer prove that her tax burden will be lightened by elimination of the questioned expenditure." *Cammack*, 932 F.2d at 769. The plaintiffs in *Cammack* had standing to claim that Hawai`i's Good Friday holiday violated the Establishment Clause, even though the statute providing for the holiday did not appropriate any money and even though plaintiffs did not show that ending the holiday would reduce their taxes. It was enough that the plaintiffs alleged amounts that the paid holiday cost the state and city. *Id.* 932 F.2d at 771.[2]

Taxpayer suits can challenge not only direct expenditures, but also actions that reduce government revenue. In *Hawley v. City of Cleveland*, 773 F.2d 736, 741-42 (6th Cir. 1985), plaintiffs had standing to challenge a lease of public property for a below-market rent. The Ninth Circuit relied on *Hawley* in *Cammack v. Waihee*, 932 F.2d. at 771). Similarly, state taxpayers can establish standing to challenge a tax exemption. *Johnson v. Economic Development Corp.*, 241 F.2d 501(6th Cir. 2001).

Thus Plaintiffs have satisfied the three requirements for state taxpayer standing set forth in *Hoohuli* and their claims are not mere "generalized grievances" but are "injur[ies] in fact."

[2] *Reimers v. State of Oregon*, 863 F.2d 630 (9th Cir. 1989) is consistent with this rule. Mr. Reimers alleged that his rights under the Establishment Clause were violated when a prison chaplain's services were terminated. His claim failed because he did not challenge the disbursement of any state funds on the chaplain program. *Id.* at 632. By contrast, Plaintiffs in the instant case have challenged disbursements of state funds.

2. Plaintiffs Satisfy the Causation and Redress Elements of Standing.

As in *Cammack*, the standing requirements of causation and redressability "are essentially identical requirements where the remedy is an order to desist." 932 F.2d at 771. In *Cammack*, the statute and contracts caused the harm; an order that the challenged statute was unconstitutional and that the expenditures must cease would grant redress. *Id.* at 772. Similarly, the harm to Plaintiffs as taxpayers is caused by the diversion of state taxpayers' money to OHA's and DHHL's unconstitutional programs. The injury can be redressed by an order to desist: a judgment declaring that the funds and lands held by DHHL and OHA are state funds and state lands free of any racial restriction on use; and enjoining future appropriation, transfer, expenditure and use for these racially restricted programs.[3]

Contrary to OHA, Opp. at 9-10, Plaintiffs are not seeking "third-party standing" on behalf of the State to convert the assets of OHA and DHHL into state property. These assets already are state property. HRS § 10-13 (money appropriated to OHA held in separate state accounts); *State of Hawai`i v. United States*, 676 F.Supp. 1024, 1036, n. 29 (D. Haw. 1988) (US gave title to the Hawaiian home lands to State in 1959); *Kepo`o v. Watson*, 87 Haw. 91, 952 P.2d 379 (Haw. 1998) (home lands are state lands). OHA and DHHL are state agencies and what they own the State owns. See *Rice v. Cayetano*,

[3] Although State Defendants suggest that a non-Hawaiian applicant who is denied benefits under the challenged programs would be the proper person to sue, Defendants' arguments would deny such a person standing. They contend that the sole purpose of the programs is to promote the betterment of Hawaiians and native Hawaiians. If that purpose is not severable from the programs themselves, then the programs would be struck down along with the racial exclusion. The applicant would not get any benefits even if he wins, i.e. the court could not give him redress. Therefore, he, too, would lack standing.

528 U.S. 495 (2000) at 520-21 (OHA is state agency); HRS § 26-17 (DHHL is state agency). In ¶ 2 of their Prayer for relief, Plaintiffs are challenging the State's restrictions of the use and benefit of these assets to certain racial classes. Plaintiffs would benefit if these assets were no longer walled off from those who do not meet the State's racial tests but were available to be used in programs that are not segregated by race.

OHA Defendants misconstrue *Cantrell v. City of Long Beach* to forbid any state taxpayer action that seeks prospective relief. Combined with the rule that the Eleventh Amendment bars suits against states and state officials in their official capacity for retrospective relief, this would bar all state taxpayer suits. *Hoohuli* refutes OHA's argument. There, the Ninth Circuit found standing for a state taxpayer who sought an injunction. 741 F.2d at 1172. Similarly, in *Cammack* both this Court and the Ninth Circuit found standing for a state taxpayer who sought declaratory relief. 932 F.2d at 767. In *Rice*, 941 F.Supp. at 1538, this Court held that taxpayers "who seek to enjoin the expenditure of state funds for allegedly illegal government activity . . . satisfy the *Hoohuli* test." *Cantrell*, which relied on *Hoohuli*, is consistent with it. *Cantrell* held that federal plaintiffs cannot establish federal standing by invoking a state procedural statute that gave standing in state court to taxpayers seeking injunctive relief. 241 F.2d at 683. The court held that while a state law that created substantive rights could create standing in federal court to enforce those rights (e.g. in a diversity suit), a state procedural statute cannot expand federal standing. *Id.* at 684. In the instant case, Plaintiffs are not invoking any state procedural rules to establish standing. They rely on federal procedure to invoke federal jurisdiction to enforce federal rights.

