

Reference Material: General (3 of 3)

Senator Daniel K. Inouye Papers

Kaho'olawe, Box KL3, Folder 2

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6/29/92 Meeting on Kaho'olawe Case
Kaho'olawe

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HOOLEHUA

96729

Mr. Akutagawa

Enterprise #.

↓ Billy -5217

Kaho'olawe

6-29-92

- 1)
- 2) Ordinance clearance
- 3)

extended
life of the Commission

5 years.

\$ 70-75 million

Kendall

120 people

Based on plans formed by
Senate Bill and Commission
for a "limited use park"

Feel. Responsibility → what

NEPA requirements? EIS necessary?

No, subject to challenge.

off-shore ordinance is a separate
issue.

Bill
Team
Campbell

Scott Parker @ Yale SOM

Super
Sanctuary

critical habitat vs. single species humpback

need Summit State, Congress, NOAA

Someone visiting after State

Alula / Pat DeLeon / Limoni

Wash Court Hotel
People of Color.

Roger Betts, Exec Sec

\$.5 mill studies by Commission

King (Hist)
Barbara

Sam King. English, Army free spiders.

\$ 200,000 study ordinance removal

Chair
held → Joel August. Main firm views this Commission
as end by Congress

State does not have a good track record
on gathering rights -

Ask Keoni Fairbanks about Kahoolawe.

Fisheries Council -

Fishing rights carried at a federal
level then Native fishing will
fit in better w/ Indian/salmon type -

find out reef ecosystem w/ Kahoolawe
limited access → court -

NOAA must make recommendations by next
month -

Hannibal Tavares support → Repub. Support.

Claim (Name)

530-5744

WENDER.

Signature

task - develop technology
depend - 7 yr development program
fund - hasn't be continuous -

12m - 7 yr program
JAN - Sept - no continuity -

FI ISLAND

AUG-82

SENATOR: I CALLED THE NAVY TODAY TO SEE WHERE THE KAHOO LAWE ORDNANCE REMOVAL PROJECT STANDS. EVIDENTALLY, LITTLE PROGRESS IS BEING MADE BECAUSE SOME FUNDAMENTAL QUESTIONS HAVE NOT BEEN RESOLVED. e.g. WILL THE MILITARY DISPOSE OF THE PROPERTY AFTER THE ORDNANCE IS REMOVED? HOW DO YOU HANDLE ORDNANCE IN, AROUND AND UNDER THE 'SACRED' PLACES? THIS BRIEFING SHOULD BRING US UP TO DATE.

FRANK

CO Naval Eng and
design and tech ctr
Johnnie Paul MD
20640
Capt Paul Paul

Jim Hershby
Legislative affairs

48 U.S.C. 3511

United States v. Chun Chin, 150 F.2d 1016 (9th Cir. 1944)

condemnation not appropriate, proceeding to acquire land for use of U.S., where land was in possession + control of tenants, but could be set aside by Pres.

808-948-7213 (9205)

→ Report of agent of crown lands.

808-948-7213 Reference
→ Chapman

1,000,000

King's lands - $\frac{1}{3}$ ~~to go~~ of portion cultivated to go to tenants, if they wanted,

Remainder

$\frac{1}{3}$ to govt

$\frac{1}{3}$ to nobles (chiefs + land agents)

$\frac{1}{3}$ to tenants farmers

1,500,000

1,500,000

(30,000
mt of
done)

could also retain $\frac{1}{3}$ proportionate share of govt land.

Great Mahale - Jan 27 - March 7, 1848. King + 245 Mahale grants, nobles traded off land - 1,500,000 acres to
March 8, 1848 - king set off 1,500,000 as "government" lands ^{revenue} incl of 1,000,000 reserved for himself (Crown lands)

... Title to land

Annexation -

Ceded lands - most part crown
each conveyed for particular
purpose. If purpose terminates,
or becomes superfluous,
diminished, then

Invent
Pol Act

Phil
McMurdery
42993

Lighthouse only -

Stamp

Ced Gannon
4265060

What effect does the
E.O. have. Can
Chief Exec. change
use of island. If
cannot, then what
effect does Navy
occupation have. State
has not requested
return.

Red govt to remedy - State can
base.

Ray Hopper
Personnel
Central office
Bureau of Med + Surgery

Pl. 86-3 4 USC 48 (prec. 491 nt)

Margaret Goodman - 426-6003

Hawaii Hist Land Law -

George Costello - 6006

Jane Rubin 6012

Robert Meltz "

RECOMMENDATIONS ON WHAT TO SEND PEOPLE ABOUT KAHOOLAWE

(List devised by Rick 10/77)

- * February 1976 Newsletter.
- * Executive Order 10436.
- * Executive Summary of Kahoolawe Cleanup Study (8 pages including map and table of projected costs).
- * Kahoolawe Cultural Inventory 2/10/77, or any updated version.
- * Press Release on Navy plan to phase out live ammunition (5 pages including cover letter dated 4/7/77 by DKI and letter to DKI from Navy Secretary Claytor).

Insert
A

When Hawaii became a state, the United States conveyed to the new State essentially all lands ceded to

Under the terms of the Hawaiian Statehood Act (P.L. 86-3, 73 Stat. 4, March 18, 1959) the United States conveyed to the new State essentially all lands which had been ceded it 1898, or acquired in exchange for lands so ceded, with certain exceptions. ~~The United States Section 5 of the Act~~ Included among the exceptions--in other words, land to which the United States retained title--~~are~~ were "Any lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United States under any... (2) Executive Order,...." Since executive Order 10436 of Feb. 20, 1953 was still in effect at that time, as it is today, Kohoolawe was among the exception to the general transfer to title to the States, and title to it therefore remains vested in the United States.

insert
B

1901 to Present

The United States took possession of Kohoolawe briefly during world war I. Then, in 1928, ~~it~~ it took possession of some 23.3 acres for lighthouse purposes under Presidential Proclamation No. 1827 (Feb. 3, 1928). The United States' possession of the remainder of the island dates back to 1941 when the ;U.S. Army took possession under a sublease of May 10, 1941. ~~and~~ ~~supplemental~~ This sublease was supplemented by an agreement of March 1, 1944 and then transferred to the Navy ~~it~~ on November 1, 1945. It remained in effect until terminated on October 28, 1952 by Presidential Proclamation 2487. Subsequently, by Executive Order 10436 of Feb. 20, 1953, the entire island, with the exception of that portion previously taken for lighthouse purposes, was taken for the use of the United States for naval purposes and placed under the jurisdiction of the Secretary of the Navy.

You have raised the question of whether the United States government's title to K. might be subject to a condition, the happening of which might cause title to the island to revert to the State of Hawaii.

As far as I have been able to determine, K. was among the lands ceded unconditionally to the United States and the United States has never renounced ~~this title~~ or in any way attempted to surrender this fee simple title to the island.

Further, it appears that ~~the island has always~~ at all times since the Great Mehele the island has been "government" or "public" land ~~as opposed to "crown" lands~~ belonging to the monarchy or lands ~~turned over to private ownership.~~

Early History to 1897

The land system which existed in Hawaii at the time it was discovered by Captain Cook in 1778 had no concept of fee simple absolute ownership of land and all landholdings were considered revocable. ~~On the death of a chief, for example, his successor was free to redistribute the land under his control among his subordinate chiefs. The land formerly controlled by the dead chief~~

~~Land controlled by a high chief, for example, did not necessarily~~

Land controlled by a high chief, for example, did not necessarily descend to his heirs upon his death. Instead, the chief's successor was free to redistribute the land among his subordinate chiefs as he saw fit. Similarly, a chief who gained control of new territory ~~as a result of the frequent warfare of the time~~ *by conquest* had no obligation to recognize existing interests in the land but instead could reassign it to his own supporters.

During the period 1778-1846, Hawaii became something of a trading center and the capital thus accumulated, largely by Westerners rather than the local population, was directed towards the development of large scale plantations in the islands. Westerners entering Hawaii's land system as foreign settlers were "given" lands by the king or chiefs in return for services or simply out of traditional Hawaiian generosity. As Westerners acquired land and invested capital they also created enormous pressures to have the kingdom adopt ~~the~~ Western systems of landholding so their interests could be protected and the land ~~could be~~ freely transferred.

The islands' first written ^{constitution} ~~constitution~~, adopted in 1840, and the laws immediately enacted pursuant to it, attempted to adjust lands rights to the changing social and economic situation. As an attempt to limit Westerners' rights to land, however, the constitution reaffirmed that no land could be conveyed without the consent ~~of~~ of the monarch, stating:

Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I. was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest ~~portion~~ *part* of land without the consent of the one who had, or has the direction of the kingdom.

To avoid a confrontation with the Westerners, however, the constitution's preamble ~~proclaimed~~ proclaimed that land already held by them would not be reclaimed by the crown.

Despite the concessions made in the 1840 constitution, however,
The pressures to adopt a more westernized land tenure system continued unabated. ~~The~~ The government finally responded in

1845 by enacting a law which established ^{ing} a Land Commission, ~~with a~~ mandate ~~was~~ to undertake "the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners,..."

The basic job facing the Land Commission was to devise and then put into effect a system partitioning the undivided and intertwined interests of the king, chiefs and commoners in the land not already granted to foreigners.

Ultimately, a policy was proposed and accepted by the king whereby certain land would be held by the monarch in his own right ~~and~~ (ultimately referred to as "Crown lands") and the remainder would be divided in thirds, one-third to the government, one-third to the ~~chiefs~~ chiefs and land agents and one third to tenant farmers. During the period January 27 to March 7, 1848, the Great Mahele or land division took place, dividing land between the king and the chiefs. Immediately thereafter, on March 8, 1848, the king divided all of the land ~~to~~ to which he then had title between himself and the government. When this process was completed, ~~the~~ the chiefs and land agents had been given some 1,500,000 acres of the more than 4,000,000 acres of land in the ~~kingdom~~ kingdom; the king had retained some 1,000,000 acres ^{for} for himself as ~~government~~ crown lands; and some 1,500,000 acres ^{had been} set aside as "government" land. Tenant farmers were entitled to claim a portion of the crown lands ~~and~~ and lands conveyed to the chiefs and land agents, ~~cultivated~~ ^{cultivated} by them, but they ultimately ended up with only about 30,000 acres. *"really cultivated" by them, plus a house lot of not more than 1/4 acre,*

The land transfers which took place during the Mehele were recorded in ~~a book~~ the Mahele Book. ~~With reference to K, there is a reference at Page 200 of the Mahele Book~~ ^{here is a notation} which says "Kahoolawe no Aupuni G.P. Judd", which translates to "Kahoolawe for the Government G.P. Judd (Mr. Gerrit P. Judd was the committee of one who had been earlier appointed by the Privy Council to receive reports on lands belonging to the king).

~~K~~ K was among the property which the king conveyed to the government on March 8, 1848, immediately after the Mahele. This was done by a deed which recited, in part, as follows:

Know all men by these presents, that I Kamehameha III by the grace of God, King of these Hawaiian Islands, do hereby give, make over and set apart forever to the chiefs and people of my kingdom, and convey all my right, title and interest in the lands situated here in the Hawaiian Islands, inscribed in pages 179 to 225, both inclusive, of this book, to have and to hold to my chiefs and people forever."

This deed appears at page 225 of the Mahele Book and incorporates by reference the ~~above~~ ~~notation~~ ~~regarding~~ K.

By Act of June 7, 1848, the Hawaiian legislature accepted "in the name of the Chiefs and People of the Hawaiian Islands" the lands granted by King Kamehameha III, ~~including~~ including, by specific reference, the island of K.

1849 to 1900

representative

~~challenge~~
After seizing power,

The Hawaiian monarchy came to an end on January 17, 1893 and was replaced with a provisional government dedicated to seeing Hawaii made a part of the United States. The annexationists rushed off to Washington, hoping that President Benjamin Harrison would be able to prod the United States Senate into ratifying a treaty of annexation before his term expired and President Grover Cleveland, an avowed opponent of annexation, took office on March 4. This effort was unsuccessful, and annexation then had to wait until the republican administration of William McKinley took office in 1897.

In the meantime, the leaders of the provisional government established a republic under a constitution which became effective on July 4, 1894.

Then, on June 16, 1897, representatives of the Republic of Hawaii and of the United States signed a treaty of annexation. President McKinley forwarded the treaty to the United States Senate with a ~~message~~ supporting message from himself and from the Secretary of ~~the~~ State.

The Hawaii Senate for its part ~~acted promptly~~ and promptly ratified the treaty and forwarded it to ~~the~~ the Hawaiian President, Sanford Dole, who signed it on ~~the~~ September 10, 1897. A copy of the treaty is attached.

The annexationists feared that they would not be able to get the necessary two-thirds vote in the United States Senate necessary for ratification, however. They therefore followed a precedent established when Texas was annexed in 1845, and ~~had~~ Instead of seeking to have the treaty ratified, they ~~had~~ ~~annexationists~~ obtained a joint resolution of annexation, ~~requiring~~ a procedure requiring only a majority vote in each house of Congress.

The Joint Resolution of Annexation, a copy of which is attached, was enacted on July 7, 1898,

Article II of the treaty provides, in pertinent part, as follows: The Republic of Hawaii also cedes and hereby transfers to the United States the absolute ownership of all public, government, or Crown lands, public buildings, or edifices, ports, harbors, military equipments, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenances thereunto appertaining.

The Joint Resolution does not make specific reference to this legislative act, but it does recite that the Government of the Republic of Hawaii had "in due form, signified its consent, in the manner provided by its constitution, " to cede all sovereignty over the ~~the~~ Republic

The Joint Resolution does not refer to the treaty directly. It does recite, however, that the Joint Resolution to an action "in due form, ... in the manner provided by its constitution

~~Except for minor changes required by those changing the operative document~~

The Joint Resolution ~~does not~~ make specific reference to the treaty. ~~It does~~ recite, however, that the ~~government~~ government of the Republic of Hawaii had acted "in due form, ... in the manner provided by its constitution" ~~and then~~ picks up the language of the treaty ~~almost~~ almost exactly as it appears in the treaty.

over

from a treaty to a resolution should be noted

It should be noted that Memorandum of Title prepared by Mr. Herbert Evalike and dated March 9, 1897, a copy of which is attached, recites that the United States is vested with fee simple title to K. under Article II of the Annexation Treaty

Navy is obligated to ~~make~~ render the unneeded portion reasonably safe for human habitation, without cost to the State.

It should be noted that this paragraph provides no automatic reversion to the State. Instead, the Navy can hold onto the entire island as long as it is needed for naval purposes. Then, even if it determines that it no longer needs all or any portion of the island, and the State makes a "seasonable" request, its only obligation is to render the unneeded land reasonably safe for human habitation, at its own expense. Although presumably the State would then again have possession and control of the land so cleared, title to it would remain in the United States. As of the present time, of course, the Navy is strenuously insisting that it has a continuing need of Kohoolawe ~~land~~.

At the time Hawaii became a state, the United States owned ceded property which had been "set aside" and other ceded property which had not been set aside nor conveyed to the ~~territory~~ Hawaii. The United States held merely the naked title to the latter type of property, since, pursuant to section 91 of the Organic Act of 1900, the possession, use and control remained with the territory.

When Hawaii became a state, the United States conveyed to the new State ~~essentially all lands~~ essentially all lands ^{which had been} ceded to it, or acquired in exchange for lands so ceded, ~~with the~~ But not all ceded ~~exceptionz~~ certain exceptions, including such lands which ~~had been set~~ lands were returned to the State. ~~aside for the use of the United States by an act of congress,~~ Specific exceptions were made to the general grant, the by Executive Order, or by certain proclamations.

See attached sheet insert "A"

Section 5 of the Hawaiian Statehood Act (P.L. 86-3, 73 Stat. 4, March 18, 1959) sets forth the general scheme by which all ceded land, with a variety of stated exceptions, is conveyed to the new State. Section 5(c) exempts from this general grant lands which had been set aside for the use of the United States by executive order. Since executive order 10436 of Feb. 20, 1953 was still in effect at that time, as it is today, Kohoolawe was among the exceptions to the general transfer of title to the State, and title to it therefore remains vested in the United States.

^{as a precondition to statehood,} Further, section 7 of the Hawaiian Statehood Act requires that certain propositions be placed before the electors of the territory, that they be duly adopted and ~~become~~ become effective as amendments to the State constitution. Had the electors failed to adopt the propositions set for in Section 7 of the Act, the provisions of the Act would no longer have been effective and Hawaii could not then have become a State. The third of the three propositions submitted for adoption provided as follows:

All provisions of the Act of Congress approved

(Date of Approval of this Act)

reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people.

By ratifying this provisions, the people of the territory ~~again~~ affirmed the statutory plan set forth in Section 5 of the Act and gave just that much additional ratification, if such was necessary, to the United States' title to Kohoolawe.

Subsequent to statehood, ~~a procedure~~ a procedure was established by legislation (P.L. 88-223 of December 23, 1963) by which excess land could be conveyed to the State of Hawaii, but this relates only to land determined to be "surplus" and is therefore not relevant here.



Kaho'olawe

Aloha 'Āina

Published by the Protect Kaho'olawe Fund

SPECIAL EDITION: Kaho'olawe Island Conveyance Commission Hearings / April 1991

If you have touched or been touched by Kaho'olawe, now is the time to step forward and kokua the island. Come to the Kaho'olawe Commission hearings and share your mana'o - verbally or in writing - about any or all of the following concerns:

1. Why Kaho'olawe is important to Hawaiian culture, beliefs, customs and practices.
2. The rich natural resources and cultural sites on the island and the ocean around it.
3. Why military use of Kaho'olawe should stop altogether - forever.
4. How the island can be used in the future for our people especially our 'opio.
5. Who should control and manage Kaho'olawe in the future - the State of Hawai'i? the federal government? the Hawaiian Nation?
6. How the Protect Kaho'olawe 'Ohana should continue to work as stewards for the island.

YOU WANTED TO STOP THE BOMBING . . . WELL IT STOPPED:

On October 22, 1990 President Bush directed the Secretary of Navy to "discontinue use of Kaho'olawe as a weapons range effective immediately." On November 5, 1990 Congress, with President Bush's signature, enacted Senate Bill 3088 which stated that Kaho'olawe "may not be used for bombing training, gunnery training, or similar munitions delivery training" from November 5, 1990 until 120 days after the date on which a final report by the Kaho'olawe Island Conveyance Commission is submitted to Congress - April 4, 1993.

. . . BUT ONLY FOR 2 YEARS AND 120 DAYS

Unless and until Executive Order 10436 is rescinded, or Congress extends its ban on bombing, Kaho'olawe will not be safe. The Navy can start bombing on April 5, 1993. We must turn out and speak on behalf of Kaho'olawe to make sure that the Commission's report to Congress will say to stop military abuse of Kaho'olawe forever and give Kaho'olawe back to the Hawaiians. Don't hold back. Now is the time to speak out.

THE COMMISSION HEARINGS ARE A BEGINNING:

There's a lot of work to heal Kaho'olawe. It's going to be hard to get the Congress and the President to make the Navy stop using the island, clean it up and give it back to the Hawaiians. These hearings are the beginning. Over the next two years, the Commission and the 'Ohana will plan for ordnance clearance, natural resources stewardship, cultural resources stabilization and restoration. We will look at ways to have the island come under sovereign control of Native Hawaiians. After the findings and recommendations are submitted it will take at least another year of lobbying to get Congress and the President to accept them. The Commission needs to hear what the community wants in order to include it in their planning and their report. The call is going out - Moloka'i Nui A Hina, Hawai'i Moku O Keawe, O'ahu, Maui, Kaua'i, Lana'i. Ho'olohe . . . Pane mai. Hear . . . Answer . . . Come out. Let's focus on Kaho'olawe again - until she's home safe with us.

KAHO'OLAWE CAN CHANGE FROM JUST A SYMBOL INTO AN ACTUAL PRECEDENT FOR ALOHA 'AINA, SPIRITUAL PRACTICES AND HAWAIIAN RIGHTS

Kaho'olawe helped to activate and organize Hawaiian grassroots movements for Aloha 'Aina kuleana issues on all our islands. Kaho'olawe can help puka through for a Hawaiian sovereign land base. We can also set precedence for recognizing traditional and spiritual Hawaiian customs, beliefs and practices on the island. In addition, Native Hawaiian gathering and fishing rights in natural area land and marine reserves will get special standing and acknowledgement on and around Kaho'olawe.

WHO IS THE KAHO'OLAWE ISLAND CONVEYANCE COMMISSION?

The commission has five members. The chairperson is Hannibal Tavares, who as Mayor of Maui County lobbied hard to return Kaho'olawe to Hawai'i. Noa Emmett Aluli, physician from Moloka'i and a founding member of the Protect Kaho'olawe 'Ohana is the Vice-Chairperson. The other three members include Frenchy DeSoto, early member of the Protect Kaho'olawe 'Ohana and trustee for the Office of Hawaiian Affairs; James Kelly, president of EAP Associates, an international consulting firm focussed on Southeast Asia and member of the National Security Council under President Reagan; and Howard Stephenson, chairman and chief executive officer of Bancorp Hawai'i, Inc. and its principal subsidiary Bank of Hawai'i. and a member of the UH Board of Regents.

HOW IS THIS COMMISSION DIFFERENT FROM OTHER COMMISSIONS?

The Native Hawaiian Study Commission had a majority of members who were haole, from the mainland. This Commission has a majority who are local and who have worked to stop the bombing of Kaho'olawe for the past ten to fifteen years. The majority can prevail in the final report.

HOW IS THIS COMMISSION SIMILAR TO OTHER COMMISSIONS?

Like the State-Federal Task Force on the Hawaiian Home Lands which had a majority of Hawaiians and came up with an excellent report, the success and implementation will be depend upon the follow-up by Congress and the President of the United States.

WHAT DOES THE 'OHANA WANT FOR KAHO'OLAWE?

The 'ohana's priority is to heal Kaho'olawe. The ordnance has to be removed, the cultural sites have to be stabilized, soil erosion has to be stopped, ground cover and trees need to be planted, the native birds need to be attracted back to the island, and the surrounding marine life needs to be protected.

HOW SHOULD THE ISLAND BE USED?

All commercial use of the island and surrounding ocean must be banned. The 'Ohana envisions use in the following ways:

Wahi Pana - a traditional sacred place of the Hawaiian people.

Pu'u'honua - place of refuge for Hawaiians from all walks of life to visit and experience the warmth and comfort of the land, practice aloha 'aina and get back in touch with our spirituality as Hawaiians.

Natural Land and Marine Reserve With Guaranteed Native Hawaiian Access - restore and re-establish the natural resources of the land with native species of flora and fauna. Establish a marine sanctuary around the island. Recognize Native Hawaiian access and gathering rights on and around Kaho'olawe.

Cultural Learning Center - traditional cultural and spiritual customs, beliefs and practices can be freely exercised and flourish.

WHO SHOULD HAVE JURISDICTION OVER KAHO'OLAWE?

Kaho'olawe, as land that was taken away from the government of the Hawaiian Kingdom is part of the ceded public lands. It is rightfully Hawaiian land.

Under terms and language in Presidential Executive Order 10436 and the Admissions Act, the land is to be returned to the state government, in a condition reasonably safe for human habitation, when the military no longer needs and uses the island for training. However, as with all ceded lands in Hawai'i, the Protect Kaho'olawe 'Ohana believes that the island should be part of a Hawaiian land base under the sovereign control of the Hawaiian nation.

We feel confident that the Hawaiian nation will eventually be recognized and re-established. Ka Lahui Hawai'i, Office of Hawaiian Affairs or Hawaiian Home Lands are existing entities for self-determination and sovereignty. Jurisdiction of the ceded lands may pass to one, all or some new combination of these groups. Kaho'olawe should be included in that ceded land base for the nation. In the meantime, while this is being worked out, Kaho'olawe should be held in trust for the nation. It can be land banked by the federal government, the state government or private trust such as the Protect Kaho'olawe 'Ohana.

The 'Ohana would like a survey of the various forms of jurisdiction and title enjoyed by Native Americans which could serve as options for Kaho'olawe - federal trust title (most

Indian reservations); federally-restricted title (some Indian lands); federally-protected title (Alaska Native corporation lands), state trust title (some Indian reservations), or private land trusts.

It will take a lot of money to clean-up, manage, protect and restore the island's natural and cultural resources. Rather than have Kaho'olawe turned over to the state government, it may provide more protection to the island to have an agency of the federal government, other than the military, to hold the island in trust for the Hawaiian nation. The Department of the Interior or the National Parks Service might provide reasonable alternatives.

Having an agency of the state government, such as the Department of Land and Natural Resources or the Office of Hawaiian Affairs assume control of the island may complicate the process of turning it over to the Hawaiian nation - in the long run.

WHO SHOULD MANAGE/PROVIDE STEWARDSHIP OF KAHO'OLAWE?

No matter who controls Kaho'olawe - the federal government, the state, or the Hawaiian Nation - the Protect Kaho'olawe 'Ohana has demonstrated the commitment, perseverance and expertise to manage the resources of the island. The Protect Kaho'olawe 'Ohana should continue to serve as steward for the island, as it has for the past ten years.

WHAT HAS THE 'OHANA DONE OVER THE PAST TEN YEARS UNDER THE CONSENT DECREE?

We have taken over 3,000 visitors to the island for educational, religious, cultural, and scientific activities. Annual Makahiki ceremonies have been conducted to Lono for the past ten years on re-established heiau in Hakioawa, and Moa'Ula. Other religious customs and practices to Kanaloa, Papa and patron deities of fishing, navigation and carving are regularly carried out on a personal basis by 'Ohana members. The Hakioawa camp site has been improved to include a pa hula, and a traditional halau (still under construction). Trails to major cultural sites on the island are maintained. Water catchments to irrigate planting sites have been constructed. Revegetation of native plant species has begun. An 'Ohana water study has revealed a ground water source of over 13 square miles and rainfall of approximately 24 billion gallons a year. Under 'Ohana monitoring, the Navy has gotten rid of almost all of the goats on the island.

