

## Must Hawaii Reach a Political Settlement with Native Hawaiians Before Transferring 1.2 million Acres of Land?

by Margaret Robison Kantlehner

PREVIEW of *United States Supreme Court Cases*, pages 328–331. © 2009 American Bar Association.

# Case at a Glance

In the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893, Overthrow of the Kingdom of Hawaii, Congress acknowledged and apologized for the United States' role in that overthrow. Now the Supreme Court has agreed to review whether this resolution strips Hawaii of its authority to sell, exchange, or transfer 1.2 million acres of state land until it reaches a political settlement with native Hawaiians about the status of that land.

Margaret Robison Kantlehner is an associate professor of law at Elon University School of Law in Greensboro, N.C. She may be reached at [mkantlehner@elon.edu](mailto:mkantlehner@elon.edu) or (336) 279-9205.

### ISSUE

Does the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893, Overthrow of the Kingdom of Hawaii (Apology Resolution) strip Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land unless and until it reaches a political settlement with native Hawaiians about the status of that land?

### FACTS

Respondent Office of Hawaiian Affairs (OHA) sued petitioner State of Hawaii to enjoin the state's transfer of a parcel of land in West Maui known as the "Leiali'i parcel." OHA claimed that the prospective sale of the parcel to a private developer would violate the state's fiduciary duty to native Hawaiians under Article XII, Section 4, of the Hawaiian Constitution. OHA based its arguments, in part, on Apology Resolution findings that ceded lands in Hawaii may be subject to unrelinquished claims of native Hawaiians.

Prior to the lawsuit, there was a dispute over the fair market value of

the Leiali'i parcel. The developer, the Housing Finance and Development Corporation (HFDC), proposed residential uses since the property lies in an area with a critical shortage of affordable housing. HFDC began working to develop the property in 1987. While the parties negotiated over the fair market value, HFDC spent \$31 million developing the parcel. After the Apology Resolution was adopted in 1993, OHA insisted that HFDC attach a disclaimer to the transfer of the Leiali'i parcel stating that the conveyance would not waive or diminish native Hawaiian claims to ownership of the land. HFDC rejected this proposal. On November 4, 1994, HFDC purchased the land from the state for \$1 and tendered to OHA its 20 percent portion of the fair market value, \$5,573,604.40. OHA refused the check and filed this lawsuit on November 4, 1994.

The history of the Leiali'i parcel is relevant to the arguments. In 1893, the Hawaiian monarchy was overthrown and the Republic of Hawaii was declared. The Leiali'i parcel was a part of former crown and government lands of the Republic of

*STATE OF HAWAII ET AL. V. OFFICE OF HAWAIIAN AFFAIRS ET AL.*  
DOCKET No. 07-1372

ARGUMENT DATE:  
FEBRUARY 25, 2009  
FROM: SUPREME COURT OF HAWAII





Hawaii, which were subsequently ceded to the federal government in 1898 when Hawaii was annexed into the United States as a federal territory. The people of Hawaii voted in favor of statehood in 1959, and Hawaii became the 50th state shortly thereafter. The United States transferred ceded lands to the new state, directing it to hold the lands in public trust. Under the state constitution, as a result of a state constitutional convention in 1978, OHA was designated to receive and manage a portion of the income, including sales proceeds derived from the public trust lands, for the benefit of native Hawaiians. Because of its responsibilities, OHA brought the original lawsuit in state court in 1994.

OHA cited the Apology Resolution as support for the proposition that the federal government has recognized past injustices to native Hawaiians and possible unrelinquished claims of native Hawaiians to their native lands. The trial court denied OHA's request for an injunction, concluding that sale of the Leiali'i parcel would not constitute a breach of trust by the state as long as it did not otherwise breach the high standards applicable to it as trustee.

On appeal, the Hawaii Supreme Court unanimously vacated and remanded, directing the trial court to enjoin the state from selling the Leiali'i parcel, or any other ceded lands held by the state, until the claims of native Hawaiians to those lands have been resolved by the Hawaiian Legislature.

The state filed a petition for certiorari to the Supreme Court of the United States, asserting jurisdiction under 28 U.S.C. § 1257, because the Hawaii Supreme Court decision rests primarily on federal law, namely the Apology Resolution. The U.S. Supreme Court granted certiorari.

## CASE ANALYSIS

The Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893, Overthrow of the Kingdom of Hawaii (Apology Resolution), Pub. L. No. 103-150, 107 Stat. 1510, expresses the federal government's regret for the role of federal officials in the illegal overthrow of the Kingdom of Hawaii. The Apology Resolution sets forth a list of historical findings, including the finding that the native Hawaiians never directly relinquished their claims over their lands to the United States. The findings were followed by three sections of operative text. Section 1 recites that Congress acknowledges the historical significance of the illegal overthrow in depriving the native Hawaiian people of their rights to self-determination and commending reconciliation efforts. Section 2 defines the term "Native Hawaiian" to include any person who is a descendant of the aboriginal people who, prior to 1778, occupied the area that now is the state of Hawaii. Section 3 affirms that the resolution is not intended to serve as a settlement of claims against the United States.

The state contends that the Hawaii Supreme Court erred in issuing the injunction against any transfer of the lands by the state until the federal and state governments have reached reconciliation with the native Hawaiian people. The state asserts that the Apology Resolution does not address title to state lands. Further, the state argues that the federal Newlands Resolution, which annexed Hawaii into the United States in 1898, and the Admission Act, which specified the terms for Hawaii's entry into the Union as a state and transferred to the new State of Hawaii most of the ceded lands in 1959, foreclose the Hawaii Supreme Court's premise that native Hawaiians have valid land

claims to be protected by the injunction.

