

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

RICHARD NELSON III, *et al.*,

Plaintiffs,

vs.

HAWAIIAN HOMES COMMISSION, *et al.*,

Defendants.

CIVIL NO. 07-1-1663-08 (JHC)
(Declaratory Judgment)

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

Trial: June 29, 2015

Judge: Hon. Jeannette H. Castagnetti

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

In 2007, Plaintiffs, native Hawaiian beneficiaries of the Hawaiian Homes Commission Act, filed suit against the State of Hawai`i for failing to adequately fund the Department of Hawaiian Home Lands as mandated by article XII, section 1 of the Hawai`i Constitution.¹ Plaintiffs also sued the Department of Hawaiian Home Lands, the Hawaiian

¹ Article XII, section 1 states in pertinent part:

. . . The legislature shall make sufficient sums available for the following purposes: (1) development of home, agriculture, farm and ranch lots; (2) home, agriculture, aquaculture, farm and ranch loans; (3) rehabilitation projects to include, but not limited to, educational, economic, political, social and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved; (4) the administrative and operating budget of the department of Hawaiian home lands; in furtherance of (1), (2), (3) and (4) herein, by appropriating the same in the manner provided by law.

Homes Commission and its commissioners, in their official capacities, for breaching fiduciary duties owed to Plaintiffs for failing to seek from the legislature all funding the State is constitutionally required to provide to the Department of Hawaiian Home Lands. Summary judgment was granted in Defendants' favor and against Plaintiffs in 2009 on the ground that Plaintiffs' claims were barred by the political question doctrine. Plaintiffs appealed and, in 2012, the Hawai'i Supreme Court determined that the question of what constitutes "sufficient sums" for administrative and operating expenses under article XII, section 1 was justiciable and not barred by the political question doctrine. *Nelson v. Hawaiian Homes Commission*, 127 Hawai'i 185, 277 P.3d 279 (2012).

A non-jury trial was held on Plaintiffs' claims that the State of Hawai'i violated its constitutional duty to provide sufficient sums to the Department of Hawaiian Home Lands for its administrative and operating budget (count 1 of Plaintiffs' First Amended Complaint) and that the Department of Hawaiian Home Lands, the Hawaiian Homes Commission and its commissioners breached their trust duties by failing to seek from the legislature all the funding to which the department is constitutionally entitled (count 2).

Nine witnesses testified over the course of eight trial days and 239 exhibits were received into evidence. David Kimo Frankel, Esq. and Sharla Ann Manley, Esq. appeared on behalf of Plaintiffs. Deputies Attorney General Girard D. Lau and Charleen M. Aina appeared on behalf of Defendants Wesley Machida and the State of Hawai'i ("State Defendants"). Melvyn M. Miyagi, Esq. and Ross T. Shinyama, Esq. appeared on behalf of Defendants Hawaiian Homes Commission, the Department of Hawaiian Home Lands, Jobie Masagatani, William K. Richardson, Michael P. Kahikina, Renwick V.I. Tassill, Doreen Napua Gomes, Gene Ross Davis, Wallace A. Ishibashi and David B. Kaapu ("DHHL Defendants").

Having considered the evidence presented at trial, the arguments and written submissions of the parties, and as supported by the Findings of Fact and Conclusions of Law herein, the Court finds and concludes that the State failed to meet its constitutional obligation to provide sufficient sums for the Department of Hawaiian Home Lands' administrative and operating budget as required by article XII, section 1 of the Hawai`i Constitution. More specifically, the State violated its constitutional duty by failing to appropriate sufficient general funds to the Department, thereby forcing the Department of Hawaiian Home Lands to use its own funds, including funds from the general leasing of Hawaiian home lands, to pay for the Department's administrative and operating costs -- precisely what article XII, section 1 was supposed to prevent. The Court also finds and concludes that the Hawaiian Homes Commission and the Department of Hawaiian Home Lands owe a fiduciary duty to the beneficiaries of the Hawaiian Homes Commission Act to pursue the funding that the Department needs for its administrative and operating expenses, and prior to 2012, the Department and the Commission failed to pursue adequate funding from the legislature, thereby breaching their fiduciary duty owed to Plaintiffs, as beneficiaries of the Hawaiian Homes Commission Act.

FINDINGS OF FACT

A. History of Article XII, Section 1 the Hawai`i Constitution

1. Before the Hawai`i Constitutional Convention of 1978, article XI, section 1 of the Hawai`i Constitution provided:

The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms of said Act, and the legislature may, from time to time, make additional sums available for the purposes of said Act by appropriating the same in the manner provided by law.

2. Consequently, before the 1978 Constitutional Convention, the State of Hawai`i Legislature (“Legislature”) had the discretion to fund (or not fund) the Department of Hawaiian Home Lands (“DHHL”). *Exh. B-39* [copy of *Nelson v. Hawaiian Homes Commission* SCWC 30110 (May 9, 2012)] at 6.

3. In 1979, as a result of the 1978 Constitutional Convention, the electorate of the State of Hawai`i voted to amend the Hawai`i Constitution, article XI, section 1, renumbered as article XII, section 1, to replace the last sentence of the first paragraph, quoted above, with the following language:

The legislature shall make sufficient sums available for the following purposes: (1) development of home, agriculture, farm and ranch lots; (2) home, agriculture, farm and ranch loans; (3) rehabilitation projects to include, but not limited to, educational, economic, political, social and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved; (4) the administrative and operating budget of the department of Hawaiian home lands; in furtherance of (1), (2), (3) and (4) herein, by appropriating the same in the manner provided by law.

Hawai`i Constitution, article XII, section 1 (emphasis added).

4. “Through this amendment, the discretionary funding language was changed to mandatory funding language.” *Exh. B-39* at 6; *Exh. B-45* (copy of Stand. Comm. Rep. No. 56, in Proceedings of the Constitutional Convention of Hawaii of 1978, Volume 1 (1980)) at 630 (“Your [C]ommittee [on Hawaiian Affairs] proposal makes it expressly clear that the legislature is to fund DHHL for purposes which reflect the spirit and intent of the Act. Your Committee decided to no longer allow the legislature discretion in this area.”)

