

HAWAIIAN HOME LANDS RECOVERY ACT

HEARING
BEFORE THE
COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE
ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

S. 2174

**TO PROVIDE FOR THE ADMINISTRATION OF THE HAWAIIAN HOMES
COMMISSION ACT, 1920, AND FOR OTHER PURPOSES**

JUNE 16, 1994



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HAWAIIAN HOME LANDS RECOVERY ACT

THURSDAY, JUNE 16, 1994

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 2:05 p.m., in room SD-366, Dirksen Senate Office Building, Hon. Daniel K. Akaka, presiding.

OPENING STATEMENT OF HON. DANIEL K. AKAKA, U.S. SENATOR FROM HAWAII

Senator AKAKA. The hearing will come to order.

The Committee on Energy and Natural Resources is hearing a bill, S. 2174, to provide for the administration of the Hawaiian Homes Commission Act, 1920, and for other purposes.

I would like to say aloha and welcome to today's guests to today's hearing and witnesses here and particularly those who have flown here from the State of Hawaii. I wish I had the time to venture into the audience as I usually want to do and hug every one of you. I am sorry to tell you that I am rushing from one meeting to the other. Usually we try to start here on time and already we are behind the hour, but I want to welcome you with much aloha and to tell you that your presence here means a lot to me, to the committee and that your statements will really be helpful.

More than 70 years ago, an enlightened Secretary of the Interior, Franklin Lane, received an urgent appeal from Prince Jonah Kuhio Kalaniana'ole about the plight of native Hawaiians. In response to the decline of numbers of native Hawaiians and the disintegration of the Hawaiian culture and society, Secretary Lane agreed that the Federal Government should provide a homesteading program for native Hawaiians. 203,000 acres were set aside for this purpose. The idea was to create housing and agricultural opportunities and thereby rejuvenate the Hawaiian people. Homestead opportunities would allow native Hawaiians to, once again, enjoy their traditional lifestyle.

As we all know, the enlightened program that Secretary Lane envisioned fell far short of expectations. From its inception in 1921, the Hawaiian Home Lands program has been riddled by failure.

We now have an opportunity to put this sad history behind us and foster a new beginning for the program. Under Interior Secretary Bruce Babbitt and with Mr. Michael Heyman acting as the designated official for native Hawaiian concerns, I sincerely hope that we can achieve a new era of enlightenment which will improve the welfare of native Hawaiians.

As I see it, the first thing that the Federal Government should do to revitalize the Hawaiian Home Lands program is to restore lands that were taken during Hawaii's territorial period.

Today's hearing will focus on S. 2174, the Hawaiian Home Lands Recovery Act, a bill establishing a process to restore or replace Hawaiian Home Lands taken by the Federal Government during Hawaii's territorial period. The bill would also provide compensation for lost use of such lands, whether the land has already been returned or remains under Federal control. Where the return of land is not possible, the bill would provide lands of equal value as a replacement.

I believe my legislation is fully compatible with discussions underway between the State of Hawaii and the Department of the Interior and will simply provide a mechanism which allows the return or a replacement of lands alienated.

Prior to introducing my bill, I wrote to Mr. Heyman and I strongly encouraged him to continue his current discussions with the State of Hawaii. We all hope these discussions will bear fruit. I made it clear that my bill would complement the Department's efforts by giving the Secretary of the Interior authority, which it currently lacks, to provide compensation for lands withdrawn during the territorial period.

I introduced S. 2174 before negotiations were completed and convened today's hearing so that Congress would be ready to respond as soon as a settlement is reached. Native Hawaiians have waited nearly 70 years for justice. When a settlement is reached, I want to be ready to move legislation as soon as possible to authorize compensation.

While much improvement has been made in the administration of the Hawaiian Home Lands program in recent years, the 73-year-old history of the Hawaiian Homes Commission Act has demonstrated that a system of checks and balances is needed to resolve these claims.

Finally, I want to point out that the Energy Committee has also received a report prepared by the General Accounting Office on the Hawaiian Home Lands program. The most significant finding of the GAO report is that 37 executive orders and proclamations used by territorial governors to withdraw home lands violated the Hawaiian Homes Commission Act. Native Hawaiians have always contended that territorial withdrawals violated the 1920 act and GAO has finally confirmed this fact.

I look forward to evaluating this report further as well as the testimonies received at today's hearing.

We have many witnesses scheduled to testify today and a limited amount of time available. So that we can be sure to have enough time to hear from everyone who is scheduled to testify, I would ask each witness to please limit your testimony to no more than 5 minutes. Each witness' complete written statement will be included in the hearing record in its entirety. The record will remain open for 2 weeks to receive additional comments and testimony.

The first witness on today's schedule was Senator Inouye. Senator Inouye wanted to be here today, but because of a scheduling conflict, he could not join us.

Our first witness will be Michael Heyman, Deputy Assistant Secretary, Policy Management and Budget, Department of the Interior. We certainly are happy to have you. I will tell you that you have been very helpful to all of us in giving us the facts to our questions and we look forward to your statement.

STATEMENT OF I. MICHAEL HEYMAN, DEPUTY ASSISTANT SECRETARY, POLICY MANAGEMENT AND BUDGET, DEPARTMENT OF THE INTERIOR

Mr. HEYMAN. Thank you very much, Senator. It is a pleasure to be here. Just for the record, my name is I. Michael Heyman and I am Counsel to the Secretary of the Interior, as well as indicated, Deputy Assistant Secretary for Policy Management and Budget.

I have a relatively long statement.

Senator AKAKA. Mr. Heyman, may I ask you to hold for a second while we take care of some traditional customs from Hawaii?

Mr. HEYMAN. Of course.

Senator AKAKA. Thank you.

[Hawaiian chant.]

Senator AKAKA. Mahalo nui, Hoaliku and Kamaki. I thank you for this very lovely and deep-seated custom. I tell all of you here that what has happened makes things right. Malama pono.

Thank you very much, Mr. Heyman.

Mr. HEYMAN. Well, I have been rarely been so treated at a hearing at which I have testified. It is a pleasure.

I do welcome the opportunity to be here to respond on behalf of the Department of the Interior to the committee's request for our views on the proposed Hawaiian Home Lands Recovery Act. In summary what I am going to say is that the legislation, it appears to us, would be premature to pass at this time, not to pend at this time, but to pass at this time. In our view congressional action should be deferred pending completion of the claim review process that is already underway in the administration. I am going to talk a little bit about that.

I am going to try to cut down on some of this testimony given the number of witnesses there are, but nevertheless, I do think it would be good to give a little background about what my role is representing the Secretary of the Interior.

The genesis of that role as the Secretary's designated officer under the Hawaiian Homes Commission Act and the steps the Department is taking to investigate some of the important matters raised by the pending legislation is relevant to this hearing today. It is really relevant to a full understanding of our position that we think that passage of this statute presently would be premature.

On January 19, 1993, the outgoing Solicitor of the Department of the Interior from the prior administration signed an opinion concluding that the Federal Government had no trust responsibility to native Hawaiians under the Hawaiian Homes Commission Act and the Hawaii Statehood Act of 1959. On November 15, 1993, the current Solicitor of the Department, John Leshy, withdrew that opinion.

Upon the withdrawal of the opinion, Secretary Babbitt wrote to the Governor and to the Hawaii congressional delegation stating that the withdrawal of the opinion would clear the way for further

discussions regarding the needs of native Hawaiians and announcing my appointment as his special representative under the Hawaiian Homes Commission Act. As you are well aware, the Department of the Interior has assumed the role of lead Federal agency with respect to the Hawaiian Homes program in accordance with the recommendations of a 1983 Federal/State task force on the Hawaiian Homes Commission Act. As a result of the task force report, the Secretary appoints an official to serve as the Secretary's designated officer for that act and it is in that capacity that I appear today.

Secretary Babbitt was aware that important questions had arisen in recent years about whether the provisions of the Hawaiian Homes Commission Act and the Hawaii Statehood Act regarding native Hawaiians had been properly carried out. In designating me as his special representative, he asked me to meet with representatives of the State and with Hawaii's congressional delegation to discuss these questions and to determine what further steps might be taken by the United States.

The State has presented a number of land claims based upon alleged violations of the Hawaiian Homes Commission Act in the years prior to statehood. I want to discuss the Department of the Interior's review of these claims, specifically our efforts to determine whether the allegations have merit and to decide whether redress by the Federal Government to these claimed statutory violations is in order. That obviously is quite relevant to the act before us.

The land transfers that the Department is reviewing occurred during Hawaii's territorial period, obviously prior to 1959. The claims are for lands that were set aside for homesteading purposes for native Hawaiians by Congress under the Hawaiian Homes Commission Act, available lands, and then were transferred and alienated from the Hawaiian Homes program allegedly in violation of statutory restrictions in the Hawaiian Homes Commission Act.

The first type of transfer involved lands that allegedly were wrongfully removed from the available lands for use by the Federal Government. The State of Hawaii points principally to executive orders of the territorial governor of Hawaii which in 1930 and 1933 set aside over 1,356 acres of available lands at Lualualei in Oahu for use by the Navy. These lands continue to be used by the Navy today.

The second type of transfer involves the removal of some available lands by the territorial governor and transfer to the territorial government of Hawaii and in some instances to third parties. The State maintains that these lands could only have been used for native homesteads or for general leases. The State is seeking redress in the form of the return of lands illegally taken from the available lands or their replacement by equivalent lands and damages for lost value and income, again quite similar to the provisions in the act.

Based on the agreement of the Department and Hawaii to review the land claims, we have been engaged in an ongoing process of review. We have invited the State to provide us with factual and legal information and the State has done so. In addition to factual documentation for the claims, the State has provided us with legal

memoranda prepared by its Attorney General setting forth the theories on which it relies to establish the alleged illegality of the land transfers. The memoranda and other documents are under review by our Solicitor's office.

We have had two lengthy meetings with the State, on March 15 and May 13, to discuss the merits of the claims. These meetings were attended by Norma Wong, a personal representative of the Governor, by Phil Shimer of the State's liaison office in Washington, by William Tamm and George Kaeo, attorneys from the State's Attorney General's Office, and by Judge Edward King, the court-appointed and State law-sanctioned independent representative of the beneficiaries under the Hawaiian Homes Commission Act. Attorneys from our Solicitor's office and I met with these State officials and the representative of the beneficiaries and have engaged in a full open dialogue on the nature of the claims that Hawaii has presented to us.

I might say the nature of that has essentially been a review by our Solicitor's office of the papers submitted by the State, the raising of questions and some counter-arguments by some of the lawyers in our Solicitor's office, a very, very searching conversation amongst those representing Hawaii and folks from our Solicitor's office. I have been feeling like a judge sitting and listening to argumentation, but I have found that the nature of the interaction has been very good from my perspective in learning the nature of the conflict and understanding the points that are being made.

As I have indicated, we have been considering in our review of Hawaii's written submissions and our meetings the many issues raised by Hawaii's claims. We have not yet completed that review; therefore, I cannot speak definitively at this time to the merits of the State's claims or whether we would recommend corrective action. I can say, however, that the State has raised several significant legal issues to which we are giving the kind of careful consideration I indicated.

Preliminarily it would appear that the United States has important threshold legal defenses, including things like statute of limitations and, in the case of Lualualei, prior litigation in the Ninth Circuit under the Quiet Title Act. Nonetheless, we are considering the merits of the State's claims, including whether the land transfers were in fact illegal under the Hawaii Organic Act of 1900 and other authorities, whether the State or the beneficiaries had a compensable interest in the available lands, and whether any damages can be shown for the allegedly wrongful transfers. That is with my lawyer's hat on, if you will.

But finally, apart from the legal merits, we are considering whether the State or the beneficiaries have an equitable claim. It is a kind of fuzzy idea under these circumstances, but an equitable claim that would be appropriate for redress. It is essentially a policy issue and the policy issue is whether or not in my view the intention of the Hawaiian Homes Commission Act was frustrated by the kinds of transactions that were stated to an extent that you would find that for policy reasons, looking to the chancellor rather than looking to the law judge, one would recommend that there be responsive action by the United States. That too is a matter of concern to us.

We anticipate bringing closure to our review process within the Department by the end of August 1994. However, whatever recommendations the Department might reach would not, of course, end the review process within the administration. The administration's ultimate position on the claims and on the proposed legislation—and I would think they would be very interlinked—would need to be determined through the Office of Management and Budget, in coordination with other Federal agencies which in this instance would likely include the Department of Defense and the Department of Justice.

So, I would foresee that when we come to our own conclusions in August, we then begin to orchestrate the review by other agencies so that the administration can come forward with a position responsive to this act, and that would be the time that I would have expectations that the administration would be able to be responsive with regard to the matters that are contained in there.

Now, I do not have to go through this proposed legislation. You have already and it is evident to those amongst us. I put down in my written testimony at one point that of course the legislation focuses largely on relief and in a way presupposes that the land claims are meritorious and should be redressed. Whether or not the administration agrees with that is going to be I think the heart of its response with respect to the statute itself and obviously finding a mechanism, if there is agreement on that, will be aided enormously by the act that you are proposing.