When plaintiffs satisfy the test for taxpayer standing, it does "not matter that their dominant inducement to action" is a matter of principle. *Doremus*, 342 U.S. at 334-35. "It is not a question of motivation but of possession of the requisite finance interest, that is, or is threatened to be, injured by the unconstitutional conduct." *Id.* at 335. Under the Ninth Circuit's *Hoohuli* test, Plaintiffs have taxpayer standing.

B. Plaintiffs Have Standing as Beneficiaries of the Public Land Trust.

The public land trust was created by federal law: The Newlands Annexation in 1898 expressly accepted the terms offered by the Republic of Hawaii (including the requirement that, with the exceptions noted, proceeds and revenues of the ceded lands "shall be used solely for the benefit of the Inhabitants of the Hawaiian Islands for educational and other public purposes."). Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, Resolution No. 55, known as the "Newlands Resolution", approved July 7, 1898; Annexation Act, 30 Stat. 750 (1898).

This trust was recognized by the Attorney General of the United States in Op. Atty. Gen. 574 (1899) (Ex. AA, Dec. SPB).

> Page 576. "The effect of this clause is to subject 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 or other public purposes."

The Organic Act in 1900 reiterated that "All funds arising from the sale or lease or other disposal of public land shall 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 approved July 7, 1898." Organic Act §73(e).

Having accepted the duties of a trustee of the public land trust for the benefit of the people of Hawaii, the United States is (or at least through the time it returned the ceded lands to Hawaii in 1959, was) obliged to treat all of the inhabitants of Hawaii, including the plaintiffs, with the strict equality that is required of a trustee who is obliged to protect the interests of multiple beneficiaries.

The scope of the U.S. fiduciary duty in administering trust property is a question of federal law. *U.S. v. Mason*, 412 U.S. 391, 397 (1973). Congress's power to change the public land trust is limited by the Fifth Amendment, the equal footing doctrine and the fiduciary duty under federal law of the United States as trustee of the public land trust, at least through the time it returned most of the ceded lands to Hawaii in 1959. The power of the United States to act as trustee of the public land trust is, like all of its powers, limited by the Fifth Amendment. The equal protection component of the Fifth Amendment and the obligations of a public trustee require that the United States in all its actions related to the public lands trust treat all beneficiaries equally, without regard to race.

The State's role and the scope of its duties as trustee is likewise limited by federal law, including the Newlands Resolution, the Admission Act, the United States Constitution, the Fourteenth Amendment and other federal laws. The State has accepted the duties of a trustee of the public lands trust and has recognized that its fiduciary obligations to the beneficiaries are governed by the same strict standards applicable to private trustees. "The State owes this same high standard to the beneficiaries of the ceded lands trust and, as stated in the text, the beneficiaries of this trust should not be left powerless to prevent the State from allegedly neglecting its obligations." *Pele Defense*

Fund v. Paty, 73 Haw. 578, 604, 837 P.2d 1247, 1264 (1992). The trustee must deal impartially when there is more than one beneficiary. *Ahuna v. Dept. Hawaiian Home Lands*, 64 Haw. 327, 340 (1982) citing federal authorities including *Mason*, supra.

As beneficiaries of the public land trust, plaintiffs have federally created rights under the Newlands Resolution and the Admission Act and have standing to invoke 42 U.S.C. § 1983 to sue state officials who violate the terms of the federally created trust (as limited by the requirements of the United States Constitution) or who violate other federal laws in their administration of that trust.

This Court and the Ninth Circuit have repeatedly found that beneficiaries of the public land trust have standing to challenge illegal actions by state officials who manage the trust assets, both land and revenue. "[A]t least at the outer limits, federal law must act as a barrier beyond which the State cannot go in its administration of the ceded lands pursuant to section 5(f)." *Price v. State of Hawai`i*, 921 F.2d 950, 955 (9th Cir. 1990). As beneficiaries, Plaintiffs have standing to sue to hold Defendant officials to the limits imposed by federal law, including the highest federal law, the Constitution. See *Price v. Akaka*, 928 F.2d 824, 826-27 (9th Cir. 1990); (Fourteenth Amendment as well as §5(f) apply to OHA in its management of trust assets).

Plaintiffs are citizens of Hawai`i and beneficiaries of the public land trust. Complaint ¶ 9; Plaintiffs' Declarations supporting Motion for TRO, ¶ 3. "The Admission Act itself makes clear that the [public lands trust] is to benefit *all* the people of Hawaii." *Rice v. Cayetano*, 528 U.S. at 525 (Breyer concurring) (emphasis in original).