5. The above amendment was drafted by the Committee on Hawaiian Affairs who “decided that the legislature should provide sufficient funds to DHHL for the following projects: . . . 4. For administrative and operational costs, which expenditure requests are to be

utilized for all of the [other 3 enumerated purposes in the State Constitution, article XII, section 1].” *Exh. B-45* at 630.

6. Delegate De Soto, in addressing the amendment, stated:

The Committee on Hawaiian Affairs decided that its major goals [during the 1978 Constitutional Convention] were to identify the problems and concerns of native Hawaiians as they relate to the Hawaiian Homes Commission Act in Article XI of this State Constitution. It was apparent that the identifiable problem areas were – first, that the DHHL – the Department of Hawaiian Home Lands – which provides a land base, has a monumental and eternal dilemma in funding.

....

The department must finance its own program through the general leasing of its lands. Incidentally, DHHL is the only one of 17 state departments which must fund itself. Therefore, land of any value through the years has been generally leased for revenue purposes.

Exh. B-46 (Debates in the Committee of the Whole on Hawaiian Affairs Comm. Prop No. 11, in Proceedings of the Constitutional Convention of Hawaii of 1978, Volume II (1980)) at 410-411.

7. Delegate Sutton also addressed the amendment and, specifically, the word “sufficient,” stating,

The State must not only insure there are funds to prepare sites but also insure that there is a way for the DHHL administration to be fully funded to get the evermounting paperwork done. There are presently only 90 people statewide, who are limited by time and other constraints as to what they can do. As demands on the department and staff grow, a much bigger staff will be required. At present, the DHHL budget calls for the expenditure of \$1.3 million; \$1.1 million is through land revenues and the rest through Time Certificates of Deposit (TCDs). From this budget, \$750,000 goes toward staff salaries for 66 percent of the staff. Even this figure will rise as this portion of the staff is civil service and subject to an 8-percent annual inflation rate. The other 34 percent of the staff is funded through the Comprehensive Employment and Training Act (CETA) and the State Comprehensive Employment and Training program (SCET) funds. If these temporary dollars are cut, the staff would have to be cut accordingly. Not only is

there a demand on the money for staff, but there are also other administrative demands that need to be met through funds, especially in the area of record-keeping. Problems the department is facing in record-keeping include a lack of proper equipment to record information, lack of a filing system, the need to automate many portions of the system to speed up the processing of records -- now there are only electric typewriters.

....

For the administration, there is need for support of a staff to adequately service the department's beneficiaries and to purchase equipment which will allow sufficient management of its resources and records.

Id. at 414 (emphases added).

8. Delegate Crozier also addressed the amendment and stated:

The Department of Hawaiian Home Lands is currently obligated to fund its own administrative budget. It is the only department that has to pay its own way. Because of this, when an administrative budget is developed, it is not based on their needs in order to achieve their goal. It is based on the amount of money the department is to receive through its funding mechanisms. One of the major mechanisms is the revenues derived from general leasing. General leasing is the leasing of DHHL lands to the general public. General leasing is not used to rehabilitate Hawaiians; these revenues are used in the administration of the department.

Id. at 415 (emphasis added).

9. Delegate Ontai likewise addressed the amendment and stated:

The Hawaiian homes department and the act were and are the most neglected part of the State of Hawaii, the most neglected department. It was woefully lacking in funds at its inception, and for the past 50 years and even today, it lacks funds to run the department properly.

Id. at 422 (emphasis added).

10. During the debates in the Committee of the Whole on Hawaiian Affairs,

Delegate Burgess asked if the "\$1.3 million to \$1.6 million that was mentioned [earlier in the

debates was] the total cost of the programs which are mandated to the legislature[,] . . . includ[ing] the development of home, agriculture, farm and ranch lots, and the other aims [of the amendment]?” *Id.* at 421. Delegate Sutton responded that “[t]he \$1.3 million to \$1.6 million is for administrative costs at present. Their need is more.” *Id.* at 422 (emphasis added).

11. Before voting on the above amendment to the Hawai`i Constitution, article XII, section 1, the Hawai`i electorate was advised of the following:

If adopted, this amendment:

- requires the legislature to fund the Department of Hawaiian Home Lands.
- guarantees that traditional funding continue.
- allows Department more flexibility.

Exh. B-47 (Informational Booklet re: Amendments to the State Constitution Proposed by the 1978 Constitutional Convention, November 7, 1978 at No. 27).

12. No other State department has a constitutional mandate requiring the legislature to provide “sufficient sums” for its administrative and operating budget.

B. General Fund Appropriations

13. From its beginning through fiscal year 1989 (with few exceptions), DHHL received no general (or external) funding for its administrative and operating expenses. *Exh. 4* at 3 – 4.

14. Prior to the 1978 Constitutional Convention, DHHL’s administrative and operating budget consisted of more than \$1.4 million (from special funds). *Exh. A-64* at 47. In addition to these funds, temporary funds were provided through the Comprehensive Employment and Training Act (CETA) and the State Comprehensive Employment and Training program (SCET) to pay for more than one-third of DHHL’s staff in 1977. *Id.* at 8 – 10. These additional

funds were not part of DHHL's operating budget. Partial Tr. 06/29/15 p.m. at 14 (Testimony of Rodney Lau).

15. For fiscal year 1977-78, DHHL's administrative and operating budget consisted of more than \$1.6 million (from special funds). *Exh. 1* at 44; *Exh. 77*. In addition to these funds, temporary funds were also provided through CETA and SCET. These funds supported one-third of DHHL's staff. *Exh. 1* at 7 – 9; *Exh. B-45* at 631-32; *Exh. B-46* at 414. These additional funds were not part of DHHL's operating budget. Partial Tr. 06/29/15 p.m. at 14 (Testimony of Rodney Lau).

16. The source of funds in fiscal years 1976-77 and 1977-78 were primarily DHHL's operating fund and its administration account, which are special funds. *Exh. A-64* at 47; *Exh. 1* at 44; Tr. 07/07/15 (Testimony of Jobie Masagatani).