There are other portions of this act that formalize the set of relationships between the administration and Hawaii concerning the Hawaiian Homes Commission Act. I do not really have much objection with regard to those. I am not sure they are necessary because at least under informal arrangements between the Department of the Interior and the State of Hawaii, we have been able to create the kinds of processes that are noted in the act, but I thought that we should leave those to another day and be really looking at the claim matters most significantly.

My guess is that either I or whoever succeeds me in this role, as I move on to other tasks, will be back before you this coming fall after the process that I have described occurs, not only the Department of the Interior being able to be responsive, but also the other necessary agencies in the administration to answer further questions with regard to the administration's view of the advisability of the act.

I thank you very much for giving me this opportunity to testify. Of course, I stand ready to answer questions that you might have. [The prepared statement of Mr. Heyman follows:]

PREPARED STATEMENT OF I. MICHAEL HEYMAN, DEPUTY ASSISTANT SECRETARY,
POLICY MANAGEMENT AND BUDGET, DEPARTMENT OF THE INTERIOR

My name is I. Michael Heyman, Counsellor to Secretary of the Interior Bruce Babbitt and Deputy Assistant Secretary for Policy. I welcome the opportunity to be here this afternoon to respond on behalf of the Department of the Interior to the Committee's request for our views on the proposed Hawaiian Home Lands Recovery Act. In summary, our view is that legislation would be premature at this time. Congressional action on this subject should be deferred pending completion of a claim review process already underway within the Administration.

Before addressing the bill, I would like to describe the genesis of my role as the Secretary's Designated Officer under the Hawaiian Homes Commission Act (HHCA)

and the steps the Department is taking to investigate some of the important matters raised by the pending legislation. This background information is important to a full understanding of our position that the legislation is premature at this time.

On January 19, 1993, the outgoing Solicitor of the Department of the Interior from the prior Administration signed an opinion concluding that the Federal government had no trust responsibility to Native Hawaiians under the Hawaiian Homes Commission Act of 1920 and the Hawaii Statehood Act of 1959. On November 15, 1993, the current Solicitor of the Department, John D. Leshy, withdrew that opinion.

Upon the withdrawal of the opinion, Secretary Babbitt wrote to Governor Waihee and to Hawaii's Congressional delegation stating that the withdrawal of the opinion would "clear the way for further discussions regarding the needs of Native Hawaiians" and announcing my appointment as his Special Representative under the Hawaiian Homes Commission Act. As you may be aware, the Department of the Interior had assumed the role of "lead Federal agency" with respect to the Hawaiian Homes program in accordance with the recommendations of a 1983 Federal-State Task Force on the HHCA. As a result of the Task Force Report, the Secretary of the Interior appoints an official to serve as the "Secretary's Designated Officer for the Hawaiian Homes Commission Act", and it is in that capacity that I appear before you today.

Secretary Babbitt was aware that important questions had arisen in recent years about whether the provisions of the HHCA and the Hawaii Statehood Act of 1959 regarding Native Hawaiians had been properly carried out. In designating me as his Special Representative, he asked me to meet with representatives of the State of Hawaii and with Hawaii's Congressional delegation to discuss these questions and to determine what further steps might be taken by the United States.

The State has presented certain land claims based upon alleged violations of the HHCA in the years prior to statehood. I would like to discuss the Department of the Interior's review of these claims, specifically our efforts to determine whether the allegations have merit, and to decide whether redress by the Federal government for these claimed statutory violations is in order.

The land transfers that the Department is reviewing occurred during Hawaii's territorial period, i.e., prior to 1959. The claims are for lands that were set aside for homesteading purposes for Native Hawaiians by Congress under the HHCA ("available lands"), and then were transferred and alienated from the Hawaiian Homes program, allegedly in violation of statutory restrictions in the HHCA. The first type of transfer involves lands that allegedly were wrongfully removed from the available lands for use by the Federal government. The State of Hawaii points principally to executive orders of the territorial governor of Hawaii which, in 1930 and 1933, set aside over 1,356 acres of available lands at Luahualei, Oahu, for use by the Navy. These lands continue to be used by the Navy today. The second type of transfer involves the removal of some available lands by the territorial governor and transfer to the territorial government of Hawaii and, in some instances, to third parties. The State maintains that these lands could only have been used for Native homesteads or for general leases. The State is seeking redress in the form of the return of lands illegally taken from the available lands or their replacement by equivalent lands, and damages for lost value and income.

Based on the agreement of the Department and Hawaii to review the land claims, we have been engaged in an ongoing process of review. We have invited the State to provide us with factual and legal information, and the State has done so. In addition to factual documentation for the claims, the State has provided us with legal memoranda prepared by its Attorney General setting forth the theories on which it relies to establish the alleged illegality of the land transfers. The memoranda and other documents are under review by our Solicitor's Office.

We have had two lengthy meetings with the State, on March 15 and May 13, 1994, to discuss the merits of the claims. These meetings were attended by Norma Wong, a personal representative of Governor Waihee, by Phil Shimer, of the State's liaison office in Washington D.C., by William Tamm and George Kaco, attorneys from the State's Attorney General's Office, and by Judge Edward King, a court-appointed and state law-sanctioned independent representative of the beneficiaries under the HHCA. Attorneys from our Solicitor's office and I met with these State officials and the representative of the beneficiaries and engaged in a full, open dialogue on the nature of the claims that Hawaii has presented to us.

As I indicated, we have been considering, in our review of Hawaii's written submissions and in our meetings, the many issues raised by Hawaii's claims. We have not yet completed our review; therefore, I cannot speak definitively at this time to the merits of the State's claims or whether we would recommend corrective action. I can say, however, that the State has raised several significant legal issues to

which we are giving careful consideration. Preliminarily, it would appear that the United States has important threshold legal defenses, including the statute of limitations and, in the case of Lualualei, prior litigation in the Ninth Circuit under the Quiet Title Act, *State of Hawaii v. United States*, 676 F.Supp. 1024 (D. Hawaii 1988), *aff'd per curiam*, 866 F.2d 313 (9th Cir. 1989). Nonetheless, we are considering the merits of the State's claims, including whether the land transfers were in fact illegal under the Hawaii Organic Act of 1900 and other authorities; whether the State or the beneficiaries had a compensable interest in the available lands; and whether any damages can be shown for the allegedly wrongful transfers. Finally, apart from the legal merits, we are considering whether the State or the beneficiaries have an equitable claim that would be appropriate for redress.

We anticipate bringing closure to the review process within the Department by providing a summary of the results of our review by the end of August, 1994. However, whatever recommendations the Department might reach would not end the review process within the Administration. The Administration's ultimate position on the claims, and on the proposed legislation, would need to be determined through the Office of Management and Budget in coordination with other Federal agencies which, in this instance, would likely include the Department of Defense and the Department of Justice.

With this background on the status of the Department's ongoing review process to consider the Native Hawaiian land claims, I will now offer some comments on the proposed legislation.

The heart of the proposed bill is section 3, which authorizes the Secretary of the Interior to settle claims for land against the United States through negotiations with a representative of the beneficiaries and the State of Hawaii. The lands at issue are those lands set aside under the HHCA which subsequently were transferred to the Federal government. The Secretary would be authorized to negotiate land exchanges "in exchange for the continued retention by the Federal government of [the] lands described." The lands to be offered to the State are to have a value no less than the value of the lands retained by the Federal government. The lands which may be offered in exchange for the continued right of use include lands controlled by the Secretary of the Interior, other than lands within the National Park or National Wildlife Refuge systems, or surplus Federal lands that the Federal government is not required to convey to the State under the Hawaii State Admissions Act. The exchanges are to be completed within one year, subject to a possible extension of one additional year.

The legislation, as we read it, focuses on relief, and thus presupposes that the land claims are meritorious and should be redressed. In our view, this puts the cart before the horse. We are in the process of reviewing the validity of the claims—from both a legal an equitable perspective—and whether to recommend remedial action. We believe that such an analysis is an important first step to an informed consideration of any type of relief, including the relief set forth in the proposed legislation, and is likely to be a critical part of the Administration's considerations of any relief proposed. Thus, we would be unable to take a position on the merits of the claims or on the appropriate character of any form of relief until the Department and the Administration have completed their review of the claims. As I indicated, the Department hopes to have its review of the claims completed by the end of August.

Furthermore, the enactment of this legislation at this time would interrupt and render virtually irrelevant the review process that has been ongoing for the past seven months. Progress has been made as a result of the exchange of information, meetings, and dialogue among the existing participants in the review process. The present process should be allowed to be brought to a conclusion before any alternative process, if necessary, is considered. We also note that the bill does not indicate how the representative of the beneficiaries is to be chosen. This uncertainty could be a source of confusion and delay in addressing the land claims under the bill.

We thus believe that Section 3 of the proposed legislation is premature and that action on it should be deferred.

In addition to the provisions governing land claims, the proposed legislation includes several sections formalizing the ongoing role of the Department of the Interior in the administration of the HHCA.

Section 4 establishes a procedure for Congressional approval of amendments to the HHCA. Section 5 establishes a procedure under which the Secretary of the Interior is to perform his statutory responsibility of approving proposed land exchanges under section 204(3) of the HHCA. Section 6 requires the Secretary of the Interior to designate a representative to administer the responsibilities of the United States under the HHCA and under this legislation.

Certain matters addressed in sections 4, 5, and 6 of the proposed legislation (amendments, exchanges and appointment of the Secretary's Designated Officer) are currently implemented through procedures that have been agreed to informally by the Department and the State. As I indicated earlier in my testimony, the position of Special Representative, addressed in section 6 of the bill, was established in accordance with the recommendation of a 1983 Federal-State Task Force Report on the HHCA. The procedures addressed in section 4 of the bill for forwarding State legislation amending the HHCA to Congress for the approval required by Section 4 of the Hawaii Admission Act have been developed under an informal working arrangement among the Secretary of the Interior, the State of Hawaii and Congress. The procedures governing the Secretary's approval of land exchanges under the HHCA, addressed in section 5 of the bill, also were developed by the Department and the State in the course of reviewing and approving proposed land exchanges in the middle 1980s.

The Administration has not had the time to review these provisions so as to be able to take a position on whether they are appropriate or necessary. We see no real urgency at this time in formalizing Interior's role in administering the HHCA because the procedures I have outlined above appear to be working satisfactorily. Finally, our current review of the land claims could result in a proposal that would involve revisions to the ongoing role of the Department in the administration of the HHCA. Pending the completion of the review of the land claims, it would be advisable to allow us to retain the flexibility to structure a proposal with the State that could address, if warranted, the administrative issues covered in sections 4, 5, and 6 of the legislation. Thus, we recommend that action on these sections be deferred at this time.

I appreciate the opportunity to testify before you today and would be pleased to answer any questions you may have.

Senator AKAKA. Thank you very much. Mahalo nui, Mr. Heyman.

I believe that this is your first congressional hearing in your capacity as the Interior Department's—and let me slowly say the Department's official for the Hawaiian Homes Commission Act.

Mr. HEYMAN. Yes, sir.

Senator AKAKA. Your presence here is important to native Hawaiians as you represent the Clinton administration's position with regard to Hawaiian home lands.

I also want to congratulate you with the remark you just made because I understand that you will leave the Department of the Interior later this year to become the Director of the Smithsonian Institution. I am sure you will meet your new challenge as you have here and meet that challenge with great enthusiasm.

Mr. HEYMAN. Thank you, sir. I certainly will try.

Senator AKAKA. Your remaining time at the Department of the Interior may be short, but native Hawaiians anxiously hope that it will also be productive before you leave.

Mr. Heyman, your remarks offer hope that we can begin a new chapter in Federal-State relations over Hawaiian home lands. I was particularly encouraged by the statement in your testimony that you were considering whether the State or the beneficiaries have an equitable claim that would be appropriate to redress.

For too many years the State of Hawaii and the Federal Government have challenged each other with technical legal arguments such as whether the statute of limitation has expired, whether the territorial governor was an agent of the Federal Government, or whether Federal officials violated their statutory obligations. What has been missing and what your testimony now recognizes is the need to consider the broad public interest in correcting the history of problems in the Hawaiian Homes Commission Act.

The fundamental question should be whether the objectives of the Hawaiian Homes Commission Act have been fulfilled and

whether territorial, State, and Federal officials acted with the best interests of native Hawaiians in mind.

As you consider the merits, Mr. Heyman, of the case on the withdrawal of Hawaiian home lands during the territorial period, will you consider the broader equitable concern about achieving fairness for the native Hawaiian beneficiaries?