Although there is no direct cause of action under the Admissions Act, the Ninth Circuit has held that the Act creates federal rights which beneficiaries can enforce by

invoking 42 U.S.C. § 1983, as Plaintiffs have done here: "the trust obligation is rooted in federal law, and power to enforce that obligation is contained in federal law." *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 739 F.2d 1467, 1472 (9th Cir. 1984). The Ninth Circuit has repeatedly reaffirmed this holding that beneficiaries of the public land trust have standing to invoke § 1983 and sue state officials to compel them to comply with their obligations under federal law regarding both the trust lands and proceeds.[4] The court has held that this line of standing authority is consistent with *Lujan*. *Price v. Akaka*, 3 F.3d 1220, 1223-25 (9th Cir. 1993).

These federal laws create federal rights. The meaning and effect of an international agreement between the United States and a foreign country is a matter of federal law. The Annexation Resolution is a federal law. The scope of the United States' fiduciary duty in administering property it holds in trust is a question of federal law. *U.S. v. Mason*, 412 U.S. 391, 397 (1973). When the United States transferred its

[4] *Price v. State of Hawai`i*, 764 F.2d 623, 628-30 (9th Cir. 1985) (beneficiaries have standing to seek to enjoin expenditures of trust proceeds and to compel state to apply proceeds to finance distribution of land); *Ulaleo v. Paty*, 902 F.2d 1395, 1397 (9th Cir. 1990) (standing to sue under § 1983 to challenge land exchange), *Price v. Akaka*, 915 F.2d 469, 471-72, n. 2 (1990) (standing to sue to challenge alleged illegal management and spending of public land trust income); *Napeahi v. Paty*, 921 F.2d 897, 901 n.2 (9th Cir. 1990) (standing to challenge state officials' alleged abandonment of public trust land to private individuals); *Price v. Akaka*, 928 F.2d at 828 (federal right enforceable under § 1983 to challenge expenditures of trust income); *Price v. State of Hawai`i*, 939 F.2d 702, 706 (9th Cir. 1991), amended 1991 U.S. App. LEXIS 17944 (9th Cir. 1991) (standing to challenge state officials who allegedly failed to enforce trust regarding parcel of ceded lands); *Han v. Department of Justice*, 824 F.Supp. 1480 (D. Haw. 1993), affirmed 45 F.3d 333 (9th Cir. 1995) (standing to challenge use of § 5(f) land by illegal leases and licenses).

responsibilities as trustee along with most of the trust corpus to the State of Hawai`i under the Admissions Act, §5, the scope of the State's duties as trustee became a matter of federal law. *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 739 F.2d at 1472.[5] The federal courts have the power to formulate a body of law governing this trust, drawing upon the common law of trusts. *Price v. State of Hawai`i*, 921 F.2d at 955.

As noted above, it is now well established that beneficiaries of the public land trust have standing under § 1983 to assert whatever rights they may have under federal law regarding the terms and management of the trust. See *Maine v. Thiboutot*, 448 U.S. 1 (1980) (§ 1983 encompasses claims for deprivation of federal rights, not only constitutional rights). Therefore, Plaintiffs have standing to assert their federal rights as beneficiaries under all applicable sources of federal law.

The State Defendants contend, at page 27 of their Memo in Opp. that, "the terms of the 1898 'trust' have been refined or amended by 1) the Admission Act, which expressly authorized ceded land revenue to be expended 'for the betterment of native Hawaiians,' Section 5(f), and by 2) the Hawaiian Homes Commission Act." By this contention the State claims that, notwithstanding general principles of trust law, Congress as trustee, could change the terms of the trust by imposing racial restrictions that exclude most beneficiaries from some trust assets and reserve them for the exclusive use of a

[5] By Admission Act § 5(f), the United States transferred ceded lands to Hawai`i in public trust. *State v. Zimring* 58 Haw. 106, 124, 566 P.2d 725 (1977) and *Yamasaki v. Trustees of OHA*, 69 Haw. 154. 159, 737 P.2d 446, 449 (1987); see also Hawaii Attorney General Opinion July 7, 1995 (A.G. Op. 95-03) (ASection 5 [Admission Act] essentially continues the trust which was first established by the Newlands Resolution in 1898, and continued by the Organic Act in 1900. Under the Newlands Resolution, Congress served

racial class. Plaintiffs contend that Congress has no such power. See *Babbitt v. Youpee*, 519 U.S. 234 (1997) (Congress' power to destroy rights in lands it holds in trust is limited by Fifth Amendment). Rather, as trustee, Congress, has a duty to act impartially amongst multiple beneficiaries. Furthermore, Congress has no power to discriminate among beneficiaries on racial grounds. See *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957) (government, acting as trustee, cannot enforce even privately created racial classification). Plaintiffs assert federal rights to equal treatment that neither Congress nor the State can override. At the very least, Plaintiffs have standing to assert their claims under § 1983.

