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NO. _____

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

PUALANI KANAKA‘OLE KANAHELE,) CIVIL NO. 1CCV-20-0000235 (LWC)
EDWARD HALEALOHA AYAU,) (Other Civil Action)
KELI‘I W. IOANE, JR.,)
) APPEAL FROM THE:
Petitioners/Plaintiffs-Appellants,)
) 1) FINAL JUDGMENT, Filed and entered
vs.) herein on March 17, 2022
)
) 2) ORDER DENYING PLAINTIFFS’
STATE OF HAWAI‘I; DEPARTMENT OF) MOTION FOR PARTIAL SUMMARY
TRANSPORTATION; JADE BUTAY, in his) JUDGMENT, FILED ON JULY 13, 2020,
official capacity as director of the Department) Filed herein on November 5, 2021
of Transportation; DEPARTMENT OF)
LAND AND NATURAL RESOURCES;)
SUZANNE CASE, in her official capacity as)
the director of the Department of Land and)
Natural Resources; DEPARTMENT OF)
HAWAIIAN HOME LANDS; HAWAIIAN)
HOMES COMMISSION; WILLIAM J.)
AILĀ, JR., in his official capacity as the)
director of the Department of Hawaiian Home)
Lands and Chair of the Hawaiian Homes)
Commission; PATRICIA A.)
KAHANAMOKU-TERUYA, RANDY K.)
AWO, PAULINE N. NAMU‘O, ZACHARY)
Z. HELM, DENNIS L. NEVES, MICHAEL)
L. KALEIKINI, RUSSELL K. KAUPU, and)
DAVID B. KA‘APU, in their official)
capacities as members of the Hawaiian)
Homes Commission,)
) FIRST CIRCUIT COURT
) JUDGE: HON. LISA W. CATALDO
)
Respondents/Defendants-Appellees.)
)

**PETITIONERS/PLAINTIFFS-APPELLANTS' APPLICATION FOR TRANSFER TO
THE HAWAI'I SUPREME COURT**

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**PETITIONERS/PLAINTIFFS-APPELLANTS' APPLICATION FOR TRANSFER TO
THE HAWAI'I SUPREME COURT**

I. REQUEST FOR TRANSFER TO THE HAWAI'I SUPREME COURT

Petitioners/Plaintiffs-Appellants Pualani Kanaka'ole Kanahale, Edward Halealoha Ayau, and Keli'i W. Ioane, Jr. ("Plaintiffs") apply to transfer this case to this Court pursuant to Hawai'i Rules of Appellate Procedure ("HRAP") Rule 40.2.

This ongoing appeal is about the right of native Hawaiian beneficiaries of the trust established by the Hawaiian Homes Commission Act ("HHCA" or the "Act") to sue to stop the unauthorized and uncompensated taking of trust lands and other breaches of trust. Plaintiffs established, by undisputed and admissible evidence, that the State and its agencies have breached their trust duties and violated the Act when the Department of Transportation unilaterally took over sixty-five acres of land out of the Hawaiian home lands trust inventory in 2018 by designating those lands as a State Highway.

On summary judgment the circuit court below found that Plaintiffs, native Hawaiian beneficiaries injured by the taking of trust lands, are precluded from suing over these breaches of trust due to a legislative enactment that resolved claims arising before 1988, even though that same law preserved the ability of beneficiaries to sue over future breaches of trust. On appeal, the State does not dispute the record of their breaches of trust. Instead, they rely solely on affirmative defenses to prevent a ruling on the merits of Plaintiffs' claims. If the State's argument is taken to its end, and if the circuit court's ruling is permitted to stand, native Hawaiian beneficiaries will be prevented from suing to stop the taking of trust lands and breaches of trust in contravention of the clear policy of this Court to permit suits by beneficiaries to enforce the State's trust duties.

This case meets the statutory requirements for transfer to this Court. The proper management of the Hawaiian home lands trust, and beneficiaries' rights to sue to protect that trust, are matters of imperative and fundamental public importance. Further, while established precedent of this Court disposes of many of the issues in this case, this appeal presents the first opportunity for this Court to interpret and clarify specific provisions of two legislative acts concerning the administration and enforcement of the Act. For these reasons, this Court should accept the transfer of this appeal.

II. STATEMENT OF PRIOR PROCEEDINGS

A. PLAINTIFFS' COMPLAINTS

On February 13, 2020, Plaintiffs filed their initial Complaint with the Circuit Court of the First Circuit, naming as defendants the State of Hawai'i Department of Transportation ("DOT"); Jade Butay, in his official capacity as the director of DOT; Department of Land and Natural Resources ("DNLR"); Suzanne Case, in her official capacity as the director of DNLR; Department of Hawaiian Home Lands ("DHHL"); Hawaiian Homes Commission ("Commission"); William Ailā, Jr., in his official capacity as the director of DHHL and Chair of the Commission; Patricia A. Kahanamoku-Teruya, Randy K. Awo, Pauline N. Namu'o, Zachary Z. Helm, Dennis L. Neves, Michael L. Kaleikini, and David B. Ka'apu, in their official capacities as members of the Commission (together, "Defendants").¹ *See* Dkt. #1. ² On February 20, 2020, Plaintiffs filed their First Amended Complaint, adding Defendant Russell K. Kaupu in his official capacity as the then-newest member of the Commission. *See* Dkt. #12.

