

HO'OHOLO I MUA - TOWARDS RECONCILIATION?
OFFICE OF HAWAIIAN AFFAIRS V. HOUSING AND COMMUNITY DEVELOPMENT
CORPORATION OF HAWAII*

Moanike'ala Crowell, JD 2008

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On January 31, 2008, the Hawai'i Supreme Court issued a unanimous decision, authored by Chief Justice Ronald Moon, in *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i*.¹ The Court held that the State of Hawai'i is prohibited from alienating approximately 1.2 million acres of "ceded lands" until the claims of the Native Hawaiian people to those lands have been resolved. Native Hawaiian claims to ceded lands are based on their historical significance to the Hawaiian Kingdom. Many in the Native Hawaiian community saw the opinion as a positive step or ho'oholo i mua towards reconciliation and as encouraging Native Hawaiians, the larger community, and those with differing perspectives to continue a dialogue not only on the use and disposition of ceded lands, but also on Native Hawaiian self-determination.

Background

The ceded lands consist almost entirely of the Government and Crown lands of the Hawaiian Kingdom. In the 1848 Māhele, beginning the conversion of Hawai'i's communal land tenure to a fee simple system, Kamehameha III set aside the Government lands for the benefit of the chiefs and people. The Crown lands, originally reserved as the King's private lands in the Māhele and made inalienable under an 1865 act, provided a source of income and support for the Crown. After the illegal overthrow of the Hawaiian Kingdom in 1893, and with the subsequent establishment of the Republic of Hawaii in 1894, the Republic claimed all Government and Crown lands. In 1898, the Republic transferred or "ceded" the approximately 1.8 million acres of Government and Crown lands to the United States.

In 1959, the State Admission Act transferred a majority of the lands, about 1.4 million acres, to the State of Hawai'i to be held in trust – approximately 200,000 acres had been specifically set apart in the Hawaiian Homes Commission Act of 1920 for homesteading by native Hawaiians; the remaining 1.2 million acres were also impressed with five trust purposes, including "the betterment of the conditions of native Hawaiians."²

In 1994, the Housing and Community Development Corporation of Hawai'i (HCDCH) and the State were in the process of transferring two parcels of ceded lands – one on Hawai'i Island and the other on Maui – to private developers for residential housing. Although there had been transfers of ceded lands prior to this time, this was the first such proposed transfer after the passage of the 1993 Apology Resolution and similar state legislation.

In the Apology Resolution, Congress apologized to the Native Hawaiian people for the overthrow of the Kingdom of Hawai'i with the participation of agents and citizens of the United States and expressed its "commitment to acknowledge the ramifications of the overthrow . . . in order to provide a proper foundation for reconciliation between the United

States and the Native Hawaiian people.”³ Congress specifically recognized that the ceded lands were taken without the consent of or compensation to the Native Hawaiian people or their sovereign government and that “the indigenous Hawaiian people never directly relinquished their claims . . . over their national lands to the United States.”⁴

Thus, in 1994 and based on its understanding of the Apology Resolution, the Office of Hawaiian Affairs (OHA) filed suit against the HCDCH, its board members, the State, and the Governor to stop the transfer of the two parcels. Soon after, four individual plaintiffs – Pia Thomas Aluli, Jonathan Kamakawiwo’ole Osorio, Charles Ka’ai’ai and Keoki Maka Kamaka Ki’ili – also filed suit, and the court consolidated the two lawsuits. The plaintiffs sought to enjoin the State from alienating the two specific parcels of ceded lands and indeed any ceded lands from the public land trust. Alternatively, plaintiffs sought a declaration that the defendants were not permitted to sell or transfer ceded lands from the public land trust, or, if the defendants prevailed, a declaration that transferring or selling ceded lands would not limit future claims by Native Hawaiians to ceded lands.

The trial court issued a lengthy opinion validating the factual and historical basis for Native Hawaiian claims to ceded lands, but ultimately favoring the State. The court determined that the plaintiffs’ claims were barred by a number of jurisdictional and other defenses including sovereign immunity, waiver and estoppel, and justiciability. The trial court also concluded that the State had the express authority to alienate ceded lands.

Hawai’i Supreme Court Decision

On appeal, the Hawai’i Supreme Court disposed of each procedural and jurisdictional issue, finding in favor of OHA and the four individual plaintiffs. Central to the Court’s decision was its interpretation of the 1993 Apology Resolution, as well as Hawai’i legislative acts, recognizing the claims of the Native Hawaiian people to ceded lands. Contrary to the State’s position that the Apology Resolution was a mere policy statement, the Court found the Resolution to have the force of law because it resulted from legislative deliberations and proceedings. The Court concluded that while the Apology Resolution does not require that ceded lands be turned over to the Native Hawaiian people, it does recognize that Native Hawaiians have unrelinquished claims to the ceded lands.