Judge Ezra's decision dismissing Patrick Barrett's claim that his native Hawaiian customary and traditional gathering rights were infringed is not to the contrary. *Carroll v. Nakatani*, 2001 WL 1797494. In his complaint, Barrett did not assert any claim as a beneficiary of the public lands trust. He admitted that he had never gathered, had no intention of gathering, and had no evidence that anyone had been excluded from such use of the public lands on grounds of race. Id. *10-*11.

By contrast, in their Complaint and in their declarations in support of their Motion for TRO, Plaintiffs have asserted that diversion of ceded lands and ceded lands revenues to unconstitutional purposes harms each Plaintiff as a beneficiary and give them standing to sue the Defendants. Complaint ¶¶ 58(a), 62(a), 76-82; Declarations ¶¶ 7, 8. Plaintiffs have alleged that approximately 200,000 acres of Ceded Lands have been removed from general public use and are being held in the "Home Lands Trust" for the exclusive benefit of the racial class of native Hawaiians. Complaint ¶¶ 2(c) 58(a). In addition, 30% of

---

as trustee; under the Organic Act, the Territory of Hawaii served as Trustee.@) (Ex. Y,

revenues from the public lands trust that are or were in sugar production as well as 30% of revenues from lease of water rights are similarly diverted to the exclusive use and benefit of the same racial class. Complaint, ¶¶ 56, 58(a); Haw. Const. Art. XII §1; HHCA § 213(i). Plaintiffs have further alleged that under state law, the state officials are obliged to divert 20% of the Ceded Lands revenues to a segregated trust fund administered by the OHA trustees for the exclusive use and benefit of the same racial class. Complaint ¶ 61. HRS §§ 10-13, 10-13.5. *Hoohuli*, 631 F.Supp. at 1155, 1157 (pro rata portion of Ceded Lands Trust is transferred to a separate trust which OHA manages for the exclusive benefit of native Hawaiians and are separately held by OHA and administered solely for programs to benefit native Hawaiians).

As set out above, from time to time the State has chosen to appropriate general funds to OHA and DHHL as representing or in lieu of their alleged shares of the public land trust. Because of this peculiar accounting practice, some of the same transfers and expenditures of state funds support both taxpayer standing (because they are appropriations, transfer and expenditure of state general funds) and beneficiary standing (because the State deems them to be revenue from the public land trust).

Therefore, Plaintiffs have standing under both as state taxpayers and as beneficiaries of the public land trust.

II. Plaintiffs Are Likely to Prevail on the Merits.

Defendants' arguments on the merits of Plaintiffs' equal protection claim repeat arguments that they made and lost in the Supreme Court in *Rice* and in this Court in

---

Dec. SPB).

Arakaki. Plaintiffs attempted to anticipate these arguments in their initial memo at 9-23, and little needs to be added here.

Rice established that "Hawaiian" and "native Hawaiian" are racial classifications under the 15th Amendment. *Arakaki* held that they are racial classifications under the Fourteenth Amendment too and it struck down the racial restrictions of running for and holding office on both 15th and 14th Amendment grounds. Arakaki et al. Order Granting Plaintiff's Cross-Motion for Summary Judgment ("*Arakaki* Order"), Exh. B to Dec. SPB. Both cases rejected Defendants' arguments based on *Morton v. Mancari*, 417 U.S. 535 (1974).

The essence of this case is that neither the federal government nor the states may use racial classifications unless those classifications pass strict scrutiny. To pass strict scrutiny a racial classification must be narrowly tailored to a compelling state interest. Promoting the interests of a racial group is an illegitimate and uncompelling state interest. A race-based program that is designed to last indefinitely fails strict scrutiny. The OHA and DHHL programs fail strict scrutiny. Attempts to bury this simple analysis in the arcana of Indian law and to characterize racial discrimination as a sacred trust obligation have already been rejected in *Rice*.

Although State Defendants now argue that *Rice* and *Arakaki* are irrelevant, in their opening brief on appeal in *Arakaki* they announced the implications of these decisions when they begged the Circuit Court not to affirm this Court on Fourteenth Amendment grounds: "**Extending any adverse ruling the Fourteenth Amendment would jeopardize the existence of OHA itself.**" Opening Br at 14. (Emphasis in original.) They added: "Indeed, a Fourteenth Amendment ruling rejecting Mancari's

applicability would jeopardize . . . the . . . Hawaiian Homes Commission Act's homesteading program." *Id.* at 52 (emphasis in original). In short, *Arakaki,* which is binding precedent in this case, is potentially fatal to their programs.

Defendant's argument that Hawaiians are "Indian Tribes" has already been addressed. Memo in Support at 14-23. To analogize people of Hawaiian ancestry to an genuine Indian tribe, Defendants must try to redefine "Indian tribe" to mean a group of people defined solely by ancestry. But "ancestry can be a proxy for race. It is that proxy here." *Rice,* 528 U.S. at 514. Defendants' "*Mancari* argument" converts federal Indian law into a racial law.