HOW MUCH OF THE ISLAND SHOULD BE CLEARED OF ORDNANCE?

The entire island and the surrounding ocean should be cleared of surface ordnance. Areas to be used for camp sites, site stabilization, trails, and revegetation projects should be cleared of sub-surface ordnance.

IS ACCESS TO KAHO'OLAWE OPEN?

To protect the island's valuable and vulnerable cultural and natural resources access to the island is still open on a limited basis only through the 'Ohana. The offshore waters are closed during the week but open on weekends. Landing on the island is prohibited. Upcoming access dates are: Thursdays - Sundays, April 25 - 28; May 16 - May 19; June 20 - 23; July 25 - 28; August 22 - 25; and September 19 - 22. Contact your 'Ohana coordinator listed on the back if you want to go and for future monthly access dates.

HOW CAN YOU HELP?

Get your family and friends to the hearings, organize small meetings for showing of old and new videos, get ready for second round of Commission hearings to comment on the draft of their findings and recommendations in August-September 1992.



WE MUST REMAIN VIGILANT. BEGIN TO RESETTLE THE ISLAND AND BE PREPARED TO OCCUPY IT IF THE NAVY TRIES TO START BOMBING AGAIN !

THE RETURN OF KAHO'OLAWE

by Noa Emmett Aluli, M.D. - physician in family practice on the island of Moloka'i and founder of the Protect Kaho'olawe 'Ohana

On October 22, 1990, President Bush directed the Secretary of the Navy to discontinue use of Kaho'olawe as a weapons range. On November 5, 1990 Congress enacted Senate Bill 3088 which stated that the Island not be used for bombing training for two years and 120 days. It also established a Commission which would recommend the terms of returning the Island to the State.

For 15 years, the Protect Kaho'olawe 'Ohana led the native Hawaiian and general public protest to end the desecration of the 'aina/land; to preserve the 600 archaeological sites and 2,000 features; and to better manage and control soil erosion with better conservation practices and programs. Today, members of the Protect Kaho'olawe 'Ohana remain committed to permanently end the bombing and to return control of the Island to the people of Hawai'i.

The Protect Kaho'olawe 'Ohana has persevered to oversee the Island's cultural and natural resources despite personal and collective sacrifices. Beginning in 1976, we carried out a series of occupations of the Island. These led to arrests and lengthy and expensive court defenses. Our members were sentenced to imprisonment or they were barred from ever returning to Kaho'olawe. In some instances our family, friends and community ostracized us. The hardest loss we had to endure was the tragic disappearance of George Helm and Kimo Mitchell, apparently in the waters surrounding the Island, in their effort to stop the bombing.

In 1976, the 'Ohana filed a federal civil suit which sought compliance with environmental, historic site and religious freedom protection laws. By 1977 the court required the Navy to conduct an environmental impact statement; identify, inventory and protect the historic sites of the Island; submit for nomination to the Secretary of the Interior those sites which qualified for listing in the the National Register of Historic Places; and to refer to the Secretary for an opinion respecting the entire Island's eligibility for inclusion in the National Register.

In 1980, the 'Ohana partially settled this suit with a Consent Decree mandating the Navy to continue to survey and protect the historic and cultural sites; clear surface ordnance from 10,000 acres; begin soil conservation and revegetation programs; eradicate the goats on the Island; and limit the ordnance impact area to the central third of the island.

The role of the Protect Kaho'olawe 'Ohana as steward of the Island was acknowledged and we were allowed access to the Island four days of 10 months of every year for religious, cultural, educational and scientific activities.

Since the 1980 Consent Decree, the 'Ohana has taken over 3,000 visitors to Kaho'olawe. We have re-dedicated our ancestors' shrines, temples and places where we conduct religious ceremonies; cleared hiking trails; and established a permanent base camp on the northeast side of the Island as well as three temporary camps along the north and west side. 6,500 acres has been cleared of surface ordnance and all but three "judas" goats have been eradicated. Soil conservation and revegetation programs are helping to restore and revive the resources of Kaho'olawe

At the foundation of our work is the Hawaiian way of *aloha 'aina*: love, respect, caring for, and responsibility for our land. The 'aina and all of nature is our source of existence, not only as the origin of humanity, but also as the source of natural resources for day-to-day subsistence. The Hawaiian related to the land as an ancestor and dear friend, giving its various natural forms and features descriptive names just as they named their own children. They honored and worshiped the life forces of nature as gods. They did not possess or own the land or its abundant resources. This was inconceivable. Instead, they maintained stewardship over it - planting and fishing according to the moon phases and the changes from rainy to dry seasons.

Today is a real new age for Hawaiians. Young and even old, want to go back to their roots . . . want to get to understand their genealogy, knowing that they are descended from the gods. Kaho'olawe has been central to cultivating this kind of awareness. Just being on Kaho'olawe is actually a religious ceremony for a lot of people who have joined us on our accesses to the island. For us, Hawaiian religion is also a sovereign claim. It is the major claim for those of us in the Protect Kaho'olawe 'Ohana who have stuck it out for the past 15 years.

Kaho'olawe helped to activate and organize Hawaiian grassroots movements for *aloha 'aina* and rural island community concerns on all our islands. Now, with the ending of the bombing, there is the potential for the Kaho'olawe Island Conveyance Commission to work with the major players in state and national government to bring the island home to our people.

The Protect Kaho'olawe 'Ohana wants Kaho'olawe to set a precedent for a sovereign land base that would eventually come under the jurisdiction of a re-established Hawaiian nation. We also want to recognize traditional and spiritual Hawaiian customs, beliefs and practices on the island. Native Hawaiian gathering and fishing rights in natural area land and marine reserves may get special standing and acknowledgement for the first time around Kaho'olawe.

Kaho'olawe is a place that will always teach us about being Hawaiian - even in the modern Hawai'i we live in today. As more people make the time to visit the island they will also discover her beauty, her importance, and her significance. We invite anyone, but especially those who want to keep Hawai'i a special place for our families to live in, to join us on one of our monthly accesses to the island. We can be contacted at P.O. Box 62012 / Honolulu, Hawai'i 96839.

February 21, 1973

MEMORANDUM

TO: Honorable Richard A. Kawakami, Chairman
Committee on Water, Land Use and Development

FROM: Sunao Kido, Chairman and Member
Board of Land and Natural Resources

SUBJECT: H. C. R. No. 22 -- Requesting the Return of the Island of
Kahoolawe, Hawaii, to the State of Hawaii.

The Department of Land and Natural Resources is in accord with the concept expressed in H. C. R. No. 22 requesting the U. S. Navy to cease all bombing activity and to initiate the procedure for the return of the island of Kahoolawe to the State of Hawaii.

However, we should be cognizant that if Hawaii is to be the mid-Pacific base because of the U. S. Navy withdrawal from Japan, Korea, Okinawa and Philippines, then, Hawaii becomes even more significant from a strategic standpoint for the Pacific basin complex.

The deteriorating condition of Kahoolawe has been in progress since goats and sheep were permitted to over-graze the island. The termination of ranching activity did not halt the decline of the sparse vegetation. Goats and sheep left on the island continued nibbling away at edible plants. The goats and sheep population on Kahoolawe had been estimated as high as 5000 - 8000 as recently as 1970.

Under Presidential Executive Order No. 10436, the State is permitted reasonable access to Kahoolawe to carry out a conservation program. First of all, we need to ask ourselves, why a conservation program for Kahoolawe? Do we need to carry out a conservation program? What do we intend to accomplish?

February 21, 1973

At present, the vegetation on Kahoolawe consists primarily of kiawe trees and australian salt bush and esan grass. Several shrubs and herbs can be found but not widely. Approximately 1/3 of the island is denuded.

There is severe erosion on the bare plateau regions of Kahoolawe. This is clearly evident both from the massive gullies on the slopes and from visible sediment which clouds the water and cover the bottoms in the numerous coves of the north shore. Ground cover would arrest these adverse conditions. Without proper land conservation measures, Kahoolawe would not only waste away into the sea; its soil would pollute the sea.

Therefore, it shall be the policy of the State to carry out a conservation program as provided in Presidential Executive Order No. 10436. In view of today's concern for our environment, we cannot permit unchecked erosion to wash an island into the sea nor to permit pollution of our island waters.

The conservation program for Kahoolawe would, of course, bring about direct halt to almost a century of uncontrolled erosion. The present success of test plantings point to the feasibility of expanded plantings. New trees, shrubs and grasses can provide ground cover for erosion control. Additionally, more food and cover for birds will become available. Trees and other plantings will improve the appearance of the island. An arid island now almost a desert can be transformed into a productive land mass; this island could become a show place to illustrate our open space efforts. The entire island, at some future date, could provide an attractive setting for recreation opportunities--fishing, hiking, camping, picnicking, nature study, botanical research and other similar activities.

It is not intended that a massive short-term program to rehabilitate Kahoolawe be carried out. Rather, a long-term conservation program of 25 or even 50 years is recommended. This will not infringe on the U. S. Navy's use of Kahoolawe. As provided in the Presidential Executive Order, we should look to the return of Kahoolawe--and that, at such time, the island would be inviting and immediately useable for recreation. It is not improbable to consider the shift in the military posture of the U. S. through agreements with other nations, or development of newer military weapons that will preclude the need of Kahoolawe for bombing purposes. Perhaps, the military, too, will develop a conscience on environmental deterioration and seek an alternative method for this type of training.

SUNAO KIDO

TKT:hk

Gen:

You sent Abu-Haydar
a recent letter asking for an
update and urging cooperation
with Dhana on tree
planting. Do you want
this additional walking?
Eder

Kaho'olawe Cultural Resources
Inventory

Summary of Findings as of 10 February 1977

Dr. Robert J. Hommon
Archaeologist
Historic Preservation Office
Honolulu, Hawaii

In the 24 days so far spent on Kaho'olawe by the State archaeological team, about 4,100 acres (14% of the island) have been surveyed, 28 archaeological sites have been recorded, and one of these--number 109--has been salvaged. All sites except for 109 are likely to be eligible to the National Register of Historic Places.

We have discovered archaeological sites in the two regions surveyed: the central plateau and the northwest coast. Most of the sites on the severely eroded plateau consist of small hills or hummocks of top soil out of which cultural materials--artifacts, sea shells, charcoal, etc.--can be seen to be eroding and deposited on the red hardpan. Most of the coastal sites are located near the mouths of gulches and consist of clusters of platforms, terraces and stone enclosures that once served as foundations of pole and thatch structures and as working areas. These clusters are the remnants of small communities.

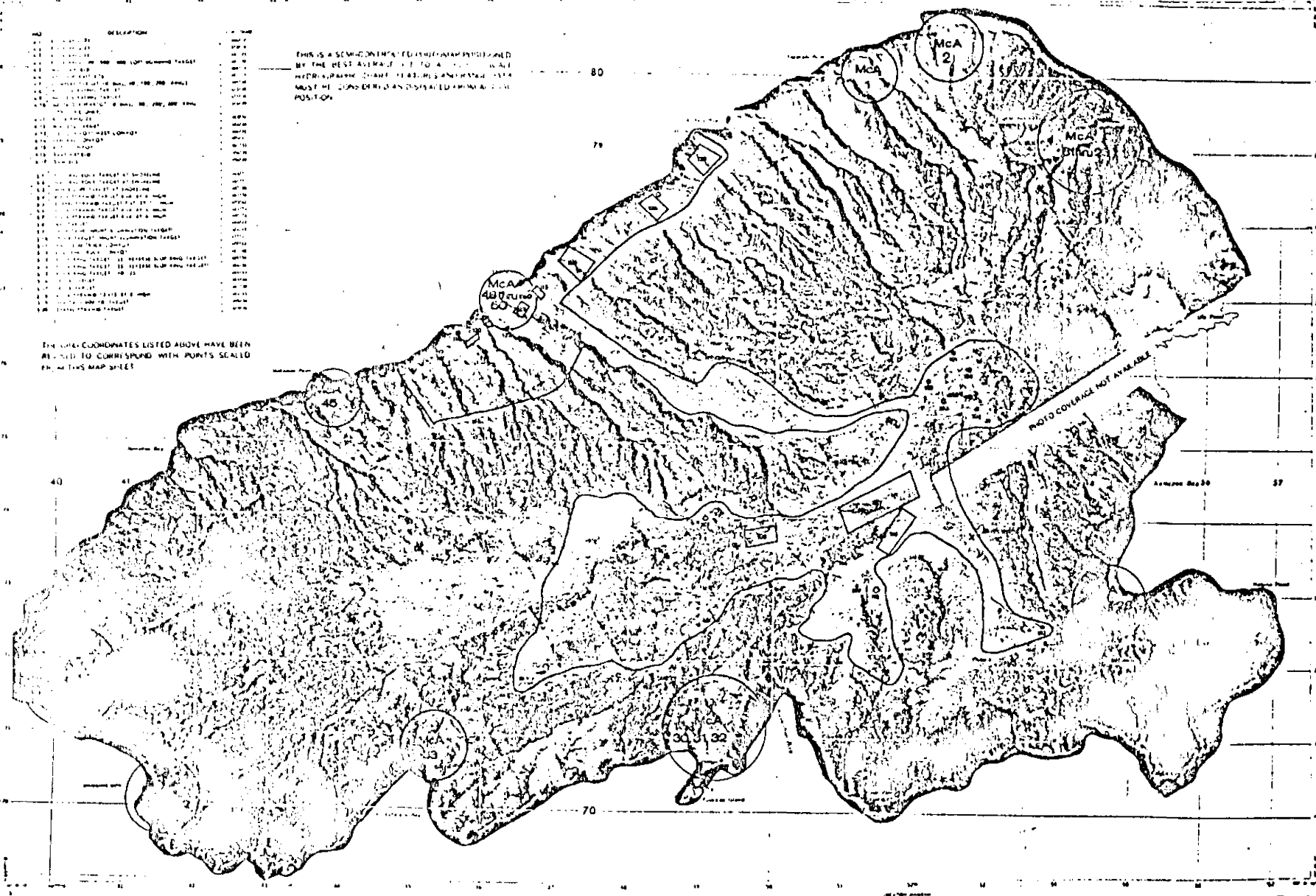
Despite the necessarily superficial nature of our investigation we have already gathered a great deal of unexpected information about the prehistory of Kaho'olawe and about ancient Hawaiian culture in general. Examples follow: 1) On the east slope of Pu'u Moiwi near the center of the island is an ancient quarry for stone adz heads that is second in size only to that on Mauna Kea. 2) Nearly all of the adz heads found at Pu'u Moiwi are of forms that are usually considered rare in the Hawaiian islands. An objective of future research will be to discover the significance of this fact. 3) The making and use of fingernail-sized cutting tools of basaltic glass (similar to obsidian) were major activities of ancient Kaho'olawe residents. One site contains an estimated 10,000 to 20,000 tools and fragments of this substance. Basaltic glass artifacts are extremely important because each can be dated quickly, accurately and inexpensively by a method developed here in Hawaii. We have already analyzed samples from five sites which reveal a minimum occupation span of more than 450 years; from AD 1150 to about 1600. Total period of occupation will almost certainly be more than 900 years: from AD 1000 or earlier to the present. 4) Before our investigations only one verified Hawaiian quarry for basaltic glass had been found (on Mauna Kea). We now have evidence of

numerous quarries on Kaho'olawe, one of which is a lava tube actually mined by the Hawaiians, unique in the islands. 5) Our investigations now indicate that Kaho'olawe was occupied on a permanent basis and parts of the central plateau may have been planted in sweet potatoes and other dry-land crops. This tentative conclusion contradicts the earlier views that most of the sites on Kaho'olawe are the remains of temporary fishing stations. Population density was probably equal to that of Lana'i. 6) Preliminary archaeological and geological evidence suggest that as recently as the late 1300s the water table was higher than at present, surface water was more abundant, present-day gulches were gently-sloping valleys, vegetation was more widespread, and conditions on the plateau were much more conducive to Hawaiian agriculture than at present. It is quite possible that large scale erosion and resultant environmental degradation was initiated by the introduction of goats to the island in the 19th century.

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THIS IS A SEMI-CONTINUED (HORIZONTAL) MAP PREPARED BY THE BEST AVAILABLE PHOTO AERIAL PHOTOGRAPHY. HYDROGRAPHIC CHART FEATURES AND OTHER DATA MUST BE OBTAINED FROM AN APPROPRIATE CHART POSITION.

THE UTM COORDINATES LISTED ABOVE HAVE BEEN REVERSED TO CORRESPOND WITH POINTS SCALD FROM THIS MAP SHEET.



Legend

White numbers with circles are targets
 Black numbers and symbols are Archaeological Sites
 Irregular area outlined in black is Area Surveyed
 for archaeological sites, 1976-77

Large Circles with "MCA" and numbers are sites identified by G. McAllister (1931)
 (Note: MCA 24, not shown, is near site 103; MCA 25, not shown, is near 11)

Senator,

For your information

Laurie

A handwritten signature in black ink, appearing to be 'Laurie', with a large loop at the top and several overlapping strokes.A handwritten signature in black ink, appearing to be 'JL', with a long vertical stroke on the left and a loop at the bottom.

Cose
Kahoolawe

3 AUG 1978

125/78
State
AG approval

FOR: EILER
LAURIE

THIS IS AN UNOFFICIAL COPY
OF THE LATEST VERSION BROUGHT TO
OUR OFFICE TODAY BY SUS ONE.
IT IS EXPECTED TO BE SIGNED NEXT WEEK.

MEMORANDUM OF UNDERSTANDING
PERTAINING TO THE ISLAND OF KAHOOLAWE

Dail

In a spirit of mutual cooperation, this memorandum of understanding has been signed to set forth common intent and objectives concerning the island of Kaho'olawe. The United States Navy and the State of Hawaii agree to implement the following regarding the island of Kaho'olawe:

- (1) The elimination of all cloven-hooved animals from the island;
- (2) A soil conservation program evolving from the cooperative experimental planting programs jointly conducted by the State of Hawaii and the U. S. Navy since 1970;
- (3) A program of continued cooperation between the Navy and the State in inventorying archaeological sites on Kaho'olawe which are eligible for inclusion in the National Register of Historic ^{Places} Sites;
- (4) The careful planning of operations by the Navy so as to avoid hazarding such sites;
- (5) The provision for reasonable support services and transportation by the U. S. Navy to carry out the above programs;

- (6) The continuance of efforts to develop other programs for mutual benefit; and
- (7) The development of specific management plans for performing the above; it being understood that the activities included in the management plans shall be accomplished speedily and cooperatively.

The State is aware of the position of the United States Navy that there is continuing need for the island of Kaho'olawe. The State is also aware, however, of the special concerns of various organizations and individuals, regarding land use of the island of Kaho'olawe. The United States Navy is also aware of

Memorandum of Understanding
Pertaining to the Island of Kahoolawe

Page 2

the State's desire for the ultimate transfer of the island of Kaho'olawe to the State in accordance with federal laws.

GEORGE R. ARIYOSHI
GOVERNOR, STATE OF HAWAII

S. L. GRAVELY, JR.
VICE ADMIRAL, U. S. NAVY
COMMANDER THIRD FLEET

Approved as to Form:

State of Hawaii
Attorney General

2

BRIEF CHRONOLOGICAL RECAP OF USE
OF KAHO'OLAWA

Kaho'olawe up to this time was under Hawaii's people

1830 - 1840 Penal Colony

Till 1900 - various leases to politicians, businessmen, and
ranchers - attempts unsuccessful at grazing

1910 - Angus McPhee given 20 yr. lease for cattle ranching

1941 - Subleased to Navy for aerial and shore target practice

1948 - MCPhee filed suit - but died that year

Feb. 20, 1953 - Executive Order gave Navy full control

- The first occupation was organized and led by Charlie Maxwell of Maui
- Walter is asked by Maxwell to join the group - Walter in turn asks Emmett Aluli and George Helm.
- efforts of occupation was to "reclaim" military controlled Kaho'olawe for Hawaiian people
- mission failed because of premature publicity
- party of 30 Hawaiians and 6 boats, were turned back off the shores of Kaho'olawe because of harassments by the Coast Guard and also fear of having their boats confiscated.
- nine refused to turn back - 8 part Hawaiians and 1 Muckleshoot Indian did land on the 'aina of Kaho'olawe
- one returned to O'ahu within couple hours of landing, 6 others picked up later by Navy and Coast Guard personel - two others seperated from group earlier could not be found and were left on island without food and water
- pair eludes authorities for 2 days for the purpose of surveying the results of 35 years of Navy bombing on Kaho'olawe
- after 2 days of walking on Kaho'olawe Walter and Emmett voluntarily gave themselves up on Tues., Jan. 6 in the a.m.
- they were handcuffed and taken to Kahului Airport and issued "Armed Forces citations" on trespassing (similar to traffic citation) - charges dropped later
- as a result of touching and embracing the 'aina of Kaho'olawe what they saw was not a barren rock, but a lush green land with valleys, steep cliffs, and white sand beaches, that were being destroyed with every drop of a bomb. What they saw hurt them....the desecration of 'aina - the giver of life - the destruction of our culture and heritage by the bombings of our sacred heiaus and fishing Ko'as. What they saw was erosion, devastation and destruction. They came back with a promise.... that they would tell the people of Hawai'i what they had seen and felt and that they would not let Kaho'olawe die.

THAT WAS THEIR PROMISE....THAT WAS THEIR COMMITMENT!!!!

EKAHI: first landing

It is our Kupuna, the spirit of this land, who reaches out for help. On January 4, 1976 - Nine kamaaina touched the 'aina and felt her pains upon seeing the destruction brought about by the military bombings.

THE KAHOO LAWE NINE

HAWAIIAN SUN

1/4-20

WALTER RITTE, 30, Kalae, Molokai. The rugged leader of the Hawaiian rights group, Hui Aloha, has been active in the Hawaiian movement for years. He has organized various protests ranging from demanding information about Kaluakoi's west end resort to setting up marches to gain access to the closed off beaches on the west end of Molokai. The son of Molokai's only musician, Ritte has worked closely with the Molokai canoe club and coordinator of various Hawaiian projects.

EMMETT ALULI, 32, Oahu. The first Hawaiian to be graduated from the University of Hawaii medical school, Aluli also is very active in Hui Aloha. Aluli's activism in Hawaiian rights comes from regarding the stories of the old homesteaders on Molokai to asking himself to occupy the Navy bombed island of Kahoolawe.

ELLEN MILES, 63, Pahoa, Hawaii. The grandmother from the Big Island was one of the main forces in landing on Kahoolawe. "I didn't come all the way from the Big Island to turn back now," she scolded the decision of some to return without landing on Kahoolawe. Miles doesn't feel she is too old to be active in the Hawaiian movement: "My mother is fighting the real estate people who want her Hawaiian homestead," she said, then added with a smile, "and she's really old."

IAN LIND, 28, Honolulu, Oahu. The staff director of the American Friends Service Committee, Lind helped record the occupation of Kahoolawe by operating cameras

and tapes. Lind has worked closely with the Hawaii Native Claims group on Hawaiian rights. "We had talked about the bombing of Kahoolawe for a long time," he told the Sun. "The American Friends Service Committee is behind any effort to stop the destruction of the island. So when Gail (Prejean) told me about the occupation, I was ready to go and help any way I could."

KARLA VILLALBA, 18, Kapeo, Hawaii. The landing party didn't include only Hawaiians, but also a member of another tribal society, American Indians. Villalba, a Muckleshoot Indian, had met Steve Morris, a member of the landing party at the Native Claims Association convention and volunteered her support. "Hawaiians face the same problems that Indians do," Villalba told the Sun. "I hope the two groups can work together to overcome their problems."

STEVE MORRIS, 29, Kapeo, Hawaii. A quiet, soft spoken community worker for the Queen Liliuokalani center, Morris has been active in Hawaiian Native Claims. "It's kinda hard to talk about Hawaiians' claim to the land when the Navy is destroying an entire island," he said. "The bombing of the historical sites was the thing that we talked about the most. So when Charlie (Maxwell) called me up last week about the occupation, I told Karla and Grandma (Ellen Miles) and we flew over here."

KIMO ALULI, 21, Oahu. A young, interested Hawaiian, Aluli became involved in the Kahoolawe occupation through his cousin,

Emmett Aluli. "I didn't know what would happen when Emmett told me about going to Kahoolawe," Kimu said. "But I'm proud to have been part of the occupation because now people not just in Hawaii but all over the mainland will know about the Navy's bombing and our rights as Hawaiians." Aluli said the experience was definitely an eye opener to him. "The control politicians have is so great, it's hard for the minorities to grasp. I know because that was me. But after seeing Kahoolawe, it's the way the real Hawaii was—no roads, no buildings, I just want to keep it that way."

GAIL PREJEAN, 32, Oahu. Leader of the Hawaiian Native Claims group, Prejean is a vocal supporter of Hawaiian rights. "The Native Hawaiian people have traditionally had a close relationship to the 'aina," he said in a press conference the night before the landing. "Our purpose in visiting Kahoolawe is to reassert our right to the 'aina, to focus attention on the issue of Native Hawaiian rights, to survey the damage that years of control by non-Hawaiians has brought to the island, and to discover in what way future waste of the land can be prevented."

GEORGE HELM, 30, Oahu. A well-known musician, Helm grew up on Molokai and received an athletic scholarship to St. Louis High on Oahu. After graduation, Helm worked in the travel industry all over the world. "It was a convention in Las Vegas that finally did it for me," he said. "When I saw all the plastic, all the cosmetic effect in the middle of the desert, I said that's it, I quit." Helm returned to Hawaii and began studying Hawaiian music and poetry.

MILITARY

Executive Order of 1953 gave Navy full control of island. Over next 2 decades, naval spokesman kept insisting Kaho'olawe was essential to nation's defense.