Moreover, the Court reasoned, the Apology Resolution and analogous State acts give rise to the State’s fiduciary duty to preserve the ceded lands until the claims of Native Hawaiians are resolved. The Court stated, “such duty is consistent with the State’s obligation to use reasonable skill and care in managing the public lands trust” and the State’s conduct should be judged “by the most exacting fiduciary standards.”⁵

While the Court’s major pronouncements were based on the Apology Resolution, a federal law, the Court was careful to separately ground its decision in Hawai’i state law. The Court specifically pointed to Acts 354 and 359, both passed in 1993, in which the legislature recognized that “the indigenous people of Hawai’i were denied . . . their lands” and made other findings similar to those of the Apology Resolution.⁶ The Court also found support for its decision in Act 329 (1997), designed to clarify the proper management of lands in the public

land trust, and Act 340 (1993), requiring that the island of Kaho‘olawe be held in trust and transferred to a sovereign Native Hawaiian entity in the future.

In sum, the Court stated:

In this case, Congress, the Hawai‘i state legislature, the parties, and the trial court all recognize (1) the cultural importance of the land to native Hawaiians, (2) that the ceded lands were illegally taken from the native Hawaiian monarchy, (3) that future reconciliation between the state and the native Hawaiian people is contemplated, and (4) once any ceded lands are alienated from the public land trust, they will be gone forever.⁷

In deciding whether a permanent injunction should issue, the Court stated, “Obviously, without an injunction, any ceded lands alienated from the public lands trust will be lost and will not be available for the future reconciliation efforts.”⁸ Significantly, the Court recognized that money reparations in lieu of the lands themselves would not be an adequate remedy because of the inextricable bond between the Native Hawaiian people and the ‘āina:

‘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.⁹

Ultimately, the Court found that the plaintiffs had met all the requirements for an injunction “pending final resolution of native Hawaiian claims through the political process.”¹⁰ The Court sent the case back to the trial court with instructions to issue an order granting an injunction prohibiting the defendants from selling or otherwise transferring the specific lands involved and any other ceded lands from the public lands trust until the claims of Native Hawaiians to the ceded lands have been resolved.

Petition for Review to the U.S. Supreme Court

On April 29th, the State of Hawai‘i announced that it would seek U.S. Supreme Court review of the Hawai‘i Supreme Court’s decision. The question for review as framed by the State is whether the Apology Resolution, which the State characterizes as a “symbolic resolution,” strips the State of its sovereign authority to alienate “29 percent of the total land area of the State and almost all the land owned by the State”¹¹ unless and until it reaches a political settlement with Native Hawaiians. The petition goes on to argue that the Hawai‘i Supreme Court “badly misconstrued congressional intent” in enacting the Apology Resolution and “raised grave federalism concerns.”¹²

Conclusion

The State's action in petitioning the U.S. Supreme Court for review makes clear that many difficult challenges lie ahead for the Native Hawaiian people. These complexities will best be approached as the Hawai'i Supreme Court did in this landmark decision: with a full understanding of the history of Hawai'i and the importance of ceded lands in the reconciliation process.

Note: On October 1, 2008, the U.S. Supreme Court granted the State's petition for review. Briefing in the case is on-going and oral arguments are expected to be held in late February or early March 2009.

¹ OHA v. HCDCH, 117 Hawai'i 174, 177 P.3d 884 (2008).

² Section 201(a)(7) of the Hawaiian Homes Commission Act ("HHCA") defines a native Hawaiian as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778" and § 5(f) of the Admission Act specifically references this definition from the HHCA.

³ P.L. 103-150, 107 Stat. 1510 (Nov. 23, 1993).

⁴ P.L. 103-150, 107 Stat. 1510 (Nov. 23, 1993).

⁵ OHA v. HCDCH, 117 Hawai'i 174, 195, 177 P.3d 884, 905 (2008).

⁶ OHA v. HCDCH, 117 Hawai'i 174, 194, 177 P.3d 884, 904 (2008).

⁷ OHA v. HCDCH, 117 Hawai'i 174, 213, 177 P.3d 884, 923 (2008).

⁸ OHA v. HCDCH, 117 Hawai'i 174, 214, 177 P.3d 884, 924 (2008).

⁹ OHA v. HCDCH, 117 Hawai'i 174, 214, 177 P.3d 884, 924 (2008) citing the trial court (citation omitted)(emphasis in the original).

¹⁰ OHA v. HCDCH, 117 Hawai'i 174, 218, 177 P.3d 884, 928 (2008)

¹¹ Petition for a Writ of Certiorari at (i), *State of Hawaii v. Office of Hawaiian Affairs*, U.S. Sup. Ct. No. 07-1372.

¹² *Id.* at 3.

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