In their First Amended Complaint, Plaintiffs seek declaratory and injunctive relief based on "State Defendants' Breach of Trust" (Count 2) and "DHHL Defendants' Breach of Trust" (Count 1) related to the DOT's taking of the Mauna Kea Access Road (the "Access Road" or the "MKAR") without compensation. Specifically, Plaintiffs seek to stop (1) the State Defendants' ongoing violations of their trust duties as well as provisions of the Act and state law and (2) the DHHL Defendants' ongoing violations of their trust duties to act in the exclusive interest of its beneficiaries. *See* Dkt. #12 at 8-11 ¶¶ 74-115. Plaintiffs also seek damages on behalf of the trust pursuant to Hawai'i Revised Statutes ("HRS") chapter 673 (Supp. 1988) to restore the trust for the State's uncompensated taking of the Access Road.³ *See id.* at 2, 9, 11-12 ¶¶ 3, 6, 89, *Prayer for Relief* ¶¶ H, K.

¹ DOT, Director of Transportation Butay, DNLR, and Director of DNLR Case are collectively referenced as "State Defendants." DHHL, the Commission, and Chair Ailā are collectively referenced as "DHHL Defendants."

² All citations to the Record on Appeal will be: Dkt. # ____. Citation to all filings with the Intermediate Court of Appeals will be: CAAP Dkt. # ____.

³ Plaintiffs are not asking for personal damages but instead request damages pursuant to Chapter 673 to remediate the trust for the injuries caused by Defendants' actions and omissions.

Plaintiffs, through their complaint, do not seek the closure of the Access Road nor the exclusion of the public from it. This action was instead brought to enforce Defendants' legal and trust duties to native Hawaiian beneficiaries of the Hawaiian home lands trust.

B. MOTION TO DISMISS

On March 12, 2020, Defendants, all represented by the same counsel and undertaking a joint defense, filed a Motion to Dismiss Plaintiffs' Complaint based on Hawai'i Rules of Civil Procedure ("HRCP") Rule 12(b)(6), asserting that the State has not waived its sovereign immunity with respect to the Access Road; Act 14 barred all actions against the State and its officials "on any decision related to the resolution" of claims covered by the HHCA, including any "uncompensated use of Hawaiian home lands for state road claims and highways[;]" and Plaintiffs lack standing to challenge the designation of the Access Road as a State highway under HRS chapter 264 because they fail to allege any redressable injury-in-fact from the designation. *See* Dkt. #54. The Circuit Court of the First Circuit⁴ denied the Motion at the hearing held May 8, 2020. Dkt. #68. Defendants filed their Answer to the First Amended Complaint on May 18, 2020 and the First Amended Answer on May 28, 2020. Dkts. #76, 80. On May 29, 2020, the court entered its Order Denying Defendants' Motion to Dismiss. Dkt. #82.

C. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

On July 13, 2020, Plaintiffs filed their Motion for Partial Summary Judgment (the "Motion"), Dkt. #84-87, seeking declaratory and injunctive relief to remedy the ongoing breaches of trust regarding the operation and control of the Access Road:

Plaintiffs ask that this Court grant appropriate declaratory relief establishing Defendants' liability by declaring that: (1) State Defendants have breached their trust obligations and violated the HHCA by asserting control over the Hawaiian home lands underlying the MKAR and using the same without compensation; (2) State Defendants are liable for breach of the Hawaiian home lands trust pursuant to Hawai'i Revised Statutes chapter 673; (3) control of the Hawaiian home lands underlying the MKAR rests solely with DHHL Defendants; (4) the MKAR is not a state or public highway; and (5) DHHL Defendants have breached their trust obligations and violated the HHCA by failing to address and redress State Defendants' interference with DHHL Defendants' exclusive control and their rent free use of the MKAR.

⁴ The Honorable Lisa W. Cataldo presided.

Should Plaintiffs prevail on the instant motion, they reserve the right to seek appropriate remedies, including injunctive relief and damages.

Dkt. #84 at 2-3. In support of the Motion, Plaintiffs provided uncontroverted admissible evidence, including multiple admissions by Defendants in self-authenticating documents, that Defendants breached their trust duties under the Act as follows:

State Defendants' Breach of Trust

- The properties underlying the Access Road are Hawaiian home lands.
- State Defendants have asserted control over the trust lands underlying the Access Road.
- State Defendants did not obtain a lease, license, easement, or other land disposition, approved by the Commission, for the trust lands underlying the Access Road.
- There is no deed of conveyance for the lands underlying the Access Road to the director of transportation or the County Council and no order of condemnation for the same issued by a court.
- State Defendants have not compensated the Hawaiian home lands trust for their control and use of the trust lands underlying the Access Road.