OFFICIAL U.S. NAVY
STATEMENT 1972

"Kaho'olawe is very dry and barren and cannot compare to the lush tropical beauty of the other Hawaiian Islands. Documents show that Kaho'olawe was wasteland long before the arrival of the Navy. Bombing has done little to mar it's badly eroded surface."

This is the one and only response by the Military to returning Kaho'olawe back to civilian use:

"The basis for our opposition is two fold: First, it is absolutely essential to national defense that the military services be provided a target complex on which they may conduct realistic weapons training; and second, there is no site available in the Mid-pacific other than Kaho'olawe that meets the necessary criteria for an air-to-surface and surface-to-surface target complex."

POLITICIANS

Congressional - Nov. 26 - Dec. 2 1975

- Congress passes bill for study on cost for restoring Kaho'olawe to Hawai'i.
- Patsy Mink has been trying since 1969 to get Navy to give island back.
- However, this (1975), for the first time, Mink and Inouye were able to get a study on the return of Kaho'olawe tagged onto the appropriations bill for military construction.
The bill however does not give Kaho'olawe back to the people of Hawaii. It only asks that a study be done on the feasibility of returning the island to civilians.
- when asked why the return of Kaho'olawe is being rooted in red tape of a year long study, done by the very agency that opposes giving up the island, Inouye said: "There is no real short-cut. This is a long process that will take several years. The study is better than no study at all."
- It didn't take the Pentagon several years of study to take the island back, Why should it take several years of study to give it back?
- Mink's office claims the Pentagon study is the first step in the necessary channels to regain possession of the island.

COUNTY OF MAUI

- a live 500 lb. military bomb was found on Maui near Ma'alaea
- Mayor Cravalho states:
"Without a doubt this discovery emphasizes the point we have been making for a long time - that the bombing practices do present a clear and continuing danger to the physical safety of the citizens of Maui.
In the face of the most recent evidence, I will press for the immediate and permanent ending of all bombing activities on Kaho'olawe."
- Cravalho also contacted congressional leaders Fong, Mink, and Inouye to assist on this matter.

112
II ELUA: second landing

On January 12, 1976, seven days after the first landing on Kaho'olawe, two men and two women returned to Kaho'olawe to show their concern. Walter and wife Loretta Ritte, Walter's sister Scarlet, and Dr. Emmett Aluli landed that day to show their concern.

As to this date, the only response to the Ohana (pertaining to the letter sent to President Ford, 1/6/76) from the White House was, "We do not have any reply at this time."

1/16/76, a proposed "First step," a Navy spokesman said is to conduct a survey on whether or not there are any significant historical structures on Kaho'olawe and if there are, are they qualified or significant enough to be protected in accordance with federal regulations.

To us, this is a hard thing to follow. For that, in the last 40 years the military has been guilty of negligence. Negligence, for it seems they never even bother to look at what they were bombing. What could be worst is, if they saw and never bothered to care.

After second landing, Ritte and Aluli were reportedly warned not to go back to Kaho'olawe, but, not technically warned.

Aluli, in coming off the island early, said he and Ritte went back because "what they are doing (the Navy) to the aina really hurts us, you wouldn't believe how much it hurts us. It's time to stop talking story. How can I be in the health profession, if the things are not healthy on the outside. How can I heal people, when the basic things are not healthy.

Some reactions from Loretta Ritte when she came off Kaho'olawe.
Negative: "Everywhere you look, she explained, you see all the stones in pieces, all scattered around from the bombs."
Positive: "There is an attachment to that island, she said, you look at the rocks and you get this feeling . . . I wish every Hawaiians could get on that island, they would find what they really lost."

Walter Ritte, before going on to Kaho'olawe the second time, left behind this message - stop bombing on a beautiful aina
- personnel conviction to return
- invites those who feel as he does to join him
of occupation, Walter Ritte says.

"My only hope is that, somebody high enough will act to stop the bombing that has been going on all these years." After personally seeing a terrible devastation and destruction caused by the bombing. I have commented myself deeply to see that this is ended.

1/20/76, to this date we came up with nothing in the way of concrete reactions. Our reactions to this was we must educate the People of Hawaii in the concept of Aloha - Aloha Aina.

1 / 28 / 76

HO'OKUPU -- (to sprout, grow), ceremonial gift giving as a sign of honor and respect

KUHAU ALCHA -- (free will offering), gift of love

- 1) First Attempt; ho'okupu ceremony planned without Navy's consent
- 2) Sam Lono fails to show up due to Haw'n Airlines mis-placing his ticket; other kupunas are not able to come; mis-communications
- 3) All night ho'oponopono held on "mud flats" near Maalaea to settle all mis-understandings and mis-communication
- 4) 200 people show up at Maalaea pier at sunrise
- 5) No boats show up -- Coast Guard and Navy scare tactics are successful in scaring off boats
- 6) 'Ohana decides to go through with personal ho'okupus at Pu'u Olai, Makenna, which is the shortest distance to Kaho'olawe from Maui. Here, the currents are favorable for the transporting of our plants, fruits, etc., ho'okupu to Kaho'olawe.
- 7) Despite failure, the Kaho'olawe family circle rows larger and closer

2 / 13 / 76

- 1) 3 meetings set up with Navy brass to negotiate for our Ho'okupu
- 2) Navy finally agrees to allow the blessing of the aina on Feb. Friday the 13th at their convenience on a working day.
- 3) Stipulations set by Navy:
 - a. All boat license numbers must be presented ahead of time
 - b. Only 5 people allowed to go to Hakioawa Bay 1 day early to prepare for the ho'okupu
 - c. Only 20 people to be allowed on the island at one time and they must be accompanied by 8 ordinance experts for protection
- 4) News and Navy play scare tactics until Friday morning
- 5) Harry Mitchell, Karl Mowat, Adolph Helm, Warren Haynes, and Alex Toro leave one day early to prepare imu for the blessing.
- 6) Over 200 people show up at sunrise
- 7) First boat to show up is a press boat; Sam Lono, Emma Defries, advise Walter and Emmett that they must attend the blessing because of their religious obligations to the aina of Kaho'olawe. Despite bail restrictions set by federal court, the first boat leaves with advance party and the press people.
- 8) Frances Kauhane, Charles Warrington, George Helm, Harry Ho, and 2 Maui men paddle canoe across to Kaho'olawe; once on the island the ocean becomes so rough that the canoe is not able to leave through the surf. The canoe swamps 3 times and is left on the island to be picked up at a later date.

- 9) Kupunas of Maui and Molokai leave on next available boat which turns out to be the Min Sette, a huge yacht which ends up taking over 40 people, including the rest of the Molokai Ohana.
- 10) 5 Hilo people leave from Maalaea on 18 footer; they make it despite late departure and rough seas
- 11) About 37 people go to Lahaina and charter our own boat, the Viajero, because no other boats show up. This boat does not reach Kaho'olawe due to engine trouble and Coast Guard trouble. These people hold their own ho'okupu ceremonies by throwing their gifts into the ocean about 1 mile short of Kaho'olawe.
- 12) A small sailboat takes 11 people out of Lahaina; this boat also does not touch the aina due to rough seas and Coast Guard trouble.
- 13) 65 kamaaina land successfully on Kaho'olawe despite the rough seas and the Coast Guard and Navy harrassment. The Ho'okupu is successful -- the blessing of the island is completed -- ho'okupus and mohai aloha are planted into the aina of Kaho'olawe -- new life on island
- 14) The rough seas get worse as the day goes on -- almost as if the island does not want anyone to leave -- the ocean is too rough to allow the kupunas to be brought in safely; therefor, they do not get their chance to touch the aina as they had planned to. Everyone returns by helicopter.
- 15) Many people besides the kupunas are greatly disappointed that they were not able to touch the aina with their mohai aloha as they had planned to. There is criticism that this was not a real ho'okupu because not everyone that wanted to participate in the blessing on the island was able to.
- 16) Despite negative criticism, the Ohana was able to accomplish the blessing of the aina of Kaho'olawe -- much aloha was given to Kaho'olawe on this day.

EHA LANDING

Up to this point, there was quiet tolerance of the red-tape procedures taking place to accomplish our end -- stop the bombing. We would trust the system and go through proper and legal channels. The following events led to the Eha landing:

Dec., 1976 -- Sen. Daniel Inouye's U.S. Navy-sponsored study on the clean-up of Kaho'olawe (initiated in Nov. 1975) stated as "risky"; estimated at a cost from \$77-#130 million; take 4-6 years.

Jan., 1977 -- Petitions were being prepared for statewide circulation by the 'Ohana to present to President Carter. (A date of Feb. 13, 1977 was eventually set.)

-- A class action legal suit (i.e., the named individuals in the suit represent a certain defined class of people through the nature of their complaint) had been filed on Oct. 13, 1976. Charges of violations by Navy and government of 13 specific State and Federal laws. It was now in the process of interrogatories, whereby each plaintiff and defendant answered questions presented by the attorneys of each side.

Jan. 5, 1977 -- Stearns commentary printed calling Navy-sponsored study of clean-up, 'snow job'.

Jan. 17, 1977 -- State historical preservation officer, Jane Silverman agrees to need for kama'aina witness on joint Navy-State study of Kaho'olawe.

Jan. 23, 1977 -- Archaeological report released after one year survey. Knowing that archaeological teams had been conducting surveys this past year on the Island, Emmett and George intended to make the withheld information public through court action. However, as a result of a meeting with the archaeologists, the following story was released: "Kaho'olawe: Little island, big find" (Hon. Adv. 1/23/77)

Jan. 28, 1977 -- "Up for sale to U.S.; most of Lanai" (Hon. Adv. 1/28/77) This was the final thrust of the stab we had just received with the archaeological report. Politicians and big business (Castle & Cooke) were again playing games with the destiny and sensitivity of the Hawai'i people.

Jan. 28, 1977 -- Pacific commander, Admiral Weisner makes statement concerning importance of Kaho'olawe in maintaining readiness.

(10)

THE SIGNIFICANCE OF THE ISLAND -- CULTURALLY, HISTORICALLY & RELIGIOUSLY -- WHICH WALTER AND EMMETT SPIRITUALLY EXPERIENCED A YEAR AGO ON THE EKAHI LANDING WAS ONLY NOW BEING VERIFIED PUBLICLY BY THIS TEAM OF "EXPERTS". AND DESPITE THESE "EXCITING AND FLABBERGASTING" FINDS, ONE OTHER FACT REMAINED: THE BOMBING CONTINUED, POSSIBLY DESTROYING AND REARRANGING VALUABLE UNWRITTEN EVIDENCES OF THE HAWAI'I PEOPLE. AND NO ONE WAS TRYING TO STOP IT.

EHA: FOURTH LANDING

"There is no wrong in wanting to stop the desecration of our heritage. Our kupuna need the KOKUA of many more. It will be soon when a fourth landing will stop the bombing."

Jan. 30, 1977 -- EHA LANDING. 5 Hawai'i land on Kaho'olawe in another attempt to bring a permanent halt to the Navy's bombing.

Each individual made his own decision to go. Each gave his mana'o before they landed.

As Eha landing makes the news, 'Ohana shares its mana'o and politicians and Navy make statements.

Feb. 1, Monday -- Press conference at Bishop Museum held by 'Ohana. Emmett spokesman; issues statement explaining the motivation for Eha landing.

Much disbelief is expressed about the presence of the 5 men on the Eha landing of Kaho'olawe.

Feb. 2, Wednesday -- George, Francis, and Charlie come out to share what they saw and experienced on Island, and to continue the work back here. Also to give credibility to the occupation.

Feb. 3, Thursday -- George, Francis & Charlies hold press conference at Iolani Palace. Announce telegram sent to President Carter.

Feb. 5-6, Saturday & Sunday -- Hawaiian Civic Club Convention, with 1,121 delegates, unanimously adopt resolution in support of Kaho'olawe. George partly responsible for Civic Club support when he is allowed to address the convention body. Richard Lyman also makes supportive statement to this movement of "Hawaiian reawakening."

- Feb. 5-7, Saturday-Monday -- 45-man Marine and Navy team conduct search for Walter and Richard. Search called off after 2 days because "...no sign of Ritte or Sawyer was found by the ground search party..."
- Feb. 7, Monday -- Navy announces plans to resume howitzer firing exercises on the island on Wednesday.
- Glen Davis and Karl Mowat also make Eha landing Monday night on 'aina of Kaho'olawe.
- Feb. 9, Wednesday -- Navy plans live-ammunition training. Akaka contacted to intervene via White House to stop live-ammunition firing.
- *Ohana makes public the presence of 2 more members on aina.
Glen + Karl give up due to threat of live firing
- Feb. 10, Thurs. -- Judge refuses to halt bombing on Maui county suit; Glen and Karl arraigned; support from Hawaii ILWU 142.
- Feb. 11, Friday -- George breaks tradition by addressing the House of Representatives session. House adopts resolution to stop the bombing. House Resolution #132.
- Feb. 14, Monday -- Letter from Council of Hawaiian Organizations sent to President Carter; insight on how Hawaiians feel.
- Feb. 15, Tuesday -- Congressional delegation given "tour" of Kaho'olawe and demonstration of training. Tour called 'snow job' by 'Ohana.
- Feb. 14, Monday -- George and Francis leave for Washington D.C.
- Feb. 16, Wednesday -- Judge King denies request for preliminary court injunction to halt bombing by Walter & Richard, Loretta and Zennie. "...not a court decision..."
- Feb. 17, Thursday -- 'Ohana members meet with Congressional delegation (except for Inouye) on Maui.
- Akaka meets with Moloka'i 'Ohana on Moloka'i.
- Feb. 18, Friday -- Announcement by Navy to hold 23-day war games involving United States, Australia, Canada, New Zealand. 40 ships, 250 aircraft, & 28,000 men.
- Feb. 18, Friday -- Samuel Kealoha makes another Eha landing on Kaho'olawe by surfboard from Kihei, Maui. (Rite on, Brah!)
- Feb. 18, Friday -- George and Francis return from Washington, D.C. Hold press conference at UH Law School; express disappointment in and lack of cooperation by Inouye's office.

Feb. 20, Sunday -- Mass Invasion -- another Eha landing by nine people from all islands: Joyce Kainoa (Molokai), Mei-Ling Chang (Maui), Solomon Fernandez, Bill Lawrence, Attwood Makaanani, Todd Higashi, Buddy Peters (Kauai), Norman Kalahiki & Boise Mattos (Oahu). Plans to mass invade 100 people called off again because of scare tactics by military against boat owners and premature exposure to press.

Following this part of the Eha landing and the fact that the press tended to work negatively on the understanding by the 'Ohana of the events passing, a "silence" with the press was agreed upon.

~~March 5, Saturday~~ -- Walter and Richard leave Island.

~~March 7, Monday~~ -- Court arraignment.

Dear _____:

I write in reference to S 911, a bill I introduced in April of this year ~~where- which- which~~ ^{which} would provide for the clearing of a small portion of the island of ~~the~~ Kaho'olawe of unexploded ordnance.

S 911 goes beyond a similar measure introduced in the 95th Congress in that it allows for the development of the ~~appropriate~~ ^{as well as} technology appropriate for this unique operation ~~and~~ ^{and} ~~provides for~~ the demonstration of that technology on selected sites on the Island. ~~-The-bill-language-was-worked-out--drafted-with--the-advice-and-consultation-of-members-~~ This expansion of the measure's intent was made pursuant to comments and criticisms received from the Navy last year.

I believe that such efforts will greatly assist us in arriving ^a at final determination of the feasibility and cost of ~~clearing~~ ~~Kaho'olawe~~ of rendering Kaho'olawe "reasonable safe" thus settling much of the controversy surrounding the Island's current use and future potential. Accordingly, within the applicable rules and regulations, I would most appreciate receiving your thoughts and comments relative to this important matter.

aloha, dki

2-21

Senator

From Eiler

Re: Title to Kahoolawe

Arlene has secured ~~xxxxxxof~~ the attached Memorandum of Title and plans to do a story on it this week. She wants comment from you as a part of the column. She attaches considerable significance to the fact that Kahoolawe was crown land (see p 4 & 5) and therefore has been taken from the Hawaiian people without proper compensation as per the statement in the introductory to our Hawaiian Native Land Claims Bill. As I understand it there is feeling that this reduces the Navy's claim to clear legal use of the Island for as long as they feel necessary. It is likely to be so claimed by the Ohana group.

Given the above the nature of our response should probably tie the settlement of the Kahoolawe question into the bigger issue of Hawaiian Reparations. This might have the effect of de-escalating the confrontation between the Navy and the Hawaiians. It would now become first a legislative problem and a settlement of the future of Kahoolawe a subject for recommendation by the Commission with benefits in leu of return a possibility.

Sparky, in the meeting on Thursday with the Ohana group, warned them not to lose sight of their bigger problem or to do anything on the Kahoolawe problem which could cost them dearly in the settlement of native land claims outstanding.

Should I try prepare something with Rick which would recognize this greater inter-relationship given the title history? ^{*} If it is going to cost the government dearly to return the Island or even part of it, perhaps alternative compensation can be provided to the benefit of both the Hawaiians and the government.

**see attached*

ITINERARY FOR KAHOO LAWE VISIT

14 February 1977

1. The following is the itinerary for the orientation trip to Kahoolawe Island for Senator Inouye, Representative Akaka and Representative Heftel, and assistants, sponsored by Admiral Thomas B. Hayward, Commander in Chief, U. S. Pacific Fleet:

1030 - Meet at CINCPACFLT Headquarters, Makalapa, proceed to Command Briefing Room.

1030 - Welcome by Admiral Hayward. Trip overview presented by CAPT Crockett, COMTHIRDFLT Staff.

At conclusion of brief, proceed via automobile to Halawa Pad for Helo Embarkation.

1055 - Helicopter Safety Brief. (By Squadron Representative)

1105 - Lift off from Halawa.

1145 - Arrive Kahoolawe, commence flyby as shown on attached chart.

1200-1230 - On deck at Smugglers Cove

1235-1255 - On deck Luà Makika (UTM 525758)

1300-1315 - On deck at A-4 Target (UTM 482721)

1320-1355 - On deck at Air Observation Post

1400 - Depart Kahoolawe. Lunch aboard helo enroute.

1445 - Arrive Halawa Pad, proceed to CINCPACFLT Headquarters.

1500 - Remarks by Admiral Hayward followed by CAPT Crockett

2. The Congressional Party is composed of the following:

Senator Daniel Inouye,

Representative Daniel Akaka,

Representative Cecil Heftel.

They are being accompanied by the following personnel from their staffs:

COL David Peters, USA (RET)

Mr. Giugni

Mr. Eiler

Mr. Ravnholt

Mr. Matsunaga

3. The following personnel will be accompanying Admiral Hayward and his guests in the lead helicopter:

VADM Gravely, Commander THIRD Fleet

BGEN Twomey, Commanding General, First Marine Brigade

CAPT Crockett, Kahoolawe Project Officer, Staff
Commander THIRD Fleet

CAPT Naylor, Commander, Explosive Ordnance Disposal
Group ONE

Mr. Swedberg, Pacific Facilities Command Conservationist

CAPT Stierman, Staff, Commander in Chief, U. S. Pacific
Fleet, Public Affairs Officer

M E M O R A N D U M

TO: RICHARD COLLINS

DATE: June 12, 1990

FROM: JENNIFER GOTO

RE: RETURN OF KAHOO LAWE PLAN

Set forth below is a short historical background, current situation, and proposed action to secure the return of Kahoolawe.

HISTORICAL BACKGROUND

Kahoolawe is located between the Islands of Maui, Lanai and Molokai. It is approximately 11 miles long and 6 miles wide with an area of 28,776 acres--the smallest of the Hawaiian islands. Approximately 10,000 acres, or third of the highest portions of the island are virtually barren due to uncontrolled grazing of goats which has led to excessive wind and storm erosion. The remaining two thirds of the island are partially covered with some shrubs and grasses.

In 1918, the parcels were leased to Angus McPhee to establish a cattle ranch; in 1933, the lease was extended for 21 years. In 1941, the McPhee family subleased a portion of the island to the federal government for military purposes for \$1.00 per year through October 1952.

On December 1941, the McPhees were banished from the island after their ranch was bombed. During World War II, Kahoolawe was the most bombed island in the Pacific. In September of 1952, a special land committee, formed by then Governor Owen Long, recommended that the island be transferred to the Department of Defense. On February 20, 1953, Kahoolawe was taken for U.S. naval purposes by Executive Order issued by President Dwight Eisenhower.

The Executive Order set forth the following: (1) Kahoolawe was placed under the U.S. Navy's jurisdiction, and the Territory retained the right, at reasonable intervals, to enter and inspect the island, provided that it did not interfere unreasonably with U.S. naval activities; (2) the Navy agreed to eradicate the goats or keep the numbers at or below 200 and the Territory was allowed to begin a soil conservation program; and (3) once the island was no longer of use to the Navy, the Territory would be notified, and "upon reasonable request of the Territory, render such area, or such portion thereof, reasonably safe for human habitation, without cost to the Territory." This is the key provision to the issue at hand.

On August 9, 1978, a Memorandum of Understanding was entered into by then Governor George Ariyoshi and Vice Admiral S.I. Gravely, Jr. regarding Kahoolawe. The parties agreed to the following: (1) elimination of all goats; (2) continuation of the jointly conducted soil conservation program; (3) joint cooperation in inventorying archaeological sites eligible for inclusion in the National Register of Historic Places;

and (4) recognition by each party of the other's intentions as it related to the island--Navy's intention to continue using the island, and State desire for the ultimate return of island. This was the last official State action on Kahoolawe.

In 1975, the activist group, Protect Kahoolawe Ohana (PKO), was formed. Over the years, PKO has protested the bombing of the island. In 1980, PKO entered into a Consent Decree with the Secretary of Defense for the purpose of precluding further litigation of claims relating to the use of Kahoolawe and its surrounding waters by the Navy. The Decree also addressed land and ocean management issues, development of an archaeological plan and Navy's agreement not to bomb these areas, and providing PKO access to the island. On March 18, 1981, Kahoolawe was placed on the National Register of Historical Places because it is the only island in Hawaii where the total prehistoric and historical system is known to be preserved.

Since 1982, Australia, New Zealand, Japan and Great Britain have declined to bomb the island during the RIMPAC exercises. Canada and the U.S. continue to participate in the shelling exercises. South Korea is suspected of participating in the Kahoolawe exercise this year.

CURRENT SITUATION

Archaeological survey work continues; however, there has been damage to some of the sites in the agreed upon off limit bombing areas. The goat eradication project is still underway, however it was not until 1985 that the animal population fell under the required 200 as specified in the 1953 Executive Order. The State and Navy continue the joint soil conservation program; the Hawaii Legislature appropriated \$325,000 thus far for planting native trees and foliage in the off-limit areas. Maui County which has jurisdiction over Kahoolawe developed a Community Plan for the island for future civilian use.

The Navy continues to state that Kahoolawe is an integral part of its military training, and is the only place in the Pacific that the Navy is able to coordinate all supporting arms, including sea-based forces, particularly naval gunfire and live aerial bombardment.

PROPOSED ACTION

As a result of the Inouye-Waihee meeting:

1. The Governor and his staff are presently working on an Executive Order which he will sign. As I understand it, the Order will request the return of Kahoolawe in a "lesser habitable" condition and thereby reduce the Navy's obligation to clean up the island prior to its return as set forth in the 1953 Eisenhower Executive Order. It will define "habitable use" for these purposes, utilizing the Maui County Community Plan for Kahoolawe, and in accordance with the discussions during the meeting including beach use,

park use, archaeological study areas and historical preservation areas. Additionally, it will Order the State to negotiate with the Navy for the return of the island based thereupon.

2. Governor's Executive Order will be sent, together with a Joint Resolution of the Hawaii State Legislature demanding the return of Kahoolawe. The Legislature has passed an identical measure for the past four or five legislative sessions.

3. Once the Governor is prepared to formally send the Order to Washington, D.C., to whom does he send the documents? (President, Secretary of Defense, Secretary of the Navy, Speaker of the House, Senate Majority and Minority Leaders, relevant House and Senate Committee Chairmen?)

4. In light of the political issue involving Saiki, it is going to be very important that we have orchestrated a plan for Waihee, Akaka and Inouye secure the press and praise prior to the Order reaching Washington. For obvious political reasons, the stopping of the bombing at this point is most important because if nothing else it will show progress prior to the election. I have set forth below several options.

a. Meeting with Secretary Cheney and Inouye (and maybe Waihee and Akaka) to discuss the return and end of the bombing of Kahoolawe;

b. Funding line-item to determine time frame and dollars to implement the "Waihee Plan" and possibly no monies to be used to bomb the island for this duration;

c. Finding the Navy another island/target;

d. How Akaka will play?--involvement in any possible meeting, Akaka the one to request the funds? His staff has broached the idea of introducing an authorizing bill once Waihee's Order get to Washington for the end to the bombing and for the Navy to negotiate the return in accordance with the "Waihee Plan." I told them to hold off until you and I discussed the matter and decided upon the most prudent and politically wise course of action. Obviously, such a measure would be no chance of passage, but would generate a lot of favorable press in Hawaii.

I need your guidance and direction so that I can inform Governor's and Akaka's staffs accordingly.

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Heckathorn, J. (1990, July). Kaho'olawe: A Travelogue, with Digressions. *Honolulu*, 44-47.

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Native Hawaiian Land Rights

Neil M. Levy†

** Professor Levy traces the historical displacement of Native Hawaiians from their land and explores the problems of preserving the landholdings and cultural heritage of the Native Hawaiian community. He suggests that the problems require legislative solutions similar to those afforded to Native Americans and Alaskan Natives. "*

In less than 200 years of contact with Western civilization, Native Hawaiians, descendants of Polynesians who inhabited the Islands prior to 1778, have lost control of the great bulk of their homeland. Today they face a new period of crisis. This article focuses on the historical displacement of Native Hawaiians from their land—a displacement accomplished primarily through legal mechanisms rather than military actions—and then explores the current problems facing the Native Hawaiian community in its attempt to conserve and expand its presently limited landholdings. The article suggests that Native Hawaiians, as an indigenous people, occupy a unique status akin to that of Indians and Alaskan Natives, and that their problems accordingly require special legal solutions.