Mr. HEYMAN. Well, I think that is what I mean by equitable consideration, sir. I hesitate at the moment to be very specific about what the references would be to make those judgments. I think that is a matter that I would really want to think through very carefully and read more than I have read so far, but clearly I want to quest for what was the purpose and set of expectations with regard to the passage of that act, what did Congress believe that it was doing and why, and were the things that occurred that are the subject matter of dispute presently matters which are really inconsistent with that history and the reasons for the passage of the act in the first instance. So, it is really a more policy-based inquiry than it is trying to determine whether if we were litigating in a court of law, there would be redress because of technical violations of law or whether those would be blocked by more technical considerations such as statute of limitations, sovereign immunity, and the like.

Senator AKAKA. If the Clinton administration decides that the Federal Government should provide land to the Hawaiian Home Lands Commission, will you need statutory authority from Congress authorizing transfer of lands?

Mr. HEYMAN. I believe we are going to need some statutory authority in the end, yes. I think that in the end if the administration concludes that redress ought to be had, I think Congress is going to have to participate in that decision.

Senator AKAKA. Under your current timetable, you complete your review of Hawaiian home land withdrawals by the end of August, as you mentioned. Do you plan to issue formal recommendations at that time?

Mr. HEYMAN. I am not sure whether the Department of Interior itself will be issuing anything or whether or not it will institute an interagency review and what will emanate from that is an administration viewpoint. That is really something I have got to talk with the Secretary about and others within the Department in terms of the propriety of our action at that point, but I do assure you that by the end of August, the Department of the Interior will have come to its own conclusion with regard to how it believes this matter ought to be determined.

Senator AKAKA. Well, if there is a report that comes from that, we certainly would like to have a copy of that.

Mr. HEYMAN. Yes, sir, of course.

Senator AKAKA. In your testimony you state that other Federal agencies, particularly the Departments of Defense and Justice, will need to respond to your report. What effort has been made to open discussions with these agencies or keep them apprised of your progress?

Mr. HEYMAN. So far, none. So far, we have been proceeding largely under that umbrella that I have as the Secretary's special designee. Our view has been that until we have a firm grip on the

subject matter, we ought not to be conferring, but as soon as we do, of course, we should be conferring with our sister agencies.

Senator AKAKA. Budget considerations drive all policy decisions in Washington these days, as you know. One of the reasons why S. 2174 authorizes compensation in the form of land rather than dollars is that it is getting harder and harder to squeeze funding from the Federal budget. From a budgetary standpoint, Mr. Heyman, is not the conveyance of lands the only viable form of relief that Congress could provide at this time?

Mr. HEYMAN. Well, it seems to me that it is the most practical form of relief that could be provided, although I need not caution you, Senator—you know much better than I—that one of the problems that besets Hawaiian home lands at the moment is lack of cash to build infrastructure and to do the other kinds of things that are necessary to help the Commission and the Department make the land usable for its very purposes. But perhaps land transfers would be sufficient, depending upon the land that is transferred, in terms of being able to convert largely through rentals a cash flow for those purposes.

Senator AKAKA. You serve as the designated official for native Hawaiian concerns at the Department of the Interior, and we are happy that there is such a designation. What do you consider to be the mission of your office?

Mr. HEYMAN. Well, at the moment it is a little narrower than some might expect. The focus is really on problems that arise under the Hawaiian Homes Commission Act. Obviously there are plenty of folk who want to have dialogue with the administrative part of the Federal Government with respect to subjects that are broader, the sovereignty subjects, trust subjects, and the like.

I concluded that I ought to start out more modestly with regard to a really defined set of conflicts where a real resolution is possible and then let it kind of grow in a common law way to see whether or not my compass should be broader. But I do caution that my assignment essentially is one that is tied to matters that fall within the Hawaiian Homes Commission Act.

Senator AKAKA. Is your office able to assist the Department of Hawaiian Home Lands to obtain assistance from Interior and other Federal agencies in an effort to further the purposes of the Hawaiian Homes Commission Act?

Mr. HEYMAN. Well, I have not been asked to do that in a way, but I see nothing inconsistent with even the narrower role that I have defined and being able to try to be helpful in those regards.

Senator AKAKA. Aside from the issue we are discussing today, in your view what is the greatest obstacle facing the Hawaiian Home Lands program?

Mr. HEYMAN. Well, I suspect it is the same obstacle that is affecting so many programs of Government presently which is the paucity of resources.

Senator AKAKA. If negotiations were allowed to continue, what recourse is available to native Hawaiians if they believed that the negotiated settlement was inadequate?

Mr. HEYMAN. Well, I have not studied that, obviously, but I would presume that they would have standing to bring a lawsuit to test that issue.

Senator AKAKA. Hawaii is a Reclamation State and the Bureau of Reclamation assisted in the development of Molokai irrigation project. Do you think there may be a role for the Department in providing infrastructure to assist the present program?

Mr. HEYMAN. Well, I obviously cannot respond to that with any certainty. There are those of us and others in the Federal Government presently who would see roles for folk like those who are becoming to some extent supernumeraries in reclamation to help with infrastructure creation, but so far the intricacies of Government have really made it very difficult to organize those kinds of efforts.

The same is true of the military. The opportunities for engineers in the military, Army engineers and the like, to be able to aid in the creation of infrastructure in circumstances of this sort and thus ease the transition on the defense budget and not have it go down as rapidly as it otherwise might be are really opportunities that nobody has really—as far as I know, people have not explored in the depths that I think would be useful.

Senator AKAKA. Well, in the brief time that we have had with you in your new position, I want to tell you that we have really enjoyed working with you, Mr. Heyman, and I want to wish you well in your future. I just know you will succeed in whatever you want to do.

Mr. HEYMAN. Well, I appreciate that, Senator.

I am only going to be able to stay in the room another 20 minutes or so. So, I apologize to other witnesses that I shall not be able to hear them, but two of my very important staff members, Wilma Lewis, the Associate Solicitor and Danny Aranza, are both here and will stay here and will be in positions to answer questions if you have them.

Senator AKAKA. Well, I certainly thank you for them and thank you very much for your statement.

Mr. HEYMAN. Thank you, Senator.

Senator AKAKA. We often have roll call votes here, and there is one in progress now. So, I am going to have to take that vote and therefore the chair calls a 10-minute recess.

[Recess.]

Senator AKAKA. The Committee on Energy and Natural Resources will come to order.

At this time we will have a panel of Norma Wong, Deputy Director, Office of State Planning, State of Hawaii, and the Honorable Hoaliku Drake, chairperson, Department of Hawaiian Home Lands. The committee welcomes you to Washington and here to the hearing. We look forward to your statements and we welcome you with much aloha. I want you to know that your statement in its entirety will be placed in the record and we will hear from Norma Wong.

STATEMENT OF NORMA WONG, DEPUTY DIRECTOR, OFFICE OF STATE PLANNING, STATE OF HAWAII, HONOLULU, HI

Ms. WONG. Mr. Chairman, I will endeavor to summarize the statement.

It is a privilege to appear before you today. I wanted to let you know that this statement is submitted on behalf of Governor Waihee, who you met with earlier. Per your request, we have incorporated in this testimony comments on the proposed bill as well as

a description of the land claims under the Hawaiian Homes Commission Act that we are in discussion with Interior on and the State's comments on the GAO report entitled Hawaiian Homelands: Hawaii's Efforts to Address Land Use.

Governor Waihee is deeply appreciative of your strong support for Federal redress of claims of statutory violations and your support made it possible to create a congressional record in February of 1992 in which many of the same persons who are testifying today apprised the committee of wrongful actions of the Federal Government. Your efforts, as well as those of other members of our delegation, were key to Secretary Babbitt's agreement to initiate the discussions that we are now in.

It is because of your successes in laying the foundation for meaningful talks between the State and the Department of the Interior that the Office of the Governor requests your forbearance in temporarily tabling the Hawaiian Home Lands Recovery Act until such time as the claims settlement package is imminent.

In its present form the proposed bill is an authorization for negotiations to proceed. The State and the Department have engaged since March of this year in substantive discussions. We are aware that there may be other issues intended to be addressed by this proposed bill, and we stand ready to assist the committee in any way to address those issues.

In particular, we are aware that there is concern regarding the representative of the beneficiaries who currently sits with the State's negotiating team at all Interior discussions, as well as participating in preparation for those meetings. As you may know, the State legislature created the position of a State court-appointed independent representative and mandated the State's consultation with this representative in the pursuit of Federal claims. Upon conclusion of the last meeting at the Department of the Interior, the independent representative and the State's team deemed the progress to be encouraging and to have reached a juncture in which it would soon be critical to actively consult with beneficiaries.

To this end, we have planned consultations with representatives of the two beneficiary organizations, the State Council of Hawaiian Homes Association and Hui Kako'o. In addition, we have discussed the possibility of informal discussions regarding legal strategy with the Native Hawaiian Legal Corporation and the legal counsel to the Office of Hawaiian Affairs to the extent that it is appropriate vis-a-vis their own client relationships and responsibilities.

With respect to the land claims themselves, it is the State's contention that the specific claims that have been submitted are statutory violations. While Federal responsibility for these claims must be upheld, it will not be necessary to either establish or refute Federal trust responsibility which was the topic of a 1992 hearing before this committee.

Mr. Heyman has already described the claims that we have before them, so I would just state them briefly here.

The first category is permanent reservations of lands for Federal purposes without compensation or land exchange, the largest parcel of which is Lualualei.

The second is public use of trust lands without compensation for the pre-statehood period. The State returned 29,633 acres to the

Hawaiian home lands corpus in 1984—they are no longer in either the hands of the Federal Government nor the State—and have since compensated \$9.7 million for post-statehood use, with an additional \$2.3 million to be paid before the end of this year.

The third is alienation of Hawaiian home lands. The State seeks compensation and land exchanges to cure the statutory violations without bringing action against private parties and post-statehood impacts will be cured by State actions.

As Mr. Heyman indicated, we are engaged in substantive discussion on several policy and legal issues. Without going into them in detail, these include the basis of the claims constituting statutory violations, the relationships between the act and sections 73 and 91 of Hawaii's Organic Act, powers reserved to the Congress of the United States versus the executive branch or the territory, the relationship between any compensation and revenue caps on lease rent revenues under section 212 of the act, and Federal responsibility for actions that took place during the territorial period.

Finally, the State believes that there are certain misrepresentations and errors of analysis in the GAO report that may have an impact on the outcome of negotiations. Therefore, we ask that the State's written comments be noted by this committee.

This concludes my oral presentation.

[The prepared statement of Ms. Wong follows:]

PREPARED STATEMENT OF NORMA WONG, DEPUTY DIRECTOR, OFFICE OF STATE
PLANNING, STATE OF HAWAII, HONOLULU, HI

Mr. Chairman, it is a privilege to appear before you today in response to the June 7, 1994 invitation from Chairman Johnston, and the May 26, 1994 memorandum from your staff. My name is Norma Wong, Special Assistant for Federal State Relations, and this statement is submitted on behalf of Governor John Waihee. Per your requests, incorporated in this testimony are: (1) comments on the proposed bill entitled "The Hawaiian Home Lands Recovery Act"; (2) description of land claims under the Hawaiian Homes Commission and the status of discussions with the Department of the Interior regarding those claims; and (3) the State's comments on the GAO report entitled *Hawaiian Homelands: Hawaii's Efforts to Address Land Use Issues* (GAO/RCED-93-1-191).

Governor Waihee is deeply appreciative of your strong support for federal redress of claims of statutory violations of the Hawaiian Homes Commission Act. Your support made it possible to create a congressional record in February, 1992, in which many of the same persons who are testifying today apprised this committee of wrongful actions of the federal government that began before Hawaii became a State, and which continue to this day. Your efforts, as well as those of the other members of Hawaii's congressional delegation, were key to Secretary Babbitt's agreement to initiate discussions with the Department of the Interior on those very same issues.

It is because of your successes in laying the foundation for meaningful talks between the State and the Department of the Interior that the Office of the Governor requests your forbearance in tabling the "Hawaiian Home Lands Recovery Act" until such time as a claims settlement package is imminent.

In its present form, the proposed bill is an authorization for negotiations to proceed. The State and the Department of the Interior have engaged since March of this year in substantive discussions on legal issues involving statutory violations of the Hawaiian Homes Commission Act. We have already begun the negotiations that the proposed bill intends to authorize and frame. The State respectfully submits that any further deliberation of the proposed bill at this time would send an inappropriate signal to the Department of the Interior that Congress does not intend for there to be any discussion until those negotiations are duly authorized by Congress.

We are aware that there may be other issues intended to be addressed by this proposed bill, and stand ready to assist the Committee in any way to address those issues.

In particular, we are aware that there is concern regarding the representative of the beneficiaries, who currently sits with the State's negotiating team at all Interior discussions, as well as participating in any preparation for those meetings. As you may know, the Hawaii State Legislature created the position of a state court-appointed independent representative of the beneficiaries, and mandated the State's consultation with the independent representative in the pursuit of federal claims. Upon conclusion of the last meeting with the Department of the Interior, the independent representative and the State's team deemed the progress to be encouraging, and to have reached a juncture in which it would soon be critical to actively consult with the beneficiaries and keep them apprised. To this end, we had planned consultations with representatives of the two beneficiary organizations: the State Council of Hawaiian Homes Associations, and Hui Kako'o. In addition, we had discussed the possibility of informal consultations regarding legal strategy with the Native Hawaiian Legal Corporation and the legal counsel to the Office of Hawaiian Affairs, to the extent that it is appropriate vis-a-vis client relationships and responsibilities.