State Defendants' Liability Under HRS Chapter 673

- Plaintiffs are native Hawaiians as defined under the Act.
- Plaintiffs issued an intent to sue letter more than 60 days prior to the filing of the Complaint [as required by HRS chapter 673].

DHHL Defendants' Breach of Trust

- DHHL Defendants were aware of the State's seizure of trust lands.
- DHHL Defendants failed to challenge the State's control of the trust lands underlying the Access Road.
- DHHL Defendants never sought fair market value compensation for State Defendants' use and control of trust lands.

Dkts. #84-87; Dkt. #104 at 1-2.

On July 27, 2020, Defendants filed their Memorandum in Opposition to Plaintiffs' motion, Dkt. #92, and Plaintiffs filed their reply on July 30, 2020. Dkt. #97.

D. THE CIRCUIT COURT'S DENIAL OF PLAINTIFFS' MOTION AND ENTRY OF JUDGMENT

On November 5, 2021, nearly a year and a half after the Motion was filed, the circuit court entered its Order Denying Plaintiffs' Motion for Partial Summary Judgment. Dkt. #126. In

its Order, the circuit court denied Plaintiffs' Motion, concluding that Act 14 "forecloses" Plaintiffs' claims and requested relief. *Id.* at 9. The court held in relevant part:

Act 14 is dispositive of the Motion. . . .

Based on the plain and unambiguous language of Act 14, the Court finds the intent of the Legislature clear: upon enactment, Act 14 fully and finally resolved the claims referenced therein, including the "uncompensated use of Hawaiian home lands for state roads claims and highways," which arose between August 21, 1959 and July 1, 1988.

. . .

Because the controversies or claims regarding the trust lands underlying MKAR arose between August 21, 1959 and July 1, 1988, Act 14 also makes clear that upon its passage, the Act resolved all future claims related to those Hawaiian home lands. *See* 1995 Haw. Sp. Sess. L. Act 14 § 4 at 699 ("The passage of this Act is in full satisfaction and resolution of all controversies at law and in equity, known or unknown, now existing or hereafter arising") (underscore added). As such, no cause of action can accrue related to the home lands underlying MKAR after June 30, 1988 so as to permit suit pursuant to HRS ch. 673. *See* 1995 Haw. Sp. Sess. L. Act 14 § 12 (1) at 702.

Id. at 5-9 (emphases in original omitted).

On December 3, 2021, Plaintiffs filed a Motion for Leave to File Interlocutory Appeal, *see* Dkt. #134, and a Proposed Stipulation for Extension of Time to Appeal the November 5, 2021 Order, *see* Dkt. #136, the latter of which the court granted on December 8, 2021. Plaintiffs withdrew their Motion for Leave on February 8, 2022. *See* Dkt. #152. On February 10, 2022, Defendants filed a Stipulation and Order to Amend Order Denying Plaintiffs' Motion for Partial Summary Judgment, which sought to amend the circuit court's November 5, 2021 Order to reflect that the court already ruled on Plaintiffs' claims and that "summary judgment be entered in favor of Defendants because no genuine issue as to any material fact exists and Defendants are entitled to summary judgment as a matter of law." Dkt. #155. The court entered its Amended Order Denying Plaintiffs' Motion for Partial Summary Judgment that same day. Dkt. #157; CAAP Dkt. #4. Final Judgment was entered on March 16, 2022. Dkt. #159; CAAP Dkt. #2.

Plaintiffs filed a timely notice of appeal on April 13, 2022. CAAP Dkt. #1.

E. BRIEFING BEFORE THE INTERMEDIATE COURT OF APPEALS

On August 24, 2022, Plaintiffs filed their Opening Brief. CAAP Dkt. #31. Plaintiffs argue that, because the material facts are not in dispute and the controlling law is well-settled, the circuit court erred when it denied Plaintiffs' Motion. *Id.* at 8-9. Plaintiffs argue that they were

entitled to summary judgment declaring that (1) the Access Road is located on trust lands under the jurisdiction of DHHL Defendants, (2) the Access Road is not a State or public highway, (3) State Defendants have breached their trust duties and violated the terms of the HHCA by taking trust lands without compensation, and (4) DHHL Defendants breached their trust duties and violated the terms of the Act by failing to redress State Defendants’ breaches of trust. *Id.* at 22. Plaintiffs also argue that the circuit court erred as Act 14 resolved only those claims that existed between August 21, 1959 and July 1, 1988, and the State’s taking of the Access Road through its designation of the road as a State highway occurred in 2018 and was an entirely new taking of trust lands. *Id.* at 34.

On November 2, 2022, Defendants filed their Answering Brief. CAAP Dkt. #41. They argue that (1) Act 14 bars Plaintiffs’ claims as it “resolved breach of trust claims regarding the use of MKAR as a public road” and (2) Plaintiffs’ claims are barred by sovereign immunity. *Id.* at 20, 33.