I

A HISTORY OF NATIVE HAWAIIAN LANDHOLDINGS UNTIL 1920

A. Traditional Land Tenure

When Captain Cook arrived in Hawaii in 1778, he found a complex land tenure system,¹ which has been compared to the feudal sys-

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Preliminary research for this article was begun under a summer grant from the National Endowment for the Humanities. The author wishes to thank Rhoda Haberman, J.D. 1975, Golden Gate University, and Sandra Pechter, J.D. 1974, Golden Gate University, for their invaluable assistance in the preparation of this article.

1. For detailed discussions of early Hawaiian land tenure, see generally J. CHUNEN, THE GREAT MAHELE (1958) [hereinafter cited as THE GREAT MAHELE]; G. DAWS, SHOAL OF TIME (1968) [hereinafter cited as SHOAL OF TIME]; J. HOBBS, HAWAII—A PAGEANT OF THE SOIL (1935) [hereinafter cited as PAGEANT]; I. R. KUYKINDALL, THE HAWAIIAN KINGDOM 1778-1854 (1938) [hereinafter cited as 1 HAWAIIAN KINGDOM]; A. LIND, AN ISLAND COMMUNITY (1938) [hereinafter cited as ISLAND COMMUNITY]; M. Kelly, Changes in Land Tenure in Hawaii, 1778-1850, June, 1956 (unpublished thesis in University of Hawaii Library) [hereinafter cited as Kelly].

tem of medieval Europe.² This system successfully sustained an extremely dense population³ and provided surplus goods sufficient to support chiefs and priests and to replenish Cook's expedition.⁴ Although there were larger administrative divisions,⁵ the basic landholding unit was the *ahupuaa*, which ranged in size from 100 to 100,000 acres and usually had natural boundaries.⁶ The ideal *ahupuaa* was an economically self-sufficient,⁷ pie-shaped unit which ran from mountain tops down ridges to the sea. Most *ahupuaa* were in turn divided into *ili*, some of which were virtually independent while others were mere operating subdivisions of the *ahupuaa*. A hierarchical society paralleled this pattern of land division. At the top, a chief controlled each *ahupuaa*; land agents (*konohiki*) and subchiefs subordinate to the chief controlled smaller amounts of land; and at the bottom of the hierarchy common farmers worked land for the chief's personal benefit. Commoners also had plots for their own use and had certain gathering rights in the noncultivated lands of the *ahupuaa*.⁸

No concept similar to the fee simple absolute existed at this time and landholdings were considered revocable. On the death of a high chief, his successor was free to redistribute the land among the low chiefs and, when any chiefs died, the lands were not necessarily passed on to the decedent's heirs. Frequent warfare often brought new chiefs who could reassign the conquered land to their followers, rather than leave it with the conquered nobles. These changes in control usually affected neither the boundaries of the *ahupuaa* and the *ili*⁹ nor the tenure, such as it was, of common farmers.¹⁰ Although a commoner in Hawaii owed a work obligation to those higher in the structure, he was free to leave an *ahupuaa* if unhappy with his landlord. This situation, which distinguished pre-Cook land patterns from the European feudal system, may have been a major factor in ameliorating abuses by the chiefs, who were anxious to keep ample work forces on their lands.¹¹

2. See, e.g., PAGEANT, *supra* note 1, at 1.

3. An estimated three hundred thousand people lived on 6,415 square miles. R. SCHMITT, DEMOGRAPHIC STATISTICS OF HAWAII: 1778-1965, at 10-11 (1968).

4. See I HAWAIIAN KINGDOM, *supra* note 1, at 12-20.

5. The island (*mokupuni*) was the primary division, followed by a geographic division called the *mokuaina*. Although this was not a political unit, modern Hawaiian judicial districts tend to follow old *mokuaina* boundaries. THE GREAT MAHELE, *supra* note 1, at 3.

6. *Id.* at 1-3; see discussion of boundary setting practices in *In re Boundaries of Pulehunui*, 4 Hawaii 239 (1879).

7. But see Kelly, *supra* note 1, at 32. Occasional trade fairs were held for goods not available in all localities.

8. See *id.* at 20-26.

9. *Id.* at 3. Today many large estates follow the boundaries of old *ahupuaa* and *ili kupo*.

10. See PAGEANT, *supra* note 1, at 7.

11. See Kelly, *supra* note 1, at 42.

B. Transitional Period 1778-1846

The arrival of Westerners completely altered socio-economic patterns as Hawaii became a major refreshment stop for European vessels sailing the Pacific and a major supplier of the sandalwood trade.¹² Partially through the use of European arms, Kamehameha I had expanded his rule by 1795 to all of Hawaii except the island of Kauai.¹³ A proliferation of administrative levels and a rise in palace court life accompanied this unification. The king and his court were attracted to newly available European and Oriental goods, so that the Hawaiian economy had to supply a now enlarged aristocratic class with imported luxuries. While the economy thus turned from one primarily aimed at subsistence to one enmeshed in international trade, the commoners' condition worsened as Western diseases destroyed much of the population,¹⁴ traditional notions of feudal responsibility were disrupted, and an onerous tax system was instituted.¹⁵

Land tenure patterns reflected and served this new economy. Kamehameha II, who acceded to the throne in 1819, considered it politically unwise to revoke the holdings of his predecessor's subchiefs. Foreign traders were anxious to codify this new stability, fearing that changes in landholdings might lead to civil wars and disruption of commerce. When Kamehameha III acceded to the throne at the age of twelve, the council of chiefs, under the tutelage of an English frigate captain, extracted from the regent a formal policy, later characterized as the Law of 1825, which allowed chiefs to keep their lands upon a king's death.¹⁶ At the same time, Westerners entered Hawaii's land usage patterns as foreign settlers were "given" lands by the king or chiefs in return for services or merely out of traditional Hawaiian generosity.¹⁷ After overharvesting collapsed the sandalwood trade, Westerners with substantial capital accumulated in that trade began large-scale plantations on the Islands.¹⁸

12. ISLAND COMMUNITY, *supra* note 1, at 9-11.

13. See 1 HAWAIIAN KINGDOM, *supra* note 1, at 29-60, for description of Kamehameha's conquest of other kingdoms within the Islands. The independence of Kauai was eroded over the next several decades.

14. ISLAND COMMUNITY, *supra* note 1, at 94-99.

15. *Id.* at 41.

16. 1 HAWAIIAN KINGDOM, *supra* note 1, at 119-22.

17. See *Keelikolani v. Robinson*, 2 Hawaii 514 (1862) for a description of one such land transfer in 1827. See also PAGEANT, *supra* note 1, at 17-19.

18. Three Americans started the first venture in 1835 under the name of Ladd & Co., by obtaining a fifty-year lease, signed by both the king and his governor on Kauai, for a 1000-acre parcel on that island. The lease contained no terms concerning the rights of tenants but provided that Ladd & Co. might hire native laborers to work the land if it made adequate payments to the laborers, the governor and the king. The transaction thus combined the modern Western lease for a term of years with a partially

Hawaii's first written constitution, adopted in 1840, and the laws immediately enacted pursuant to it,¹⁹ attempted to adjust land rights to the new relationships between Hawaiian chiefs and commoners and Hawaiians and Westerners. The constitution and the laws are frequently viewed as liberalizing forces²⁰ because they announced tenants' rights in land and lowered labor taxes. They also represent, however, a final attempt to preserve the non-mercantile land system and to reverse the tide of Hawaiians who were leaving their traditional homes for the booming towns of Honolulu and Lahaina. For example, one statute provided that, "No man living on a farm whose name is recorded by his landlord, shall without cause desert the land of his landlord. Nor shall the landlord causelessly dispossess his tenant."²¹ Native Hawaiians who had already left the land were offered an opportunity to return by applying to a governor or the king for any uncultivated lands.²²

The constitution also attempted to deal with two areas of conflict between Hawaiians and Westerners: attempts by chiefs to vest land rights in Westerners without the approval of the crown, and attempts by Westerners, who had received land rights from the king, to transfer those interests to other foreigners without the king's express permission. The traditional Hawaiian land system did not confront these issues, since landholdings before the law of 1825 had been revocable at the pleasure of the king. In disputes over land rights between the king and foreigners, the foreign community had distinct advantages.

feudal labor arrangement. Lease agreement reproduced in part at 1 HAWAIIAN KINGDOM, *supra* note 1, at 175.

19. These documents frequently evidence a strong missionary flavor. *See, e.g.*, Law of Nov. 9, 1840, ch. 3, § 5, in TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS ESTABLISHED IN THE REIGN OF KAMEHAMEHA III (1842) 32 [hereinafter cited as TRANSLATION]; (THE FUNDAMENTAL LAW OF HAWAII 18 (L. Thurston ed. 1904) [hereinafter cited as Thurston]). "As for the idler, let the industrious put him to shame, and sound his name from one end of the country to the other." Thurston at 18.

The statute book cited above is the first compilation in English of the constitution of 1840 and the laws enacted within the two years following its passage. Hawaii has reproduced its early statutes in other volumes. Since statute books for the Hawaiian Kingdom are now extremely rare, this article will give a parallel citation where applicable to Thurston and to 2 REVISED LAWS OF HAWAII 1925 [hereinafter cited as REVISED LAWS 1925].

20. *See, e.g.*, 1 HAWAIIAN KINGDOM, *supra* note 1, at 167.

21. Act of Nov. 9, 1840, ch. 3, § 6, in TRANSLATION at 33; (Thurston at 18-19).

This attempt proved futile: "Neither the laws of 1839 nor of 1840 were found adequate to protect the inferior lords and tenants, for although the violators of law, of every rank, were liable to its penalty, yet it was so contrary to ancient usage, to execute the law on the powerful for the protection of the weak, that the latter often suffered. . . ." Principles Adopted by the Board of Commissioners to Quiet Land Titles, Act of Oct. 26, 1846, [1846] Hawaii Laws 87 (REVISED LAWS 1925 at 2127). For further discussion of the Principles see text accompanying note 36 *infra*.

22. Act of Nov. 9, 1840, ch. 3, § 6, in TRANSLATION at 34 (Thurston at 19).

First, foreign gunboats frequently came to Hawaii to enforce the merchants' views.²³ Second, Westerners had assumed many of the most important positions and thus were able to influence government decisions.²⁴ Native Hawaiians had come to fear the foreigners' accumulation of land.²⁵ The chiefs realized that such holdings would increase the power exercised by foreigners and decrease their own ability to receive labor dues from commoners who became part of the Western plantation economy.

In attempting to delimit the Westerners' claims to land, the constitution of 1840 reaffirmed that the king could lose no land without his consent;²⁶ thus he could prevent alienation to foreigners. However, fearing a confrontation with Westerners, the king provided in the constitution that property already held by them would not be reclaimed by the crown.²⁷ In 1841, Kamehameha III again sought to forestall conflict with the foreign community by proclaiming a plan of accommodation allowing the Islands' governors to enter into fifty-year leases with the foreigners.²⁸ Neither the constitution nor the accommodation plan put to rest Western-Hawaiian land disputes. In 1843, partially in response to a lease dispute involving the British Consul, Richard Charlton, the British warship *Carysfort* entered Honolulu and its captain took over virtually all functions of government for five months.²⁹ The British

23. In 1837, one prominent American merchant wrote:

Property is much safer here than formerly—the visits of the American, English and French men-of-war during these sixteen months have established inviolability of property and persons, and the natives taught and made to fear the "laws of the Nations"; and that a sovereign and a government come under the ban of laws as well as subjects or individuals.

Letter from Henry A. Pierce to James Hunnewell, Aug. 6, 1837, in 1 HAWAIIAN KINGDOM, *supra* note 1, at 153.

24. See Kuykendall, *American Interests and American Influence in Hawaii in 1842*, 1930 ANN. REPORT OF THE HAWAIIAN HISTORICAL SOC'Y 61 (1930).

25. See, e.g., petition from natives of Molokai and Maui to the King, July, 1845, objecting to the land being sold to Westerners, Legislative File Folder #2, Hawaii State Archives.

26. The constitution of 1840 stated:

KAMEHAMEHA I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I. was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom.

Constitution of 1840, in TRANSLATION at 11-13 (Thurston at 3).

27. Preamble to constitution of 1840, in TRANSLATION at 10 (Thurston at 1). This preamble had been proclaimed by Kamehameha III in 1839 in virtually the same form as it appeared in the constitution and is frequently referred to as the Declaration of Rights.

28. Royal Proclamation, May 31, 1841, in 1 HAWAIIAN KINGDOM, *supra* note 1, at 275.

29. See generally SHOAL OF TIME, *supra* note 1, at 112-120.

government, upon learning of this action, repudiated it and ordered the *Carysfort* to leave Hawaii. To the Hawaiian Kingdom the lesson must have been clear: its independence was at the whim of great Western powers, whose nationals increasingly desired to own the lands of Hawaii.

C. *Era of the Mahele*

By 1845, the land tenure system could neither maintain itself in the face of a hostile foreign world nor accommodate itself to the wishes of that world. The government's response to these problems was a time honored one: appoint a commission. The Land Commission was charged to undertake "the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired anterior to the passage of this Act. . . ."³⁰ Its decisions, subject only to appeal to the Hawaii Supreme Court, were to be based on existing land law of the kingdom, including "native usages in regard to landed tenures."³¹ Its ethnic composition illuminates the hold which non-Hawaiians had obtained on important government positions: of the Commission's five members, two were Hawaiians, one was half-Hawaiian, and two were Westerners.³²

Under the traditional land system, especially after the constitution of 1840, holdings of the king, chiefs and commoners were intertwined and undivided. Lacking guidelines to undertake the division of those interests, the Commission at first did not act on the bulk of Hawaiian lands. Instead it focused its immediate attention on building lots in Honolulu and Lahaina since this land had already left the feudal production scheme.³³ Claimants proving rights in these lands received Land Commission Awards specifically stating that the Commission found "no native rights of occupancy in this plot."³⁴ Although the concept of fee simple was not part of the Hawaiian land system at that time, the Minister of Interior was authorized to issue fee patents based upon these awards.³⁵ The Commission was thus able to resolve a number of land disputes which had developed with the foreign community.

30. Act of Dec. 10, 1845, ch. 7, § 1, 2 [1847] Hawaii Laws 107, in REVISED LAWS 1925 at 2120 (Thurston at 137).

31. *Id.* § 7 at 109, in REVISED LAWS 1925 at 2123 (Thurston at 138-39).

32. 1 HAWAIIAN KINGDOM, *supra* note 1, at 280.

33. See 2 [1847] Hawaii Laws 84, in REVISED LAWS 1925 at 2127 (Thurston at 143).

34. For English language copies of early land Commission Awards and Royal Patents, see J. CHINEN, ORIGINAL LAND TITLES IN HAWAII 8-9 (1953).

35. Act of Dec. 10, 1845, ch. 7, § 9 [1846] Hawaii Laws 109, in REVISED LAWS 1925 at 2123 (Thurston at 139). *But see* 1 HAWAIIAN KINGDOM, *supra* note 1, at 282-84 for discussion of the limited government experiment in 1845 of selling small lots with fee simple title in the Makawao district of Maui and the Manoa valley on Oahu.

In 1846, the Commission adopted Principles,³⁶ ratified by the legislature,³⁷ to guide its work with land still under the traditional system. The Westerner-dominated Commission perceived its goal to be a total defeudalization and partition of undivided interests.³⁸ In discussing a fair and equitable division between king, chiefs, and tenants, the Principles stated:

If the King be disposed voluntarily to yield to the tenant a portion of what practice has given to himself, he most assuredly has a right to do it; and should the King allow to the landlord one-third, to the tenant one-third and retain one-third himself, he, according to the uniform opinion of the witnesses, would injure no one unless himself; . . . According to this principle, a tract of land now in the hands of landlord and occupied by tenants, if all parts of it were equally valuable, might be divided into three equal parts³⁹

The specifics for fulfilling the Principles were much debated until a formulation drafted by a Westerner, Justice William Lee, was accepted by the king and chiefs in Privy Council on December 18, 1847. The Lee formulation distinguished the king's private lands (those he held directly as noble) from lands he held as king and provided that he should retain all his private lands, with a right in his tenants "to a fee simple title to one-third of the lands possessed and cultivated by them" whenever the king or tenants desired.⁴⁰ The remaining land of the kingdom was to be divided into thirds: one-third to the Hawaiian government, another third to the chiefs and land agents, and the final third to the tenant farmers.⁴¹ By paying the government, a chief or *konohiki* could also retain his proportional share of the one-third that was to go to the government.⁴²

36. Principles Adopted by the Board of Commissioners to Quiet Land Titles in their Adjudication of Claims Presented to Them, Act of Oct. 26, 1846, 2 [1847] Hawaii Laws 81, in REVISED LAWS 1925 at 2124 (Thurston at 140).

37. The ratification declared that "all claims for landed property in this kingdom shall be tested by those principles and according to them be confirmed or rejected." Resolution of the Legislative Council, 2 [1847] Hawaii Laws 94, in REVISED LAWS 1925 at 2137 (Thurston at 154).

38. Act of Oct. 26, 1846, 2 [1847] Hawaii Laws 81, 92, in REVISED LAWS 1925 at 2134 (Thurston at 151).

39. *Id.* at 83, in REVISED LAWS 1925 at 2126 (Thurston at 142-43).

40. Rules adopted by the Privy Council, Dec. 18, 1847, § 4, 4 PRIVY COUNCIL RECORD (1847), quoted in Alexander, *A Brief History of Land Titles in the Hawaiian Kingdom*, in THURM'S HAWAIIAN ALMANAC AND ANNUAL FOR 1891 at 112.

41. *Id.* at § 2.

42. *Id.* § 6 at 112-13. The commutation was often reduced or virtually eliminated by Privy Council action. Cf. 1 HAWAIIAN KINGDOM, *supra* note 1, at 288. Moreover, many *konohiki* simply failed to make the payment. In 1892, after much of the land had passed into non-Hawaiian hands, a statute was passed setting the commutation as one-third the value of the land at the time of the *Mahale*, without interest. Act of Dec. 16, 1892, ch. 68, § 1 [1892] Hawaii Laws 165, in REVISED LAWS 1925 at 2151.

The "Great *Mahele*"—or division—began January 27, 1848, and ended March 7. In the "*Mahele Book*," the interests of 245 chiefs and *konoiki* were divided from the king's private interest and the king quit-claimed his interest in specific *ahupuaa* and *ili* under each chief's control. The chiefs reciprocally quit-claimed to the king their interests in the balance of the divided lands, which then became the king's private land subject only to commoners' claims to one-third of that which they possessed and cultivated. Nevertheless, on March 8, 1848, the day after the last *mahele* between king and chiefs, the king "set apart forever to the chiefs and people of my Kingdom" approximately 1,500,000 acres,⁴³ retaining for himself, his heirs and successors approximately 1,000,000 acres. The latter were subsequently referred to as Crown lands and the former as Government lands. The Land Commission then awarded the remaining 1,500,000 acres of the kingdom to the chiefs⁴⁴ though these awards stated specifically that they were "reserving the rights of the people."⁴⁵

Total defeudalization of landholdings required the Commission to divide and parcel out the interests of the common people. An 1850 act⁴⁶ allowed each tenant to apply for his own *kuleana*. The *kuleana* could come from the Crown lands, from the Government lands created by the king, or from the other 1,500,000 acres of the kingdom, and could only include land which a tenant had "really cultivated"⁴⁷ plus a houselot of not more than a quarter of an acre.⁴⁸ The tenant received a fee title to this land if the claim was proved before the Land Commission and survey costs were paid.⁴⁹ The Commission, the legislature, and the king had previously promised the commoners an un-

Even then, a statute had to be adopted in 1909 to provide for enforcement of the payments. Act of April 20, 1909, Act 90, § 1, [1909] Hawaii Laws 118.

43. The division was affirmed by legislation. Act of June 7, 1848, [1848] Hawaii Laws 22, in REVISED LAWS 1925 at 2152.

44. See ISLAND COMMUNITY, *supra* note 1, at 46; SHOAL OF TIME, *supra* note 1, at 127.

45. An English language copy of such a patent can be found in J. CHINEN, ORIGINAL LAND TITLES IN HAWAII 9 (1953). Because of this reservation, a *kuleana* award made later in time was good against an earlier patent. See *Kekiekie v. Dennis*, 1 Hawaii 69 (1851).

46. Act of Aug. 6, 1850, § 1 [1850] Hawaii Laws 202, in 2 REVISED LAWS 1925 at 2141. Actually, a joint resolution of the Legislature of Nov. 7, 1846 had similarly allowed the Minister of the Interior to divide out the interests of tenants. §§ 4-5 2 [1847] Hawaii Laws 71. However, little came of that power, probably because of insufficient government mechanisms to deal with it.

47. Act of Dec. 21, 1849, § 6, [1850] Hawaii Laws 203, in REVISED LAWS 1925 at 2142.

48. *Id.* § 5, in REVISED LAWS 1925 at 2142.

49. Except for houselots in Honolulu, Lahaina and Hilo, *kuleana* recipients did not have to pay any commutation in order to receive their titles. *Id.* § 2, in REVISED LAWS 1925 at 2141-42.

divided one-third interest in most of Hawaii.⁵⁰ Although many historians have viewed the *Kuleana* Act as a beneficent one,⁵¹ creating more than 8,000 yeoman holdings,⁵² commoners received divided title to fewer than 30,000 acres, less than one percent of the land.⁵³

Many reasons have been advanced for the scant quantity of land that commoners received. One suggestion is that most commoners lacked even the small capital needed for the required survey. Another is that commoners did not apply for *kuleana* because they feared reprisals by chiefs and land agents.⁵⁴ While these suggestions explain the number of commoner families receiving grants, the more cogent reason why commoners received so little *kuleana* land is that *kuleana* grants were severely limited by the "really cultivated" clause of the *Kuleana* Act. Furthermore, an act of the legislature barred all commoners' land claims not proved by 1854.⁵⁵ Thus, the great bulk of Hawaiian people was separated from the lands of Hawaii. Transferable title to almost two-thirds of Hawaii was concentrated in the hands of the king and the 245 recipients of *mahele* grants. The failure of the *kuleana* to provide an adequate land base for Native Hawaiians was not merely a function of *kuleana* size. Historically, commoners had only small fields to work for their own benefit, but they also were able to use other non-cultivated lands within the *ahupuaa* in return for labor dues. In 1847, the legislature had specifically confirmed the

50. See text accompanying notes 39-41 *supra*.

51. See, e.g., Lydgate, *The Vanishing Kuleana*, THURM'S HAWAIIAN ALMANAC AND ANNUAL FOR 1915 at 103.

52. Recent research by Marion Kelly, historian, Bishop Museum, Honolulu, Hawaii determined the number of recipients to be 8205. Letter from Marion Kelley to Neil Levy, February 18, 1975.

53. 1 HAWAIIAN KINGDOM, *supra* note 1, at 294. Compare the effect of the General Allotment Act, ch. 119, 24 Stat. 388 (1887) on mainland Indian tribes. Under the guise of turning Indians into yeomen farmers, that act gave interests in tribal property to individual Indians and distributed the "excess" to non-Indians. See D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (1973).

54. See, e.g., MORGAN, HAWAII—A CENTURY OF ECONOMIC CHANGE 1778-1876, at 137 (1948).

55. An Act Relating to the Board of Commissioners to Quiet Land Titles, [1853] Hawaii Laws 26, in REVISED LAWS 1925 at 2145. Under Hawaiian case law, decisions of the Land Commission could not later be collaterally attacked. *Kaai v. Mahuka*, 5 Hawaii 354 (1885); *Kukiiahu v. Gill*, 1 Hawaii 90 (1851).

In the 1850's one might have argued that the *Kuleana* Act merely divided out a small portion of the commoners' interests under the Lee formulation and that the commoners should have been entitled to the remainder of those interests. If such a governmental taking argument was made before the Land Commission or the Supreme Court of Hawaii, it did not succeed. It must be recalled that the Hawaiian Constitution of 1840 had no clause requiring compensation for the taking of property. The closest provision to a due process clause was the preamble which stated that "nothing whatever shall be taken from any individual except by express provision of law." TRANSLATION at 10 (Thurston at 1).

common people's right to grow crops for their own use and to pasture animals on unoccupied lands.⁵⁶ The *Kuleana* Act withdrew the right to grow crops and pasture and merely provided some gathering rights,⁵⁷ which meant little to a weak tenant surrounded by large fenced landholdings. Thus the foreigners heightened the hierarchical structure of Hawaiian society by removing its ameliorative qualities.

The transformation to the modern Hawaiian land system was completed by creating formalized mechanisms for the sale of government lands and by allowing aliens to own land in Hawaii. Acts in 1846⁵⁸ authorized government land sales approved by the king and Privy Council and, by May 1, 1850, the government had sold over 27,000 acres under these laws.⁵⁹ Subsequently, the *Kuleana* Act directed that portions of government land be set aside in lots of one to fifty acres for purchase by natives who did not qualify for *kuleana*⁶⁰ and fixed a minimum price of 50 cents per acre.⁶¹ Although these laws allowed common people who had not received *kuleana* the chance to own land, they did so at the price of establishing the principle that government land could be sold off. By 1852, thousands of acres of prime Hawaiian land were in the hands of foreigners. More importantly, Western property concepts were imposed on the legal structure and would facilitate the rapid, steady takeover of Hawaiian-owned lands during the next several decades. Moreover, the government's commitment to selling its remaining land put Westerners, with their access to capital, in a position to take Hawaiian land through the legal procedures they had established.⁶² Western Imperialism had been accomplished without the usual bothersome wars and costly colonial administration.