With respect to the land claims themselves, it is the State's contention that the specific claims that have been submitted to the Department of the Interior are statutory violations of the Hawaiian Homes Commission Act. While federal responsibility for these claims must be upheld, it will not be necessary to either establish or refute federal trust responsibility, which was the topic of a 1992 hearing before this committee. These land claims can be categorized as follows:

(1) Permanent reservation of lands for federal purposes, without compensation or land exchange. The Act says that lands can be licensed, or general leased for public purposes, but not set aside. In 1930 and 1933, three executive orders (E.O. Nos. 382, 599 and 1153) set aside over 1,356 acres at Lualualei, Oahu for military purposes. These lands are still under use by the federal government, and no lease rent has been paid nor has there been any land exchange.

(2) Public use of trust lands without compensation. Compensation for the pre-statehood use of Hawaiian Home Lands that were set aside by executive orders and proclamations for public purposes, without compensation or land exchanges. The State claims that the set-asides were not allowed under the Act, and therefore constitute statutory violations of the Act for which Hawaiian Home Lands ought to be compensated. The State returned 29,633 acres to the Hawaiian Home Lands corpus in 1984, and has since compensated \$9.7 million for post-statehood use, with an additional \$2.3 million to be paid before the end of this fiscal year.

(3) Alienation of Hawaiian home lands. In violation of the Act, over 500 acres were alienated to private parties prior to Statehood. The State seeks compensation and land exchanges to cure these statutory violations without bringing action against private parties. Post-statehood impacts will be cured by state actions.

Since March of this year, the State and the Department of the Interior have engaged in substantive discussion on several policy and legal issues, including: the basis of the claims constituting statutory violations; the relationships between the Act and Sections 73 and 91 of Hawaii's Organic Act; powers reserved to the Congress of the United States, versus the executive branch or the Territory of Hawaii; the relationship between any compensation and revenue caps on lease rent revenues under Section 212 of the Act; and federal responsibility for actions that took place during the territorial period.

Finally, there are misrepresentations and errors of analysis in the GAO report that may detrimentally impact the outcome of negotiations. We ask that the State's written comments be noted by this Committee.

COMMENTS FROM THE STATE OF HAWAII ON THE GENERAL ACCOUNTING OFFICE'S MAY 1994 FINAL DRAFT REPORT HAWAIIAN HOMELANDS: HAWAII'S EFFORTS TO ADDRESS LAND USE ISSUES

In response to the State of Hawaii's comments on the findings submitted in September 1993, the General Accounting Office (GAO) made a number of revisions to its report. However, there are still some findings that are inaccurate or misleading which must be corrected before Congress can accept this report as a guide for future action. They are as follows:

GAO Comment 6, page 22, and pages 2, 4 and 5: In *Keauakaha I*, 588 F.2d 1216, 1224, footnote 7 (9th Cir. 1979), the Court held the co-plaintiff doctrine in which it allowed Native Americans a private right of action to sue to protect their rights in trust property held by the United States was not available to Native Hawaiians after the State of Hawaii's admission into the Union in 1959, in part because the U.S. no longer held title to Hawaiian Home Lands.

The Court did not squarely face the issue of the federal government's responsibility. The court noted that both the title and the day to day management of the lands

had been transferred to the new State of Hawaii. *Keauakaha I* held there was no substantial federal question under 28 U.S.C. Sec. 1331(a) involved in an action to compel an unconsummated land exchange between The Department of Hawaiian Home Lands (DHHL) and a county government.

This case has been misconstrued to capture a much broader issue beyond what the Court actually decided on. The Court decided a narrow issue of whether the federal courts would have jurisdiction in post 1959 DHHL management. It did not address trust responsibility in the Territorial period, or even the nature of trust duties. Thus, the statement by GAO is inaccurate and misleading.

GAO Comment 8, pages 2 and 7: There is no legal analysis for GAO's view that the President had authority under Section 91 of the Organic Act to withdraw lands for the use and purposes of the United States, in light of Congress' express reservation of executive authority over DHHL lands when it passed the Hawaiian Homes Commission Act.

In the Act, Congress dedicated specific lands (Sec. 203) for homesteading and absolutely prohibited the Territorial Governor from exercising any authority over these lands (Sec. 206) and expressly restricted any non-homesteading use of these lands to recallable leases only. The fact that the GAO could find no evidence of a Presidential delegation only serves to support the absence of authority to engage in such conduct.

Page 2, paragraph 2, sentence 2 and page 10: The value and probable uses of the set aside lands have changed over time and cannot be characterized either as benefiting Native Hawaiians or as being unsuitable for homesteading use. Neither factor has any bearing on whether the land was wrongfully taken in violation of an Act of Congress, nor the denial of compensation.

Page 8, paragraph 3, sentences 4-8: This material is unsubstantiated commentary which does not constitute a formal determination of any kind, and should be struck from the report.

Page 8, paragraph 4: The views of the Department of Justice on whether the federal government had a trust responsibility to beneficiaries prior to statehood has never been formally considered. This comment should be deleted.

Senator AKAKA. Thank you very much, Norma, for your presentation and your statement.

We will hear from Chairman Hoaliku Drake.

STATEMENT OF HOALIKU L. DRAKE, CHAIRPERSON, HAWAIIAN HOMES COMMISSION, DEPARTMENT OF HAWAIIAN HOME LANDS, HONOLULU, HI; ACCOMPANIED BY GEORGE KAEAO

Ms. DRAKE. Senator Akaka and members of the Senate Committee on Energy and Natural Resources, ano ai. Me kealoha la ou kou. Greetings with warmth that emanates from within me and embraces you.

I am Hoaliku L. Drake, Chairman of the Hawaiian Homes Commission. Thank you for the opportunity to testify on the Hawaiian Home Lands Recovery Act proposal. I will summarize my testimony at this time.

I appreciate very much the continuing efforts of Senator Daniel Akaka and your committee to support the settlement of native Hawaiians on the land, the primary objective of the Hawaiian Homes Commission Act.

The restoration of the Hawaiian Home Lands Trust assets is a matter of paramount importance to the Hawaiian Homes Commission, the entity responsible for carrying out the State's fiduciary duty on behalf of native Hawaiian beneficiaries. The land claims that have been identified stem from wrongful Federal and State actions, actions that have impaired the ability of the trust to deliver entitlements to several generations of native Hawaiians.

Part I of my testimony provides background information about the Department of Hawaiian Home Lands.

Part II discusses actions that the State of Hawaii has taken to resolve controversies relating to the Hawaiian Home Lands Trust. It also identifies the Hawaiian Homes Commission's obligations to the beneficiaries of the trust and the work of the task force on DHHL land title and related claims formed in 1991 by Governor John Waihee.

The task force's work led to the trust receiving \$9.7 million in 1992 as compensation for the period from statehood to 1992 for past use of 29,633 acres of Hawaiian home lands that had been illegally set aside by executive action.

The Department of Hawaiian Home Lands completed its land title claims research at the end of 1993. More than 40,000 acres of Hawaiian home lands were identified which are now held by Federal, State, and county governments and private parties. These lands are identified in Exhibit A.

Land exchanges have been authorized to resolve claims for land leased by the State to the Federal Government at a nominal rate of \$1 for the term. In a bold step to expedite the resolution of land claims, Governor John Waihee initiated action this year to transfer 16,518 acres of State lands to the trust.

Part III touches on Federal actions or non-actions relating to the trust. I would like to emphasize that Federal assistance to the Hawaiian Homes program since 1921 has been negligible. Thus, it is especially heartening to know of your committee's interest in and support for the program.

Part IV discusses the claims against the Federal Government. Although it is based on testimony previously supplied to your committee, the wrongful use of Hawaiian home lands continues to have adverse consequences on the program.

Clearly the Federal Government had responsibility for creating the Hawaiian Homes Commission Act designating the lands and overseeing the program. Actions taken then by the Federal Government continue to plague Hawaiian home lands today. Based on historical, legal, and moral grounds, I firmly believe that the Federal Government has a duty to correct the wrongful actions that have occurred during the territorial period from 1921 to 1959.

The State of Hawaii through the Governor's office, the Department of Hawaiian Home Lands, and the court-appointed independent representative has begun discussions with the U.S. Department of the Interior on statutory violations of the Hawaiian Homes Commission Act that occurred during the territorial period. We believe these discussions have been most helpful and will be fruitful.

Part V contains our comments on the Hawaiian Home Lands Recovery Act. We support the purpose and intent of this legislative proposal to make the Hawaiian Home Lands Trust whole by acknowledging Federal responsibility and providing a process to resolve claims.

Our suggestions on changes to the bill include: the Hawaiian Homes Commission, the entity of the State with specific fiduciary responsibilities under the act, should be named as a party to the negotiations.

If a representative whose actions are binding on beneficiaries is to be involved, there should be consensus among beneficiaries as to

how a representative is selected and that person's responsibilities, and funding support should be given.

The scope of claims should be expanded to include lands that were alienated from the trust and wrongfully set aside without compensation during the territorial period.

Language excluding Federal lands required to be conveyed to the State under section 5 of the Admission Act should be deleted because all Federal holdings in Hawaii should be considered for settlement of claims, not just lands that specifically stated, but all Federal lands.

Section 4 relating to congressional consent to amendments to the act may not be necessary as the existing administrative procedure is adequate.

We support Federal assistance to conduct surveys and appraisals of Hawaiian home lands as provided for in section 5(d). However, as a procedure for expediting land exchanges, we feel an evaluation needs to be made of the necessity for the Secretary of the Interior to review and approve exchanges.

The Department of Hawaiian Home Lands fully supports the intent and purpose of this legislative proposal, as well as any effort to expedite the resolution of claims against the Federal Government. There are ongoing discussions between the Federal and State executive branches that could lead to fruitful results. Your committee may decide to await the results of these discussions before acting on legislation. If, however, it is felt that legislation is necessary at this time, the Department of Hawaiian Home Lands is available to work with your staff to address the concerns that we have identified and to develop revisions for your consideration.

On behalf of the Hawaiian Homes Commission and native Hawaiians, I thank you for the opportunity that you offered us today and mahalo a nui loa to you.

Senator AKAKA. Thank you very much, Mrs. Drake, for your testimony.

I have a few questions to ask both of you. Mrs. Drake, may I ask you, if you would like to have George Kaeo join you.

Ms. DRAKE. Certainly.

Senator AKAKA. Between 1921 and 1959, nearly 30,000 acres of Hawaiian home lands were withdrawn from the home lands trust by the Federal Government. Although much of the acreage has been returned, as you and Norma have testified, the land with the highest value, Lualualei, remains under Federal control.

Ms. DRAKE. That is right.

Senator AKAKA. The estimated value of Lualualei is \$68 million. Mrs. Drake, if Lualualei or other land of equal value were returned to the Hawaiian Homes Commission, what would this do to create new opportunities for homesteading and potentially reduce the backlog on the beneficiary waiting list?

Ms. DRAKE. Senator, if you are looking at the 1,300 acres of land at Lualualei where there is an aquifer that produces over 10 million gallons of water per day to the Federal Government, and resources on these lands are such that we ourselves could have developed a home for our people with the infrastructure and monies that we could have generated. The whole area in that particular leeward coast—as you know, we owned the ahupuaa from the moun-

tains to the sea at Nanakuli, and these lands would just enhance the property that we already have. If you equate that into dollars, the \$68 million of course would help us in bringing an infrastructure for much of the lands that we already have.

Senator AKAKA. In addition to authorizing the Secretary to restore lands to the home lands trust, S. 2174 provides new authority to the Secretary to exchange Federal lands for Hawaiian home lands. The purpose of this provision is to permit Hawaiian home lands that are of marginal use for homesteading to be exchanged for Federal land that is better suited for housing. A considerable portion of the land in the home lands inventory cannot support housing or agriculture because it is too far from essential infrastructure or is of marginal value for agriculture. Of course, the exchange would have to involve land of equal value.

My question is, would it be beneficial to have authority such as this to exchange Hawaiian home lands for Federal land?

Ms. DRAKE. Yes, sir, it would. It would give us the opportunity to select the kinds of land that we would be able to develop infrastructure. That is at this particular time costing us \$40,000 per house lot because of the kinds of land that we are developing for homestead purposes.

Senator AKAKA. As you know, this bill does provide a process to resolve these claims. Mrs. Drake, section 6 of the bill is designed to give Mr. Heyman's office a clearly defined mission. The bill charges the designated official with the responsibility for advancing the interests of beneficiaries by promoting homestead opportunities and encouraging greater economic self-sufficiency for beneficiaries.