On November 28, 2022, Plaintiffs filed their Reply Brief. CAAP Dkt. #47. They argue that (1) Act 14 could not have resolved Plaintiffs’ claims as they are based on the new taking of trust lands that occurred 40 years after the Act 14 claims period, as opposed to the claims related to the **past public use** of the Access Road trust lands that Act 14 resolved, and (2) Plaintiffs’ claims are not precluded by sovereign immunity because Act 395 authorizes their claims for damages and their remaining claims are prospective in nature. *Id.* at 3, 9.

III. SHORT STATEMENT OF RELEVANT FACTS⁵

A. THE MAUNA KEA ACCESS ROAD ON HAWAIIAN HOME LANDS

This case involves the State’s discharge of the Hawaiian Homes Commission Act. DHHL, led by the Commission, is the State agency charged with implementing the Act. *See* HHCA § 202. The Act establishes a homesteading program that provides long-term residential, agricultural, and pastoral homesteading leases to its beneficiaries. *Id.* § 207. DHHL and the Commission are the only entities entitled to control and manage trust lands that are designated for the Act’s program. *Id.* § 206 (“The powers and duties of the governor . . . shall not extend to lands having the status of Hawaiian home lands, except as specifically provided in [the

⁵ A complete recitation of the relevant facts can be found in Plaintiffs’ Opening Brief. *See* CAAP Dkt. #31.

HHCA].”); *id.* § 204(a) (“[A]ll available lands shall immediately assume the status of Hawaiian home lands and be under the control of the [DHHL] to be used and disposed of in accordance with the provisions of this Act[.]”); Hawai‘i Administrative Rules (“HAR”) § 10-2-42 (requiring Commission approval for land dispositions).

The Access Road is an approximately 6.27 miles long road that passes through 49,100 acres of Hawaiian home lands in Humu‘ula, Hawai‘i Island (“Humu‘ula trust lands”). *See* Dkt. #80 at 8 ¶ 46, Dkt. #92 at 9-10, Dkt. #94 at 79. Altogether, the road covers approximately 65.142 acres of trust lands in Humu‘ula. Dkt. #86 at 99. The Access Road begins at the intersection with Saddle Road, also known as the Daniel K. Inouye Highway (Route 200), and extends 125 feet past the Hale Pōhaku entrance, also known as the Onizuka Center for International Astronomy Visitor Information Station. *See* Dkt #80 at 8 ¶ 46; Dkt. #86 at 8-11, 16. The Access Road was initially a bulldozed jeep road completed in 1964 by the State. *See* Dkt. #86 at 8-11, 16. Under the State’s direction, the road underwent several improvements as public funding was made available. *See* Dkt. #92 at 10; Dkt. #86 at 9-10.

The Humu‘ula trust lands were selected by the Commission for inclusion into the Hawaiian home lands trust on June 27, 1929. *See* Dkt. #92 at 9, Dkt. #94 at 71. At that time, and continuing for almost fifty years, the Board of Land and Natural Resources (called the Commission on Public Lands prior to statehood) managed those lands and leased the same to Parker Ranch. *See* Dkt. #92 at 9-10, Dkt. #94 at 79-81. In 1976, DHHL requested those trust lands back, and the State relinquished the same, though now burdened with a road. *See* Dkt. #92 at 10; Dkt. #94 at 63. Beginning in 1983, Hawai‘i County took over maintenance obligations for the Access Road through a resolution, while still recognizing that the Access Road is Hawaiian home lands. Dkt. #92 at 10, #94 at 87; *see* Dkt. #87 at 25-26. Neither the County nor the State received a deed of conveyance or order of condemnation for the Access Road at any time. *See* Dkt. #87 at 16; Dkt. #106 at 57:14-23, 62:19-21, 63:1-3; Dkt. #104 at 11.

B. THE LEGISLATURE ADOPTS ACT 395 AND ACT 14

Since the Act’s passage, thousands of acres of Hawaiian home lands were used, disposed of, or withdrawn from the trust by the State “in contravention of the [Act].” *See* 1995 Haw. Sp. Sess. Laws Act 14 (“Act 14”), § 1 at 696; *Kalima v. State*, 111 Hawai‘i 84, 88, 137 P.3d 990, 994 (2006) (“*Kalima I*”).

In 1988, the Hawai‘i State Legislature attempted to address the criticisms of the management of Hawaiian home lands and provide redress to its beneficiaries through “The Native Hawaiian Judicial Trusts Relief Act.” *See* 1988 Haw. Sess. L. Act 395 (“Act 395”), §§ 1-7; *Kalima I*, 111 Hawai‘i at 88, 137 P.3d at 994. Act 395 provided, among other things, a limited waiver of sovereign immunity for beneficiaries of the trust to bring suit for breaches of trust as well as an opportunity for the governor to present a proposal to resolve claims for past breaches of trust arising between August 21, 1959 and June 30, 1988. *See* Act 395, § 5 at 945; *Kalima I*, 111 Hawai‘i at 88, 137 P.3d at 994.