Apologists for missionaries and other early Westerners might argue that the introduction of nineteenth-century Western property no-

56. Resolution of November 7, 1846, §§ 1-2, 2 [1847] Hawaii Laws 70.

57. Act of August 6, 1850, § 7, [1850] Hawaii Laws 203, in REVISED LAWS 1925 at 2142. *Oni v. Meek*, 2 Hawaii 87 (1858) interpreted the *Kuleana* Act as implicitly repealing all former gathering rights.

58. Law of April 27, 1846, ch. 7, §§ 1-3, [1846] Hawaii Laws 99-103, in REVISED LAWS 1925 at 2190; Resolution of Nov. 7, 1846, § 6, 2 [1847] Hawaii Laws 71.

59. PAGEANT, *supra* note 1, at 54.

60. Act of August 6, 1850, § 4, [1850] Hawaii Laws 203, in REVISED LAWS 1925 at 2142.

61. Act of July 11, 1851, [1851] Hawaii Laws 52-53.

62. An 1847 amendment of the Land Commission law permitted foreigners to receive title to lands in which they had had an interest before 1845. Act of June 28, 1847, 2 [1847] Hawaii Laws 78, in REVISED LAWS 1925 at 2233. A limitation in that amendment, which provided that Western-held land could only be resold to Native Hawaiians, was negated by legislation in 1850: Act of July 10, 1850, [1850] Hawaii Laws 146-147, in REVISED LAWS 1925 at 2233-34. The 1850 legislation allowed any resident of Hawaii to own land regardless of citizenship. The sole disability against foreign property owners, concerning escheatment, was removed in 1854. Act of June 28, 1854, [1854] Hawaii Laws 15, in REVISED LAWS 1925 at 2235.

tions helped break a pernicious feudal system, or that the Western community in Hawaii could not have foreseen the harsh effects of defeudalization and the difficulties which a people face in turning from a feudal to a capitalist economy. A more realistic observer can conclude, however, that the foreigners were motivated by greed. Rev. Richard Armstrong wrote to his brother on January 15, 1850:

The government has lately granted fee simple titles to all the natives, for the land they have lived on and occupied. This gives the final blow to the old feudal system and makes this a nation of freeholders. It is a point for which I have long contended and finally on my own motion it was carried by the King and Council. On their part it lost a great struggle as it cuts them off, at once, from the labour of all their tenants, and they must now work their lands by hired labour. *This will compel them to sell their waste lands of which they have an abundance.*⁶³

D. The Plantation Economy

With a permanent population of fewer than two thousand, Westerners took over most of Hawaii's land in the next half-century⁶⁴ and manipulated the economy for their own profit.⁶⁵ They had already stripped the land of its only readily exploitable resource, sandalwood.⁶⁶ After the Reciprocity Treaty of 1876,⁶⁷ which allowed Hawaiian sugar to enter the United States duty-free, Western-owned sugar plantations dominated the Hawaiian economy.⁶⁸ That the local population did not participate in this economy proved no obstacle; laborers were imported from the Orient and Europe.⁶⁹ By the turn of the century Hawaiians were a minority in their own homeland.⁷⁰

63. Letter on file in Library of Congress, Armstrong-Chapman papers; copy on file, Hawaiian Mission Children's Society, Honolulu, Hawaii (emphasis added).

64. In 1897, the Western 9 percent of the population, owned 67 percent of the taxable lands, while Hawaiians and part-Hawaiians owned only 24 percent. *ISLAND COMMUNITY*, *supra* note 1, at 57.

65. For detailed histories of Hawaii during this period *see generally* R. HOROWITZ, L. VARGHA, J. FINN, & J. CEASER, *PUBLIC LAND POLICY IN HAWAII: AN HISTORICAL ANALYSIS* (Legislative Reference Bureau Report No. 5, 1965) [hereinafter cited as *HISTORICAL ANALYSIS*]; 2 R. KUYKENDALL, *THE HAWAIIAN KINGDOM 1854-74* (1953) [hereinafter cited as *2 HAWAIIAN KINGDOM*]; 3 R. KUYKENDALL, *THE HAWAIIAN KINGDOM 1874-93* (1967) [hereinafter cited as *3 HAWAIIAN KINGDOM*]; J. MORGAN, *HAWAII: A CENTURY OF ECONOMIC CHANGE* (1948) [hereinafter cited as *CENTURY OF ECONOMIC CHANGE*].

66. *CENTURY OF ECONOMIC CHANGE*, *supra* note 65, at 61-68.

67. Treaty with Hawaiian Islands, January 30, 1875, [1875] 19 Stat. 625, T.S. No. 161; Act of July 18, 1876, ch. 2, [1876] Hawaii Laws 4-6.

68. By 1898, 125,000 acres were in cane sugar. *See 3 HAWAIIAN KINGDOM*, *supra* note 65, at 62. This acreage was the best on the Islands and its economic importance was greater than its proportion of land.

69. *CENTURY OF ECONOMIC CHANGE*, *supra* note 65, at 188-194.

70. In 1896, Hawaiians and part-Hawaiians constituted about 35 percent of the population. A. LIND, *HAWAII'S PEOPLE* 27 (1967).

Plantations were made possible by legislation enabling Westerners to purchase large tracts of government land,⁷¹ pursuant to which the kingdom sold over 600,000 acres by 1893 at an average price of 92 cents per acre.⁷² Although Native Hawaiians made the largest number of purchases, the bulk of the acreage went to Westerners. For example, before 1864, more than 320,000 acres were sold to only 213 Westerners.⁷³ In the following year the entire island of Niihau, over 61,000 acres, was sold to one Western entrepreneur.⁷⁴ Westerners also accumulated Crown lands via leasehold arrangements despite the fact that the Crown lands had been made inalienable in 1865.⁷⁵ By 1890, 76 lessees controlled 752,431 acres of Crown and government land by leasing at an annual rate of pennies per acre.⁷⁶

Some Westerners acquired large amounts of acreage for plantations by overreaching or actual fraud. In 1880, Claus Spreckels, the California sugar baron, purchased from a descendant of Kamehameha I all her rights in the Crown lands.⁷⁷ Although this claim had no legal value since Crown lands were inalienable, Spreckels persuaded the 1884 legislature to give him 24,000 acres of high quality sugar land in exchange for his asserted claim.⁷⁸

71. Statutes cited notes 58 and 62 *supra*. Until the Act of September 25, 1876, [1876] Hawaii Laws 118-119, such sale did not have to be at auction.

72. See HISTORICAL ANALYSIS, *supra* note 65, at 186.

73. Compare the purchase during the same period of approximately 90,000 acres by 333 Native Hawaiians. Statistics compiled by the author from COMMISSIONER OF PUBLIC LANDS OF THE TERRITORY OF HAWAII, INDICES OF AWARDS (1929), containing entries of grantees and acreage for all Royal Hawaiian government land grants.

74. COMMISSIONER OF PUBLIC LANDS OF THE TERRITORY OF HAWAII, INDICES OF AWARDS 10 (1929).

75. Upon the death of Kamehameha IV in 1865, Queen Emma applied under the intestate succession laws for a one-half interest in the estate and a right of dower in the remaining half. Ruling against her, the Hawaiian Supreme Court declared that despite the clear intent of Kamehameha III during the *Mahela* to have the Crown lands treated as private property, they belonged to the possessor of the Crown, subject only to a dower right. *In re Kamehameha IV*, 2 Hawaii 715 (1864). This litigation led to legislation which affirmed the decision of the court and further declared that all land remaining with the Crown "shall be henceforth inalienable, and shall descend to the heirs and successors of the Hawaiian Crown forever." Act of January 3, 1865, § 3 [1864] Hawaii Laws 70, in REVISED LAWS 1925 at 2178. This act also substituted an income of \$6,000 for the Queen's dower and provided for bonds to redeem existing mortgages.

76. HISTORICAL ANALYSIS, *supra* note 65, at 137.

77. SHOAL OF TIME, *supra* note 1, at 225.

78. Act of July 21, 1882, ch. 10, [1882] Hawaii Laws, in REVISED LAWS 1925 at 2179.

Under a statute that authorized government land exchanges, Act of August 14, 1895, § 17, [1895] Hawaii Laws 56-57, Charles Gay exchanged slightly fewer than 300 acres on Oahu for 48,000 acres on Lanai. R. HOROWITZ, PUBLIC LAND POLICY IN HAWAII: LAND EXCHANGES (Legislative Reference Bureau Report No. 2, 1964) 14-15. *McCandless v. Carter*, 18 Hawaii 221 (1907) upheld this questionable transaction.

In 1865, Joseph H. Morrison measured the dimensions of an *ahupuaa* of almost 50,000 acres, reported to the Hawaiian owner that the *ahupuaa* was only 1,200 acres, and then purchased it for a mere \$600. The court set aside the transaction, relying not only upon the disparity between the sales price and the true value, but also on the relationship of trust between the buyer and seller.⁷⁹ In other cases, however, courts upheld transactions where the evidence strongly suggested an illiterate seller sold property for far less than its true value, or was confused about the nature of the transaction.⁸⁰

Intermarriage between Western men and the daughters of land-rich Hawaiians also resulted in the loss of Native Hawaiian control over land.⁸¹ The courts facilitated this loss of land. For example, one decision voided an attempt by a Hawaiian woman to transfer land to her brother and thus out of the control of her Western husband.⁸² The administration of the Bishop Estate illustrates another instance in which Native Hawaiians lost control of the land.⁸³ When Bernice Pauahi Bishop, the last descendant of Kamehameha I, died in 1884, her estate included more than 375,000 acres.⁸⁴ The bulk of her estate was bequeathed to a charitable trust, administered by five named Westerners, whose successors were to be appointed by a majority of the justices of the supreme court.⁸⁵ Thus, even if the charitable estate had been efficiently managed for the benefit of Native Hawaiians, as the testator intended, control of almost 10 percent of the land of Hawaii passed out of Hawaiian hands as a result of the disposition. As Rev. Armstrong had predicted,⁸⁶ the chiefs who had been accustomed to the feudal labor dues system were unable to manage cash plantations and many large estates were lost through debts and mortgage foreclosures.⁸⁷

79. *Kapaakea v. Morrison*, 2 Hawaii 272 (1860); see also *Ainini v. Kala*, 6 Hawaii 16 (1869); *Kapea v. Mochonua*, 6 Hawaii 49 (1871).

80. See, e.g., *Kanakanui v. Leslie*, 7 Hawaii 223 (1888); *Namomi v. Ah Nui*, 5 Hawaii 441 (1885); *Kapaukea v. Lawrence*, 4 Hawaii 674 (1873).

81. Although the descendants are obviously part-Hawaiian, subsequent marriages to Westerners have led to a present landholding class whose cultural identity differs from the bulk of landless Hawaiians.

82. *Mutch v. Holau*, 5 Hawaii 316 (1885).

83. For discussion of present problems of the Bishop Estate, see text accompanying notes 171-217 *infra*.

84. This accumulation of land in the estate of one person occurred because of the scarcity of heirs in the Kamehameha line. See Midkiff, *The Kamehameha Schools and the Bishop Estate*, in *THE KAMEHAMEHA SCHOOLS—75TH ANNIVERSARY LECTURES* 163-64 (1965).

85. Will of Bernice Pauahi Bishop, ¶ 14, Equity file No. 2048 (Hawaii Cir. Ct., 1st Cir., December 2, 1884). Cited in relevant part in *Kekoa v. Supreme Court*, 55 Hawaii 174, 516 P.2d 1239, 1241 (1973).

86. See text accompanying note 63 *supra*.

87. For account of an early mortgage granted by Native Hawaiians, see, e.g., *May v. Haalelea*, 2 Hawaii 191 (1859).

As Westerners gained control over government lands and holdings of the Native Hawaiian aristocracy, the *kuleana* became easier to obtain and the majority of these minimal holdings were soon lost.⁸⁸ The *kuleana* owners were frequently harassed by the illegal diversion of water and by foraging cattle from large ranches.⁸⁹ Without the former concomitant rights to grow crops and pasture animals on unoccupied land in the rest of the *ahupuaa*,⁹⁰ the *kuleana* could not provide their owners with a subsistence living. The economic difficulties in maintaining them, plus the absence of restraints on alienation, frequently led to sales at nominal prices.⁹¹ *Kuleana* which had been leased to Westerners were never returned⁹² because natural landmarks disappeared when the *kuleana* became part of plantations.⁹³ *Kuleana* were lost to larger surrounding landholders by frequent invocation of the doctrine of adverse possession.⁹⁴

E. The Republic and the Annexation

Westerners, having asserted economic dominance over the Islands by the 1880's, turned to the establishment of complete political control.⁹⁵ Influential Western growers formed the Hawaiian League in 1887, whose stated goals were to end corruption in the Hawaiian government and to reduce the monarch's power.⁹⁶ The group staged a coup d'etat on July 6, 1887, forcing the king to promulgate a new constitution to replace the constitution of 1864. The "Bayonet Constitution" substituted the power of Western landowners for that of the king.⁹⁷ The upper class of legislators, previously appointed by the king from the Native Hawaiian nobility,⁹⁸ was now to be elected by those

88. For discussion of the current problems of remaining *kuleana*, see text accompanying notes 145-70 *infra*.

89. See discussion of the history of cattle on the Islands in *Davis v. Green*, 2 Hawaii 367 (1861). See also *CENTURY OF ECONOMIC CHANGE*, *supra* note 65, at 169.

90. See text accompanying notes 56-57 *supra*.

91. Cf. *ISLAND COMMUNITY*, *supra* note 1, at 47-52.

92. *Id.*

93. See Wise, *History of Land Ownership in Hawaii*, in *ANCIENT HAWAIIAN CIVILIZATION* 89-90 (1956).

94. See text accompanying notes 160-70 *infra*.

95. See generally S. STEVENS, *AMERICAN EXPANSION IN HAWAII, 1842-1898* (1945) [hereinafter cited as *AMERICAN EXPANSION*]; M. TATE, *THE UNITED STATES AND THE HAWAIIAN KINGDOM* (1965) [hereinafter cited as *U.S. AND THE HAWAIIAN KINGDOM*].

96. See 3 *HAWAIIAN KINGDOM*, *supra* note 65, at 347-49.

97. For example, the absolute veto power of the monarch under the constitution of 1864, art. 31, was reduced to a limited veto power in the constitution of 1887, art. 48, in Thurston at 173, 187.

98. Constitution of 1864, art. 45, in Thurston at 174.

who paid taxes,⁹⁹ from a field of candidates limited to wealthy land-owners.¹⁰⁰ Americans and Europeans residing in Hawaii, who were literate in any Western language and met the taxpaying criteria, did not have to be citizens to vote,¹⁰¹ while illiterate Hawaiians under the age of 47 were barred from voting.¹⁰²

The political victory of 1887 did not satisfy the desires of those Americans who wanted Hawaii annexed to the United States; and in the 1890's they formed the Annexation Club.¹⁰³ In 1893, when Queen Liliuokalani threatened to proclaim another constitution increasing the crown's power,¹⁰⁴ the American merchant community organized to overthrow the monarchy. Even after the Queen had clearly abandoned her plan,¹⁰⁵ the Americans continued their opposition under the name of the Committee of Public Safety. On January 16, 1893, John L. Stevens, the United States Minister in Hawaii and a long-term friend of the annexationists,¹⁰⁶ ordered marines to land in Honolulu. His excuse for invading was to protect American citizens and property.¹⁰⁷ The insurrectionists proclaimed a provisional government which Stevens recognized even before the Queen's chief lines of defense had surrendered. The Queen realized that her forces could not defeat the armed merchants and the United States Marines. In order to prevent futile bloodshed, she relinquished her governmental authority. The reaction on the mainland against United States military involvement in the revolution temporarily prevented the annexation which the merchant revolutionaries had planned.¹⁰⁸ The provisional government therefore established the Republic of Hawaii, which lasted until annexation in 1898.

99. Constitution of 1887, art. 59, in Thurston at 189.

100. Constitution of 1887, art. 56, in Thurston at 188.

101. Constitution of 1887, art. 59, in Thurston at 189.

102. Constitution of 1887, art. 62, in Thurston at 190.

103. AMERICAN EXPANSION, *supra* note 95, at 206-08.

104. *See* U.S. AND THE HAWAIIAN KINGDOM, *supra* note 95, at 155-91.

105. *Id.* at 173.

106. AMERICAN EXPANSION, *supra* note 95, at 187.

107. *See* U.S. AND THE HAWAIIAN KINGDOM, *supra* note 95, at 176.

108. For example, President Cleveland, in refusing to submit a treaty of annexation to the Senate in 1893, pointed to the unethical role the United States had played.

But for the notorious predilections of the United States Minister for Annexation, the Committee of Safety, which should be called the Committee of Annexation, would never have existed.

But for the landing of the United States forces upon false pretexts respecting the danger to life and property the committee would never have exposed themselves to the pains and penalties of treason by undertaking the subversion of the Queen's Government.

But for the presence of the United States forces in the immediate vicinity and in position to afford all needed protection and support the

The constitution of the Republic expropriated¹⁰⁹ the Crown lands, without compensation to the monarch,¹¹⁰ and made them available to Westerners for purchase. Although leaving *Mahele* lands to the descendants of lesser chiefs and their transferees,¹¹¹ the Western minority had secured control over another vast part of Hawaii. The Land Act of 1895¹¹² provided for the disposition of some former Crown lands as homesteads.¹¹³ Only citizens could apply for homesteads¹¹⁴ and the exclusion of most Orientals from citizenship¹¹⁵ limited homesteading to Hawaiians and Westerners.¹¹⁶ The portion of the Act most suited to Native Hawaiians provided for 999-year leases of small acreage at no cost.¹¹⁷ The leases, however, were inalienable and could not be de-

committee would not have proclaimed the provisional government from the steps of the Government building.

PRESIDENT'S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, H.R. EXEC. DOC. No. 47, 53d Cong., 2d Sess. XIII (1893).

109. See constitution of 1894, art. 95, [1895] Hawaii Laws 118, in Thurston at 237.

110. Queen Liliuokalani brought suit against the United States for compensation, but this claim was denied. *Liliuokalani v. United States*, 45 Ct. Cls. 418 (1910).

111. King Kamehameha III had separated his private lands from those of the government to safeguard them from Western takeover. In debate in the Privy Council, June 6, 1848, G.P. Judd had stated that it was necessary for the King to divide his private lands from the lands of the government because, "If no explanation of this kind is made, it will mix matters later on, and some of the foreigners will come later on and say they have an interest in the lands too." Debates of the Privy Council in 1848 at 42, June 6, 1848, on file in Hawaii State Archives.

112. Act of August 14, 1895, Act 26, [1895] Hawaii Laws Spec. Sess. 49-83.

113. Homesteading had been previously provided for by Act of August 29, 1884, ch. 45, [1884] Hawaii Laws 86, in REVISED LAWS 1925 at 2200. However, only 527 homesteads were taken out under this previous act and subsequent amendments, and of those only 337 were patented. HOUSE COMM. ON THE TERRITORIES GOVERNMENT FOR THE TERRITORY OF HAWAII, H.R. REP. No. 305, 56th Cong., 1st Sess. 65 (1900). The 1895 Land Act provided for continued auction sales of land, but limited the size of parcels to 1000 acres. Act of August 14, 1895, Act 26, § 17, [1895] Hawaii Laws 56.

114. Act of August 14, 1895, Act 26, § 31 [1895] Hawaii Laws Spec. Sess. 62.

115. Constitution of 1894, art. 17-18, [1895] Hawaii Laws 79, in Thurston at 205-206. The constitution provided citizenship for only those Orientals born or naturalized in the Republic of Hawaii. The effect of this naturalization requirement was to exclude most Orientals from homesteading eligibility.

116. The Land Act was conceived by plantation owners as a means to attract white labor and to prevent an Oriental takeover by the Chinese and Japanese plantation workers they had imported. See essays by Hawaiian President Sanford B. Dole in 2 HAWAIIAN KINGDOM, *supra* note 95, at 192. Dole wrote, "The problem of population is only to be worked out through far more comprehensive efforts, which shall aim to bring settlers and citizens rather than convicts and coolies . . ."

117. Act of August 14, 1895, Act 26, §§ 28-55, [1895] Hawaii Laws Spec. Sess. 61. The Land Act of 1895 also provided a right of purchase lease designed for impoverished potential agricultural entrepreneurs (*id.* §§ 59-64 at 75) and a cash freehold for those who had capital (*id.* §§ 65-70 at 78). The Commissioners of Public Land also sold land for cash plus credit (*id.* § 17 at 56) and thus fashioned what have frequently been referred to as "Special Homestead Agreements," primarily with Westerners.

vised, but would descend to statutory heirs.¹¹⁸ An analysis of homesteading in the first years after the Land Act indicates that Native Hawaiians were not the main beneficiaries.¹¹⁹

Changing attitudes in the United States concerning imperialism permitted Hawaiian annexation in 1898,¹²⁰ but annexation did not immediately affect the homesteading program. Although the joint Newlands Resolution of Annexation ceded all public lands of the Republic of Hawaii to the United States,¹²¹ it affirmed the validity of "municipal legislation of the Hawaiian Islands"¹²² and the public land laws of the United States were made inapplicable to Hawaii.¹²³ Ironically, a 1910 amendment to the Organic Act,¹²⁴ which was designed to facilitate the homesteading programs, became the precursor of their demise. It directed the Territory to open land in a given locality when 25 or more qualified homesteaders applied for that land.¹²⁵ For the sugar interests, this amendment could not have come at a less opportune time. A large number of long-term leases on crown lands were due to expire during the 1920's and 1930's, and thus could become open to homesteading under the 1910 amendment.¹²⁶ For example, a prime sugar tract previously leased to the Waiakea Mill Company near Hilo had been opened to homesteading in 1918.¹²⁷ Although the Mill Company leased back virtually all the land within several years, the industry undoubtedly wished to avoid the costs of regaining homestead land.

An entirely different problem provided the rationale for legislation to protect the sugar industry from homesteading. During this period,

118. Act of August 14, 1895, Act 26, § 43, [1895] Hawaii Laws Spec. Sess. 67. Under Public Law No. 746 (1950) these 999-year leases can be converted to fee at the holder's option. Act of Sept. 1, 1950, ch. 833, 64 Stat. 572, *as amended*, Act of Aug. 23, 1954, ch. 824, 68 Stat. 764.

119. HISTORICAL ANALYSIS, *supra* note 95, at 11, 14.

Although homesteading continued into the twentieth century, the initial benefits to Hawaiians were ultimately lost. By 1951, fewer than 10 percent of the homestead leases remained in Native Hawaiian hands. G. LUTER, REPORT ON HOMESTEADING IN HAWAII 1839-1961 (Jan. 3, 1961) at 15, on file Hawaiian State Dept. of Land and Natural Resources. The lack of capital to fulfill the development condition of the leases and the ban on testamentary disposition were partly responsible for these relinquishments.

120. AMERICAN EXPANSION, *supra* note 65, at 293-99.

121. Joint Resolution of July 7, 1898, No. 55, 30 Stat. 750 (1898).

122. *Id.* § 1.

123. The Newlands Resolution had transferred fee title to the United States but the Territorial Government interpreted the Resolution as allowing continued disposal of public lands. The Organic Act specifically validated those problematic transactions, but it did not significantly affect homesteading. Act of April 30, 1900, ch. 339, §§ 73, 91, 31 Stat. 141.

124. Act of May 27, 1910, ch. 258, § 5, 36 Stat. 443.

125. *Id.* 36 Stat. 443, 446.

126. See generally REPORT OF THE WAIAKEA HOMESTEAD COMMISSION (1926).

127. *Id.* at 12.

racial consciousness was rising among Hawaiians and part-Hawaiians, and the Hawaiian leadership perceived that the Hawaiians were a dying race.¹²⁸ The Hawaiian Protective Association suggested that Native Hawaiians be "rehabilitated" by removing them from the influences of city tenements and returning them to the land.¹²⁹ The result was the Hawaiian Homes Commission Act of 1920¹³⁰ which, by its terms, purported to mitigate the perceived racial problem. Although the act may be cited as a humanitarian effort for the surviving descendants of an indigenous people, it was enacted by sugar barons who would not tolerate accelerated homesteading.¹³¹ A deal was struck: some second-class lands would be put aside for Native Hawaiians under the new program and, in return, all cultivated sugar lands would be withdrawn from homesteading.¹³²

Although the Commission was authorized to lease parcels to Native Hawaiians for 99 years at nominal rates,¹³³ the land made available was arid and of marginal agricultural value.¹³⁴ Hawaiians, in many instances several generations removed from agricultural life, were thus to rehabilitate themselves on land that experienced farmers would not touch.¹³⁵ Furthermore, homesteaders' land rights were limited: they could not sublet, transfer or mortgage the land to non-Hawaiians and they even needed Commission approval to transfer to Hawaiians.¹³⁶ Finally, the Act provided little financial assistance to Native Hawaiians desiring to erect homes and begin farming operations.¹³⁷

128. Cf. A. LIND, HAWAII'S PEOPLE 17-18 (1955). Hindsight demonstrates that by 1920, the population of part-Hawaiians was increasing faster than the population of pure Hawaiians was decreasing. *Id.*

129. M. Vause, Hawaiian Homes Commission Act, 1920 (unpublished thesis in University of Hawaii Library) 119.

130. Act of July 9, 1921, ch. 42, 42 Stat. 108.

131. See generally M. Vause, Hawaiian Homes Commission Act, 1920 (unpublished thesis in University of Hawaii Library).

132. Withdrawal was authorized by Congress in the Act of July 9, 1921, ch. 42, §§ 203, 212, 42 Stat. 109, 112.

133. *Id.* §§ 207(a), 208(2), 42 Stat. 109-11.

134. Approximately 200,000 acres of public land were "made available" to the Hawaiian Homes Commission, which was a branch of the territorial government. Act of July 9, 1921, ch. 42, § 203, 42 Stat. 109. See text accompanying notes 218-52 *infra* for discussion of current problems of the Hawaiian Homes program.