As Chairperson of the Hawaiian Homes Commission, would you find it helpful if the Department of the Interior had a broader responsibility to promote the wellbeing of beneficiaries as provided in section 6?

Ms. DRAKE. Yes, sir, we would.

Senator AKAKA. I am glad that we have had Mr. Heyman in this position even for the short period because he has been a great one in helping us bring some definition to his position.

Let me turn to Norma Wong. Norma, I know that there is some difference of opinion about whether the revenue caps in the Hawaiian Homes Commission Act should limit compensation for lost use of home lands taken by the Federal Government. The State's view on this issue is that the revenue cap should not act as a barrier to compensation for the lost use of land taken by the Federal Government.

Compensation for lost use relates to the misappropriation of lands, not the lease revenue this land might have generated. I fully agree with your interpretation on this matter.

I also want to thank you for your testimony and appreciate your comments and also your assistance that you have offered to the committee.

As I see it, land withdrawn by the Federal Government could have been productively used by beneficiaries for homesteading or agriculture, but the Federal Government deprived Hawaiian beneficiaries of the opportunity to do so when it misappropriated the land.

Ms. Wong, could you outline the State's position on the issue of lost use?

Ms. WONG. Mr. Chairman, if you look at how the State has settled its portion of the claims and use that as a parallel to our claim with the Department of Interior, we are essentially using as a compensation base a lost use as represented by appraisal, measured over time with respect to the highest and best use of the land over time, and we use that as a measuring device to provide for compensation for that period of time in which those lands were not in Hawaiian home lands' hands. By using that appraisal method, that tended to make adjustments with respect to the changes of uses that might have occurred to Hawaiian home lands given the circumstances of that period in history or what was in the surrounding area, available infrastructure or not, et cetera. So, we use that.

In our discussion with the Department of the Interior, we explained that this is not meant—it was a means of measuring that. We could have used other means, and we in fact did discuss at the State level the use of three or four other tools. But this method seems to provide for the best adjustment over time as well as the highest compensation to the Department of Hawaiian Home Lands. It is my understanding that we have had a full discussion with Interior on this issue.

Senator AKAKA. I would appreciate if you or the Attorney General's Office would provide a formal statement on the issue of lost use.

What efforts has the State had with the Department of Justice and Department of Defense outside of the Department of the Interior?

Ms. WONG. The State has had some discussions. Governor Waihee had some discussions directly with Attorney General Reno. The Attorney General has designated someone on her staff to be a direct contact to the State of Hawaii as we proceed with this discussion. The Attorney General advised the Governor that at any time that it would appear to be useful for the Department of Justice to be at the table that they would, but there has been a determination or an agreement that while we are going through these preliminary discussions with Interior, it would be probably best not to have the Department of Justice at the table at the same time.

The State is making every attempt to not only have these discussions be on the basis of legality, but also on the basis of policy. We are encouraged by Mr. Heyman's view that policy will be a paramount lens for these claims. That is a lens that best comes from Interior than from the Department of Justice. So, that is the extent of our discussions on these claims themselves.

We have had other discussions with the Department of Justice in terms of the political status issue.

Senator AKAKA. When Mr. Heyman was at the witness table, I commended him for considering the equitable merits of our case involving territorial withdrawal rather than strictly the legal merits of this claim. Do you share the view that we need to consider whether the fundamental objectives of the Hawaiian Homes Commission Act have been fulfilled?

Ms. WONG. Yes, very much so, Mr. Chairman and staff. That is essentially what the State had to do when we considered the State

side of the claims, actions that occurred or circumstances that are still there after 1959, and we essentially went through a period of time in which policymakers in the State of Hawaii made a determination that the Hawaiian Homes Commission Act was frustrated by these actions taken, and it was necessary for the State, as a matter of policy, as well as a matter of law, to right those wrongs. Those discussions occurred over a period of time.

I would submit that also was the case on the Federal side in their participation in the 1983 Federal-Hawaii task force report. We do understand that the Federal Government must be a little more deliberate than the State was in terms of the arguments of equity and we are assisting the Department of Interior to go through that process.

Senator AKAKA. In your testimony you state that you have reached a critical juncture which means that you must begin broader and more active consultation with the beneficiaries so that they are apprised of the possible outcome of your discussions with the Department of the Interior. I am glad to say your statement is, I feel, very encouraging. Consultation with the beneficiary community is essential if we are to achieve broad support for any settlement.

Has this consultation already taken place or will you initiate this process soon?

Ms. WONG. We will be initiating this process soon. We have had only sketchy discussions so far. Nothing formal. We, of course, have been apprising the Hawaiian Homes Commission in open meeting, but we do not consider that to be adequate as far as a beneficiary consultation.

By critical juncture, I would say that so far we have not had any discussion with Interior that would lead to any kind of specific settlement, which is to say what would the beneficiaries deem to be adequate as far as the settlement is concerned. But given the progress that we have made, what we know is that we are pretty far along on dealing with the equity arguments and legal arguments, and we may reach a situation sooner than later, talking about what kind of package would the beneficiaries agree to. So, it is important for us to have those discussions.

Senator AKAKA. What authority do you believe the current independent representative—that is Judge King—has in the current process?

Ms. WONG. There are two pieces of paper that govern that, one of which I am more familiar with than the other. There are the court documents, and actually Mr. Christensen, who will be testifying for the Native Hawaii Legal Corporation, is more familiar with that and I would recommend that you ask him the same question.

In terms of the State legislation, the State legislation authorized the creation of the independent representative, appropriated monies to support him and his office, and also said that the State must consult with the independent representative. It does not get more specific than that, and how the State is treating it is we have included Judge King in our preparation before we go to Interior and the writing of papers. He is present at the time and I believe that he is still feeling his way in terms of the evolution of his job. I do

know that he intends to independently consult with the beneficiaries and has established an advisory council for that purpose.

Senator AKAKA. Because of military base closure initiatives, land will soon become available at Barbers Point Naval Air Station. Will the State's efforts to obtain Barbers Point include opportunity for land use by the Department of Hawaiian Home Lands?

Ms. WONG. The answer is yes. We understand that there may be some procedural problem on the priority of the State's request and that it may be appropriate to have a legislative vehicle that would essentially create some form of a land bank for any lands that would ordinarily go up for sale upon surplus to be placed in this land bank. We have had some preliminary discussions with Interior on whether they would find that to be something that they would support. That is about as far as we have gone.

Senator AKAKA. These questions may be to both of you, whoever answers first.

Have the appraisals for the land at Lualualei been finalized? If yes, what are the dollar estimates for current exchange value and lost income compensation, and if no, why not? What are the current time frames for completion?

Ms. WONG. Mr. Chairman, the Hawaiian Home Lands Task Force has ordered an update of the appraisal based on final instructions after our review, and we do expect that to be ready shortly. What is shortly for an appraiser is generally 6 weeks.

Senator AKAKA. Another question is, how many additional appraisals do you anticipate being necessary to settle any additional land claims?

Ms. WONG. Mr. Chairman, I could not give you the exact number. The most problematic area is the alienations. They are scattered throughout the islands and those appraisals will have to be done by geographic area, et cetera. They will be complicated as a result. So, I cannot tell you exactly how many appraisals that would take.

Senator AKAKA. Well, do you have any other comments you would like to make to the committee?

Hoaliku.

Ms. DRAKE. Well, first of all, I would like to thank you, Senator, for inviting us and for your tremendous interest in making our Hawaiian trust whole again. Your efforts in this matter have I believe touched all of our hearts, and I would like to extend this to you and Senator Inouye for his kokua in this matter also. Mahalo a nui loa.

Senator AKAKA. Well, I want to tell you since you mentioned the Senator's name, he wanted to be here, but he could not be here this afternoon at this time. If it were in the morning, he would have been. But we do have his statement.

Again, I want to thank you folks so much. You have done so much for the State and for the beneficiaries and for the people of Hawaii. I think you know what we are trying to do here is really to put together a process that can carry on and not impede whatever has been going on in negotiations. We just want to pick up from where it ends and take it on from there. So, I say mahalo a nui loa. Thank you so much for coming and for your statements. Aloha.

At this time I would like to call the panel of Kamaki Kanahele who is Chairperson, State Council of Hawaiian Homestead Associations; Henry Kauhi, Executive Director, Hui Kako'o; also Carl Christensen, Attorney, Native Hawaiian Legal Corporation; and Mahealani Cypher of The Gibson Foundation. I want to welcome all of you to this hearing. Thank you so much for coming to Washington to offer your testimony, and we look forward to your testimony.

Again, before I call for your testimony, I want to thank Hoaliku, the State people, and all of you who are here for your graciousness and for the lovely leis and for carrying out our Hawaiian tradition even here in Washington, D.C.

I would like to hear first from Kamaki Kanahele. I want to say that all of your testimonies will be entered into the record in their entirety.

Kamaki.

STATEMENT OF KAMAKI KANAHELE, CHAIRMAN, STATE COUNSEL OF HAWAIIAN HOMESTEAD ASSOCIATIONS, WAIANAE, HI

Mr. KANAHELE. Mahalo a nui loa, Mr. Chairman.

Senator AKAKA. Aloha.

Mr. KANAHELE. Aloha kakou. May I also extend our aloha not to only you, Mr. Chairman, but to your staff who has helped us a great deal.

Aloha kakou, Mr. Chairman and members of the Committee on Energy and Natural Resources.

I am Kamaki Kanahele, Chairman of the State Council of Hawaiian Homestead Associations. The acronym is pronounced "sha." The SCHHA represents 23 Hawaiian homestead associations whose elected officers represent approximately 30,000 native Hawaiians living on the land. We are, Mr. Chairman, the State's largest native Hawaiian organization as defined.

We are here today to present testimony in response to Chairman Johnston's invitation on this proposed bill to provide for the administration of the Hawaiian Homes Commission Act, 1920.

We do extend our fondest mahalo nui and congratulations to you especially, Mr. Chairman, for the success of Public Law 103-150 which was addressed as an apology bill and to bringing it to full fruition in acknowledging the illegal overthrow of our sovereign Nation by the United States.

We believe that our presence here today begins still another step in your efforts to correct the wrongs done to our people and that a "reconciliation" process, which this bill allows for, shall begin. The "apology bill," as I would like to call it, signed by President Clinton recognizes that the laws of the United States itself, Mr. Chairman, against an allied Nation were violated by their actions and now the requirements for this draft proposal begins the initiation for partial remedy.

Remedy, Mr. Chairman, by this proposal calls for the restoration of the Hawaiian Homes Lands Trust. As we begin this first legislative effort, may we also allow it to be the beginning of the full restoration of our nation.

As beneficiaries, our effort here today is to emphasize the importance of beneficiary representation in any and all aspects affecting

the Hawaiian Homes Commission Act. This bill must be amended to include representation not by a single individual, but amended to read that representation for the beneficiaries shall be the Chairman, Department of Hawaiian Home Lands, Chairman or designee of the State Council of Hawaiian Homestead Associations, and the Executive Director or his designee of Hui Kako'o to represent the beneficiaries on the waiting list.

These groups should be included in the negotiation process which shall recognize that all Federal surplus lands in Hawaii be prioritized to first restore the Hawaiian Home Lands Trust and/or added to the inventory in order to complete the obligations of the Federal Government in its mission to better the conditions of the native Hawaiians and recognizing by this trust as an entity separate from all other future Federal and State settlements;

That the land exchange initiatives in the bill be a settlement of negotiations between the said organizations and the Federal Government;

That in such negotiations of land exchange or land utilization, the bill shall read that in such negotiations the fair market value for the highest and best use of the land be required.

We wish to state, Mr. Chairman, that this bill is a very good beginning and that you should be congratulated for the next step if only to allow for security for congressional participation as a check and balance from that of the administration.

Mr. Chairman, in our efforts here we note in the submissions that have been made this afternoon that the designated official representative of the Department of the Interior has done a wonderful service to us. We do feel, however, that as the designated official representative that surely his listening ear needs to be bent more toward beneficiaries concerned rather than that of administration.

We also congratulate you on S. 2174 which certainly provides new authority to the Secretary under a specific condition, as far as we are concerned, and that the Congress take the lead in this and that security is our greatest asset at this time in not allowing the administration to decide totally the initiatives for and on behalf of the beneficiaries.

Mahalo a nui loa, Mr. Chairman. For the record's sake, although you have asked us to speak for 5 minutes, this is only a 5-minute presentation, and we will accept your invitation to submit a full presentation of testimony from the SCHHA within 2 weeks. Mahalo a nui loa.

[The prepared statement of Mr. Kanahale follows:]

PREPARED STATEMENT OF KAMAKI KANAHELE, CHAIRMAN, STATE COUNSEL OF HAWAIIAN HOMESTEAD ASSOCIATIONS, WAIANA'E, HI

Aloha kakou Mr. Chairman, members of the Committee on Energy and Natural Resources.