In 1995, the State Legislature enacted Act 14, which authorized a future land exchange to compensate for, among other things, the past rent-free “use” of acreage underlying streets and on Hawaiian home lands trust lands between August 21, 1959 and July 1, 1988, and resolved controversies arising within that time period. *See* Act 14 §§ 1, 2, 4, 12; *Kalima I*, 111 Hawai‘i at 90, 109-11, 137 P.3d at 996, 1015-17. The Legislature did not designate which lands were to be exchanged nor did it provide an exemption from the required processes for removing lands from the Hawaiian home lands trust. *See generally* Act 14. In addition, the Legislature specifically preserved future breach of trust claims asserting a “cause of action accruing after June 30, 1988[.]” Act 14, § 12 at 702.

In the nearly three decades that have passed since the enactment of Act 14, none of the relevant parties have initiated, let alone completed, a land exchange to compensate for the past use of trust lands upon which the Access Road is situated. *See* Dkt. #95 at 108 (confirming that “no lands have been conveyed to DHHL to satisfy the State’s commitment to compensate the trust for its past use of Hawaiian home lands as State highways on various islands totaling a claimed amount of 346.203 acres,” including the 65.142 acres under the Access Road); Dkt. #108 (DHHL Defendants admitting that that “the completion of the land transfers have not occurred”); Dkt. #87 at 16-21; Dkt. #106 at 57:14-23, 62:19-21, 63:1-3. Thus, the Access Road remains part of DHHL’s inventory of trust lands.

C. DOT ASSERTS CONSTRUCTIVE OWNERSHIP OVER THE ACCESS ROAD FOR THE FIRST TIME

On March 15, 2018, the DOT took the Access Road by unilaterally approving the designation of the road as State Highway Route 210. *See* Dkt. #87 at 23; Dkt. #80 at 10 ¶ 61. This was the first time that the DOT claimed jurisdiction over the Access Road. The vehicle for

this “designation” was an internal DOT memo, “requesting designation of Mauna Kea Observatory Access Road as a State Highway.” Dkt. #87 at 23. DOT does not have a deed of conveyance or order of condemnation dedicating the Access Road as a State or public highway, as required by HRS chapter 264. *See id;* cf. HRS § 264-1 (c). Instead, this self-serving memo was sent from a DOT representative and accepted by another DOT representative, Director of Transportation Jade Butay, without approval from DHHL or the Commission. *See* Dkt. #87 at 23.

The 2018 designation attempts to remove the Access Road from the Hawaiian home lands trust and place it within the exclusive authority of DOT. The designation allows DOT to close and restrict use of the Access Road at its own discretion. It prohibits DHHL and beneficiaries from installing infrastructure on or near the road without obtaining a written permit. HRS § 264-6. It prohibits DHHL and beneficiaries from connecting a new road or access to the Access Road without a DOT permit. HRS § 264-14. It allows DOT and the governor to further encumber or alienate the Access Road by granting “easements within” and “access rights along” the Access Road and adjoining trust lands. HRS § 264-13. It gives DOT the ability to seek fines or imprisonment of “any person, including any public officer or employee” including DHHL and their beneficiaries who do not obtain required permits from DOT. HRS § 264-12. As DOT can only designate roads that it or the County owns in fee simple for inclusion in the State Highways System, *see* HRS § 264-1 (requiring a deed of conveyance accepted by the director of transportation), its 2018 designation is tantamount to a seizure of title of those lands from the trust.

As an exercise of its alleged new authority under HRS Chapter 264, on July 15, 2019, DOT Defendants, with the assistance of DLNR and its Division of Conservation and Resources Enforcement, closed the Access Road to the public to allow for the transport of equipment and materials for the construction of a private commercial project. *See* Dkt. #87 at 25-26; Dkt. #80 at 10 ¶¶ 62. This closure led to a prolonged shutdown of the Access Road that interfered with the ability of the public—including Plaintiffs Pualani Kanakaole Kanahale, Edward Halealoha Ayau, and Keli‘i W. Ioane—to access Mauna Kea. *See* Dkt. #87 at 28; Dkt. #85 at 4 ¶¶ 25-30, 33; *id.* at 8 ¶¶ 18-19; *id.* at 15 ¶¶ 9-12.

D. DHHL FAILS TO CHALLENGE THE DOT’S TAKING OF TRUST LANDS

On August 30, 2019, the Department of the Attorney General, DHHL, and DOT issued a joint statement asserting:

[The Access Road] is under the control and jurisdiction of DOT. Pursuant to HRS § 26-19 and HRS Ch. 264, DOT has control and jurisdiction over all state highways and [the Access Road] is designated to DOT’s State Highway System as Route 210. This includes any portions of the road that cross over DHHL land.

Dkt. #87 at 25-26; Dkt. #80 at 10 ¶ 63. The statement pronounced that DOT “has controlled and maintained [the Access Road] since it became part of our highways system in 2018,” and that “Act 14 . . . resolved all claims concerning the use of Hawaiian home lands for public roads and highways built before and after statehood.” Dkt. #87 at 25.