17. In fiscal year 1978-79, lease rent generated 21.8% of DHHL's receipts, while interest income generated 45.5% of DHHL's receipts. *Exh. A-66* at 16. A logical inference is that a significant portion of DHHL's administrative and operating budget prior to 1978 was comprised of interest income. Much of that interest income would have been earned from lease revenue. Cf. Partial Tr. 06/29/15 p.m. at 30-31 (Testimony of Rodney Lau).

18. In fiscal years 1976-77 and 1977-78, the majority (but not all) of DHHL's administrative and operating budget came from the Hawaiian Home administration account. *Exh. A-64* at 47; *Exh. 1* at 44.

19. In fiscal year 1976-77, DHHL spent more than \$1.4 million for its administrative and operating needs. *Exh. A-64* at 47.

20. In fiscal year 1977-78, DHHL spent more than \$1.5 million for its administrative and operating needs. *Exh. 1* at 44.

21. In fiscal year 1978-79, DHHL spent more than \$1.7 million for its administrative and operating needs. *Exh. A-66* at 21.

22. After the 1978 Constitutional Convention, the first general fund appropriation to DHHL for its administrative and operating budget was for fiscal year 1988-89. *Exhs. 77 – 88; Exh. 4* at 2.

23. The State appropriated the following amounts of money to DHHL for its administrative and operating budget in general funds (i.e., not including (i) any loans to the department, (ii) any funding financed through revenue bonds, (iii) any money generated by the leasing, renting, or licensing of Hawaiian home lands or waters, or (iv) any payments pursuant to Act 14,² Session Laws of Hawaii 1995, Special Session) in each of these fiscal years:

- a. 1991-92: \$4,278,706
- b. 1992-93: \$3,850,727
- c. 1993-94: \$3,251,162
- d. 1994-95: \$3,251,162
- e. 1995-96: \$2,565,951
- f. 1996-97: \$1,569,838
- g. 1997-98: \$1,493,016
- h. 1998-99: \$1,347,684
- i. 1999-00: \$1,298,554
- j. 2000-01: \$1,298,554
- k. 2001-02: \$1,359,546
- l. 2002-03: \$1,196,452
- m. 2003-04: \$1,297,007
- n. 2004-05: \$1,277,007
- o. 2005-06: \$817,559
- p. 2006-07: \$1,067,559

² See Finding of Fact, Section F, ¶¶ 61 – 67.

- q. 2007-08: \$1,169,174
- r. 2008-09: \$883,699
- s. 2009-10: 0
- t. 2010-11: 0
- u. 2011-12: 0
- v. 2012-13: 0
- w. 2013-14: \$9,632,000
- x. 2014-15: \$9,632,000
- y. 2015-16: \$9,632,000

Exh. 57 at Exh. A column 3; *Exh. 12* at 4; *Exh. 13* at 1 – 2; *Exhs. 91-114*; *Exh. A-131*; Partial Tr. 06/29/15 at 6-8 (Testimony of Rodney Lau).

24. In fiscal year 1991-92, the State appropriated over \$4 million in general funds to DHHL for administrative and operating costs. *Exh. 57* at Exh. A column 3.

25. Between fiscal years 1997 – 2009, the State appropriated less than \$1.6 million per year in general funds to DHHL for its administrative and operating budget. *Exh. 57* at Exh. A column 3.

26. In fiscal years 2010, 2011, 2012, and 2013, the legislature appropriated no general funds for DHHL’s administrative and operating budget. *Exh. 57* at Exh. A column 3.

27. After the Supreme Court’s decision in this case, *Nelson v. Hawaiian Homes Commission*, 127 Hawai‘i 185, 277 P.3d 279 (2012), the legislature increased its general fund appropriations from zero to \$9.6 million for DHHL’s administrative and operating budget expenses. *Exh. 57* at Exh. A column 3; *Exh. 12* at 4; *Exh. 13* at 1 – 2; *Exh. A-131*.

28. Given the prior years’ funding levels and the legislature’s subsequent increase in funding after the Supreme Court’s decision, it is reasonable to find that it was because of this lawsuit that the legislature appropriated \$9.6 million more for DHHL’s

administrative and operating budget expenses than it had been providing. No witness offered any other plausible explanation for this subsequent increase in funding.

C. DHHL'S Administrative and Operating Budget

29. Administrative and operating expenses include recurring costs of operating, supporting and maintaining authorized programs, including costs for personnel salaries and wages, employee fringe benefits, lease payments, supplies, materials, equipment, motor vehicles, rent, building expenses, utilities, communications, advertising, general office expenses, travel, insurance, legal fees, consultants and other professional fees, and repair and maintenance. Partial Tr. 06/29/15 p.m. at 10-12 (Testimony of Rodney Lau); *Exh. B-31*; *Exh. B-32*; *Exh. B-19*; Tr. 07/07/15 at 85-88 (Testimony of Neal Miyahira); *Exh. A-64* at 47; *Exh. 1* at 44.

30. Since 1978, DHHL's administrative and operating expenses have increased. Partial Tr. 06/29/15 p.m. at 15 (Testimony of Rodney Lau); Tr. 07/02/15 at 100 (Testimony of Jobie Masagatani).

31. Between fiscal years 2008 and 2014, DHHL's actual administrative and operating budget expenses have ranged between \$16 million and \$19.6 million. *Exh. B-88*; Tr. 06/30/15 at 4-5 (Testimony of Rodney Lau). The actual administrative and operating expenses calculated by DHHL exclude costs associated with homestead lot development, loans, and expenditures from the Native Hawaiian Rehabilitation Fund. Partial Tr. 06/29/15 p.m. at 104-5 (Testimony of Rodney Lau). The calculation of expenses was carefully and deliberately determined. Partial Tr. 06/29/15 p.m. at 83-105 (Testimony of Rodney Lau).

32. In fiscal years 2013 and 2014, DHHL's administrative and operating expenses exceeded \$18 million annually. *Exh. B-88*.

33. DHHL's actual administrative and operating expenses do not include funds for all the DHHL authorized positions that are vacant. Filling those vacancies would require more money than the \$16 million to \$18 million DHHL expended annually in fiscal years 2008 through 2014. Tr. 06/29/15 at 85-87, 107-108 (Testimony of Rodney Lau).