I am Kamaki Kanahale, chairman of the State Council of Hawaiian Homestead Associations (SCHHA). The SCHHA represents twenty-three Hawaiian Homestead Associations whose elected officers represent approximately 30,000 Native Hawaiians living on the land. We are the states' largest Native Hawaiian organization as defined.

We are here today to present testimony in response to Chairman Johnston's invitation on this proposed bill to provide for the administration of the Homes Commission Act, 1920.

We do extend our fondest mahalo and congratulations to you Senator Akaka for the success of P.L. 103-150 (the Apology Bill) in bringing it to full fruition in acknowledging the illegal overthrow of our sovereign nation by the United States.

We believe that our presence here today begins still another step in your efforts, Senator Akaka, to correct the wrongs done to our people and that a "reconciliation" process, which this bill allows for, shall begin. The apology, signed by President Clinton, recognizes that the laws of the United States itself, against an allied nation, were violated by their actions and now the requirements for this draft proposal begins the initiation for partial remedy.

Remedy, Mr. Chairman, by this proposal calls for restoration of the Hawaiian Home Lands Trust. As we begin this first legislative effort, may we also allow it to be the beginning of the full restoration of our nation.

As beneficiaries, our efforts here today are to emphasize the importance of beneficiary representation in any and all aspects affecting the Hawaiian Homes Commission Act. This bill must be amended to include representation, not by a single individual, but amended to read that representation for the beneficiaries shall be the chairman, Department of Hawaiian Home Lands, chairman or designee of the State Council of Hawaiian Homestead Associations, and the executive director, Hui Kako'o, to represent the beneficiaries on the waiting list. These groups should be included in the negotiation process which shall:

1. Recognize that all federal surplus lands in Hawaii be prioritized to first restore the Hawaiian Home Lands Trust and/or added to the inventory in order to complete the obligations of the federal government in its mission to better the conditions of the Native Hawaiians and recognizing by this trust as an entity separate from all other future federal and state segments.

2. That the land exchange initiatives in the bill be a settlement of negotiations between the said organizations and the federal government.

3. That in such negotiations of land exchange or land utilization the bill shall read that in such negotiations the fair market value for the highest and best use of the land be a requirement.

We wish to state, Mr. Chairman, that this bill is a good beginning and that Congressman Akaka should be congratulated for this next step if only to allow for the security for congressional participation as a check and balance from that of the administration.

Mahalo for the opportunity to testify.

Senator AKAKA. Mahalo nui, Kamaki.

Now we will hear from Hanale Henry Kauhi.

STATEMENT OF HANALE HENRY KAUIHI, EXECUTIVE DIRECTOR, HUI KAKO'O, KAHULUI, HI

Mr. KAUIHI. Thank you, Mr. Chairman, Senator Akaka and distinguished members of this committee. My name is Hanale Kauhi, executive director for a newly formed organization, with the help of the Department of Hawaiian Home Lands I may add, representing over 14,000 native Hawaiian beneficiaries who are currently waiting on the Department of Hawaiian Home Lands waiting list. Our organization is named Hui Kako'o, which means to support. It is my privilege to address you in our response to S. 2174 being introduced by you, sir, and referred to as the Hawaiian Home Lands Recovery Act. We also thank you for this great opportunity to be a part of this decision making process and consider this a tremendous honor.

First we would like to commend both of our Senators for their commitment in addressing the concerns of the native Hawaiian community and applaud them for their tremendous sensitivity for issues surrounding the redress of land and due compensation relating to the Hawaiian Homes Commission Act of 1920. We believe that it will help our organization's efforts in bringing to light some of the immediate needs of the beneficiaries we serve. We also acknowledge the honorable Representatives in the congressional House and the distinguished members of the Senate, as well as

Secretary of the Interior Bruce Babbitt and the President of the United States, Bill Clinton, for their efforts in finding solutions to longstanding concerns of the native Hawaiians.

As a representative of the native Hawaiian beneficiaries on the DHHL waiting list, we have three purposes at Hui Kako'o.

The first one is to empower and represent the native Hawaiian beneficiaries and encourage active participation by native Hawaiians in matters affecting them as beneficiaries of the Hawaiian Home Lands Trust.

Second is to represent and speak as the elected voice of all applicants in legislative and judicial matters at the county, State, Federal, and international levels.

Third, work with the Hawaiian Homes Commission and the Department of Hawaiian Home Lands to support its efforts and to carry out its mission to make the trust whole.

We believe this bill has tremendous merits for the following reasons.

Number one, it brings attention to a very, very urgent problem of housing needs among the native Hawaiian community which comprises approximately 30 percent of the homeless in Hawaii.

Number two, it gives tremendous hope—I mean tremendous hope—to those who have been waiting on the list, some of which have been waiting for more than 40 years.

Number three, it addresses the fiduciary trust responsibilities of the Federal Government and its representatives from the creation of the Hawaiian Homes Commission Act of 1920 up until the admission of Hawaii as the last of the 50 States in 1959.

Number four, it redresses the issues of illegal land usage and exchanges and the compensation for usages thereof that has yet to be paid.

Number five, it provides for direct input by representatives of the beneficiaries relating to negotiations and settlement of claims against the United States.

Number six, it provides a sufficient timetable for these actions to be in effect.

Number seven, it provides directives to the proper agencies to ensure that timely, efficient, and accurate responses be taken.

We also have important concerns about certain portions of the bill and would like to address them at this time.

Number one, that this bill will not impede or compromise any ongoing discussions with State agencies and/or their representatives and the Secretary of the Interior.

That a subsection 6 in section 2 under Definitions be added to define the term "representative(s) of the beneficiaries" to include the Chairperson of the Hawaiian Homes Commission or their designated representative, the Chairperson of the State Council of Hawaiian Homestead Associations or their designative representative, and the Executive Director for Hui Kako'o or their designated representative.

We believe that this amendment is necessary as the interest of all native Hawaiian beneficiaries are affected by any and all negotiations and claim settlements that are made. These are the only recognized agencies and organizations that represent them and, I might add, who will be affected.

That before any negotiations for land exchanges are started, that the following items be considered.

That we exhaust all possibilities of all Hawaiian home lands in question be returned with regard to its original state.

B, all natural resources, to include water and/or mineral as well as forest resources, be considered.

That the responsibility for changes to return any land to its original state be the sole responsibility of the United States.

That in any case where the return of lands cannot occur, that consideration be given to direct and indirect damages resulting from the inability of usage of lands in question.

In section 3, Settlement of the Federal Claims, paragraph (a), subsection (B), that any consideration of value of the lands in question be determined not only on the monetary value of the land, but also the physical location, the spiritual, natural, and historical references be included as part of the criteria for determining its value.

Under subsection (D) of the same section, that criteria for compensation for the lost use of lands include the failure to meet the trust responsibilities of the Hawaiian Homes Commission Act to place native Hawaiian beneficiaries on the land and related costs incurred by the beneficiaries and their families.

We hope and pray that necessary amendments can be made to this legislation to ensure proper representation by the recognized agencies and organizations and that once made, that this bill receive every consideration for immediate passage.

Again, we would like to point out that we do not want to impede or negate any and all progress being made in current negotiations by the State of Hawaii and its representative or the Department of the Interior.

In conclusion, we would like to again relate the urgency of finding solutions for the native Hawaiian beneficiaries and their related housing problems and that more related legislation be introduced to ensure that the Department of Hawaiian Home Lands receive adequate funding to meet their obligations to all beneficiaries of the Hawaiian Homes Commission Act, and that we all endeavor to better the conditions of these beautiful people whose very existence and future lay within your hands. They have committed to share their aloha spirit throughout this world and continue to endeavor to spread goodwill.

Mahalo a nui loa for this opportunity to address your committee, and we hope that much consideration will be given to this testimony. God bless you.

Senator AKAKA. Mahalo nui, Hanale, for your testimony.

Now we will hear from Carl Christensen.

**STATEMENT OF CARL C. CHRISTENSEN, STAFF ATTORNEY,
NATIVE HAWAIIAN LEGAL CORPORATION, HONOLULU, HI**

Mr. CHRISTENSEN. Thank you, Mr. Chairman. I am Carl Christensen. I am a staff attorney with the Native Hawaiian Legal Corporation. I thank you for this opportunity to testify in support of the Hawaiian Home Lands Recovery Act. My comments will take the form of responses to particular provisions of the act.

First with regard to the definition of lands for which restitution would be available under this act, I believe it would be appropriate

to note that a substantial portion of the lands which were originally designated in the act never in fact made it into the trust and that it would be appropriate to provide a remedy for those lands that can be identified as falling into that category. Also lands that were improperly conveyed into private hands prior to statehood. Although neither of those categories of lands are now in the possession of the Federal Government, the breaches of trust that relate to them did occur while the trust was under Federal control and their remedy should be a Federal responsibility.

Section 3 of the bill makes reference to settlement of Federal claims. If the bill is in fact to provide a settlement having legal preclusive effect, that substantially complicates matters in that it becomes necessary to define very carefully which claims are being resolved by this act and which claims remain unresolved and also precisely the value of the lands relative to those breaches. It might be that the lands transferred under this act could be referred to as a set-off rather than a settlement which would avoid the necessity of dealing with that issue.

The bill specifies that lands which are currently to be returned to the State of Hawaii under the Admission Act should be excluded from the coverage of this bill. I concur with that and I would add also that the obligation of the Federal Government to return ceded lands under the Admission Act itself expired 5 years after statehood in 1959. Public Law 88-233 extended that obligation indefinitely and I would encourage the committee to amend the bill to include language to that effect.

The bill correctly recognizes the need for an independent representative of the Hawaiian homes beneficiaries, but it does not set forth a mechanism for the appointment of such a person. That will be a controversial matter but it should be resolved in some manner.

The 2-year duration of the negotiation process may be inadequate if the Interior Department should take a recalcitrant position because if there is a maximum 2-year duration, they could simply take a recalcitrant attitude and wait out the 2-year period. So, I would encourage there to be some sort of a hammer provision at the end of that period if no resolution has been reached.

I was interested in Mr. Heyman's remarks that there may be no existing statutory authority for conveying lands to the Department of Hawaiian Home Lands. It had been my understanding that the Federal Property and Administrative Services Act of 1949 did have a mechanism by which State agencies can now receive Government surplus lands. If that is not true, I would be interested in seeing a clarification of just exactly how the existing mechanism under that statute would work.

On the same topic, the bill proposes the transfer of land that has been designated as surplus land under that act. This may lead to an unfortunate result in that there is a distinction between excess property and surplus property. Indian tribes under 40 U.S.C. 483 can now obtain excess property with the assistance of the Secretary of the Interior. If the Hawaiian homes program is placed in the category of State agencies that receive surplus land, it is possible that there might be an effect on ongoing litigation as to whether or not

there is a trust relationship between the Federal Government and native Hawaiians.

Thank you.

[The prepared statement of Mr. Christensen follows:]

PREPARED STATEMENT OF CARL C. CHRISTENSEN, STAFF ATTORNEY, NATIVE
HAWAIIAN LEGAL CORPORATION, HONOLULU, HI

Mr. Chairman and members of the Committee:

I thank you for this opportunity to testify in support of Senator Akaka's "Hawaiian Home Lands Recovery Act". The Bill now under consideration by this Committee would, if enacted, provide a new mechanism to convey disused Federal lands in Hawaii to the Department of Hawaiian Home Lands for the use of the Native Hawaiian beneficiaries of the Hawaiian Homes Commission Act ("HHCA"). Unlike present law, it would also provide a substantial role for a representative of the HHCA beneficiaries, who would be fully independent of the government of the State of Hawaii, in the conduct and planning of such conveyances.

The failings of the Hawaiian Homes Commission Act and the breaches of trust committed by both the United States and the State of Hawaii in their administration of the programs established under the HHCA are numerous, but there is no need for me to recite here what others have said elsewhere. I do, however, have a number of comments on various aspects of the language of the Bill as it has been introduced.

1. Definition of lands for which restitution is available

Section 3(a)(2)(A)(ii) of the Bill defines the land for which restitution is to be made as "lands under the control of the Federal Government that—(I) were initially designated as Hawaiian home lands under section 203 of the Hawaiian Homes Commission Act; and (II) were nevertheless transferred to or otherwise acquired by the Federal Government." It is important to recognize, however, that these lands are only a portion of the lands that were wrongly excluded or removed from the control of the Hawaiian Homes Commission during the period when this agency was under Federal control. Although section 203 of the HHCA specified the various locations that were to be regarded as "available lands" under the HHCA, a substantial portion of those lands were never placed under the control of the Commission, thus wrongly depriving Native Hawaiians of the benefit of the use of those lands.¹ Furthermore, a number of parcels which were designated as "available lands" under the HHCA were improperly conveyed into private hands prior to Statehood.² These breaches of trust occurred while the Commission was under Federal control, and their rectification should be recognized as a Federal responsibility. Accordingly, I recommend either that §3(a)(2)(A)(ii) of the Bill be amended to include these lands among those for which restitution is available, or that language be added to direct the Secretary to recommend to the Attorney General the initiation of suits against the State of Hawaii and/or the private occupants as necessary to return these lands to trust status.