To date, DHHL Defendants have not acted to (1) preserve trust assets taken from the trust without following proper procedures or (2) protect the interests of trust beneficiaries by pursuing legal action to remedy trust lands improperly wrested from their inventory without their consent or authorization. *See* Dkt. #108⁶; Dkt. 87 at 16-21; Dkt. #95 at 105.

E. PLAINTIFFS ARE BENEFICIARIES OF THE HAWAIIAN HOME LANDS TRUST

Plaintiffs are beneficiaries of the Act who are entitled to derive multiple benefits from DHHL programs. *See* Dkt. #85 at 1 ¶¶ 2-3; *id.* at 6 ¶¶ 2-4; *id.* at 15 ¶¶ 2, 4. They look to the DHHL Defendants to fulfill their trust duties to oversee the implementation and administration of the trust, to responsibly manage trust lands and resources in a manner consistent with the interests of beneficiaries, and to engage in meaningful dialogue with beneficiaries. *See id.* at 42-45 ¶¶ 32-35; *id.* at 7 ¶¶ 12-13; *id.* at 13 ¶ 50; *id.* at 16-17 ¶¶ 17-20. Plaintiffs also exercise native Hawaiian traditional and cultural practices at Mauna Kea and consider its lands to be among the

⁶ *See* Dkt. #108 at ~10:34 (admission by Defendant Ailā that “I don’t disagree with you that the completion of the land transfers [under Act 14] have not occurred.”); ~11:18 (“[question:] who owns the deed or who controls the deed for the [Access Road]? . . . [answer by Defendant Ailā:] we own the underlying property, however, via Act 14 operational control of the road has been transferred to DOT), ~20:35 (admission by Defendant Ailā that “there is no evidence of any land exchange right now.”); *see also id.* at ~22:19 (same), ~32:55 (counsel for Defendants stating that a land exchange “has not been initiated.”); Dkt. #107 at 1-2 ¶¶ 5, 6 (including a link to the video found in Dkt. 108).

most sacred lands in all of Hawai‘i. *See id.* at 3-4 ¶¶ 17, 29-30; *id.* at 7 ¶¶ 6-10; *id.* at 15 ¶¶ 5-8. All are concerned about the mismanagement of trust resources and were personally impacted by the DOT’s improper control and closure of the Access Road. *See id.* at 3 ¶¶ 21-23; *id.* at 6-7 ¶¶ 5, 8, 14-15; *id.* at 14 ¶ 54; *id.* at 16 -17 ¶¶ 8, 13-15, 20.

In 2019, Plaintiffs gathered on the Access Road to protect Mauna Kea and the Humu‘ula trust lands in and around the Access Road, calling for Defendants to fulfill their duties as trustees to preserve trust assets and protect the interests of beneficiaries. *See id.* at 4 ¶¶ 25-28, 31; *id.* at 6-8 ¶¶ 5, 8, 18; *id.* at 15-16 ¶¶ 9-10.

IV. STATEMENT OF POINTS OF ERROR

The circuit court erred in entering its February 10, 2022 Amended Order Denying Plaintiffs’ Motion for Partial Summary Judgment.⁷ Dkt. #157. The court’s conclusions made in error are found at Dkt. #157 at 3-9. Plaintiffs objected to, and otherwise brought the error to the attention of the circuit court, at Dkt. #62 at 10-12, Dkt. #84; Dkt. #97, Dkt. #106 (Tr. 4:5-32:16; Tr. 39:19-10:15; Tr. 58:7-16; Tr. 53:19-64:16; Tr. 67:6-75:3), and Dkt. #104.

V. THIS CASE MEETS STATUTORY QUALIFICATIONS FOR TRANSFER

This case meets the statutory requirements for transfer to the Hawai‘i Supreme Court. HRS § 602-58(a)(1) provides that “[t]he supreme court . . . **shall** grant an application to transfer any case within the jurisdiction of the intermediate appellate court to the supreme court upon the grounds that the case involves . . . [a] question of imperative or fundamental public importance.” *Id.* (emphasis added). This Court may also grant an application to transfer any case that involves a “question of first impression or a novel legal question[.]” HRS § 602-58(b)(2). Because issues regarding the Act are of fundamental and imperative public importance, and because this case provides an opportunity for this Court to review specific provisions of Act 14 and Act 395, this Court should accept the transfer of this case from the Intermediate Court of Appeals.

A. THIS CASE INVOLVES QUESTIONS OF FUNDAMENTAL AND IMPERATIVE PUBLIC IMPORTANCE

⁷ The circuit court’s error necessarily also includes all orders subsidiary to the February 10, 2022 Amended Order, including the November 5, 2021 Order Denying Plaintiffs’ Motion for Partial Summary Judgment it amended and replaced, Dkt. #126, and all judgments entered in reliance of it, including the March 16, 2022 Final Judgment. Dkt. #159.