135. At that time, Governor McCarthy of Hawaii stated that if better lands were made available to Hawaiians, "the main object of the measure would be defeated as the Hawaiians would not work the land themselves but would have the work done by Japanese." Letter from Governor McCarthy to Secretary of the Interior Payne, June 30, 1920, in M. Vause, Hawaiian Homes Commission Act, 1920 (unpublished thesis in University of Hawaii Library) 117.

136. Act of July 9, 1921, ch. 42, § 208(5), 42 Stat. 111.

137. The Commission could lend prospective homesteaders up to \$3,000. *Id.* §§ 214-15, 42 Stat. 111, 112.

In return, the Organic Act was amended to provide that non-homestead leases of public land would be for 15 years and that those leases could not be withdrawn to meet new demands for homestead leases.¹³⁸ Since no one could outbid the sugar interests for these leases, the industry obtained the use of the best lands in Hawaii. In fact, the sugar interests had bought virtually permanent use of government-owned sugar lands. Homesteading, except by Native Hawaiians under the Hawaiian Homes program, came to an end.¹³⁹ Poorer Caucasians and Hawaiian-born Orientals, who as United States citizens would have been eligible for homesteading, were denied access to public lands since only persons possessing "not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778"¹⁴⁰ were eligible under the Act.

II

PRESENT LAND PROBLEMS OF NATIVE HAWAIIANS

Almost 20 percent of Hawaii's population has some Native Hawaiian ancestry.¹⁴¹ Great variation in wealth and degree of assimilation exists among Native Hawaiians, but generally that community is one of the poorest ethnic groups within the State today.¹⁴² As real estate values in Hawaii rise, the number of geographic areas in which Native Hawaiians are able to purchase land or can afford to live decreases. Since Native Hawaiian culture has been tied to the land,¹⁴³ a land base is necessary for those Hawaiians who choose a traditional way of life. In addition, sufficient urban homeland must be assured so that economic necessity will not force Native Hawaiians to leave the Islands that form the basis of their cultural identity.¹⁴⁴

In exploring possible methods to preserve and increase the land base of Native Hawaiians, this section will focus on the problems faced by Native Hawaiian *kuleana* holders: these problems are representative of those confronting other Native Hawaiian owners of small acreage fee interests. The section will then examine the Bishop Estate and the Hawaiian Homes program, the two most important potential land bases

138. Compare Act of April 2, 1908, ch. 124, 35 Stat. 56 with Act of July 9, 1921, ch. 42, § 304, 42 Stat. 117.

139. From 1921 to 1946 only one tract of land was opened for general homesteading. HAWAII (TERRITORY) LAND LAWS REVISION COMMISSION, FINAL REPORT 44 (1946).

140. Act of July 9, 1921, ch. 42, § 201(a)(7), 42 Stat. 108.

141. See T. FISHER, HAWAII: GROWING PAINS IN PARADISE 12 (1973).

142. See generally D. Tuttle, Hawaii Voting Behavior: A Guide to Estimated Social and Economic Characteristics, 1972 (unpublished thesis in University of Hawaii Library).

143. See generally Handy, Handy & Pukui, *Native Planters in Old Hawaii*, in BERNICE P. BISHOP MUSEUM BULL. No. 233.

144. Today most Native Hawaiians live in or near Honolulu. STATE OF HAWAII, THE STATE OF HAWAII DATA BOOK, A STATISTICAL ABSTRACT 8 (1974).

for Native Hawaiian utilization. Finally, it will analyze the current land reparation claim of Native Hawaiians.

A. Protection of Kuleana Rights

Despite the loss of many *kuleana*,¹⁴⁵ a significant number are still held by Native Hawaiians, particularly in rural areas such as East Molokai. Inherited *kuleana* constitute an important source of land held in fee by impoverished Native Hawaiians.¹⁴⁶ These plots, and the gathering rights they confer,¹⁴⁷ have provided adequate homesites for nuclear or extended Hawaiian families. However, three major legal obstacles bar full use of many *kuleana*.

1. Fractionated Ownership

A *kuleana* that one person received in the 1850's may now be owned by dozens of individuals if, in the intervening generations, the property passed by intestate succession.¹⁴⁸ Although each joint owner has a legal right to enter and use the land,¹⁴⁹ no one has much incentive to improve the land or pay taxes¹⁵⁰ if title is so clouded that ownership is perceived as only temporary. Even if estate counseling were feasible and effective for the future, legal assistance would be necessary to untangle those *kuleana* interests which are already fractionated.

If the number of joint owners is relatively small, there are three possible remedies. First, one joint owner can buy out the others. Second, the *kuleana* can be partitioned and each joint owner given title to a

145. Several studies indicate how few *kuleana* were retained by Native Hawaiians. One estimate is that no more than one-third of the 937 *kuleana* on Kauai were securely held by Hawaiians in 1915. J. Lydgate, *The Vanishing Kuleana*, in THURM'S HAWAIIAN ALMANAC AND ANNUAL FOR 1915 at 109. Although the percentage was likely to have been greater on the outer islands, a recent survey indicated that in densely populated Oahu less than 6.6 percent of the *kuleana* were still in Hawaiian hands as of 1936. ISLAND COMMUNITY, *supra* note 1, at 49.

146. Interview with Fred Bicoy, West Molokai Community Advisor, Office of Economic Opportunity, in East Molokai, July 27-29, 1973.

147. The *ahupuaa* historically ran from the mountains to the sea, with gathering rights for residents extending throughout this area. Today, lawful occupants of *kuleana* retain these rights. They may take firewood, house timber, aho cord, thatch and ki leaf for their own use. HAWAII REV. STATS. § 7-1 (1968).

148. As with mainland Indians, the imposition of a foreign inheritance scheme has led to ownership patterns neither traditional nor typical of Western landholding. See Comment, *Too Little Land, Too Many Heirs—The Indian Heirship Problem*, 46 WASH. L. REV. 709 (1971).

149. See *Moranho v. De Aguiar*, 25 Hawaii 267, *modified*, 25 Hawaii 271 (1920); *Lui v. Kaleikini*, 10 Hawaii 391 (1896).

150. The nonpayment of taxes is a recurrent cause of loss of *kuleana*. Interview with Fred Bicoy, East Molokai Community Adviser, Office of Economic Opportunity, in East Molokai, July 28, 1973.

portion of the land.¹⁵¹ Finally, if joint owners prefer to retain undivided ownership, title can be assigned to a mutually-owned corporation, trust, or partnership with the power to assure payment of taxes and to enforce agreed-upon land use patterns.

The owners of a *kuleana*, however, may be so numerous as to render the latter two solutions infeasible. Effective use of the land may require one or more of the joint owners to purchase the interests of others. The risk inherent in this approach is that impoverished Native Hawaiians may lose their only access to land ownership as they are bought out by more financially able Hawaiians. Only infusion of money from government or charitable sources will allow financially needy joint owners to undertake acquisition. Perhaps if *kuleana* ownership is viewed as a base of self-support for people who might otherwise need continual financial assistance, public funding is politically possible.

2. *Inadequate Access*

Since large plantations and developments surround *kuleana*, many roads leading to them are indirect or in such poor condition as to render them impassable to modern transportation. Legal tools already exist to remedy this problem: the doctrine of easements by necessity, for example, has been consistently recognized by Hawaiian courts.¹⁵² In applying this doctrine, the courts have not required prior ownership by a single person of both the servient and dominant estates,¹⁵³ nor, if the property is landlocked, have they required that the right-of-way be absolutely necessary.¹⁵⁴ The easement must be "reasonably" necessary; that is, other access must be either difficult or expensive to use.¹⁵⁵ Thus, convenient right-of-way presently used by a *kuleana* holder can usually be upheld even if the user cannot establish a prescriptive easement.

In addition, statutory sanction exists for rights-of-way to *kuleana*. Hawaiian law still retains the 1850 statute establishing *kuleana*, which declares that, "the people shall have . . . the right of way. . . . The roads shall be free to all, on all lands granted in fee simple."¹⁵⁶ This provision has been used as historical evidence to strengthen the theory

151. HAWAII REV. STATS. § 668 (1968) provides procedures for partition of real estate. Of course, compliance with zoning laws concerning subdivision of property would also be necessary.

152. See *Palama v. Sheehan*, 50 Hawaii 298, 440 P.2d 95 (1968).

153. *Henry v. Ahlo*, 9 Hawaii 490 (1894).

154. *Palama v. Sheehan*, 50 Hawaii 298, 301, 440 P.2d 95, 98 (1968); *Enos v. Wa Sing*, 4 Hawaii 457 (1882).

155. See, e.g., *Kalaukoa v. Keawe*, 9 Hawaii 191, 193 (1893).

156. HAWAII REV. STATS. § 7-1 (1968) (originally enacted as Act of August 6, 1850, § 7, [1850] Hawaii Laws 202); REVISED LAWS 1925 at 2142.

of right-of-way by necessity.¹⁵⁷ It should also be used as an independent ground to establish access to land. There is precedent using ancient Hawaiian custom and usage to determine modern property rights. For example, the court has considered the purpose of laws enacted at the time of the Great *Mahele* in order to resolve a current water rights issue.¹⁵⁸ Since the problems of the *kuleana* also stems from the Great *Mahele*, a similar approach should be taken to preserve access.¹⁵⁹

3. Adverse Possession

Fractionated ownership and lack of access often lead to disuse of *kuleana* plots which, in turn may lead to permanent loss of possessory rights through adverse possession. The doctrine of adverse possession denies to the legal owner of land the ability to use the courts to eject one who has occupied that land for a statutory period¹⁶⁰ in an open, hostile, notorious, and exclusive manner.¹⁶¹ Doctrines developed in other jurisdictions that would stay this trend, and limit the application of adverse possession, have not been adopted in Hawaii.¹⁶² Rather, adverse possession has been used primarily by large landholders to absorb the enclosed *kuleana* of Native Hawaiians.¹⁶³ Although a large

157. *Palama v. Sheehan*, 50 Hawaii 298, 300, 440 P.2d 95, 97 (1968).

158. *McBryde Sugar Co. v. Robinson*, 54 Hawaii 174, 504 P.2d 1330, *aff'd on rehearing*, 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed*, 417 U.S. 962 (1974).

159. Traditional rights of *kuleana* owners might also be used to control resource-destructive aspects of development and to extend rights-of-way throughout the *ahupuaa* to reach the mountains and beaches. It could be argued that since the people have rights to gather resources within the *ahupuaa*, any future development that would destroy these natural resources must be halted. See note 147 *supra*.

As a modest note, the legislature passed a public access statute, HAWAII REV. STATS. § 46-6.5(a) (1968). It provides that all developers, as a condition precedent to final approval of a subdivision where public access is not already established, must dedicate land for public access from public highways to the coastal shoreline, mountain trails, and existing facilities for hiking, hunting, fruit-picking, ti-leaf sliding, and other recreational purposes. See Comment, *Hawaiian Beach Access: A Customary Right*, 26 HASTINGS L.J. 823 (1975).

160. HAWAII REV. STATS. §§ 657-31, 669-1 (1968). The statute of limitations was originally 20 years. Act of July 18, 1870, ch. 22, § 1, [1870] Hawaii Laws 28. This period was reduced to 10 years in 1898. Act of April 22, 1898, Act 19, § 1, [1898] Hawaii Laws 22. See note 165 *infra* for the 1973 amendment which changed the period back to 20 years.

161. For example, Hawaiian courts have not been strict in demanding that the adverse possessor enter under claim of title. See *Deponce v. Ulupalakua Ranch, Ltd.*, 47 Hawaii 17, 395 P.2d 273 (1964); *Lalakea v. Hawaiian Irrigation Co.*, 36 Hawaii 692 (1944). Nor have they always required the adverse possessor faithfully to pay taxes. See *Gomes v. Upchurch*, 50 Hawaii 125, 432 P.2d 890 (1967); *Deponce v. Ulupalakua Ranch, Ltd.*, 48 Hawaii 17, 395 P.2d 273 (1964).

162. *Thomas v. State*, 55 Hawaii 30, 514 P.2d 572 (1973); *Oahu Ry. and Land Co. v. Kaili*, 22 Hawaii 673 (1915); *Booth v. Beckley*, 11 Hawaii 518 (1898).

163. See Town & Yuen, *Public Access to Beaches in Hawaii, "A Social Necessity,"* 10 HAWAII B.J. 5, 21 (1973).

landholder cannot gain title by merely showing non-use of the *kuleana*,¹⁶⁴ it may be relatively easy to cultivate the lands of an enclosed *kuleana* and to begin occupying the land through adverse possession. Reduction of adverse possession claims to paper title is then a simple matter¹⁶⁵ and opens the door to development. Native Hawaiians have been less able to use the doctrine to secure land for themselves. For example, if a native tenant remained on cultivated lands after 1850, but never applied for a *kuleana*, his continued possession was deemed permissive rather than adverse.¹⁶⁶ Thus it became practically impossible for a commoner to adversely possess land owned by a *konohiki*.

There are two approaches for *kuleana* owners who want to avoid this loss. One alternative, suggested by Chief Justice William Richardson of the Hawaii Supreme Court, is that more Native Hawaiians register their lands to prevent them from being taken by adverse possession.¹⁶⁷ A second approach is Native Hawaiian pressure to reform the adverse possession laws. In 1973, the statutory period for adverse possession was changed from 10 to 20 years,¹⁶⁸ thus allowing land owners a longer period in which to evict a potential adverse possessor. The legislature also passed a bill which would have required an adverse claimant to have entered the land in good faith.¹⁶⁹ Although this bill would merely have prevented successful claims by those who had *not* acted in good faith, it was vetoed by the governor.¹⁷⁰

B. The Bishop Estate

The Bishop Estate¹⁷¹ is the largest and most important of Hawaii's landed charitable estates.¹⁷² Its holdings on all major Islands except

164. *Akawai v. Lupong*, 4 Hawaii 259 (1880).

165. Title can be established pursuant to the Land Court Registration Act, HAWAII REV. STATS. § 501 (1968), Hawaii's enactment of the Torrens System. That Act has had very limited use because of its complex procedures; an application must include a boundary survey and a complete abstract of title. Expense, in fact, limits use of the Act to wealthy landowners and large developers. Most landholders rely instead on actions to quiet title, which are simple to bring, especially when unopposed. HAWAII REV. STATS. § 669 (1968). See D. Dauthet, *Clearing Land Titles in Hawaii*, Sept. 23, 1974 (unpublished paper).

166. See, e.g., *Dowsett v. Maukeala*, 10 Hawaii 166 (1895).

167. *Hawaii Advertiser*, Feb. 9, 1974, at A-2, col. 1.

168. HAWAII REV. STATS. § 657-31 (Supp. 1974).

169. H.B. 15, S.B. 879, Reg. Sess. (1973); legislative passage, April 11, 1973.

170. Governor's veto, June 1, 1973. SEVENTH LEGISLATURE OF THE STATE OF HAWAII, FINAL STATUS OF BILLS AND RESOLUTIONS 202 (1974).

171. See text accompanying notes 83-85 *supra* for discussion of the formation of the Bishop Estate.

172. Other major landed charitable estates include Queen's Hospital, Queen Liliuokalani Trust, and The Bernice P. Bishop Museum. See R. HOROWITZ, PUBLIC LAND POLICY IN HAWAII: MAJOR LANDOWNERS 17 (Legislative Reference Bureau Report No. 3, 1967) [hereinafter cited as MAJOR LANDOWNERS].

Lanai comprise nine percent of the state.¹⁷³ The will of Princess Bernice Pauahi Bishop established the Estate and named five Westerners as trustees; their successors were to be named by the members of the Hawaii Supreme Court.¹⁷⁴ The trustees were authorized "to sell and dispose of any lands of the . . . estate and to exchange lands and otherwise dispose of the same" to further the trust purposes.¹⁷⁵ Approximately 90 percent of the Estate's land is leased for long terms for residential, agricultural, commercial, and industrial purposes.¹⁷⁶ But the Estate has failed to put its resources to effective use. Although the Estate's total landholdings are valued conservatively at more than \$500,000,000,¹⁷⁷ its annual income is under \$9,000,000,¹⁷⁸ or less than two percent of its capital. Such a minimal return raises the question of whether the trustees are fulfilling their statutory obligation to manage the Estate in the "manner in which men of ordinary prudence, discretion, and judgment would act in the management of their own affairs."¹⁷⁹

More importantly, the low return has prevented the Estate from realizing its benevolent aims. Princess Bishop's will directed the trustees to hold the corpus upon the following trusts: to maintain two schools, and to support orphans and other indigents, "giving the preference to Hawaiians of pure or part aboriginal blood. . . ."¹⁸⁰ Despite

173. *Id.* at 17, 44.

174. Will of Princess Bernice Pauahi Bishop, para. 14, Equity file No. 2048 (Hawaii Cir. Ct., 1st Cir. Dec. 2, 1884).

For the decision that Justices, when appointing Trustees, are acting as individuals rather than as members of the judiciary, see *Kekoa v. Supreme Court*, 59 Hawaii 174, 516 P.2d 1239 (1973); *In re Bishop Estate*, 23 Hawaii 575 (1917), *aff'd*, 250 F. 145 (9th Cir. 1918).

175. Will of Princess Bernice Pauahi Bishop, para. 13, Equity file No. 2048 (Hawaii Cir. Ct., 1st Cir. Dec. 2, 1884). Codicil No. 1, para. 17 further states: "I give unto the trustees named in my will the most ample power to sell and dispose of any lands or other portions of my estate . . . but [direct them] to continue and manage the same, unless in their opinion a sale may be necessary for the establishment or maintenance of said schools, or for the best interest of my estate." *Quoted in Midkiff v. Kobayashi*, 54 Hawaii 299, 330, 507 P.2d 724, 742 (1973).

176. MAJOR LANDOWNERS, *supra* note 172, at 20, 23-24.

177. The Bishop Estate reported the basis of its tax assessment of July 1, 1972 was \$360,592,000. See Honolulu Advertiser, Aug. 1, 1973, at A-7, col. 1. The state assesses property at 70% of real market value. PROPERTY TECHNICAL OFFICE, DEPT OF TAXATION, HAWAII'S ASSESSMENT-SALES RATIO STUDY 1973 at 1 (1974). Compare for example, the endowment of Stanford University at \$365,000,000, STANFORD UNIVERSITY, FACTS: STANFORD UNIVERSITY, 1973-1974, and the Carnegie Corporation at \$284,000,000, M. LEWIS, THE FOUNDATION DIRECTORY 258 (1971).

178. "In 1971-1972 the annual rents totaled \$8,775,805. There was additional income of \$666,968, from interest, dividends and other sources." Honolulu Advertiser, Aug. 1, 1973, at A-7, col. 1.

179. HAWAII REV. STATS. § 557-2(a)(3) (Supp. 1974).

180. Will of Princess Bernice Pauahi Bishop, para. 13, Equity file No. 2048 (Hawaii Cir. Ct., 1st Cir. Dec. 2, 1884), cited in *In re Bishop Estate*, 53 Hawaii 604, 609-10, 499 P.2d 670, 674 (1972).

this broad directive to support and educate indigent Native Hawaiians, the Estate has limited its activities almost exclusively to maintaining the Kamehameha Schools.¹⁸¹ Moreover, the Kamehameha Schools receive only 85 percent of their expenses from the Estate; the balance is collected in tuition from students—all of whom are part-Hawaiian.¹⁸²

To combat the low return on its capital, the Estate has begun to lease large tracts of land to private companies which develop and sublet that land. These transactions, however, have sparked resentment among those Native Hawaiians who no longer believe that development is always beneficial. In 1969, for example, a broad-based political coalition opposed the eviction of a pig farmer from Bishop Estate land slated by the trustees for a Kaiser Aetna development.¹⁸³ It is ironic and unfortunate that a charitable estate would have prevented a traditional Hawaiian activity in order to produce revenue to educate Native Hawaiians. During the past five years, the Estate has attempted to raise capital by large acreage sales.¹⁸⁴ A 1970 sale of 2,300 acres to a developer was set aside as against the best interest of the Estate, because the trustees had not insured that the sales price was adequate.¹⁸⁵ In 1973, the Estate agreed to sell 15,000 acres on the island of Hawaii for \$6,200,000,¹⁸⁶ a price of about \$413 an acre.

The trustees have attempted to minimize public inquiry about Estate finances by pointing to the difficulties of running a tax-exempt foundation.¹⁸⁷ Their activities are shrouded in an accounting system that has been described as difficult to understand;¹⁸⁸ and, in the past,

181. Zalborg, *Bishop Estate-Kam Schools Relations*, Honolulu Advertiser, Aug. 1, 1973, at A-7, col. 1.

182. Statement of Trustee Matsuo Takabuki in Honolulu Advertiser, July 31, 1973, at A-13, col. 1; *The Kamehameha Schools, Providing Education Services for Hawaii's Youth* (1973) (brochure to parents from the schools).

183. See R. Pedersen, *The Ad Hoc Committee for a Hawaiian Trustee* 28, August, 1972 (unpublished thesis in University of Hawaii Library) [hereinafter cited as Pedersen].

184. Nevertheless, the trustees recently claimed that tax consequences made the sale of *small* plots of Estate land prohibitive, thereby justifying their low cash flow. Honolulu Advertiser, Aug. 1, 1973, at A-7, col. 1.

On the other hand, in the early 1960's, the Estate vigorously opposed legislation that would have allowed long-term lessees of residential property to purchase the remainder interests in leased lands. See, e.g., H.B. 16, Reg. Sess. (1961). For discussion of the political battle see R. HOROWITZ & N. MILLER, *LAND AND POLITICS IN HAWAII* (1963). The Estate marshaled Native Hawaiian opposition to the legislation by pointing to the potential shrinkage of Estate holdings. See generally Pedersen.

185. *Midkiff v. Kobayashi*, 54 Hawaii 299, 329-34, 507 P.2d 724, 743 (1973).

186. Honolulu Star-Bulletin, July 11, 1973, at A-1, col. 2.

187. Zalborg, *Bishop Estate-Kam Schools Relations*, Honolulu Advertiser, Aug. 1, 1973, at A-7, col. 1.

188. Report of the Master on the Petition of the Trustees for Approval of the 83rd Annual Report at 30, Equity file No. 2048 (Hawaii Cir. Ct., 1st Cir. Sept. 25, 1970) [hereinafter cited as Master's Report].

they have breached their legal obligation to publish annually a list of the Estate's assets in a Honolulu newspaper.¹⁸⁹

The trustees could amplify the Estate's benefits to Native Hawaiians, consonant with the Bishop will, by making land available directly to Native Hawaiians. The Estate's sale of land to developers for \$413 an acre indicates that the same or comparable land could have been made available to Native Hawaiian groups at a similar rate. Although the price may have been inadequate for a third party, it is arguably proper for a beneficiary.¹⁹⁰ This procedure would ease the problems of landless Native Hawaiians without lessening Estate revenues. Furthermore, the will directed the trustees to "devote a portion of each year's income to the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians. . . ."¹⁹¹ Case law is clear that trustees have latitude in implementing the intent of the testator as determined from a will in its entirety.¹⁹² Under this authority the Estate could support indigent Native Hawaiians by leasing land to them at a nominal rate. In a narrower application of this principle, land and homes could be made available to indigent parents of students and potential students of the Kamehameha Schools.¹⁹³

Since trustees have enormous discretion under the will, lawsuits probably cannot force them to take innovative action such as allowing Native Hawaiians free use of Estate land or deciding against development projects that might disrupt Native Hawaiian communities. Action by the trustees themselves is the best hope for such policy changes. The appointment of trustees sympathetic to the needs of Native Hawaiians is the surest means of effecting major changes within the Bishop Estate. Consequently, the Native Hawaiian community has attempted to reform the appointment of trustees. In 1971 the Ad Hoc Committee for a Hawaiian Trustee was formed to prevent the appointment of a non-Hawaiian to fill a vacancy on the Board of Trustees.¹⁹⁴ Although both the political movement and corollary lawsuits¹⁹⁵ were unsuccessful, when another vacancy opened up in 1974, the Supreme Court appointed a Native Hawaiian to the position.¹⁹⁶

189. *In re Bishop Estate*, 16 Hawaii 804 (1905).

190. See text accompanying note 193 *infra*.

191. Will of Princess Bernice Pauahi Bishop, para. 13, Equity file No. 2048 (Cir. Ct., 1st Cir. Dec. 2, 1884); cited in *In re Bishop Estate*, 53 Hawaii 604, 609-10, 499 P.2d 670, 674 (1972) (emphasis added).

192. See *Estate of Weill*, 48 Hawaii 553, 406 P.2d 718 (1965); *Hawaiian Trust Co. v. Breault*, 42 Hawaii 268 (1958).

193. For a discussion of the interrelation of poverty and education, see C. JENCKS, *INEQUALITY—A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* (1972).

194. See generally Pedersen, *supra* note 183.

195. *Kekoa v. Supreme Court*, 53 Hawaii 174, 516 P.2d 1239 (1973).

196. Honolulu Star-Bulletin, Aug. 14, 1974, at A-1, col. 5.

However, lawsuits by Native Hawaiians are a proper means of enforcing the trustees' non-discretionary duties to account and to make the trust productive.¹⁹⁷ To date, Native Hawaiians have been reluctant to prosecute such suits for fear that, if brought into issue, the entire Estate program might be challenged as granting an unconstitutional preference on the basis of race. This concern was exacerbated in 1972 by a concurring opinion in an appeal to the Hawaii Supreme Court from a routine order approving an accounting by the trustees.¹⁹⁸ Justice Abe took the occasion to opine that the Bishop will does not require the Estate to prefer Native Hawaiians for admission to Kamehameha Schools,¹⁹⁹ even though this interpretation of the will conflicts with that of the original trustees, including the testator's husband.²⁰⁰ Moreover, the opinion concluded that such a preference for Native Hawaiians would be unconstitutional.²⁰¹ The majority refused to discuss the question of preference since it had not been raised at the trial.²⁰² However, the issue will surely be judicially considered in the future.