34. DHHL suffers from a lack of funding and staffing, which adversely affects beneficiaries of the Hawaiian Home Lands Trust. Tr. 06/30/15 p.m. at 42 (Testimony of Rodney Lau); Tr. 07/02/15 at 102-4 (Testimony of Jobie Masagatani); Tr. 07/02/15 p.m. at 3-5, 8-10, 55, 112 (Testimony of Jobie Masagatani).

35. If DHHL received sufficient general funds for its administrative and operating expenses from the State, DHHL would be able to use its special funds and trust funds to provide financial assistance to low-income beneficiaries to help them acquire homestead lots. Tr. 07/07/15 at 62 (Testimony of Jobie Masagatani).

36. DHHL has determined that it needs additional funding to address operational shortfalls. It has determined that it requires funding so that it can fill all of its vacant positions as well as for 64 additional positions. *Exh. B-13; Exh. 24*; Tr. 07/02/15 at 102-105; Tr. 07/02/15 p.m. at 66; Tr. 07/07/15 at 5, 9, 10 (Testimony of Jobie Masagatani).

37. DHHL requested the following sums of money be appropriated to it for DHHL's administrative and operating expenses in each of these fiscal years, regardless of the means of financing:

1991-92:	\$5,111,453
1992-93:	\$5,079,006
1993-94:	\$5,569,607
1994-95:	\$5,609,683
1995-96:	\$6,178,421
1996-97:	\$6,222,903

1997-98:	\$6,944,784
1998-99:	\$7,710,784
1999-00:	\$7,120,905
2000-01:	\$7,120,905
2001-02:	\$7,373,104
2002-03:	\$7,373,104
2003-04:	\$8,890,352
2004-05:	\$8,947,595
2005-06:	\$9,129,838
2006-07:	\$9,129,838
2007-08:	\$10,966,821
2008-09:	\$11,522,092
2009-10:	\$19,603,754
2010-11:	\$19,603,754
2011-12:	\$20,122,220
2012-13:	\$20,122,220
2013-14:	\$25,727,315
2014-15:	\$27,122,825
2015-16:	\$28,478,966

Exh. 57 at *Exh. A* column 1; *Exh. 11* at 5; *Exh. 12* at 5; *Exh. 13* at 5.

38. For fiscal year 2014-15, DHHL determined that it needed \$27,122,825 for its administrative and operating budget, not including for repairs. *Exh. 12* at 5; *Exh. B-3*; *Exh. B-4*; *Exh. B-11*; Tr. 07/02/15 p.m. at 59 (Testimony of Jobie Masagatani).

39. For fiscal year 2015-16, DHHL determined that it needs \$28,478,966 for its administrative and operating budget, not including for repairs. *Exh. 13* at 5.

40. DHHL's budget requests for fiscal years 2013-14, 2014-15, and 2015-16 are based upon its analysis of: prior years' expenditures; its current operational shortcomings;

and its needs for the coming years. *Exh. 23; Exh. 24; Exh. B-3; Exh. B-4; Exh. B-13*; Partial Tr. 06/29/15 p.m. at 16-21 (Testimony of Rodney Lau).

41. DHHL's determinations as to its administrative and operating needs were made with care, expertise and sound judgment. Partial Tr. 06/29/15 at 16-21 (Testimony of Rodney Lau); Tr. 06/30/15 at 57-58, 60-63, 73-74, 81-82 (Testimony of Rodney Lau); Tr. 07/02/15 at 33-38 (Testimony of Rodney Lau); Tr. 07/02/15 at 102 (Testimony of Jobie Masagatani); Tr. 07/02/15 p.m. at 41-45, 113, 114 (Testimony of Jobie Masagatani); Tr. 07/07/15 at 5-6, 67-68 (Testimony of Jobie Masagatani); *Exhs. 12-13; Exh. 19*. No evidence was provided to the contrary.

42. Jobie Masagatani, the Hawaiian Homes Commission Chair, and Rodney Lau, DHHL's administrative services officer, were credible and clear in explaining how DHHL determined its administrative and operating needs post 2012.

43. No credible evidence was presented or produced at trial that DHHL's determinations as to its administrative and operating budget, expenses and needs were arbitrarily or capriciously made. The State presented no evidence at trial that DHHL wasted funding from the legislature.

44. DHHL needs more than \$28 million annually for its administrative and operating budget for fiscal year 2015-16, not including repairs. *Exh. 13* at 5; Partial Tr. 06/29/15 p.m. at 23 (Testimony of Rodney Lau); *Exhs 12, 24, B-4 through B-5*.

45. In each fiscal year since 1992, the State has appropriated to DHHL less in general funds than what DHHL requested to be appropriated for its administrative and operating costs:

	<u>Amount Requested:</u>	<u>Amount of General Funds Appropriated:</u>
1991-92:	5,111,453	4,278,706
1992-93:	5,079,006	3,850,727
1993-94:	5,569,607	3,251,162
1994-95:	5,609,683	3,251,162
1995-96:	6,178,421	2,565,951
1996-97:	6,222,903	1,569,838
1997-98:	6,944,784	1,493,016
1998-99:	7,710,784	1,347,684
1999-00:	7,120,905	1,298,554
2000-01:	7,120,905	1,298,554
2001-02:	7,373,104	1,359,546
2002-03:	7,373,104	1,196,452
2003-04:	8,890,352	1,297,007
2004-05:	8,947,595	1,277,007
2005-06:	9,129,838	817,559
2006-07:	9,129,838	1,067,559
2007-08:	10,966,821	1,169,174
2008-09:	11,522,092	883,699
2009-10:	19,603,754	0
2010-11:	19,603,754	0
2011-12:	20,122,220	0
2012-13:	20,122,220	0
2013-14:	25,727,315	9,632,000
2014-15:	27,122,825	9,632,000
2015-16:	28,478,966	9,632,000

Exh. 57 at Exh. A columns 1 and 3; *Exh. 12* at 5; *Exh. A-131*.

46. The \$9,632,000 legislative appropriations of general funds in fiscal years 2013-14 and 2014-15 are less than the governor and the Department of Budget and Finance

recommended be appropriated to DHHL for its administrative and operating budget. Tr. 07/07/15 p.m. at 26 (Testimony of Neal Miyahira); Tr. 07/10/15 p.m. at 29 (Testimony of Neal Miyahira).