2. Clarification of the effect of "Settlement of Federal Claims"

Section 3 of the Bill entitled "Settlement of Federal Claims" (emphasis added). The implication of the use of the term "settlement" is that land exchanges conducted under the authority of this Bill, once enacted, would "settle" particular claims and

¹In 1983, the Federal-State Task Force on the HHCA found major discrepancies between the authorized acreage under the HHCA and land inventories being used by the Department of Hawaiian Home Lands. Federal-State Task Force on the HHCA, Report to United States Secretary of the Interior and Governor of Hawaii 59-61 (1983). In its Attachment A to Appendix 15 of its report, the task force details the 20,161-acre difference between the Kaeo Report, generally recognized as the most accurate inventory, and the original authorization by Congress under the HHCA. *Id.* at 333-335. These omissions constitute claims against the Federal Government that need to be addressed in any process to resolve claims to repair the trust for failure to properly account for these trust assets.

²According to the January 1992 testimony of the Governor of Hawaii to this Committee, the Hawaiian Homes Commission improperly awarded private parties grants for 130 parcels of land covering 744.32 acres prior to Statehood. Appendix F, Report on the Hawaiian Home Lands, submitted to the Committee on Energy and Natural Resources, U.S. Senate (January 1992). After Statehood, the Commission made similar awards for 16 parcels covering 15,082 acres to private parties. *Id.*, Appendix K. In contrast, the 1983 Federal-State Task Force reported that the Commission improperly awarded a total of 139 grants covering 653,349 acres of trust lands to private parties. Federal-State Task Force Report, at 301. These improper pre-Statehood dispositions of trust lands represent additional claims against the Federal Government.

thus would extinguish those claims in the same manner as would, for example, successful litigation of a breach of trust claim brought by an Indian tribe against the United States in the Court of Federal Claims or, prior to its extinction, under the Indian Claims Commission Act of 1946. See §3(a)(3)(A) of the Bill (settlement by Independent Representative to be binding on beneficiaries). If such a settlement would have preclusive effect in this manner, it is not unlikely that litigation will result to determine either the adequacy of the land to be exchanged to the State or the scope of the claim for which a particular release is sought. To avoid such a result, it would perhaps be desirable to treat the conveyance of lands to the Department of Hawaiian Home Lands under this Bill as a setoff against such claims, rather than as a "settlement" of them. Although it may be politically impossible to enact legislation waiving the United States' sovereign immunity and the relevant statute of limitations with regard to these claims at this time, no process that fails to provide a full and fair opportunity to litigate these claims can fairly be considered to have resolved them with finality.

3. Identification of Federal lands for exchange

Section 3(a)(2)(C)(ii) of the Bill excludes "Federal lands that the Federal Government is required to convey to the State of Hawaii under section 5 of the Hawaii State Admissions Act" from the lands that may be exchanged to the Department of Hawaiian Home Lands. This exclusion is appropriate, because the Federal Government should not be allowed to repay its debt with land that it is already obligated to return to Hawaii. It should be noted, however, that under §5(c) of the Hawaii State Act the Federal Government's obligations to convey to the State of Hawaii lands retained by the United States under §5(c) of that Act expired five years after the admission of the State of Hawaii to the Union. Public Law 88-233, 77 Stat. 472 (December 23, 1963), extended that obligation indefinitely. Accordingly, the Bill's definition of lands ineligible for exchange should be amended to include a citation to Public Law 88-233.

4. The Bill correctly recognizes the need for an independent representative of the beneficiaries

Sections 3(a)(3) and 3(b) of the Bill provide for the participation of an independent representative of the beneficiaries. I strongly agree that there should be a representative of the beneficiaries who is solely accountable to them and is not subject to the control of the State of Hawaii. Indeed, I am one of the attorneys representing the plaintiffs in *Ka'ai'ai v. Drake*, Civ. No. 92-3542-10, First Circuit Court, State of Hawaii, the case that was the catalyst for the enactment of State legislation providing for the appointment of an independent representative to represent the beneficiaries in the work of the Task Force appointed by Governor John Waihee under the Governor's Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust. The Bill does not provide a mechanism for the appointment of such a representative, however, and I believe it is essential that a mechanism be identified that will give the beneficiaries adequate assurance that the person selected will be truly responsive to their desires. This mechanism should include sufficient notice to the beneficiaries to enable them to participate in the selection. It is also essential that some funding mechanism be provided to permit the Independent Representative to carry out his or her responsibilities.

5. Extension of negotiations

The two-year maximum duration of the negotiation process established under §3(b) of the Bill may unfairly handicap the State and the Independent Representative in the negotiations. This is so because a recalcitrant Secretary of the Interior could simply make a lowball offer on a take-it-or-leave-it basis, then wait for the expiration of the two-year negotiation period. I would suggest a longer negotiation period, but with the addition of a "hammer" provision specifying that a failure to reach agreement within that longer, specified period would automatically trigger a waiver of sovereign immunity and a right-to-sue for the beneficiaries.

6. This Bill should be understood as providing a new mechanism to convey lands to the Department of Hawaiian Home Lands, not as a limitation on pre-existing authority

Federal officials already have authority under, e.g., the Federal Property and Administrative Services Act of 1949 ("FPASA"), 40 U.S.C. §§471 *et seq.*, to convey certain federal lands to the Department of Hawaiian Home Lands. This Bill should be clearly recognized as providing an additional mechanism for such conveyances, with new provisions protecting the interests of the Native Hawaiian beneficiaries of the Hawaiian Homes Commission Act. As such, it does not limit the authority of Federal officials to make such conveyances under existing law and should not serve as

an impediment to negotiations now in progress between Federal and State officials and the Independent Representative appointed under the authority of 1993 Haw. Sess. Laws, Act 352.

7. Avoidance of implications adverse to Native Hawaiians from the Bill's use of the term "surplus" property

Section 3(a)(2)(C)(i)(II) of the Bill identifies the lands eligible for exchange as those declared "surplus" under the FPASA, 40 U.S.C. §§471 *et seq.* "Surplus" land, as defined in the FPASA, is "excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as defined by the Administrator." 40 U.S.C. §472(g). "Excess" property is property "under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof." 40 U.S.C. §472(e). Under 40 U.S.C. §483(a)(2), the Secretary of the Interior is authorized to convey certain "excess" real property to Indian tribes. Provisions for the conveyance of "surplus" property to state agencies are contained in 40 U.S.C. §484(j). Care should be taken that the reference in this Bill to "surplus" property, instead of "excess" property, and the consequent treatment of Native Hawaiians in a manner different from other Indian tribes, does not provide support for legal arguments in pending litigation that Native Hawaiians have no trust relationship with the Federal Government or that there is no ongoing Federal supervisory role with respect to the State of Hawaii's administration of the Hawaiian Homes State Admission Act. Consideration should be given to using the term "excess" in the Bill rather than "surplus."

Senator AKAKA. Thank you very much, Mr. Christensen.
Now we will hear from Mahealani Cypher.

**STATEMENT OF MAHEALANI CYPHER, THE GIBSON
FOUNDATION, HILO, HI**

Ms. CYPHER. Thank you for this opportunity to present testimony on behalf of Mililani B. Trask, Executive Director of The Gibson Foundation, a native Hawaiian, self-help housing organization. I will try to summarize her testimony.

We speak today on behalf of this foundation but echo the grave concern and distress of many Hawaiians and particularly of Ka Lahui Hawai'i, a native initiative for self-determination.

For some time now there has been growing concern among Hawaiians about the closed door negotiations on DHHL claims being pursued by Interior and the State of Hawaii to the exclusion of all others. We believe that this closed process should not be allowed to continue and welcome your efforts to structure some procedure and process to address these longstanding issues.

The Department of the the Interior and the State cannot resolve these issues because both parties are in a conflict of interest. History verifies that the United States and the State acted in collusion in withdrawing and encumbering trust lands for various Federal and State uses. For this reason the beneficiaries themselves need their own representatives in the process.

With the passage of Public Law 103-150, the United States has validated our claim that the Federal Government participated in the illegal taking of Hawaiian lands. The President has called for reconciliation of the harm done to the Hawaiian people. We believe that restoration of the Hawaiian Home Lands Trust is the first step in the process of reconciliation. We recommend that the Senate committee acknowledge its previous support for the apology bill and begin now to land bank Federal surplus lands for two purposes: provide land to the native Nation as restitution for the illegal overthrow and for recovery of the Hawaiian Home Lands Trust.

We have a concern that this bill does not state who the beneficiary representative is or how this person is chosen. At present there are several representatives of beneficiaries, including Judge King negotiating the DHHL claims with the State, although he was not chosen by beneficiaries to represent their interest; Ka Lahui Hawai'i, the native Nation which represents hundreds of applicants and lessees and has been actively involved in lobbying for Federal recognition; the Statewide Council of Hawaiian Homestead Associations and unaffiliated Hawaiian home associations, homesteaders who do not work with the State Council and represent themselves.

We also suggest the bill be amended to provide a standard for compensation specifically in section 3(a)(D) which would compensate lost use at fair market value for highest and best use for the duration of the loss.

We further recommend that section 3(d)'s reference to funding be moved to the end of the bill so that it can cover the costs of all activities in the bill.

We also think there should be specific reference to funding for the process of negotiation, information gathering, and related costs.

We would like to point out that in 1993 the State of Hawaii approved a settlement to resolve internal State claims relating to Hawaii's breach of trust. Background data on this settlement was not provided to the Hawaiian community and was not reviewed by the Interior Department or the beneficiaries. We suggest a new section be added to this bill to authorize a settlement of State breaches of trust.

We are also suggesting some changes to section 4(a) regarding amendments to the Hawaiian Homes Commission Act.

Further, we ask that you include language in section 5 to limit the circumstances under which land exchanges should be permitted.

Finally, we strongly urge this committee to hold hearings in Hawaii to allow Hawaiian beneficiaries to address you on this very important matter. Limiting your hearings only to Washington, D.C. virtually guarantees that the beneficiaries and their organizations and nations will not be able to attend.

Restoring the Home Lands Trust will not compensate Hawaiians for the injuries suffered in 1893, nor will it impact or alter the history of the State trustees who have utilized the Federal policy of wardship over Hawaiians to control the Hawaiian trust since 1959.

A long-term solution is needed. The United States needs to address this larger issue now. The Gibson Foundation is prepared to work with the Federal Government toward a responsible and just reconciliation.

Mahalo for this opportunity to speak on this bill. Aloha.

[The prepared statement of Ms. Trask follows:]

PREPARED STATEMENT OF MILILANI B. TRASK, EXECUTIVE DIRECTOR, THE GIBSON FOUNDATION, KIA'AINA, KA LAHUI, HI

Dear Senators:

Thank you for inviting the Gibson Foundation to present this testimony which is endorsed and supported by Ka Lahui Hawai'i.

For several months there has been concern about the closed door negotiations on DHHL Claims being pursued by Interior and the State to the exclusion of all others. We believe that this closed process should not be allowed to continue and welcome

your efforts to structure some procedure and process to address these long standing issues.

The U.S. Department of the Interior and the State cannot resolve these issues because both parties are in a conflict of interest. History verifies that the U.S. and the State acted in collusion in withdrawing and encumbering trust lands for various federal and state uses. For this reason the beneficiaries need their own representative in the process.

Our specific comments are attached hereto. We will continue to provide input into the process. Please keep us informed of all activities relating to this measure.

A. SEC. 3—SETTLEMENT OF FEDERAL CLAIMS

The Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471) should be amended to provide that all federal surplus lands in Hawaii be held by the Secretary of the Interior for the Native Hawaiian nation and to replenish the Hawaiian Home Lands trust.

The U.S. has officially apologized to the Hawaiian people for the illegal overthrow of the Hawaiian nation (The Apology Bill P.L. 103-150). The bill acknowledges that as a result of the overthrow, Hawaiians lost their sovereignty and their lands. The bill also calls for "reconciliation". The time has come to move forward for reconciliation, and the termination of wardship. We believe that the Apology Bill lays the framework for the U.S. to recognize Native Hawaiian nations and provide them with jurisdiction and control of their lands.

In 1920 the U.S. Congress provided Homelands for Native Hawaiians (50% blood) only. This trust has been depleted and the beneficiaries have died on lists while the State and Federal Governments accessed the trust for their own and public uses. Replenishing the trust does not address this problem. Eventually the Hawaiian Home Lands Trust and the Ceded Lands Trust will have to be segregated and these assets transferred to the native nation. Both the U.S. and the State will be required to recognize and work with the native nation as is the practice throughout the continent under the Federal Policy which provides self-determination to America's other indigenous peoples.