Congress' power under the Commerce Clause to "regulate commerce" with "Indian Tribes" is a special power of Congress over Indian tribes, not a special privilege of Indian tribes. That power, like all congressional powers, is limited by the Bill of Rights, including the equal protection component of the Fifth Amendment. Congress could no more enact a special body of law for the "Indian" race or the "Hawaiian" race than it could enact a special body of law for the "Aryan" race. By creating a conflict between the Indian Commerce power and equal protection, Defendants' argument would result in erasing an entire title of the U.S. Code. See *Mancari,* 417 U.S. at 552.

In *Rice,* the Supreme Court restricted *Mancari* to its peculiar facts: an affirmative hiring preference in the Bureau of Indian Affairs ("BIA") for enrolled members of federally recognized Indian tribes. *Rice,* 528 U.S. at 518- 522. *Arakaki* Order at 26 ("*Mancari* was carefully limited within the text of the decision itself and in the years since"). The Supreme Court read *Mancari* as crucially depending on the limitation of the hiring preference to "members of federally recognized tribes." *Rice,* 528 U.S. at 519-

520, quoting *Mancari*, 417 U.S. at 553 n. 24. The Supreme Court also stressed that the BIA is *"sui generis"* -- different from every other agency, particularly OHA. *Rice*, 538 U.S. at 520 quoting *Mancari*, 417 U.S. at 554. By confining *Mancari* to its facts, the Supreme Court reconciled it with later cases that apply strict scrutiny to programs that give preferences to individuals of American Indian ancestry, *Adarand Constructors, Inc. v. Pena*, 515 U.S.200 (1995) at 204 (federal race-based programs), and to "American Indians, Eskimos," and "Aleuts," *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) at 478 (state programs). *See* Benjamin, *Equal Protection and the Special Relationship* 106 YALE L.J. 537, 558-71 (*Mancari* can be reconciled with *Adarand* only by limiting *Mancari* to federally recognized Indian tribes). Thus, *Mancari* does not save the challenged programs from strict scrutiny.

"No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute," as they do here, because "[e]xpress racial classifications are immediately suspect, *Shaw v. Reno*, 509 U.S. 630, 642 (1993), and trigger strict scrutiny. In 1986, this Court anticipated *Adarand* and *Croson* by noting that "if plaintiffs were Caucasians challenging appropriations to both Hawaiians and native Hawaiians, strict scrutiny might be the appropriate standard." *Hoohuli,* 631 F. Supp. at 1159, n.22.

The expressly racial qualifications of the OHA and DHHL programs fail key elements of strict scrutiny. Defendants' opposition arguments do not meet their burden of showing that the programs are narrowly tailored to meet a compelling governmental interest that justifies the racial classifications. *See Miller v. Johnson* 515 U.S. 900, 920

(1995); *Adarand Constructors, Inc. v. Pena*, 515 U.S. at 227; *City of Richmond v. J.A. Croson*, 488 U.S. at 496-97.

Because the OHA and DHHL programs are intended to last into the indefinite future, they fail the requirement that a race-based program must be tailored in duration so that it "will not last longer than the discriminatory effects it is designed to eliminate." *Adarand*, 515 U.S. at 236, quoting *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980). OHA has been operating for 23 years and DHHL for 81 years. Nothing in the law suggests that these discriminatory programs are conceived as anything other than "timeless in their ability to affect the future." *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 276 (1986) (Powell, J.) Indeed, the proffered defense that the programs are intended to lead to a "sovereign" race-based government implies that the discrimination will be perpetual.

To try to satisfy strict scrutiny Defendants fall back on the argument that their programs are narrowly tailored to the compelling governmental interest of fulfilling alleged trust obligations to the classes of Hawaiians and native Hawaiians. State Defendants at 24-26; OHA Defendants at 20-23, 28. They even rely on the overruled Ninth Circuit decision in *Rice*. *Id.* at 22. However, because these classes are racial classes, this "compelling interest" is merely a restatement of the illegitimate governmental interest in promoting the interests of racial groups as racial groups. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Of course, racially discriminatory means can easily be tailored to a racially discriminatory end. But as this Court said in *Arakaki*, "[O]urs is a political system that strives to govern its citizens as individuals rather than as groups. The Supreme Court's brightest moments have affirmed this idea, [citing cases]

while its darkest moments have rejected the concept." *Arakaki* Order at 3. Furthermore, "[t]he Fourteenth and Fifteenth Amendments . . . were enacted as part of the effort to exorcize race as a factor upon which the government may base its treatment of its people." *Id.*

The Supreme Court considered and rejected the argument that a race-based program can be justified as fulfilling trust obligations. Addressing the voting discrimination at issue in Rice the Court said that "the State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters." Rice, 528 U.S. at 523. This constitutional principle extends beyond voting: the State's entire program singling out people for different treatment solely on grounds of racial ancestry rests "on the demeaning premise that citizens of a particular race are somehow more qualified than others" to use public lands and receive public funds.