47. Since 1978, the legislature has not appropriated enough general funds to pay for DHHL's administrative and operating expense. Tr. 07/07/15 at 13.

48. The State treats DHHL's budget requests as it does any other department. Tr. 07/07/15 at 74-5 (Testimony of Neal Miyahira); Tr. 07/09/15 at 20-24 (Testimony of Neal Miyahira); Tr. 07/10/15 at 29-31 (Testimony of Neal Miyahira).

D. The State Defendants' Case

49. The independent auditors' category "Administration and support services" in the annual audits cannot be assumed to include all of DHHL's administrative and operating expenses. Tr. 07/02/15 at 20-32 (Testimony of Rodney Lau); Tr. 07/02/15 at 41 (Testimony of Rodney Lau); Tr. 07/09/15 p.m. at 79 (Testimony of Neal Miyahira).

50. The State's position or argument as to what constitutes an "administrative and operating" expense and its exclusion of "programmatic expenses" is entitled to no weight because: (a) this claim or argument is inconsistent with the testimony of the State's designated HRCF 30(b)(6) witness at his deposition; (b) was determined after the State approved DHHL's budget appropriations for fiscal years 2013-14, 2014-15, and 2015-16; and (c) created for the purpose of this trial. Tr. 07/10/15 p.m. 12-13, 18-22 (Testimony of Neal Miyahira). Thus, it is entitled to little or no weight.

51. The State does not know how much money would be sufficient for DHHL's administrative and operating budget nor has the State determined what DHHL's needs

are for its administrative and operating budget. Tr. 07/07/15 at 14-17 (Testimony of Neal Miyahira); Tr. 07/07/15 at 27-28 (Testimony of Neal Miyahira).

52. Although the Court admitted into evidence Exhibits A-104, A-105, A-107, A-114 and A-115, questions regarding underlying data or information were unanswered or unknown concerning these exhibits, and therefore, the Court finds that these exhibits were not helpful or persuasive. Accordingly, the Court did not rely on these exhibits.

E. Special and Trust Funds

53. Revenue from the general leasing of Hawaiian home lands (to non-homesteaders) is deposited into the Hawaiian Home administration account special fund. Tr. 07/07/15 p.m. at 28 (Testimony of Neal Miyahira); *Hawaiian Homes Commission Act* (“*HHCA*”), § 213(f).

54. The primary source of revenue for the Hawaiian Home administration account is revenue generated from Hawaiian home lands (i.e., general leases, licenses, revocable permits of the “available lands”). Partial Tr. 06/29/15 p.m. at 41, 57 (Testimony of Rodney Lau).

55. Revenue generated from leases that initially are deposited into the Hawaiian Home administration account wind up in other DHHL trust and special funds. Tr. 07/10/15 at 33 (Testimony of Neal Miyahira).

56. Some of the monies from the Hawaiian Home administration account special fund, including revenue from general leasing, are deposited into the Hawaiian Home operating fund. Partial Tr. 06/29/15 p.m. at 40 (Testimony of Rodney Lau); Tr. 07/10/15 at 33-34 (Testimony of Neal Miyahira).

57. Monies from loans to DHHL, revenue bond proceeds, and monies generated by the leasing, renting, or licensing of Hawaiian home lands could be deposited into one or more special funds, but the Director of Finance and the Department of Budget and Finance have no way of determining whether those monies were the monies actually appropriated or expended by DHHL pursuant to each “B” appropriation. *Exh. 59* at 2; Tr. 07/10/15 at 33-38 (Testimony of Neal Miyahira).

58. Of the money that the legislature “appropriates” from all special funds to DHHL, it is unclear what the precise amount is that comes directly and indirectly from the leasing of Hawaiian home lands or Act 14 monies. Tr. 07/10/15 at 33-38 (Testimony of Neal Miyahira).

59. It is unclear how much of the money that the legislature authorizes each year from special funds is derived from (a) the leasing, renting or licensing of Hawaiian home lands or waters, (b) any payments pursuant to Act 14 Session Laws of Hawaii 1995, Special Session, (c) any funding financed through revenue bonds, or (d) any interest generated from the Department of Hawaiian Home Lands’ own assets. Tr. 07/0/15 at 33-38 (Testimony of Neal Miyahira).

60. Special fund “appropriations” are authorizations for DHHL to spend its own money rather than a transfer of money to DHHL. Partial Tr. 06/29/15 at 35, 56, 58-59 (Testimony of Rodney Lau).

F. Act 14

61. On or about December 1, 1994, the Task Force on Department of Hawaiian Home Lands Title and Related Claims (“Task Force”) and the independent representative of the beneficiaries of the Hawaiian Home Lands Trust entered into a

Memorandum of Understanding (“MOU”) to resolve, *inter alia*, the wrongful use and withdrawal of Hawaiian home lands from the trust by territorial or state executive actions.

Exh. B-43 at 1. The MOU called for the establishment of the Hawaiian Home Lands settlement trust fund, which was to be funded by annual payments of \$30 million. The \$30 million payments were to continue until a total of \$600 million, over a period not to exceed twenty years, was paid into the settlement trust fund. *Id.* at 5.

62. The MOU provided that “[p]ayments into the Hawaiian home lands settlement trust fund are not intended to replace or result in a diminishing of funds that the department is entitled to under Article XII, Section 1 of the state constitution. A provision to that effect should be written into the legislation implementing the agreement.” *Id.* at 6.

63. The Office of the Attorney General concurred in the MOU. *Id.* at 7.

64. In 1995, the legislature enacted Act 14 in accordance with the MOU. *Exh. B-44* at 698 (Act 14, Special Session SLH 1995 at 698). Act 14 confirmed the \$600 million settlement fund which was to be paid in \$30 million annual payments over a period not to exceed twenty years. *Id.* at 700. Act 14 also confirmed that “[p]ayments made under this Act shall not diminish funds that the department is entitled to under article XII, section 1 of the Constitution of the State of Hawaii.” *Id.* at 701.

65. Every legislative act is reviewed by the Attorney General for constitutionality. The State Defendants did not present any evidence that the Attorney General’s review of Act 14 found it to be unconstitutional.