Interpreting the will to require preference for Native Hawaiians in admission to the Kamehameha Schools raises the question of the constitutionality of such a provision in a charitable trust. The Equal Protection Clause of the Fourteenth Amendment forbids discrimination against a racial minority by a private school established by a state-administered will.²⁰³ The United States Supreme Court has not yet decided whether providing special benefits to an economically disadvan-

197. The Hawaiian Supreme Court has assumed without discussion that Native Hawaiians, as special beneficiaries of the Estate, have standing to sue. See, e.g., *Kekoa v. Supreme Court*, 53 Hawaii 174, 516 P.2d 1239 (1973); see also 4 SCOTT ON TRUSTS § 391 (2d ed. 1956). The Attorney General of the State also has authority to bring suit to protect the interests of beneficiaries of charitable estates. See *Midkiff v. Kobayashi*, 54 Hawaii 299, 335, 507 P.2d 724, 745 (1973).

198. *In re Bishop Estate*, 53 Hawaii 604, 499 P.2d 673 (1972).

199. He stated that the will

provides simply for the erection of "two schools, each for boarding and day scholars, one for boys and one for girls . . ." The only racial limitation is contained in the direction "to devote a portion of each year's income to the support and education of orphans, and others in indigent circumstances, giving preference to Hawaiians of pure or part aboriginal blood . . ."

Id. at 610, 494 P.2d at 674 (Abe, J., concurring).

200. SHOAL OF TIME 299-301.

Although the interpretation of the will by Bernice's husband as trustee is not binding on a court, much is known of the allegiance which Bernice, the last of the Kamehameha line, felt towards Native Hawaiians. See H. KENT, CHARLES REID BISHOP: MAN OF HAWAII (1969); C. BLACK & K. MILLEN, PRINCESS PAUHI BISHOP AND HER LEGACY (1959). Her testamentary intent would be carried out most faithfully by interpreting the preference clause as referring to all the charitable aims of the Estate.

201. 53 Hawaii at 611, 499 P.2d at 674.

202. *Id.* at 608, 499 P.2d at 673.

203. See, e.g., *Pennsylvania v. Board of Trustees*, 353 U.S. 230 (1957) (The Girard College Case). See also Lusk, *National Policy and the Dead Hand: The Race Conscious Trust*, in 112 TRUST AND ESTATES 554 (1973).

taged minority groups can justify racial criteria in admissions.²⁰⁴ Even if such programs are generally declared unconstitutional,²⁰⁵ the Bishop Estate program should be considered constitutional as reasonably related to a legitimate concern for an indigenous people.

United States statutes and case law²⁰⁶ have traditionally applied special rules to American Indians. Congress has passed Indian legislation in the fields of education,²⁰⁷ health,²⁰⁸ civil liberties,²⁰⁹ and general welfare.²¹⁰ *Morton v. Mancari*²¹¹ upheld a statute²¹² which required that Indians be preferred for employment within the Bureau of Indian Affairs. The Court specifically enunciated what had been implicit in earlier decisions:²¹³ Indian legislation is constitutional if ". . . the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . ." ²¹⁴ Although Native Hawaiians cannot properly be called "American Indians" in an anthropological sense, the plight of both groups as indigenous peoples within the United States calls for analogous legal treatment.²¹⁵ The phrase "Hawaiians . . . of pure or part aboriginal blood"²¹⁶ in the Bishop will is not as exclusive as the term "white." Our society tends to define one as white only if he or she has no other identifiable racial ancestry.

204. In the past term, the Court ruled moot a case which challenged an admission policy designed to increase minority enrollment at a law school. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

205. For arguments supporting the necessity for and constitutionality of minority admissions programs, see Bell, *In Defense of Minority Admissions Programs: A Response to Professor Guglia*, 119 U. PA. L. REV. 364 (1970); Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admission: DeFunis v. Odegaard*, 49 WASH. L. REV. 1 (1973). For a general discussion of considering race in order to correct racial imbalance and discrimination, see Viera, *Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 MICH. L. REV. 1553 (1969).

206. See, e.g., *Morton v. Mancari*, 417 U.S. 535 (1974); *Board of Comm'rs v. Seber*, 318 U.S. 705 (1943).

207. See, e.g., 25 U.S.C. § 452 (1970), formerly Act of Apr. 16, 1934, ch. 147, § 1, 48 Stat. 596.

208. 42 U.S.C. §§ 2001-2005(f) (1970), formerly Act of Aug. 1, 1954, ch. 658, 68 Stat. 674 (Indian Hospitals and Health Facilities).

209. 25 U.S.C. §§ 1302-1303 (1970), formerly Act of Apr. 11, 1968, Pub. L. No. 90-284, §§ 202-03 (Indian Civil Rights Act).

210. See, e.g., 25 U.S.C. §§ 631-632 (1970), formerly Act of Apr. 19, 1950, ch. 92, §§ 1, 2, 64 Stat. 44 (Navaho and Hopi Tribes: Rehabilitation).

211. 417 U.S. 535 (1974).

212. Indian Reorganization Act of 1934, 25 U.S.C. § 472 (1970).

213. See *Board of Comm'rs v. Seber*, 318 U.S. 705 (1943); *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808 (E.D. Wash. 1965).

214. *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

215. The United States Supreme Court has never defined the term "Indian" but has implicitly expanded its meaning to include Alaskan Aleuts and Eskimos, non-Indians under an "anthropological" meaning. See *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), *aff'g* 240 F. 274 (9th Cir. 1917). See also *Alaska v. Annette Island Packing Co.*, 289 F. 671 (9th Cir. 1923).

216. See text accompanying note 180 *supra*.

One who has any Hawaiian blood is by definition part-Hawaiian. Thus—although all of the students at the Kamehameha Schools have some Hawaiian blood, 83 percent have Caucasian ancestry, 67 percent have Chinese ancestry, 24 percent have Japanese ancestry, and 10 percent have Filipino ancestry.²¹⁷

In sum, the Native Hawaiian preference regarding admission to the Kamehameha Schools is probably constitutional. Since the issue will undoubtedly be raised, remedial lawsuits aimed at correcting Estate deficiencies should not be avoided for fear that the preference clause will be declared unconstitutional.

C. Hawaiian Home Lands

Formed more than fifty years²¹⁸ ago to return Native Hawaiians to a pastoral life, the Department of Hawaiian Home Lands²¹⁹ has yet to provide the Native Hawaiian community with a substantial land base.²²⁰ Although there are 190,000 acres under its jurisdiction,²²¹ less than 15 percent of that acreage is currently under lease to Native Hawaiian homesteaders.²²² Today, only 69 families live on ranch-size

217. The Kamehameha Schools, *Providing Education Services for Hawaii's Youth* (1973) (brochure to parents from the schools).

218. See text accompanying notes 126-142 *supra* on the formation of the Hawaiian Homes program. Problems of the Department of Hawaiian Home Lands have been extensively studied. See generally D. CLEGG, *PROGRAM STUDY AND EVALUATION OF THE DEPARTMENT OF HAWAIIAN HOME LANDS, STATE OF HAWAII* (1971) [hereinafter cited as *PROGRAM STUDY*]; H. DOI, *LEGAL ASPECTS OF THE HAWAIIAN HOMES PROGRAM* (Legislative Reference Bureau Rep. No. 1A, 1964) [hereinafter cited as *LEGAL ASPECTS*]; D. HANSEN, *THE HOMESTEAD PAPERS: A CRITICAL ANALYSIS OF THE MANAGEMENT OF THE DEPARTMENT OF HAWAIIAN HOME LANDS* (1971) [hereinafter cited as *HOMESTEAD PAPERS*]; A. SPITZ, *LAND ASPECTS OF THE HAWAIIAN HOMES PROGRAM* (Legislative Reference Bureau Rep. No. 1C, 1964) [hereinafter cited as *LAND ASPECTS*]; A. SPITZ, *ORGANIZATION AND ADMINISTRATION OF THE HAWAIIAN HOMES PROGRAM* (1963).

219. The Federal government gave title to Hawaiian Homes property to the state in Hawaii Admission Act, Pub. L. No. 86-3, § 5(b), 73 Stat. 5 (1959). The name of the administrative organization was then changed from the Hawaiian Homes Commission to the Department of Hawaiian Home Lands. The Department is a state executive branch directed by a Commission, whose seven members are appointed by the Governor and must include four Native Hawaiians of at least one-fourth native blood. HAWAII CONST., Hawaiian Homes Commission Act, 1920, § 202. Provisions governing the Hawaiian Homes Commission Act are now part of the state constitution as required by the Hawaii Admission Act, § 4, 48 U.S.C. Prec. § 491 (1970).

220. Doubts of the program's constitutionality were expressed both at the time of its adoption and at the time of statehood. See *LEGAL ASPECTS*, *supra* note 218, at 41-54. See text accompanying notes 205-217, *supra*, for a contrary argument.

221. DUNN & AKINAKA, *A LAND INVENTORY AND LAND USE STUDY FOR THE DEPARTMENT OF HAWAIIAN HOMES 2-4* (1972) [hereinafter cited as *LAND INVENTORY*]. There is a disparity between the original acreage established in 1920 and the present tally. See, e.g., *HOMESTEAD PAPERS*, *supra* note 218, at 30. Dunn and Akinaka attempt to answer criticism that there are "missing" homestead lands. *LAND INVENTORY* at 4.

222. *LAND INVENTORY*, app., table 2. However, almost 13,000 acres not under individual lease are used for community pastures for homesteaders. *Id.* See note 235 *infra*

parcels and 365 families live on farms, usually of 40 acres.²²³ Over 2,000 homesteading families have been assigned houselots, some as small as 7,500 square feet, in subdivision communities such as Papakolea in urban Honolulu and Kalamaula on rural Molokai.²²⁴

The Hawaiian Homes program must be considered a failure as measured by its original objective to rehabilitate Native Hawaiians by returning them to a farming life. Few of the families living on farm-size parcels actually engage in farming operations. Most have relinquished management of their land to pineapple companies in return for monthly stipends.²²⁵ However, the program has succeeded in providing houselots which save some Native Hawaiians from expulsion due to rising land costs. The houselot program evolved from the political pressures of Native Hawaiian squatters at Papakolea who wished the land they were living on to be brought under Hawaiian Homes jurisdiction.²²⁶ Today the greatest demand for homesteads is for urban houselots,²²⁷ and accounts of twenty-year waits for houselots on land-short Oahu have been documented.²²⁸

Many explanations can be offered as to why the vast acreage of the Hawaiian Homes program has provided so few homesteads. Some critics have pointed to administrative heavy-handedness and lack of innovative thinking.²²⁹ The Department itself blames the inferior qual-

for land use of the remainder of Hawaiian Home Lands.

223. J. DUNN & A. AKINAKA, LTD., A LAND INVENTORY AND LAND USE STUDY FOR THE DEPARTMENT OF HAWAIIAN HOME LANDS 4 (1972).

224. DEPARTMENT OF HAWAIIAN HOME LANDS, ANNUAL REPORT 5 (1973).

225. Homesteaders are not allowed to sublet homesteads. HAWAII CONST., Hawaiian Homes Commission Act, 1920, § 208(5). However, a series of Attorney General opinions approved arrangements which differ little from subleases. See LEGAL ASPECTS, *supra* note 218 at 14-16. The issue may become moot because pineapple companies are rapidly leaving the Hawaiian Islands. Honolulu Star-Bulletin, Dec. 14, 1973, at C-14, col. 5.

226. See account in E. Heen, *The Hawaiians of Papakolea: A Study in Social and Economic Realism*, 28-31, June, 1936 (unpublished thesis in University of Hawaii Library).

227. Currently over 3,300 Native Hawaiians, considerably more than the present number of homesteaders, are on waiting lists for urban lots. DEPARTMENT OF HAWAIIAN HOME LANDS, ANNUAL REPORT 4 (1973).

228. See, e.g., Honolulu Advertiser, Dec. 17, 1973, at A-6, col. 1; Honolulu Advertiser, Nov. 13, 1970, at C-3, col. 1.

At present the only way for an applicant to avoid the long waiting list is to receive a homestead through inheritance. If a homesteader dies, the remainder of the 99-year lease can descend or be devised but only to relatives enumerated in HAWAII CONST., Hawaiian Homes Commission Act, 1920, § 209. Because of the widespread system of *hanai*, an informal Native Hawaiian adoption system, children who have lived with a homesteading family often cannot inherit because they do not have legal standing. See OP. HAWAII ATT'Y GEN. 18 (1973). Another inheritance problem arises under the Act's blood quantum requirement: homesteaders must have at least 50 percent Hawaiian blood. HAWAII CONST., Hawaiian Homes Commission Act, 1920, § 201(7).

229. See, e.g., HOMESTEAD PAPERS, *supra* note 218.

ity of much of its land and the fact that its acreage is often located in a geographic area of low demand.²³⁰ But the fundamental causes of the Department's failures inhere in its financial structure.²³¹ First, this structure confronts the Department with a clear conflict of interests. Although funding patterns have changed since 1920, a consistent source of revenue has been the public leasing of Department lands not assigned to Native Hawaiian homesteaders.²³² Today, the Department's internal administrative costs are provided from those receipts.²³³ Although direct legislative appropriation is possible when revenue is insufficient to meet administrative costs,²³⁴ the Department has usually chosen to generate funds from public leasing, thus withholding valuable property from homesteaders.²³⁵ Whenever technological improvements or demographic movements make Hawaiian home lands valuable, the Department is faced with the choice either of allowing individual Hawaiians to use valuable land or of leasing it to non-Hawaiians in order to fund department expenses. Second, statutory fiscal ceilings stymie assignment of homesites. The Department will not open a houselot tract unless that tract has adequate roads, drainage systems and other improvements.²³⁶ But the Hawaiian home-development fund, which finances these non-revenue producing improvements, has a statutory fiscal ceiling.²³⁷ Similarly, it is Department policy not to award specific homesites unless the land has a completed home or firm construction plans.²³⁸ Most Native Hawaiians are unable to finance construction

230. See BIENNIAL REP. OF THE DEP'T OF HAWAIIAN HOME LANDS TO THE LEGISLATURE OF THE STATE OF HAWAII 6 (1971).

231. For a description of the Department's byzantine funding scheme see PROGRAM STUDY, *supra* note 218, at 54-61.

232. Compare Hawaiian Homes Commission Act of 1920, ch. 42, § 213, 42 Stat. 112, with HAWAII CONST., Hawaiian Homes Commission Act, 1920, § 213(f).

233. HAWAII CONST., Hawaiian Homes Commission Act, 1920, § 213(f). From July 1, 1972 to June 30, 1973, the receipts from general leasing totalled \$798,670, while administrative expenditures were \$558,606. Statistics supplied in interview with Richard Paglinawin, Deputy Director of the Department of Hawaiian Home Lands, in Honolulu, Hawaii, Nov. 11, 1974.

234. HAWAII CONST. Hawaiian Homes Commission Act, 1920, § 213(f)(3). If the income produced from general leases in a fiscal year is greater than the Department's approved budget, the extra revenues spill over into the Hawaiian home-development fund. *Id.* Thus, in fiscal year 1972-73, \$240,064 from general lease revenue went to that fund.

235. Today over 108,000 acres are under general lease. LAND INVENTORY, *supra* note 218, app., table 2. Over 30,000 additional acres of Hawaiian Home Lands in water, forest, and game conservation districts are not benefiting Native Hawaiians to any greater degree than the public at large. *Id.*

236. Shapiro, *Hawaiian Homes Panel Changes Leasing Policy*, Honolulu Star-Bulletin, May 26, 1973, at A-10, col. 2.

237. The ceiling for the Hawaiian home-development fund is, in fact, \$1,250,000 because of limitations on its sources of revenue. PROGRAM STUDY, *supra* note 218, at 56.

238. Shapiro, *Hawaiian Homes Panel Changes Leasing Policy*, Honolulu Star-Bulletin, May 26, 1973, at A-10, col. 2.

of their own homes,²³⁹ and banks are unwilling to lend money since Hawaiian Home lands cannot be mortgaged.²⁴⁰ New applicants must therefore turn to the Department's Hawaiian home-loan fund for financing²⁴¹—which also has a fiscal ceiling set by statute.²⁴² Thus, when homes cannot be built, land is not assigned to Native Hawaiian homesteaders.

Three major changes could assure more rapid homesteading of the land. First, the Department could assign homesites before houses are constructed, especially within existing tracts that do not need further development. In 1973, the commissioners voted unanimously to release unimproved lands for houselots,²⁴³ but rescinded their action at the next regular meeting.²⁴⁴ Since the Hawaii Attorney General has interpreted the Hawaiian Home lands as being exempt from the zoning powers of the counties,²⁴⁵ homesteaders could make immediate use of assigned land, even if they were unable to conform to housing codes. Second, the Department should reverse its present policy of denying houselots to Native Hawaiians whose net assets exceed \$10,000. Although it might be justifiable for the Department to withhold construction loans from middle-class Native Hawaiians so that its limited funds can provide homes for the poor, the Department has, by favoring general leasing and refusing homesteads to Native Hawaiians with sufficient funds to construct their own homes, perpetuated the use of Hawaiian Home lands by non-Hawaiians. Furthermore, it can be argued that Hawaiian Homes communities should reflect the true economic range of the Native Hawaiian community, rather than just its poorest members. Finally, adequate funding is necessary to develop homesteads. The statutory ceilings on the Hawaiian home-loan fund

239. Department regulations forbid the awarding of a houselot to any person with net assets over \$10,000 or "whose net worth, together with that of his spouse, is in excess of \$15,000." DEPT OF HAWAIIAN HOME LANDS, RULES & REG. § 5.01 (1973).

240. HAWAII CONST., Hawaiian Homes Commission Act, 1920, § 208(5). As an exception property can be mortgaged to another Native Hawaiian with Department permission. *Id.*

241. Under the usual arrangement, the applicant receives a land lease at a nominal rate, but must make monthly payments to the Department for monies lent for home construction. See discussion in *Kila v. Hawaiian Homes Commission*, No. 74-12 (D. Hawaii, Sept. 17, 1974).

If a homesteader wishes to surrender a homestead, the Department must pay him for certain improvements on the property. The Department will then award the homestead to an applicant on the waiting list who must agree to repay the Department that value. HAWAII CONST., Hawaiian Homes Commission Act, 1920, § 209(1).

242. The ceiling for the Hawaiian home-loan fund is \$5,000,000. HAWAII CONST., Hawaiian Homes Commission Act, 1920, § 213(b).

243. Honolulu Star-Bulletin, May 26, 1973, at B-1, col. 1.

244. Minutes of Hawaiian Homes Commission, Aug. 31, 1973, on file in Department of Hawaiian Home Lands.

245. OP. HAWAII ATT'Y GEN. 21 (1972).

and the Hawaiian Home-development fund must be removed. The Department should also attempt to generate funds from outside sources, such as the federal government, to finance home construction for Native Hawaiians.²⁴⁶ The Department should seek appropriate statutory amendments²⁴⁷ to allow use of the Hawaiian home-loan fund to insure the flow of private capital into Hawaiian Homes construction; a small amount of Department funds could thus generate the flow of much greater amounts for capital. A program might be patterned after the federal program of student loans,²⁴⁸ with the Department guaranteeing private loans to Native Hawaiians.²⁴⁹ Such guarantees might encourage banks to grant construction loans without requiring collateral since experience has indicated that most homesteaders will not fall into serious default.²⁵⁰

Since the above changes will require a major commitment of funds by the State, the Department must be willing to lead a campaign for the legislative²⁵¹ and budgetary changes necessary to increase utilization of homesteading. It is hardly in position to lead this fight while it is still dependent on general lease revenue for its administrative costs. Therefore the State's initial step must be to finance these costs from its general budget.²⁵²

246. See PROGRAM STUDY, *supra* note 218, at 27 for discussion of the difficulties of homesteaders receiving FHA loans. See also, Hawaii H. CON. RES. 56, Reg. Sess. (1971), requesting Hawaii's Congressional delegation to investigate statutory changes to allow Native Hawaiian homesteaders to receive assistance under the National Housing Act of 1949 and from the Farmer's Home Administration.

247. "Both the Admissions Act and the State Constitution delineate the methods by which the HHCA may be amended. [Hawaiian Statehood Act, § 4, 48 U.S.C. Prec. § 491 (1970); Hawaii Const. art. XI, § 3.] Certain provisions of the Act relating to administration, duties of non-administrative officials, and the increase of benefits to lessees (native Hawaiians) may be amended 'in the constitution, or in the manner required for State legislation' Generally speaking, all other provisions may be amended only with the consent of the United States." *Kila v. Hawaiian Homes Commission*, No. 74-12 (D. Hawaii Sept. 17, 1974) (court footnote in brackets). See also LEGAL ASPECTS, *supra* note 218, at 66-70.

248. Higher Education Act of 1965, 20 U.S.C. §§ 1071-1086 (1970).

249. PROGRAM STUDY, *supra* note 218, at 22-25 makes this proposal along with the suggestion for interest subsidies in this era of high interest rates. A bill to allow the Department to make such guarantees was introduced into the Hawaii legislature in 1971 but was not passed. H.B. No. 1592 Reg. Sess. (1971).

250. At present, 41 percent of homesteaders are to some degree delinquent on loan payments, but fewer than 20 percent are more than 120 days behind in payments. Honolulu Advertiser, Jan. 30, 1974, at A-13, col. 7.

251. The Department cannot homestead more than 20,000 new acres in any five year period. HAWAII CONST., Hawaiian Homes Commission Act, 1920, § 204(3). In the past, the Department has never approached this limit, but if homesteading is to be drastically increased, the section may have to be repealed.

252. To guard against any conflict of interest, revenue from the general leasing of Hawaiian Home Lands should not be separately tabulated, but should be included in the State's general revenues.

D. *Hawaiian Land Claim*

On June 27, 1974, a bill was submitted to the United States House of Representatives "to provide for the settlement of historic claims of the Hawaiian Natives."²⁵³ The bill would establish a Hawaiian Native Fund of one billion dollars, deposited in 10 equal yearly amounts, to be administered by the Secretary of the Interior.²⁵⁴ One corporation would be empowered to make distributions from the Fund to benefit Native Hawaiians;²⁵⁵ the board of directors would be elected by all fullblood or part-blood Native Hawaiians.²⁵⁶ The Hawaiian drive for reparations, spearheaded by the "ALOHA" movement (Aboriginal Lands of Hawaiian Ancestry), has grown over the past two years,²⁵⁷ partially motivated by the success of the Alaska Native Claims Settlement Act.²⁵⁸ Under that settlement, Alaskan Natives will receive almost one billion dollars and 38 million acres of land.²⁵⁹ Native Hawaiians see similarities between their claims and those of the Alaskans. In both cases, the United States, without paying compensation to the indigenous population,²⁶⁰ gained title to land in territories that later became states.²⁶¹

The Native Hawaiian land claim can also be compared to United States compensation for the lands of North American Indian tribes. Where Indian title to land had been recognized, taking could be only by consent, such as a treaty, or by compensation.²⁶² Despite the words

253. Hawaiian Native Claims Settlement Act, H.R. 15666, 93d Cong., 2d Sess. (1974). At the time of this writing, the measure had not been introduced in the 94th Congress.

254. *Id.* § 5(a).

255. *Id.* § 6. Compare the Alaska Native Claims Settlement Act, Pub. L. No. 92-203 § 7(a) (Dec. 18, 1971), 85 Stat. 691 in which Congress established 12 regional corporations because of the cultural diversity in Alaska.

256. H.R. 15666, 93d Cong., 2d Sess., § 6(f) (1974).

257. For an account of Queen Liliuokalani's unsuccessful attempt to seek redress, see *Liliuokalani v. United States*, 45 Ct. Cl. 418 (1910).

258. Alaska Native Claims Settlement Act, Pub. L. No. 92-203 (Dec. 18, 1971) 85 Stat. 688-716. This bill provided for settlement of a claim filed by Alaskan natives under the Indian Claims Commission Act, 25 U.S.C. § 70 (1970). See text accompanying notes 264-70 *infra*.

259. Alaska Native Claims Settlement Act, Pub. L. No. 92-203 (Dec. 18, 1971) §§ 6(a), 12, 85 Stat. 690-91, 701-02.

260. "In both Alaska and Hawaii Organic Acts Congress left open the possibility of a future settlement of land claims." R. Jones, A History of the Alaska Native Claims, April 20, 1973 at 31 (unpublished study for Congressional Reference Service, in Library of Congress). Compare Alaska Organic Act, ch. 53, 23 Stat. 24, 26 (1884), with Hawaiian Organic Act, ch. 399, § 73, 31 Stat. 141 (1900).

261. A nation does not automatically gain title to privately held land over which it asserts political sovereignty. See *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 86 (1833); but cf. *Milirrupum v. Nabalco Pty. Ltd.*, 17 F.L.R. 141, 200 (Austl. 1971). See generally A. SNOW, THE QUESTION OF ABORIGINES (1921).

262. "When the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent

of the fifth amendment, jurisdiction to hear the claims of Indian tribes was removed from the Court of Claims in 1863.²⁶³ Congress had to pass a special jurisdictional act for each Indian claim, until 1946, when Congress adopted the Indian Claims Commission Act.²⁶⁴ The Act vested jurisdiction in the Indian Claims Commission and waived defenses based upon sovereign immunity or the passage of time.²⁶⁵ A five-year time limit was set for any tribe on the mainland or in Alaska to present specified claims to the Commission:

- (1) claims in law or equity arising under the Constitution, laws, treaties, of the United States, and Executive orders of the President;
- (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit;
- (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity;
- (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and
- (5) claims based upon fair and honorable dealings, that are not recognized by any existing rule of law or equity²⁶⁶

More than 300 claims have been presented under the Act,²⁶⁷ many of which were based exclusively on the "fair and honorable dealings" clause.²⁶⁸ This clause indicated that moral as well as legal considerations were relevant.²⁶⁹ In debate over the bill, then Congressman Henry Jackson stated,

Let us pay out debts to the Indian tribes that sold us the land we live on [L]et us make sure that when the Indians have their day in court they have an opportunity to present all their claims of every

taking." *Tee-hit-ton Indians v. United States*, 348 U.S. 272, 277-378 (1955). *But see*, D. BROWN, *BURY MY HEART AT WOUNDED KNEE* (1970) for a contrary view of the treatment of Native Americans by the United States.