Defendants confirm the illegitimacy of their goal by tying it to racial self-government, OHA Opp. at 26, State Opp. at 19, n. 15, exactly what was rejected in *Rice* and *Arakaki.* The idea of a "government of the race, by the race, and for the race" is anathema to American democracy. "The legal rights of Americans are personal" and "are not conferred upon us as members of any group or . . . racial identification." *Ho v. San Francisco Unified School District*, 147 F.3d 854 (9th Cir. 1998). Voting and office-holding are central to elective government. If a government exclusively for and by the racial classes of Hawaiians and native Hawaiians were legitimate, Defendants would have prevailed in *Rice,* when they defended racially restricted voting, and in *Arakaki,* when they defended racially restricted office-holding. *Rice* and *Arakaki* struck down

government **of** the race **by** the race. Government **of** the race **for** the race is equally unconstitutional.

Racial discrimination cannot be saved by renaming it a trust obligation or even by relying on a trust so old that it was thought to be legal when it was created. In *Pennsylvania v. Board of Directors of City Trusts,* 353 U.S. 230 (1957), the Supreme Court held that a state agency violated the Fourteenth Amendment when it enforced the racially discriminatory terms of a private will and trust. *Id.* at 231. Similarly, in *Evans v. Newton*, 382 U.S. 296, 301-02 (1966), the Supreme Court prohibited a city from honoring a will that established a public park held in trust for the exclusive use of white people. *A fortiori*, States may not rely on governmentally created trusts to justify race-based laws.

Nor can the State hide behind Congress. The Ninth Circuit has held that the federal government does not have a trust relationship to native Hawaiians or Hawaiians based on the HHCA or the Admissions Act. *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F.2d 1216, 1224 (9th Cir. 1978); *Han v. Department of Justice*, 824 F.Supp. 1480 (D. Haw. 1993), *aff'd* 45 F.3d 333 (9th Cir. 1995). Justices Breyer and Souter, concurring in *Rice*, concluded that there is no trust for Hawaiians either, and no such trust would be constitutional. 528 U.S. at 525. In any case, the Supreme Court held in *Adarand* that Congress has no more power to discriminate than the States do. "Since the time of *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137 (1803), it has been the province of the courts to pass on the validity of congressional enactments, which are equally susceptible to constitutional infirmity as are state enactments." *Hoohuli,* 631 F.Supp. at 1159. Congress can no more authorize state discrimination than it can discriminate itself.

Similarly, Defendants cannot save their race-based programs by string-citing a long series of federal statutes, such as the "Apology Resolution," 107 Stat. 1510 (1993), that contain preambles and legislative findings. Statutes and resolutions do not prove facts. Of course, there is no dispute that Congress in fact passed the resolutions and laws the State cites but that does not establish the truth or accuracy of the assertions in the preambles or findings. As a matter of basic separation of powers, Congress does not and cannot determine the facts of a judicial case. Legislative statements in a preamble may help a court interpret the operative clauses of a particular statute by clarifying the legislative intent, but they do not legislate facts or confer rights. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION, §20.03 (5th ed. 1993).

As the Supreme Court has explained, "[w]hatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law." *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 129 (1989). When a state "seeks to justify race-based remedies to cure the effects of past discrimination," the courts "do not accept the government's mere assertion" but rather "insist on a strong basis in evidence of the harm being remedied." *Miller v. Johnson*, 515 U.S. 900, 922 (1995). This is because "blind judicial deference to legislative . . . pronouncements of necessity has no place in equal protection analysis." *Croson*, 488 U.S. at 501. Nor can a state get by with a citation to congressional fact-finding. "If all a state . . . need do is find a congressional report on the subject to enact" a race-based program, "the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity." *Id.* at 504. Nor does Congress' Commerce Clause power alter the balance between the legislative and judicial

branches. "Under our written Constitution, . . . the limitation of congressional authority is not solely a matter of legislative grace." *US v. Morrison*, 529 U.S. 598, 615 (2000).

Defendants' account of Hawai`i's history, drawn in part from these preambles, is both disputable and disputed.[6] Even if true, the alleged history of discrimination against Hawaiians in the nineteenth century is the kind of general societal discrimination that is too amorphous for an attempted remedy to qualify as a compelling state interest. See *Croson*, 488 U.S. at 497. *Saunders v. White*, 2002 WL 338744 *28 (D.D.C. March 4, 2002) (government must show its past discrimination causes specific ongoing injuries). The Fourteenth Amendment does not permit any state to preserve peculiar institutions of racial discrimination based on its peculiar history.