This case concerns the protection of the Hawaiian home lands trust from the continued mismanagement of trust resources and the ability of trust beneficiaries to sue to stop breaches of trust. These issues are of fundamental and imperative importance to Native Hawaiians and the public as a whole.

The Act furthers the vital public policy of providing for the rehabilitation of native Hawaiians and the protection of indigenous ways of life and knowing. The United States' Congress passed the Act in 1921 to address the historical suffering and declining economic and social conditions of native Hawaiians that resulted from the disruption of their traditional way of life:

During the early 1900s, concern about the plight of the Hawaiian people who had been displaced from rural to urban areas began to emerge as a result of the serious disruption in their traditional way of life. Out of concern for the declining numbers of full-blooded Hawaiians and the recognition that all previous systems of land distribution were ineffective, Congress entertained various homesteading proposals designed to rehabilitate the native Hawaiian people. Eventually, Congress enacted the HHCA, creating a land trust from ceded crown and public lands that was intended to rehabilitate the native Hawaiian people by, *inter alia*, making them eligible to receive the benefits of homesteading through leased land and related programs from the trust.

Kalima I, 111 Hawai'i at 87, 137 P.3d at 993. Title to the approximately 203,500 acres of Hawaiian home lands was vested in the United States until the Territory of Hawai'i became a state in 1959, at which time the newly-formed State entered into a "compact" with the U.S. government to assume the management of lands under the Act. *See* Hawai'i Admission Act of 1959, Pub. L. No. 86-3, 73 Stat. 4 & 5. The "principal purposes" of the Act include "[e]stablishing a permanent land base for the benefit and use of native Hawaiians," "[p]reventing alienation of the fee title . . . so that these lands will always be held in trust for continued use by native Hawaiians in perpetuity[,]" and "[p]roviding financial support and technical assistance . . . so that by pursuing strategies to enhance economic self-sufficiency and promote community-based development, **the traditions, culture and quality of life of native Hawaiians shall be forever self-sustaining.**" HHCA § 101(b) (emphasis added). To accomplish these purposes, the Act establishes a homesteading program that provides long-term residential, agricultural, and pastoral homesteading leases to its beneficiaries. *See* HHCA § 207.

Recognizing the fundamental and vital importance of the Act, Hawai'i's courts hold the State to "high fiduciary duties" in administering it. *Ahuna v. Dep't of Hawaiian Home Lands*, 64

Haw. 327, 338, 640 P.2d 1161, 1168 (1982); *see also* HAR § 10-2-19 (providing that, as trustees, it is the duty of the Commission to: “(1) Act exclusively in the interest of beneficiaries under the act; (2) Hold and protect the trust property for beneficiaries under the act; (3) Exercise such care and skill as a person of ordinary prudence would exercise in dealing with one’s own property in the management of Hawaiian Home lands; and (4) Adhere to the terms of the trust as set forth in the act.”). Proper administration of the Act does not solely benefit native Hawaiians as a discreet community; “the rights of native Hawaiians” as related to the proper discharge of the Act and the management of the trust **“are a matter of great public concern in Hawaii.”** *Nelson v. Hawaiian Homes Comm’n*, 130 Hawai‘i 162, 168, 307 P.3d 142, 148 (2013) (emphasis added) (citing *Pele Defense Fund v. Paty*, 73 Haw. 578, 614, 837 P.2d 1247, 1268 (1992)). Positively impacting trust beneficiaries **“ultimately benefit[s] the State as a whole**, because stewardship of Hawaiian Home Lands was an obligation taken on by the State as a condition for admission into the union.” *Id.* (emphasis added) (citing Hawai‘i Admission Act of 1959, Pub. L. No. 86-3, 73 Stat. 4). The State reaffirmed its commitment to these trust responsibilities by adding a constitutional provision guiding its management of the Hawaiian home lands. *See* Haw. Const. art. XII, § 2 (“The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian home projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out.”).

The Act’s imperative nature is anchored in the “cultural importance of the land to native Hawaiians”:

The native Hawaiian people continue to be a unique and distinct people with their own language, social system, ancestral and national lands customs, practices and institutions. “The health and well-being of the native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land.” Aina, or land, is of crucial importance to the native Hawaiian people—to their culture, their religion, their economic self sufficiency and their sense of personal and community well-being. ***Aina is a living and vital part of the [n]ative Hawaiian cosmology, and is irreplaceable. The natural elements land, air, water, ocean-are interconnected and interdependent. To [n]ative Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians.*** The aina is part of their ohana, and they care for it as they do for other members of their families. For them, the land and the natural environment is alive, respected, treasured, praised, and even worshiped.

Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp., 121 Hawai‘i 324, 333-34, 219 P.3d 1111, 1120-21 (2009) (emphasis added) (cleaned up) (quoting *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp.*, 117 Hawai‘i 174, 214, 177 P.3d 884, 924 (2008)). Chief Justice Richardson also commented on the fundamental importance of land to Native Hawaiians by exploring the concept of a generational family homestead:

[T]here are interests other than financial expediency which I recognize as essential to our Hawaiian way of life. Foremost is the individual’s right to retain ancestral land in order to perpetuate the concept of the family homestead. Such right is derived from our proud cultural heritage wherein it was believed that the one guarantee of survival [was] land [which was] in short supply either because of the density of population or because of the large holdings of exploiting gentry landholders. Because [Native Hawaiians] depend for their survival on specific plots of land, ownership is their goal and once land is owned it must be preserved and passed on intact to the children. All this makes for the great emphasis on the survival of the particular family line which owns the particular plot of land. . . . Mindful of our Hawaiian heritage, we must not lose sight of the cultural traditions which attach **fundamental importance** to keeping ancestral land in a particular family line.

Chuck v. Gomes, 56 Haw. 171, 179-80, 532 P.2d 657, 662 (1975) (C.J. Richardson, *dissenting*) (cleaned up and emphasis added).

This case presents questions related to the discharge of the State’s highest fiduciary duties under the Act. Plaintiffs bring their claims to stop the taking of trust lands which injures all trust beneficiaries by depriving the trust corpus of land and revenue to support homesteading. Dkt. #12 at 8-11 ¶¶ 74-115. Defendants have asserted the affirmative defenses of *res judicata* and sovereign immunity which, if successful, would limit the rights of trust beneficiaries to sue to protect trust assets in contravention of established precedent and policy of this Court. *See* CAAP Dkt. #41. The claims and affirmative defenses presented by this case therefore concern issues that have been repeatedly recognized as fundamentally important to the interests of the public.

Plaintiffs’ testimonies below further illustrate the importance of the issues presented by this case. Plaintiff Kanaka‘ole-Kanahela noted, “[t]hirty eight years after the *Ahuna* decision, I am being personally affected by DHHL Defendants making the same mistake as they did back then, allowing the government to use trust lands for non-trust purposes, without lawful authority or compensation.” Dkt. #85 at 3. Plaintiff Ioane testified that, as “a beneficiary who is still

waiting [for a homestead lease], I am irreparably harmed by the mismanagement of Trust resources that results in extending my wait even a day longer.” *Id.* at 17. Plaintiff Ayau, who resigned from his employment with DHHL due to his concerns over trust mismanagement, testified that “it is critical to make use of all trust assets wisely and efficiently so the benefits of the trust can be maximized” to remedy the growing waitlist “for homestead leases [that] **now exceeds 28,000 applicants.**” *Id.* at 7-14 (emphasis added).

Instead of affirmatively acting to protect and manage the trust lands unilaterally taken by DOT, DHHL Defendants have been complacent, allowing the dispossession of lands meant to support their beneficiaries in contravention of their high fiduciary duty. Given the recognized significance of the Hawaiian home lands trust to native Hawaiian beneficiaries, enforcement of Defendants’ trust duties is of imperative and fundamental public importance. As such, transfer of this appeal to the Hawai‘i Supreme Court is required under HRS § 602-58(a)(1).

B. THIS CASE INVOLVES QUESTIONS OF FIRST IMPRESSION

While prior decisions of this Court dispose of many of the issues presented by this appeal, this appeal presents the first opportunity for this Court to interpret and clarify specific provisions of two legislative acts concerning the administration and enforcement of the Act.

The circuit court’s application of Acts 14 and 395 to the facts in this case represents a novel application of the law deserving of review as an issue of first impression under HRS § 602-58(b)(1). No appellate court has interpreted Act 14’s invocation of *res judicata* and to what extent the act resolved later arising claims of beneficiaries based on entirely new breaches of trust. Neither has any appellate court opined on the meaning of section 2 of Act 395 and its limitations on actions seeking remedy for “projects, programs, or any other governmental activities which are continuing, and which were begun, completed, or established prior to July 1, 1988” and whether this Court’s recent decisions are relevant in interpreting that provision.

This case will provide guidance to lower courts on how Act 14 and Act 395, remedial legislation related to the Hawaiian home land trust, should be read together so to achieve the intended purpose of resolving claims “in a fair, complete, and timely manner.” Act 14 § 2 at 698 (“The primary purposes of [Act 14] are to . . . (6) Further the public interest by ensuring that claims which have arisen or may arise in the future with respect to the administration of the Hawaiian home lands trust and are brought pursuant to chapters 673 and 674, Hawaii Revised Statutes, are resolved in a fair, complete, and timely manner.”); *cf. Kalima I*, 111 Hawai‘i at 100,

137 P.3d at 1006 (maintaining that “remedial statutes should be liberally construed to suppress the perceived evil and advance the enacted remedy” and disfavoring “narrow interpretations that impede rather than advance the remedies provided by such statutes” (internal quotes omitted)). Given that these are issues of first impression not yet determined by this Court or the Intermediate Court of Appeals, transfer to the Hawai‘i Supreme Court for review is appropriate.

VI. CONCLUSION

For the forgoing reasons, this Court should accept transfer of this appeal.

DATED: Honolulu, Hawai‘i, December 7, 2022.

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