We believe that restoration of the Hawaiian Home Lands Trust is a first step in this process, but recommend that the Senate Committee acknowledge its previous support for the Apology Bill and begin now to land bank federal surplus land for two purposes:

1. For the provision of land to the native nation for restitution for the illegal overthrow; and

For the recovery of the Hawaiian Home Lands Trust.

Beneficiary representative

The measure does not state who the beneficiary representative is, or how this person is chosen. At present, there are several representatives of the beneficiaries—they include:

1. Judge King—designated by law to negotiate DHHL claims with the State. Judge King was not chosen by beneficiaries to represent their interest;
2. Ka Lahui Hawaii—The native nation represents hundreds of applicants and leases and has been actively involved in lobbying for federal recognition. Its Native citizens have also been involved in housing projects in other economic development projects on the home lands;
3. SCHHA—The Statewide Council of Hawaiian Homestead Associations;
4. Unaffiliated Hawaiian Home Associations—Homesteaders who do not work with the SCHHA and who represent themselves.

These groups should be specifically included in the negotiations process and specific reference to them should be included in the bill. The measure should be redrafted to provide a structure similar to that which was utilized when the Federal-State Task Force on the Hawaiian Homes Commission Act was chartered by James Watt in 1983.

Compensation for lost use

The bill should be amended to provide a standard for compensation. The Home Lands have been used for commercial and industrial purposes, as well as for residential and agricultural uses. Unless some standard is established in the measure, the State and Interior will seek to utilize the lowest rate for compensation. Section 3(a)(D) should be amended to state that compensation for lost use should be calculated at "the fair market rate for the highest and best use of the land for the period of usage".

Appropriations

Section 3(d) provides appropriations for Section 3 purposes only. We recommend that this section be moved to the end of the bill so that funding can be provided for the costs of activities in the bill. Section 5 of the bill calls for the U.S. to inventory the Home Lands Trust—there is no appropriation for these costs in Section 5.

There should be specific reference to provide funds for the negotiations, consultants, appraisals, maps, transportation, the inventories and staff support, etc. The funding should be under the beneficiary representatives. It is doubtful that the parties who are liable will not want to allocate funds for appraisals and costs which may increase their liability.

B. SETTLEMENT OF STATE CLAIMS

In 1993, the State legislature approved a settlement (approximately \$12 million) to resolve State internal claims relating to the State's breach of trust. The background data relating to this settlement was provided to the community or the legislature. The State settlement was not reviewed by Interior, or the beneficiaries. Interior has "oversight" obligations in this area, but failed to exercise its authority in this area.

The bill provides a process to review and settle Federal Claims. A new section should be added to authorize the settlement of state breaches of trust.

C. SECTION 4—AMENDMENTS TO THE HIICA

Section 4(a) should be amended to require the Chair of DHHL to submit to the Secretary all testimony and written input of beneficiaries on proposed amendments, whether this testimony has been submitted to the DHHL or the State legislature.

Section 4(a)(3) should be amended. The Chair is not the appropriate person to advise the Secretary on issues relating to Congress' approval. The appropriate person is the Attorney General of the State. Whenever any issue is raised regarding the Home Lands Act an Attorney General's written opinion should be issued publicly.

D. SECTION 5—LAND EXCHANGES

The Hawaiian Community and homestead organization have repeatedly called for a moratorium on land exchanges because of the history of state and federal misuse of the process. The measure as drafted, provides for land exchanges, but there are insufficient restrictions to safeguard against misuse of the process.

It is common knowledge that the Homelands are the most barren and arid lands in Hawaii. Non-profits working to develop housing initiatives have found that the home lands require millions of dollars in infrastructure, drainage, water lines, etc. because they are ill-suited for housing and other beneficiary uses such as agricultural and pastoral undertakings.

Land exchanges should only be contemplated in two instances:

1. To provide for housing, pastoral, agricultural and aquaculture undertakings by beneficiaries;
2. To replace lands which have been toxified or polluted by State or Federal uses.

FINAL COMMENTS

1. Hearings on this bill should be held in Hawaii on all islands where there are Home Lands. Holding hearings in Washington D.C. virtually guarantees that the beneficiaries and their organizations and nations will not be able to attend.

2. Restoring the Home Lands Trust will not compensate Hawaiians for the injury suffered in 1893 nor will it impact or alter the history of the State Trustees who have utilized the federal policy of wardship over Hawaiians to control the Hawaiian trusts since 1959. A long-term solution is needed. The United States needs to address this larger issue now.

Senator AKAKA. Thank you very much, Mahealani.

You heard the testimonies of the officials from the Department of the Interior and the State of Hawaii. So, this question is for any or all of you.

Aside from what each of you have stated in your testimonies, is there anything any of you wish to add to today's discussion of issues?

Kamaki.

Mr. KANAHELE. Thank you, Mr. Chairman. I have just a curiosity that I probably need an answer from staff, but not at this time. I would just like to put it on the record.

I would like to make inquiry per the recommendation of Mr. Heyman that perhaps, Mr. Chairman, in hearing his testimony that this bill should also include and be an instrument of redress, which Mr. Heyman was concerned about. I was just curious about what obstacles and/or the pros and cons of that statement should be. So, I would appreciate it very much if staff could look at that and make recommendations to us on that comment.

I would also like to state that I was very concerned about Mr. Heyman's comment that the bill was premature because I disagree. I do feel that it is an instrument that is necessary so that although the administration is moving with its objectives and goals, that certainly the Congress and this bill takes the initiative to parallel that initiative. I see that as a win-win situation and I wanted to make that little statement for the record.

Senator AKAKA. Mahalo, Kamaki. We will respond to your questions.

Are there any other comments?

Hanale.

Mr. KAUI. Thank you, Senator.

I wanted to say that in all the discussions relating to beneficiaries, number one, and those that are on the waiting list, number two, I wanted to make perfectly clear that in all the discussions we have had throughout the islands, that we have reached 100 percent support from those who were in attendance for our organization, again which I reiterate was started by the Department of Hawaiian Home Lands and with the Hawaiian Homes Commission's approval to represent these 14,000 people.

My commitment to that, Senator, is to try to ensure that even so much as you are making a tremendous step in trying to look at the Federal responsibilities and also we would like to endeavor to look into other financial means of trying to remedy the situation of these 14,000 people who have families that are in a very critical stage.

In talking to all these beneficiaries, I have to relate to you this, that their concern mainly is to just get on the land, number one. We asked what about houses. They said no. One of the first things they would like to do is get on the land. They realize that once they are on the land, that they are able to call something their own, something at least they will not be kicked off of or something they will not have to be worried about being taken away from them. That is the first concern.

The second or third concern is for the safety and health conditions to be met once they are on the land.

So, they are very basic needs, but it is something that I have to relate to you, Senator, so that you know from the beneficiaries' hearts, which you are referring to, that these are some of the main concerns that they have. We appreciate all your efforts in trying to address this within the Senate bill.

Senator AKAKA. Any other comments?

[No response.]

Senator AKAKA. I have a question for Mr. Christensen. You and other attorneys at the Native Hawaiian Legal Corporation have been on the front line in representing beneficiaries in various lawsuits over claims against the State and the Federal Government.

What is your assessment of the current judicial or administrative mechanisms available for recourse for native Hawaiians?

Also, what is your assessment of the current designated independent representative, Judge King?

Mr. CHRISTENSEN. With regard, first of all, to the judicial and administrative mechanisms, as against the Federal Government, essentially none. Unless someone can come up with a new legal theory that has not yet been dreamed of, there is essentially no recourse available against the Federal Government. Conceivably additional facilities at Lualualei might be challenged as an additional breach of the Hawaiian Homes Commission Act or of the Admission Act, but as far as obtaining legal redress in a court of law for the wrongs of the past, that appears to be foreclosed.

The State of Hawaii, on the other hand, in the last 6 or 8 years has made tremendous steps in making available new administrative or judicial remedies. The passage of the Native Hawaiian Trusts Judicial Relief Act in 1988 provides a judicial remedy for events occurring from 1988 on. That act has not yet been interpreted by the courts, but it appears to provide a very good remedy for that sort of difficulty.

The process that has been set up by the Governor's task force with regard to pre-1988 breaches of trust is not complete, and of course until it is, we will not know just exactly what comes out of it, but it is going forward and appears to be a good faith effort on the State's part to reach a resolution of these matters.

With regard to Judge King and his actions as the designated independent representative, first I should note that I was one of the attorneys that represented the plaintiffs in the lawsuit that was the catalyst for the passage of the State law that set up the process under which Judge King was designated. That bill had hearings before the legislature. Once the bill was passed, the judge who was in charge of the process saw that advertisements were put in newspapers and the information was distributed as widely as could be done under the circumstances. There were between 40 and 50 applicants for the position of independent representative including, if I remember correctly, two past presidents of the Hawaii State Bar Association. It was a very well-qualified group of people from which Judge Crandall selected Judge King to be the independent representative.

It is my understanding that he has tried very hard since his appointment to make contact with the beneficiary groups and with individual beneficiaries to find out what they want to see come out of that resolution process. I am not part of the task force's work, so I have no personal knowledge of what his part in that has been, but it is my understanding that he is doing what I would believe to be appropriate in advancing legal arguments as to whether or not certain things are breaches of trust that would most benefit the beneficiaries.

A lot of the issues as to these breaches of trust do rest on legal determinations. Was a particular type of action legal or not legal?

It is not something that can really be resolved as a matter of political negotiation or compromise.

Senator AKAKA. I think you have heard Mr. Heyman's testimony. Can you comment on Mr. Heyman's comment on equitable claims?

Mr. CHRISTENSEN. Well, I am very pleased that the Federal Government is willing to address those claims because in a strictly legal sense if all of the claims are barred by sovereign immunity or a statute of limitations, then there is no "legal" claim left, but the fact that these things did happen in the past, they were illegal at the time that they occurred, and that the Federal Government is willing to at least consider the possibility that a remedy is due for those even though there may not be a current judicial remedy available I think is a very positive step in this process.

Senator AKAKA. Thank you very much.

Kamaki.

Mr. KANAHELE. Mr. Chairman, with regard to the independent representative, Mahealani, representative of the Gibson Foundation, is correct in her statement that Judge King was not chosen by the beneficiaries to represent our interest. I need to highlight that because the State Council of Hawaiian Homestead Associations has consistently throughout the process and even in the legislature testified against it. We had not even been invited to participate in legislation that was being written, nor had we been aware of a lawsuit until the actual court appointment was taking place. When we approached the legal counsel who had initiated the suit, in this case Mr. Maheula, he said to me, "You must excuse me, but I never heard of the State Council of Hawaiian Homestead Associations."

Now, that of course angered us since we have been around for nearly 10 years and we have a representative which neither Hui Kako'o, who represents 14,000, or I who sit for 30,000 have absolutely no representation with regard to this gentleman. We appreciate his good works, but in our efforts to communicate with him, he begins by stating very clearly that he is already our representative, setting our agenda aside.

I have a real difficult time with a court-appointed individual who represents everybody in the State with 50 percent or pure Hawaiian blood when two of the largest organizations here had absolutely nothing to say on it. It was just a lawsuit initiated by three individuals being won and then a court decided who is to speak for all of us. So, for a gentlemen to sit, to speak with all of us on this level with the Interior and the State is absolutely uncomfortable and I will go on the record and tell you now not acceptable to this representative that sits here.

We look to corrective action and seek corrective action perhaps in language, testimony, and this bill.

I need to say that my uncomfortableness with Judge King is that as he has begun to do his work, his advisory committee is only about two or three who represent individuals themselves or smaller organizations, and yet decisions being made at this level by him on our behalf is absolutely unknown. That is frightening to us. So, that is why you heard the representative from Hui Kako'o as well as myself make clear that we look for a different definition of the

representative in this bill, and I needed to make sure that that was highlighted.

Mahalo a nui loa.

Senator AKAKA. Thank you very much, Kamaki.

If there are no further comments, in closing I would like to thank the witnesses for your insight and your recommendations on S. 2174. There is no question that your suggestions and your statements will be very helpful as the committee considers this important issue.

As the testimonies today have revealed, the resolution of Hawaiian home land claims is a complicated matter. I believe today's forum was productive for all of us to discuss openly where we stand and what must be done to resolve such longstanding issues. I think we can all agree on one thing—that land must be restored to the Hawaiian Home Lands Trust. How we accomplish that task will involve the administration, the State of Hawaii, the Congress, and of course not last, but first, the native Hawaiians. I am hopeful that we are on the right track. We are doing our best to try to move ahead and to continue to help the Hawaiians.

I again thank you so much because you have helped us a lot. Without impeding progress, we hope to pick it up and continue to move on and we are going to continue to need your kokua in this way. Mahalo a nui loa. Thank you very much.

Mr. KANAHELE. Thank you very much, Mr. Chairman. We appreciate it.

Senator AKAKA. The committee stands in recess subject to the call of the chair.

[Whereupon, at 4:10 p.m., the hearing was adjourned.]

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