Thus, because the challenged programs are grounded on racial classifications and cannot survive strict scrutiny, Plaintiffs are likely to prevail on the merits.

III. If a TRO is not issued, there is a substantial likelihood plaintiffs will be irreparably harmed.

Although the State scoffs at the harm done to Plaintiffs by its discriminatory programs as "incredibly minute" (State's Memo in Opp. page 3) and "trivial" (page 31), to Plaintiffs, it is real and substantial.

DHHL and OHA regularly collect public funds and spend them to carry out programs designed exclusively for the benefit of one race. Such use of public funds is presumptively invalid under the highest law of the land. Once the funds are spent, the

[6] See, e.g. Benjamin, *Equal Protection and the Special Relationship* 106 YALE L.J. 537; Hanifin, *To Dwell on the Earth in Unity: Rice, Arakaki and the Growth of Citizenship and Voting Rights in Hawai`i*, HAW. BAR J. Vol. V, No. 13, p. 15 (2002) (Exh. Z to Dec. SPB); Hanifin, *Hawaiian Reparations: Nothing Lost, Nothing Owed*, HAWAII BAR J. Vol. XVII No. 2, p. 107 (1982).

possibility that Plaintiffs will receive any benefit from those funds is, for the most part, irretrievably lost, even if and when Plaintiffs ultimately prevail. This cannot be dismissed as mere "economic" injury not deserving equitable relief because the prevailing party can recover money damages. Money damages are not an option here. The Eleventh Amendment and sovereign immunity would bar any suit for money damages against the State or state officials acting in their official capacities. Given the millions of dollars at stake, a suit against state officials in their individual capacities would be fruitless. In *University of Hawai`i Professional Assembly v. Cayetano*, 16 F.Supp. 2d 1242 (1998), this Court issued a preliminary injunction against Defendant Governor Cayetano to prevent the state from violating the Contracts Clause by delaying payment of state employees' salaries. This prevented economic harm that the Court concluded would be irreparable. This Court noted that the "Ninth Circuit has observed, 'An alleged constitutional infringement will often alone constitute irreparable harm.'" *Id.* at 1247. See *Elrod v. Burns*, 427 U.S. 347 (1976) (constitutional violation alone can constitute irreparable harm); *Topanga Press v. City of Los Angeles*, 989 F.2d 1524 (9th 1993) (First Amendment). Irreparable harm from violations of constitutional rights is not limited to First Amendment cases. In *Gresham v. Windrush Partners*, 730 F.2d 1417 1424 (11th Cir. 1984), the court granted a preliminary injunction in an equal protection case, noting that, "Discrimination in housing, when proved, almost always results in irreparable injury." Because parcels of land are unique, not fungible, enjoining transfers of real property pending final judgment is a classic reason for temporary injunctive relief.

The following will estimate roughly, using the best information presently available to Plaintiffs, the magnitude of Plaintiffs' potential loss.

Based on page 26 of the DHHL Annual Report FY 1999-00 (filed with the declaration of Jobie M.K.M. Yamaguchi), DHHL had approximate revenues that year of:

Allotted appropriations	1,332,045	(Tax moneys.)
General Leases	6,892,252	(Rents from public lands.)
Licenses & Permits	1,219,079	(Fees from public lands.)
Interest & Investment	6,675,682	(Earnings on public funds.)

In addition, pursuant to Act 14 SLH 1955, DHHL would have received for the Hawaiian Home Lands Trust Fund per Declaration of Neal Miyahara, Director of Finance, 30,000,000 (Tax moneys or bond.)

Total for year	$46,119,058
Divide by 365 =	$126,353 per day

Every one of those items represents dollars that should be used by the State for the benefit of all Hawaii's people, including Plaintiffs. If DHHL is left to its own business as usual, Plaintiffs and others similarly situated will lose every day, any possibility of receiving any benefit from $126,353 of public money. That is $884,475 per week. If final judgment is not reached for 6 months, that irrevocable loss will be each Plaintiff's share of the benefit of $23,059,422. But that is only a small part of the potential loss.

The DHHL Combined Balance Sheet shows Total Fund Equity of $225,081,187. If DHHL is left unrestrained, it could spend or encumber all of that. If DHHL is enjoined to keep those funds intact, and Plaintiffs prevail, those funds could be used to lower taxes or to improve public schools or for other purposes which would benefit all Hawaii's people, including Plaintiffs. If Defendants prevail the money will still be there.

DHHL also holds the approximately 200,000 acres of public lands referred to as the "available lands." According to the Declaration of Ms. Yamaguchi, there were 7,281

Homestead leases in effect as of 1/31/02 apparently covering slightly more than 42,000 acres. Each of those Homestead leases had an initial term of 99 years at $1 per year, extendable by the DHHL for an additional 100 years, effectively preventing plaintiffs from ever receiving any benefit, such as reasonable fair market rents or making them pay their fair share of real property taxes, from these 42,000 acres of often valuable and highly desirable public lands.