The state says that the Admissions Act anticipates that the state will earn the proceeds from the sale of ceded lands. Hawaii state law authorizes the state to hold the land, to collect leasehold revenues from it, and to sell it outright to private parties for personal residence purposes. Any funds received from the sale, or other disposition of the ceded lands, are to be held as a public trust for the citizens of Hawaii in accordance with the Admissions Act.

The state contends that no injunction should be issued, that the sale of lands should be allowed to proceed and the proceeds held in public trust.

OHA, one of the recipients of monies derived from the ceded lands, filed the lawsuit to enjoin the sale of the Leiali'i parcel. It asserted that the sale would violate the trust obligations in the federal Admissions Act and various provisions of state law. OHA's position focused on the Apology Resolution, stating that the resolution cast doubt on whether the Admission Act had passed valid title to the state. OHA stated that the United States admitted in the Apology Resolution that it had obtained title illegally. OHA said that the state's title is only as good as the United State's title was at the time of admission. Because of the illegalities surrounding the transfer of these properties to the United States at the time of admission, OHA contended that a hold should be put on any transfer of the ceded properties pending resolution of the legal title issues. OHA said that any transfer of ceded lands would violate the trust obligations of the state to the native Hawaiians, until the ownership issues were resolved.

*(Continued on Page 330)*



In addition to the Apology Resolution, OHA relied on the provisions of the Hawaii Constitution which create a fiduciary duty owed by the state to the Native Hawaiians. The Hawaiian Legislature enacted a series of statutes relating to the reconciliation process around the time of the Apology Resolution. The legislature established the Hawaiian Sovereignty Advisory Commission to facilitate the efforts of native Hawaiian people to be governed by an indigenous sovereign nation of their own choosing and a joint committee to study and make recommendations relating to the public land trust, including whether lands should be transferred to OHA in partial or full satisfaction of past or future obligations.

As a result of these ongoing reconciliation efforts, OSA asserts that the Hawaii Supreme Court correctly held that it would constitute a breach of fiduciary duty under state law for the state to sell ceded lands.

OHA continues to argue that the Supreme Court of the United States lacks jurisdiction despite the fact that the Court granted certiorari. OHA makes this assertion based on the fact that it relies primarily on state law in requesting the injunction and based on the lack of a dispute over the meaning of the Apology Resolution.

The state counters that the findings of the federal Apology Resolution are a critical part of OHA's argument. The state insists that the matter is properly before the Supreme Court of the United States because of OHA's reliance on this federal resolution.

## SIGNIFICANCE

A ruling in favor of the State will confirm that Congress has the authority to extinguish, with or

without just compensation, communal claims to public lands brought on behalf of an entire native group. The Court will affirm the validity of the Newlands Resolution of 1898, which annexed Hawaii to the United States and which recited that the Republic of Hawaii had ceded and transferred to the United States the absolute fee and ownership of approximately 1.8 acres of former crown and government lands (ceded lands). Further, the Admissions Act of 1959, which transferred most of the ceded lands from the United States to the state of Hawaii under direction that the state hold the lands in public trust, will be affirmed. The state's title to the ceded lands can be transferred without concern for unrelinquished claims of native Hawaiians.

A ruling in favor of OHA will enjoin the transfer of any ceded lands still held by the state, pending reconciliation of potential native Hawaiian claims to the ceded lands. Such a ruling deems the Apology Act to be more than a statement of regret, despite the fact that the Apology Resolution does not address the state's right to control or alienate any of the lands that it owns.

The Court will determine the effect of the Apology Resolution on title to land held by the state pursuant to the Admission Act. If the Court determines that the Apology Resolution is more than a statement of regret, then the title to any ceded lands in Hawaii may be subject to claims of native Hawaiians, despite the Admissions Act.

Further, a ruling in favor of OHA may create grounds for lands in other states to be subjected to claims by native populations, despite past congressional action extinguishing those claims.

## ATTORNEYS FOR THE PARTIES

**For Petitioner State of Hawaii et al.** (Seth P. Waxman (202) 663-6000)

**For Respondent Office of Hawaiian Affairs et al.** (Kannon K. Shanmugam (202) 434-5050)

## AMICUS BRIEFS

**In Support of Petitioner State of Hawaii et al.**

Center for Constitutional Jurisprudence (Anthony T. Caso (916) 386-4432)

Commissioner of Public Lands for the State of New Mexico (Turner W. Branch (505) 827-5713)

Grassroot Institute of Hawaii et al. (H. William Burgess (808) 947-3234)

Mountain States Legal Foundation (J. Scott Detamore (303) 292-2021)

Pacific Legal Foundation et al. (John H. Findley (916) 419-7111)

United States (Edwin S. Kneedler (202) 514-2217)

Washington et al. (Jay D. Geck (360) 586-2697)

**In Support of Respondent Office of Hawaiian Affairs et al.**

Abigail Kinoiki Kekaulike Kawananakoa (George W. Van Buren (808) 599-3800)

Alaska Federation of Natives, Inc. (David S. Case (907) 276-5152)

Asian American Justice Center et al. filed (Jonathan M. Cohen (202) 772-2200)

Current and Former Hawaii State Officials (Virginia A. Seitz (202) 736-8000)

Equal Justice Society and Japanese American Citizens League (Eric K. Yamamoto (808) 956-6548)

Hawai'i Congressional Delegation (Sri Srinivasan (202) 383-5300)

National Congress of American Indians (Brian Robert Matsui (202) 887-8784)



Native Hawaiians, Samuel L.  
Kealoha et al. (Walter R. Schoettle  
(808) 537-3514)

Native Hawaiian Legal  
Corporation et al. (Catherine E.  
Stetson (202) 637-5491)

Sovereign Councils of the  
Hawaiian Homelands Assembly et  
al. (Charles A. Rothfeld (202) 263-  
3000)