263. Act of March 3, 1863, ch. 42, § 9, 12 Stat. 765, 767.

264. 25 U.S.C. § 70 (1970).

265. *Id.* § 70(a).

266. *Id.* (emphasis added).

267. *See* Vance, *Indian Claims—The U.S. Experience*, 38 SASK. L. REV. 1, 6 (1974).

268. *See, e.g.*, *Gila River Pima-Maricopa Indian Community v. United States*, 467 F.2d 1351 (Ct. Cl. 1972); *Osage Nation of Indians v. United States*, 97 F. Supp. 381 (Ct. Cl. 1951).

269. Representative Karl Mundt stated, "If any Indian tribe can prove it has been unfairly and dishonorably dealt with by the United States, it is entitled to recover." 92 CONG. REC. A4923 (1946) (extension of remarks of Rep. Karl Mundt).

kind, shape, and variety, so that the problem can be truly solved once and for all²⁷⁰

Native Hawaiians have not yet received compensation for the less than fair and honorable treatment they suffered at the hands of Western settlers of Hawaii.²⁷¹ Uncompensated taking of title to government and Crown lands by the United States at the time of Annexation could support a compensation claim. There are two interrelated objections to compensating Native Hawaiians. First, some of the lands taken were Crown lands and therefore it can be argued that compensation for them should go to the heirs of Queen Liliuokalani. However, the Court of Claims denied compensation to Queen Liliuokalani partly on the grounds that the land should not be treated as private property.²⁷² Second, much of the land taken by the United States after annexation was returned to the State of Hawaii at the time of statehood.²⁷³ Nevertheless, the federal government today retains title to approximately 400,000 acres.²⁷⁴ Moreover, at the time of statehood Native Hawaiians comprised only a minority of citizenship, unlike their majority status at the time of annexation.²⁷⁵ This delay in exchanging federal title for state title cost Native Hawaiians the power to control the use of the returned land. Specific Congressional legislation is probably necessary to authorize a suit for compensation. No action could be brought under the Indian Claims Commission Act which is limited to claims by mainland Indians and Alaskan Natives.²⁷⁶ Nor does it seem likely that an action could be brought in the Court of Claims based on its jurisdiction over claims against the United States founded upon the Constitution;²⁷⁷ it is doubtful that annexation included a fifth amendment taking²⁷⁸ and any claim so founded would probably be time-barred.²⁷⁹

270. 92 CONG. REC. 5312 (1946) (remarks of Congressman Jackson).

271. It is doubtful that the *Kuleana* Act which reduced the land rights of commoners from approximately one-third of the kingdom to fewer than 30,000 acres could support a land claim against the United States. First, the act was passed during the time of the Hawaiian Kingdom, a half century before American sovereignty was asserted. Additionally the Hawaiian Constitution of 1840 had no clause requiring compensation for the taking of property.

272. *Liliuokalani v. United States*, 45 Ct. Cl. 418, 527 (1910).

273. See Hawaiian Statehood Act, § 5, 48 U.S.C. Prec. § 491 (1970).

274. MAJOR LANDOWNERS, *supra* note 218 at 99.

275. A. LIND, *HAWAII'S PEOPLE* 27 (1955). Most Chinese and Japanese inhabitants were excluded from citizenship at the time of annexation. See note 115 *supra*.

276. 25 U.S.C. § 70(a) (1970).

277. "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution . . ." 28 U.S.C. § 1491 (1970).

278. *Cf. Tee-bit-ton Indians v. United States*, 348 U.S. 272 (1955).

279. "Every claim of which the Court of Claims has jurisdiction shall be barred un-

The proposed Hawaiian Native Claims Settlement Act would place a dollar value on the Native Hawaiian land claim, rather than establishing a claims procedure.²⁸⁰ Native Hawaiians could thus avoid issues that have complicated other compensation litigation,²⁸¹ for example, the judicial determination of the value of the land at the time of the governmental taking.²⁸² In the Alaska Native Claims Settlement Act, Congress determined the total value of the claim in order to avoid such difficulties,²⁸³ and this procedure should be followed for Hawaii. Since there will be few, if any, additional claims by indigenous people, Congress need not fear the work load inherent in this task of establishing the dollar value of land claims.

The Hawaiian Native Claims Settlement Act also avoids a premature decision on whether compensation funds should be distributed per capita to the claimants or used for cooperative development.²⁸⁴ Funds would be turned over to the Hawaiian Native Corporation, which would be empowered to use funds for either purpose.²⁸⁵ By participating in the corporation, Native Hawaiians could determine the Fund's uses.²⁸⁶ Many Native Hawaiian land problems could be remedied if the corporation allocated funds for community development. For example, funds could be used to defractionate *kuleana*, to finance housing construction on Hawaiian Home lands,²⁸⁷ and to purchase additional lands for Native

less the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (1970).

280. H.R. 15666, 93d Cong., 2d Sess. § 5(a) (1974).

281. California Indians, for example, began their claims movement in 1902 and did not receive final compensation until 1973. For a discussion of the California claims fight see generally K. JOHNSON, *K-344 FOR THE INDIANS OF CALIFORNIA VS. THE UNITED STATES* (1966).

282. Under court-developed doctrines, claimants were not entitled to the land's present value but only to the value of the land at the time of the governmental action, unless that action amounted to a fifth amendment taking, in which case the claimants were also entitled to imputed interest. Compare, e.g., *Fort Berthold Reservation v. United States*, 390 F.2d 686 (Ct. Cl. 1968) and *Uintah and White River and White River Band of Indians*, 152 F. Supp. 953 (Ct. Cl. 1957) with *United States v. Kiowa, Comanche and Apache Tribes*, 163 F. Supp. 603 (Ct. Cl. 1958).

Perhaps the most sensible question concerning these cases was asked by Professor Monroe Price:

But how much sense does it make for judges, anthropologists, lawyers and Congressmen to go through incredible contortions to determine what occurred one hundred years ago and base compensation on such a determination?

M. PRICE, *LAW AND THE AMERICAN INDIAN* 356 (1973).

283. See note 259 *supra*.

284. On the other hand, the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, § 7(j), 85 Stat. 688 (1971) mandates some *per capita* distribution.

285. H. 15666, 93d Cong., 2d Sess. § 6 (1974).

286. See text accompanying note 256 *supra*.

287. Interestingly, H.R. 15666 does not vest rights to the Hawaiian Home Lands in the Native Hawaiian Community.

Hawaiians.²⁸⁸ If the Bishop Estate needed to sell lands to maintain its liquidity, the corporation could buy them so that the Estate land would continue to serve Native Hawaiians.

Compensation to indigenous people is essentially an ethical rather than a legal issue. Annexation removed from Native Hawaiians the opportunity to assert sovereignty over a homeland. The Hawaiian Native Claims Settlement Act would allow Native Hawaiians to reestablish some degree of cultural autonomy.

CONCLUSION

A central theme of Hawaiian history during the past two centuries has been the continual displacement of Native Hawaiians from the control and ownership of the lands of Hawaii. This trend has been less than monolithic; Native Hawaiians have received access to a token land base through ameliorative steps such as *kuleana* and the Hawaiian Homes program. Recent pressures against Native Hawaiian land holdings are posed by increased immigration and commercial growth. Just as displacement of Native Hawaiians was accomplished primarily through manipulation of the legal system, so, too, legal action is necessary to assure Native Hawaiians a future on the Islands. *Kuleana* will continue to be lost unless the legal rights of their owners are protected. Structural changes are necessary if Native Hawaiians are to fully utilize the Bishop Estate and Hawaiian Homes land. One catalyst for change would be a major award from the United States in compensation for lands taken in the past. But without a concomitant commitment by the legal system to preserve a land base for Native Hawaiians, their future on the very Islands that nurtured their culture is bleak.

288. The bill would give the corporation first option to acquire return of surplus federal lands. H.R. 15666, 93d Cong., 2d Sess. § 7 (1974).

Don't know whether these figures will be helpful to you. Most of the State do not keep figures on Hawaiians as a separate category--each agency uses its own method for classifying Hawaiians or Part-Hawaiians.

The following information was received from the State Department of Labor (Hawaiian based on father's race):

1970	1976 (figures are approximate)
294,484 (total civilian labor force)	400,000 (total civilian labor force)
26,014 (Hawaiian labor force)	36,700 (Hawaiian labor force)
1,213 (no. of unemployed Hawaiians)	5,300 (no. of unemployed Hawaiians)
State unemployment rate was 3%	State unemployment rate was 9.8%
Hawaiian unemployment rate was 4.7%	Hawaiian unemployment rate was 14.4%

The following information was received from the Department of Social Services (DSSH does not keep low-income figures based on a family of four--only individual figures available--an individual is included in the low-income category if he receives general welfare assistance, food stamps, etc.). To qualify for welfare assistance--defined by Act 145 of the Hawaii Revised Statutes (combination of factors--income level, rental or housing costs, etc.):

April, 1972 (no figures available in 1970)	March, 1976
22,363 (adults and children)	26,180 (adults and children)
7,235 (adults)	8,431 (adults)
15,128 (children)	17,749 (children)
29.8% of the welfare population were Hawaiians	24.6% of the welfare population were Hawaiians

Note: ^{Hawaiian} the welfare percentage in 1976 decreased proportionately to the change in population among other racial groups (increase in no. of Caucasians, Vietnamese and Laotian refugees, Filipinos, etc.)

Barbara

*Coast
Kahoolawe*

Kahoolawe

Kahoolawe is the eighth largest island in the Hawaiian Archipelago. Uninhabited, it is approximately 7,750 acres of, for the most part, dry, barren land.

The United States first used the Island for military training during World War I, but did not seek continuous use until 1941. Presently, an estimated 1/4 of the Island is used for training in air-to-ground weapons delivery and shore bombardment, using both live and inert ordnance.

Current Controversy

Though the issue of Kahoolawe had been raised before, it did not become a truly public concern until 1976. Attention to the Island's plight came in the footsteps of a renewed interest in the Hawaiian culture and traditions and a heightened awareness of that which had been lost. As the desecration of the land strongly conflicts with a Hawaiian religious mandate of Aloha Aina (love and respect for the land) Kahoolawe soon became a symbol of the regeneration of the Hawaiian's pride in themselves, their history and culture.

The Protect Kahoolawe Ohana

Protest aimed at permanently stopping the bombing and the eventual return of the Island, occurred early in 1976 when nine people staged a symbolic occupation of the Island and has continued over the past two years with a series of occupations, law suits filed against the Navy, legislative resolutions, and other forms of resistance. Civilian protest has largely been conducted by the Protect Kahoolawe Ohana, a group formally established after the first Kahoolawe landing.

Two individuals participating in the first occupation, Dr. Emmett Aluli and Walter Ritte, were arrested for trespassing but were later acquitted. Ritte and another Ohana leader, Richard Sawyer, were arrested for trespassing on the Island February, 1977, were convicted and served 6 months in prison for their offense. Unfortunately, this visit to the Island led to the death of George Helm, then Ohana President, and Kimo Mitchell. Trying to assist Ritte and Sawyer, both were lost at sea while attempting to reach Kahoolawe by surf board from Maui. All others arrested for trespassing during subsequent invasions have been acquitted, in most cases because their actual knowledge of the Navy's public access restrictions could not be proven.

Current status

Negotiations with the Navy by Hawaii's Congressional delegation have resulted in the Navy agreeing to 1) de-escalate and eventually phase out the use of live ordnance, 2) to concentrate training in areas removed from significant archaeological sites, and 3) to permit conduct of an archaeological survey of the entire Island.

Kahoolawe

Page Two

This latter commitment was reinforced by a September, 1977, District Court Order which also required the preparation of a revised Kahoolawe Environmental Impact Statement. This has been completed.

The Navy has also agreed to look into the question of joint-military civilian use of the Island and has begun to work with the State in a reforestation project.

A report was recently issued from the State legislature critical of the Navy's attempts at solving the Kahoolawe problem. Questions still remain in many peoples' eyes as to whether an extensive naval study of alternatives has been done and the question of joint-use remains unsettled.

KAHOOLAWE TARGET COMPLEX

January, 1977

Kahoolawe is the smallest of the eight main islands of the Hawaiian Archipelago and is located approximately six miles southwest of the island of Maui. The target island is 11 miles long, six miles wide at the widest point, and has a maximum elevation of 1,477 feet. Kahoolawe contains some 28,000 acres in an area of 45 square miles.

Because it lies in the lee of Maui's 10,000-foot volcano, Haleakala, Kahoolawe is robbed of cloud moisture from the northeast and depends on occasional southerly storms for its annual rainfall. That rainfall is about 21 inches per year according to best estimates.

Located less than 100 nautical miles from the military complexes of Oahu, and offering good visibility and a dry climate, Kahoolawe is an ideal site for air and artillery and shore bombardment.

HISTORY

The Hawaiian Islands were unified under King Kamehameha I in the early 1800s and Kahoolawe became part of the kingdom. From the 1830s through the early 1850s the island was used periodically as a penal colony.

In 1864 the island was leased to private ownership and used for grazing of cattle, sheep and goats. The lease was assumed by various other individuals until 1910 when it was canceled because the vegetation had deteriorated and the soil was badly eroded by wind and water.

The United States government acquired fee title to Kahoolawe by the annexation of Hawaii in 1898. This title to Public and Crown lands of the Republic of Hawaii was confirmed by the Organic Act of 1900. Right of use and possession was given to the territory of Hawaii pending use by the United States.

From 1910 to 1918 the island was proclaimed a Forest Reserve and efforts were made to halt the erosion and revitalize the vegetation. In 1919 the effort was abandoned and Kahoolawe once again was leased for ranch land. The lease was renewed in 1933 to expire on June 30, 1954. The lease included a provision for cancellation if the island were needed for public purposes.

By sublease of May 19, 1941, and a supplementary agreement of March 1, 1944, the Kahoolawe Ranch Company gave the U.S. government possession of the entire island. Formal notice of Federal intention to use Kahoolawe Island was given by Presidential Executive Order 10436 on 20 February 1953. Title was not affected by the Statehood Act of 1959, which recognized lands previously set aside by the United States. Public Law 88-233 passed subsequent to the Statehood Act, permits conveyance of these lands to the State when no longer required by the Federal government.

Executive Order 10436 reserved the island for the use of the United States and placed it under the jurisdiction of the Secretary of the Navy for use by the Armed Services. The executive order also granted the right of the Territory of Hawaii, at its expense and risk, and on a non-interference basis, to enter and inspect the island to ascertain the extent of forest cover, erosion and animal life thereon, and to sow or plant suitable grasses and plants under a program of soil conservation. The Order also required the Navy to eradicate, or keep to a minimum of 200 head, all cloven-hooved animals on the island. It further stipulated that when the island is no longer needed for military purposes, Kahoolawe would be rendered "reasonably safe for human habitation" and returned to the Territory without cost to the local government.

Kahoolawe Target Complex

Kahoolawe is typical of a military target complex. Its development since 1941 has been geared to the need for target facilities to meet training and readiness requirements. Targets have been designed, built and placed throughout the island's surface to get maximum advantage of the island's training environment. The targets are suitable for use by Navy ships and aircraft and troops of all services. There are three basic type land targets.

Point Targets. A single or small area target needed to assess the accuracy of a pilot, surface ship or weapons system. Point targets must be ground stabilized (known latitude/longitude/elevation) and possess characteristics of targets likely to be found in actual combat conditions. A percentage of point targets are required for use with high explosive conventional ordnance to ensure the entire evolution of handling, loading, fuzing and delivering ordnance on target is at an acceptable level of readiness and safety. Point targets are also required to assess the effectiveness and delivery accuracy of certain weapons and guns.

Area Targets. This type of target is needed to test the combat effectiveness of several aircraft or surface ships in coordination. Area targets may consist of an array of point targets or be large targets such as simulated runways, surface-to-air-missile (SAM) sites, anti-aircraft gun sites, storage areas, etc. Area targets must resemble targets most likely to be encountered in actual combat conditions.

Ringed Targets. This type target is most commonly a circular ring surrounding a target center or "Bulls Eye." It is used to pin point the accuracy of a weapon delivered from an aircraft. This target provides the maximum amount of information to observers, pilots and aircrewmembers as to the degree of readiness an individual or a squadron has achieved at any time during a training cycle.

USAGE

General Requirement. The past few years have seen a reduction of overseas bases. This withdrawal has been caused by changes in the international situation, by financial pressures, and by a rising sense of nationalism on the part of host countries. This last factor is expected to at least remain constant if not increase in the foreseeable future. Growing populations, industrial expansion, burgeoning food requirements, and increased air travel all demand land and airspace which are in short supply. The net result is that training operations on target areas like Kahoolawe have become increasingly important.

Utilization. The Kahoolawe target complex is currently utilized for weapons delivery training by U.S. Navy, Army, Air Force, Marine Corps, Coast Guard, Hawaiian Air National Guard, air, ship and ground forces, and for allied Naval forces. The targets are used for shore bombardment, gunfire support controller training, close air support training, individual and group air-to-ground attack training, and mortar and artillery firing. Normally the target complex is in use five days and four nights each week for locally based units. When aircraft carriers transit the area en route to the Western Pacific, weekend operations for embarked air wings usually are conducted.

The projected use of the target complex through 1979 is 285 days and 123 nights each year. Actual use in 1970 accounted for 216 days; 1971, 225 days; 1972, 250 days; 1973, 245 days; 1974, 250 days; 1975, 240 days. The variations were caused by fluctuations in force levels.

Simulation of Actual Combat Conditions. The unique features of Kahoolawe including its topography, climate and targets make the complex an ideal environment for simulating actual combat conditions. It provides an area large enough for sufficient realism in the training missions to enable strike leaders, pilots, ground forces and aircrewmembers to become proficient in target identification, target acquisition and accurate delivery of ordnance. In addition, the variety of landmarks and targets provide a safe method of practicing the precise timing and coordination required in large air wing strikes. This valuable training without exposure to actual enemy fire is perhaps the most valuable feature of Kahoolawe when considered in terms of lives and aircraft saved in actual combat. In conjunction with the expenditure of ordnance on these targets is the important training received by gunners, ordnancemen and ammo handling parties in the handling, loading and fusing evolutions of live ordnance aboard surface ships, aircraft carriers, at airfields, and in the field.

Readiness. The level of proficiency obtainable by military units through the use of the Kahoolawe target complex is a major factor in supporting the requirement for such a complex in the Mid-Pacific area. Without reviewing the specific features of the island complex, it is sufficient to recall the wide spectrum of training the island can provide to its users. With this training available it remains possible for the Navy and Marine Corps and Army units to achieve and maintain a high state of readiness in the Mid-Pacific area. If forward bases are phased out or reduced in Japan, Korea, Okinawa and Philippines, the Mid-Pacific region becomes even more significant from a strategic standpoint. Mid-Pacific forces must be maintained in a top state of readiness. Readiness cannot be achieved or sustained without training, adequate in scope and frequency of opportunity. The island also provides an opportunity to supplement the shore bombardment training received by West Coast ships prior to deployment.

Cost of Operating Kahoolawe. The actual costs incurred in operating the target complex are insignificant. All targets are made of surveyed or scrapped materials except for the range crew shelter and spotting shack. Since the complex is not manned on a routine daily basis there are no salary or manning allowances associated with its operation. Minor costs are incurred quarterly in conjunction with target maintenance.

Alternatives

Until such time as naval shore bombardment, carrier based aircraft bombing, artillery fire support, and close air support of ground troops are no longer an integral part of modern warfare, the U.S. military forces will require the use of a target site such as Kahoolawe to maintain combat readiness. The principal users of the island are Oahu-based units. Kahoolawe, with its excellent weather, varying terrain, and ideal location, provides a uniquely suitable target site in the Hawaiian area. Military units stationed in the western part of the mainland and in West Coast ports utilize West Coast targets, but scheduling factors and costs make it prohibitive for Hawaii-based forces to use West Coast targets. In the Hawaiian area, there are no suitable alternative targets. Several alternatives suggested in the past are briefly discussed below.

Kaula Rock (Kauai) - Small rock (108 acres), little level terrain, hazardous access, very few targets possible, no base camp or shore parties possible, no spotting facilities possible.

Pacific Missile Range Facility, Barking Sands (Kauai) - Ocean range lacks visual points of aim, visual adjustment of fall of shot, terrain features, and no live ordnance permitted.

Army Impact Areas (Oahu and Hawaii) - The Oahu areas cannot accept close air support operations due to the noise impact on the adjacent populated areas, the hazards of live ordnance to these same areas and air space restrictions. On Hawaii the hazard of night operations involving high altitude targets (6000 feet) located between two mountains both over 13,000 feet and frequent restrictions due to cloud cover preclude safe and efficient air operations. None of the three sites can accept shore bombardment due to the hazards of firing over populated areas.

Midway Island (Hawaiian Chain) - More than 900 miles and three days steaming from Oahu, inhabited, bird sanctuary, no terrain features.

Johnston Island - Some 700 miles and similar considerations to Midway Island.

West Coast Target Sites - 2500 miles from Hawaii, unfavorable weather, varying restrictions.

Artificial Island - Construction costs prohibitive.

Special Precautions

Noise. To minimize the disturbance to Maui residents, the targets were moved from the northeastern end of the island which is closest to Maui and concentrated in the center third portion so that a high ridge would diminish the noise of the ordnance impact. Special meteorological observations are made to determine if local weather conditions are conducive to "trapping and focussing" sound waves toward Maui. If such conditions exist, live ordnance expenditures are prohibited. The maximum bomb load allowed to be delivered on any one aircraft pass is a single 500 pounder.

Safety. In addition, military aircraft are prohibited from flying directly over any inhabited island when loaded. Initial approaches are made from a southerly direction to avoid commercial airways, and the delivery patterns are kept as close as practicable to the island. Each flight is briefed to remain well clear of Maui.

Community Interests

Fishing. When the target island is not going to be used over the weekend, the surrounding waters are opened to fishing by anyone who desires. Entry to the island itself remains prohibited due to the ordnance hazard. Fishing notices are broadcast by local radio stations and are published in the newspapers. Safety notices to mariners are publicized by the Coast Guard.

Conservation. In accordance with Navy directives, efforts are being made in soil and forest conservation. Projected experimental plantings have proven which trees and grasses will grow. An expansion of the reforestation effort is now in progress.

Archaeology. A program is underway to locate archaeological sites on the Island of Kahoolawe and determine which warrant preservation, and if so, which are important enough to be included in the State of Hawaii Register or in the National Register of Historic Places. The Navy is cooperating with the State and National Historic Sites Preservation Officer for the State of Hawaii.

To date, five separate archaeological expeditions have been undertaken on Kahoolawe, employing State archaeologists with logistics and transportation support from the Navy. Some sites have been found which may have archaeological significance, and military operations which might endanger those sites have been shifted to other areas. A determination of the actual importance of the sites will be made after State of Hawaii archaeologists have studied their findings.

Historical Interest. In November 1975, a surge of interest arose over Kahoolawe stemming from an increased emphasis on the study of Hawaiian culture, history, background and religion. A group of Hawaiians was permitted to hold an ancient religious ceremony on the island in February 1976.

Ordnance Removal

Problem. When the military has no further use for Kahoolawe, the Executive Order stipulates that the island is to be rendered "reasonably" safe." A study in 1969 by Explosive Ordnance Demolition (EOD) personnel estimated that there are over 10,000 tons of unexploded ordnance embedded in the island ranging from 20 millimeter to 16-inch projectiles. Extensive decontamination work could provide approximately 70% surface clearance but there could be no guarantee against later exposure of undiscovered ordnance, or against the detonation of such ordnance by construction or farm machinery. Since 1969 improvements in the technology of detection are estimated to have raised the surface clearance level to around 80%. The adjacent waters within the ten fathom curve would be more difficult to sweep and clear.

EOD Teams. Explosive Ordnance Demolition teams accompany every visiting group to the island to ensure their safety and to remove any hazardous material located near the base camp. In addition, live ordnance in the vicinity of targets and roads is detonated to assist the maintenance crews. These operations provide valuable field training to EOD personnel.

Current Situation. In November 1975, a joint conference committee of the U.S. Congress requested the Navy provide a study on the feasibility and cost of clearing the island of explosive ordnance. The Navy engaged a civilian firm, Marino Ltd., of Falls Church, Va., which is expert in ordnance clearance matters, to assist in the study.

The study was completed in September 1976, and forwarded to the Committee which requested it. The study revealed surface contamination of various types of ordnance, predominantly bombs, projectiles and rockets. There were 561 hazardous items recorded in the 1656 acres which were surveyed for an average surface density of 0.34 items per acre. Subsurface and underwater contamination densities could not be determined.

The study listed a number of cost considerations and clearance options, none of which obligates the Navy to implement any type of procedure regarding clearance. The year-long study was initiated because of a request for information from a Congressional body, and the Navy has complied with that request.

Conclusion

There is a valid basic requirement to provide Kahoolawe target training to the military forces stationed in Hawaii in order to ensure that operational readiness is maintained. While there are no suitable, alternative sites for the type of target exercises Kahoolawe offers, the military requirements will be reviewed periodically to determine if the island is still needed. Until such time as it may be conveyed to the State, the Navy will continue to cooperate in every way with State, County and City officials and the people of Hawaii.