One example of very valuable lands is the Kalawahine Streamside located on a 22.1 acre parcel in Papakolea, Oahu near Roosevelt High School described on page 14 of the DHHL Annual Report FY 1999-00. “The DHHL will provide $6.8 million for infrastructure and related site costs and the developer will finance approximately $17.4 million for house construction.” A cynic might describe this as a project where wealthy professionals get free land for homes worth up to $385,000. The Honolulu Advertiser of Sunday, January 28, 2001, available online at:

http://the.honoluluadvertiser.com/2001/Jan/28/128localnews12.html describes it.

The $26 million Kalawahine Streamside project was developed by Kamehameha Investment Corp., a for-profit subsidiary of Kamehameha Schools Trust, for the Department of Hawaiian Home Lands.

This unique upper-middle-class neighborhood on Hawaiian homestead land has 54 multilevel duplex units and 33 three-story single-family homes. Selections were made off the Hawaiian Home Lands waiting list, but the asking price of $174,900 to $196,100 for a duplex or $214,900 to $225,900 for a single-family unit made it unaffordable for most.

These are the most expensive homes ever offered to applicants, and the reason is the topography," project manager Elton Wong said. "The conditions were challenging from a design and construction standpoint. But for location, it’s a good deal. Schuler Homes sells a market product of the same size for around $385,000."

Ms. Yamaguchi says in her declaration that since the new year, 40 families have been offered residential leases. It is certain that, if not restrained, the DHHL will issue many more before this case reaches final judgment. Every new Homestead lease exacerbates the inequality and further irrevocably deprives each Plaintiff of any benefit from another parcel of public land.

OHA threatens even more irrevocable losses if it is not restrained. It has bills now pending before the current Legislature that would "reinstate Act 304-style funding" (Ex. V, Dec. SPB.) (which previously almost cost the State between $300 million and $1.2 billion) or, as an interim measure, appropriate $17 million to OHA. OHA has disclosed that the State in April 1999 had offered OHA $251 million and 360,000 acres of public land. (Ex. T, Dec. SPB.) And OHA holds $337,985,289 as of November 30, 2001 (Ex. S, Dec. SPB.) of public funds which it is free to spend or encumber.

Thus it is certain that, if a TRO is not issued, Plaintiffs and others similarly situated will likely suffer irreparable losses in the hundreds of millions and possibly as much as a billion dollars.

IV. The State Will Not Be Harmed and Public Policy Will Be Served by a TRO.

Defendants' "The sky will fall" arguments misstate the relief that Plaintiffs seek.

At page 29 of its Memo in Opp, the State says, "an injunction could throw DHHL and OHA officers and employees out of a job." However, Plaintiffs' motion does not ask for that and Plaintiffs' memo in support says at page 27, "HHC, DHHL & OHA could continue the current level of operations (i.e., they would still be able to pay operational expenses such as rent, telephone bills, office supplies, salaries, …").

On the same page, the State says, "Over $43 million in capital improvement projects would be halted, and 35 contractors would not be paid for labor and materials already supplied or ordered." Plaintiffs agree that this Court should not order State officials to breach contracts already entered into. Rather it should enjoin the State from entering into new contracts.

The State on the same page, mentions "evicting existing DHHL homesteaders from their lots." Plaintiffs made no such request. To the contrary, Plaintiffs in the Complaint, paragraph 3, make it clear they seek to avoid inequitable financial consequences to the Homesteaders. The TRO and preliminary injunction, as requested by Plaintiffs, would not affect the Homesteaders.

At page 30, the State mentions canceling OHA loans or grants. Plaintiffs agree that commitments already made should be kept. New ones should not be made. Likewise for contracts for infrastructure: state officials should carry out existing contracts but not enter into new ones.

Plaintiffs suggest that this Court issue the temporary restraining order substantially as requested to prevent any new encumbrances on trust assets. Relief can be further refined as the case proceeds.

As to the persons who may "lose a homestead for which they have been waiting for many years," would it be wise or in their best interest to move in knowing this suit is pending? Is it really a hardship to follow the same rules as everyone else? Since DHHL represents that it is both the lender and guarantor of loans, (Yamaguchi Dec. at 2), such loans will be available if Defendants prevail.

Finally, the public policy of the State of Hawai`i, as well as the public policy of the United States, disfavors racial discrimination. Hawaii Constitution Art. I, §5. Granting the temporary restraining order and preliminary injunction serves that public policy perfectly.

IV. Conclusion

For the above reasons and for the reasons stated in the motion and memorandum in support, plaintiffs request that the court issue the TRO as requested.

Dated: Honolulu, Hawaii this 8th day of March, 2002.

_____

H. WILLIAM BURGESS
PATRICK W. HANIFIN
Attorneys for Plaintiffs