66. The final \$30 million payment under Act 14 will be paid in 2015.

67. DHHL has had to rely on and use Act 14 monies to pay for its administrative and operating expenses.

G. DHHL's Reliance on Trust Funds, Special Funds and Revenue from the Leasing of Hawaiian Home Lands for its Administrative and Operating Budget

68. DHHL has had to rely on special funds and trust funds every year to cover a substantial portion of DHHL's operating costs. Partial Tr. 06/29/15 p.m. at 23-24 (Testimony of Rodney Lau); Tr. 07/02/15 p.m. at 25 (Testimony of Jobie Masagatani); *Exhs. 77-114*; *Exh. 31* at 5 (FY '89-95); *Exh. A-39* at 7; *Exh. A-40* at 7 (FY '93); *Exh. A-41* at 7 (FY '94); *Exh. A-42* at 7 (FY '95); *Exh. 4* at 4 (FY '95 & '96); *Exh. 5* (FY '96); *Exh. A-43* at 8 (FY '96); *Exh. A-44* at 8 (FY '97); *Exh. A-45* at 5 (FY '98); *Exh. A-46* at 4 (FY '99); *Exh. 6* (FY '99); *Exh. A-47* at 4 (FY '00); *Exh. A-48* at 9 (FY '01); *Exh. A-49* at 11 (FY '02); *Exh. A-50* at 21 (FY '03); *Exh. A-51* at 23 (FY '04); *Exh. A-52* at 23 (FY '05); *Exh. A-53* at 23 (FY '06); *Exh. A-54* at 15 (FY '07); *Exh. A-55* at 15 (FY '08); *Exh. 9* at 8 and 9 (FY '08 & '09); *Exh. A-56* at 15 (FY '09); *Exh. 9* at 8 (FY '08 & '09); *Exh. 10* at 3 (FY '10 & '11); *Exh. A-57* at 15 (FY '10); *Exh. A-58* at 15 (FY '11); *Exh. A-59* at 15 (FY '12); *Exh. A-60* at 16 (FY '13); *Exh. A-61* at 6 and 16 (FY '14); *Exh. 19* (FY '14); *Exh. B-9* at 1; *Exh. 12* at 4-5.

69. DHHL has had to rely on its own funds to pay for its administrative and operating expenses. Partial Tr. 06/29/15 p.m. at 6-8 (Testimony of Rodney Lau).

70. The use of special funds and trust funds to cover DHHL's administrative and operating costs results in less money available to DHHL for land development, loans and other activities that assist the beneficiaries of the Hawaiian Home Lands Trust. *Exh. 4* at 4; *Exh. 5*; *Exh. B-12* at 2; Testimony of Rodney Lau; Tr. 07/02/15 p.m. at 6-8 (Testimony of Jobie Masagatani).

71. Since 1978, DHHL has continued to rely upon the Hawaiian Home administration account to pay for its administrative and operating costs. Partial Tr. 06/29/15 p.m. at 30-31, 41-42 (Testimony of Rodney Lau); *Exh. A-66* at 21 (FY '79); *Exh. A-67* at 22 (FY

'80); *Exh. A-68* at 24 (FY '81); *Exh. A-69* at 24 (FY '82); *Exh. A-70* at 32 (FY '83); *Exh. A-71* at 00324 (FY '84); *Exh. A-72* at 29 (FY '85); *Exh. A-73* at 27 (FY '86); *Exh. A-74* at 20 (FY '87); *Exh. A-75* at 15 (FY '88); *Exh. A-76* at 19 (FY '89); *Exh. A-41* at 29 (FY '94); *Exh. A-42* at 30 (FY '95); *Exh. 31* at 3 and 4 (FY '95); *Exh. 4* at 4 (FY '95-96); *Exh. A-43* at 33 (FY '96); *Exh. A-44* at 35 (FY '97); *Exh. A-45* at 29 (FY '98); *Exh. A-46* at 28 (FY '99); *Exh. 6* (FY '99); *Exh. A-47* at 27 (FY '00); *Exh. A-48* at 33 (FY '01); *Exh. A-49* at 11 (FY '02); *Exh. A-50* at 21 (FY '03); *Exh. A-51* at 23 (FY '04); *Exh. A-52* at 23 (FY '05); *Exh. A-53* at 23 (FY '06); *Exh. 32* at 3 (FY '06); *Exh. 33* at 3 (FY '07); *Exh. A-54* at 15 (FY '07); *Exh. A-55* at 15 (FY '08); *Exh. 34* at 3 (FY '08); *Exh. 35* at 3 (FY '09); *Exh. A-56* at 15 (FY '09); *Exh. A-57* at 15 (FY '10); *Exh. A-58* at 15 (FY '11); *Exh. B-17* at 3 (FY '11); *Exh. A-59* at 15 (FY '12); *Exh. 36* at 3 (FY '12); *Exh. A-60* at 16 (FY '13); *Exh. A-61* at 6 and 16 (FY '14); *Exh. 19* (FY '14).

72. The Hawaiian Homes administration account is comprised entirely of money generated from: (a) general leases, rents, licenses, revocable permits, rock sales, and other uses of Hawaiian home lands; (b) interest and income earned from investment of these revenues; and (c) minimal or small amounts of miscellaneous revenue. Partial Tr. 06/29/15 at 30-31, 39 (Testimony of Rodney Lau); *Exh. A-66* at 20; *Exh. A-67* at 21; *Exh. A-68* at 23; *Exh. A-69* at 23; *Exh. A-70* at 32; *Exh. A-71* at 00324; *Exh. A-72* at 29; *Exh. A-73* at 27; *Exh. A-74* at 20; *Exh. A-75* at 15; *Exh. A-76* at 19; *Exh. A-77* at 18; *Exh. A-39* at 26-29; *Exh. A-40* at 27; *Exh. A-41* at 29; *Exh. A-42* at 30; *Exh. A-43* at 33; *Exh. A-44* at 35; *Exh. A-45* at 29; *Exh. A-46* at 28; *Exh. A-51* at 23; *Exh. A-52* at 23; *Exh. A-53* at 23; *Exh. A-54* at 15; *Exh. A-55* at 15; *Exh. A-56* at 15; *Exh. A-57* at 15; *Exh. A-58* at 15; *Exh. A-59* at 15; *Exh. A-60* at 16; *Exh. A-61* at 16.

73. A large portion of the principal upon which DHHL earns interest and investment income initially came from the general leasing of Hawaiian home lands. DHHL has

relied on this interest/investment income generated from the general leasing of its lands to pay for its administrative and operating expenses. Partial Tr. 06/29/15 p.m. at 30-31 (Testimony of Rodney Lau).

74. DHHL has had to rely on Act 14 settlement monies to pay for some of its administrative and operating expenses. Partial Tr. 06/29/15 p.m. at 33-34 (Testimony of Rodney Lau).

75. Every year since 1992, DHHL has had to rely on revenue generated from general leases, licenses, and revocable permits of Hawaiian home lands to make up for the State's failure to appropriate sufficient sums for DHHL's administrative and operating budget. Partial Tr. 06/29/15 p.m. at 41-42, 44-45 (Testimony of Rodney Lau); Tr. 07/02/15 p.m. at 25, 74 (Testimony of Jobie Masagatani); *Exh. A-61* at 6; *Exh. B-9* at 1.

76. General lease revenues are used to fund DHHL's operations. Partial Tr. 06/29/15 p.m. at 41-42, 44-45 (Testimony of Rodney Lau); Tr. 07/02/15 at 43-44 (Testimony of Rodney Lau); *Exh. A-69* at 2; *Exh. 10* at 2; *Exh. A-61* at 22.

H. DHHL's Actions

77. Since 1978, DHHL has been aware that article XII, section 1 required the legislature to fund DHHL's administrative and operating budget. *Exh. 2*; *Exh. 4* at 4; *Exh. 5*.

78. On July 19, 1995, Kali Watson, then Chairman of the Hawaiian Homes Commission, sent a letter to Governor Benjamin Cayetano addressing the "General Fund Reduction Target Plan." *Exh. B-2*; Testimony of Kali Watson. Chairman Watson expressed his concern "about the legality" of reducing DHHL's general funding and explained:

Article XII, Section 1, of the State Constitution requires the Legislature to make sufficient sums available for DHHL administrative and operating costs (See Attached). This past year, general fund support has been reduced. This continued erosion of

general funding by substituting special funds will adversely impact the department's direct funding to its beneficiaries.

Id. at 2.

79. The attachment to Chair Watson's letter was a copy of an opinion letter dated February 18, 1987 from Deputy Attorney General George Kaeo, Jr. to State Representative Andrew Levin setting forth the Attorney General's "opinion as to how the administrative and operating costs of the Department of Hawaiian Home Lands (DHHL) should be financed." *Exh. B-2*, attachment at 1; *see also Exh. B-2* at 1. In the Opinion Letter, the Attorney General concludes that "[t]he provisions of the Constitution are plain and unambiguous." "Article XII, § 1 mandates the legislature to make sufficient sums available to the DHHL for . . . its administrative and operating budget." *Id.* at 2.

80. The Attorney General concluded in the Opinion Letter that "the committee report[] and the informational booklet [prepared by the 1978 Constitutional Convention] make clear the intent of the framers of the constitutional provision and the understanding of the voters who adopted it." *Id.* at 5. Regarding the committee report, the Attorney General stated that "[i]t is apparent in reading the report that the Committee on Hawaiian Affairs intended to relieve the department of its present burden of general leasing its lands to generate its own revenues by requiring that the legislature provide sufficient funds to the department." *Id.* at 4. Regarding the informational booklet, the Attorney General observed that it clearly apprised voters that if the amendment was adopted, it would "require the legislature to fund the [DHHL]." *Id.*

81. Notwithstanding the concerns recognized and raised by Chair Watson in 1995 about the legality of reducing general fund appropriations to DHHL, between and including fiscal years 1992 and 2013, DHHL requested less in general funds for its administrative and operating expenses than it requested from all funding sources for its administrative and operating

expenses. In other words, DHHL's own funding requests to the legislature were for less than DHHL determined that it needed. *Exh. 57* at Exh. A columns 1 and 2.

82. Between fiscal years 2000 and 2013, DHHL requested less than \$1.6 million in general funds for DHHL's administrative and operating expenses. *Exh. 57* at Exh. A column 2.

83. For fiscal years 2009-10, 2010-11, 2011-12, and 2012-13, DHHL requested no general funds to pay for its administrative and operating budget. *Exh. 57* at Exh. A column 2; *Exh. 10*; Tr. 07/02/15 at 68-69 (Testimony of Rodney Lau).

84. In those years in which DHHL received no general funding for its administrative and operating budget, neither DHHL nor the Hawaiian Homes Commission made any substantive effort to obtain general funding from the legislature. Tr. 07/02/15 at 38-39 (Testimony of Rodney Lau).

85. DHHL identified no obstacles that prevented it from asking the legislature for sufficient sums for its administrative and operating budget prior to 2012.

86. DHHL has entered into general leases of Hawaiian home lands in order to raise revenue for administrative and operating expenses, including the general lease of land that is suitable for residential development. These lands under general lease are not available to the beneficiaries of the Hawaiian Home Lands Trust. Partial Tr. 06/29/15 p.m. at 36, 39 (Testimony of Rodney Lau); Tr. 07/02/15 at 25-27 (Testimony of Jobie Masagatani).

87. DHHL Defendants did not take meaningful steps during the relevant time period to obtain funding from the legislature for sufficient sums for DHHL's administrative and operating budget. DHHL Defendants did not sue the State for failing to provide sufficient sums for DHHL's administrative and operating budget and although given the opportunity to cross-

claim against the State Defendants in this case, DHHL Defendants did not. *Exh. 52; Exh. 56* at 16 and 17; Tr. 07/02/15 p.m. at 24 (Testimony of Jobie Masagatani); Tr. 07/07/15 at 63 (Testimony of Jobie Masagatani).

88. DHHL Defendants opposed Plaintiffs' efforts in this case to obtain sufficient funding, including substantively joining in the State Defendants' motion for summary judgment. *Exh. 51; Exh. 52; Exh. B-38* at 16 and page 4, n. 5 of concurring opinion; *Exh. B-39* at 13; *Exh. B-40* at 10; *Exh. A-133* at 38-39; Tr. 07/10/15 at 65-66.

89. Prior to 2012, before the Hawai'i Supreme Court's decision in this case, DHHL Defendants did not pursue adequate funding from the legislature in any meaningful way.

I. The Parties

90. Plaintiff Richard Nelson III is a native Hawaiian and a beneficiary of the Hawaiian Homes Commission Act. *Exh. 49, ¶3; Exh. 50* admitting to ¶3 and *Exh. 51* admitting to ¶3.

91. Plaintiff Nelson lives in Kona on the Island of Hawai'i. *Exh. 49, ¶4; Exh. 50* admitting to ¶4; *Exhibit 51* admitting to ¶4.

92. Plaintiff Nelson was notified in 2007 by DHHL that his name had been placed on the Hawaiian Home Lands waitlist for Hawai'i Island. *Exh. 49, ¶5; Exh. 50* admitting to ¶5; *Exh. 51* admitting to ¶5.

93. As a beneficiary of the Hawaiian Home Lands Trust, Nelson's interests have been harmed by the inadequate funding provided to DHHL. Tr. 07/02/15 at 80-81 (Testimony of Ka'imookalani Muhlestein).

94. Plaintiff Keli`i Ioane Jr. is a native Hawaiian, and a beneficiary of the Hawaiian Homes Commission Act. *Exh. 49*, ¶12; *Exh. 50* admitting to ¶12; *Exh. 51* admitting to ¶12.

95. Plaintiff Ioane Jr. applied for a Hawaiian homestead lease in 1981. Although he requested agricultural and pastoral lots, he has never been offered an agricultural or pastoral lot. Tr. 07/07/15 (Testimony of Keli`i Ioane, Jr.).

96. As a beneficiary of the Hawaiian Home Lands Trust, Ioane's interests have been harmed by the inadequate funding provided to DHHL. Tr. 07/07/15 (Testimony of Keli`i Ioane, Jr.).

97. Mr. Ioane's connection to the land, particularly Hawaiian home lands, is very important to him culturally and spiritually. The general leasing of Hawaiian home lands adversely affects Keli`i Ioane's interests. Tr. 07/07/15 (Testimony of Keli`i Ioane, Jr.).

98. Plaintiff Sherilyn Adams is a native Hawaiian, and a beneficiary of the Hawaiian Homes Commission Act. *Exh. 49*, ¶10; *Exh. 50* admitting to ¶10; *Exh. 51* admitting to ¶10.

99. Plaintiff Kaliko Chun is a native Hawaiian, and a beneficiary of the Hawaiian Homes Commission Act. Tr. 07/02/15 at 84 (Testimony of Kaliko Chun).

100. The general leasing of Hawaiian homes lands, including the general lease of South Kaloko-Honokōhau National Historic Park for resort use, threatened Chun's cultural and aesthetic and environmental interests. Tr. 07/02/15 at 90-91 (Testimony of Kaliko Chun).

101. As a beneficiary of the Hawaiian Home Lands Trust, Chun's interests have been harmed by the inadequate funding provided to DHHL.

102. At the time of the filing of the first amended complaint, Plaintiff James Akiona, Sr. was a native Hawaiian, and a beneficiary of the Hawaiian Home Lands Trust. *Exh. 49*, ¶ 8; *Exh. 50* admitting to ¶8; *Exh. 51* admitting to ¶8.

103. At the time of the filing of the first amended complaint, Plaintiff Akiona lived in Waimea on the Island of Hawai`i. *Exh. 49*, ¶9; *Exh. 50* admitting to ¶9; *Exh. 51* admitting to ¶9.

104. At the time of filing of the first amended complaint, Plaintiff Charles Aipia was a native Hawaiian, and a beneficiary of the Hawaiian Homes Commission Act. *Exh. 49*, ¶14; *Exh. 50* admitting to ¶14; *Exh. 51* admitting to ¶14.

105. At the time of the filing of the first amended complaint, Plaintiff Aipia lived in Pu`ukapu, on the Island of Hawai`i. *Exh. 49*, ¶15; *Exh. 50* admitting to ¶15; *Exh. 51* admitting to ¶15.

106. Plaintiff Aipia died in January 2008 and Plaintiff Akiona died in February 2012. Tr. 06/29/15 at 22-23.

107. DHHL is an agency of the State of Hawai`i and administers the Hawaiian Homes Commission Act of 1920 as set forth in the Constitution of the State of Hawai`i. *Exh. 49*, ¶16; *Exh. 50* admitting to ¶16; *Exh. 51* admitting to ¶16.

108. Defendant Hawaiian Homes Commission is the governing board of DHHL. *Exh. 49*, ¶17; *Exh. 50* admitting to ¶17; *Exh. 51* admitting to ¶17.

109. Jobie Masagatani is the current chair of the Hawaiian Homes Commission. Tr. 07/02/15 at 97 (Testimony of Jobie Masagatani).

110. The current members of the Hawaiian Homes Commission are Chair Masagatani, Michael Kahikina, Renwick Tassill, William Richardson, Wallace Ishibashi, David

Kaapu, Pua Canto, Gene Ross Davis, and Puan Chin. Tr. 07/02/15 at 16 (Testimony of Jobie Masagatani).

111. The Finance Director for the State of Hawai`i is currently Wesley Machida.

112. The State of Hawai`i became a state pursuant to the Hawai`i Admissions Act of 1959.

113. To the extent that any Finding of Fact is in whole or in part a Conclusion of Law, the Court then deems it a Conclusion of Law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter of this case and over all parties.

2. Plaintiffs have standing to enforce article XII, section 1 of the Hawai`i State Constitution and the Hawaiian Home Lands Trust. *Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Haw. 192, 204-5 and 208 n.26, 891 P.2d 279, 291-92 and 295 n.26 (1995); *Pele Def. Fund v. Paty*, 73 Haw. 578, 592-94, 603-05, and 614, 837 P.2d 1247, 1257-58, 1263-64, and 1268-69 (1992); *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp.*, 121 Hawai`i 324, 331-35, 219 P.3d 1111, 1118-22 (2009); *Kapiolani Park Preservation Soc'y v. Honolulu*, 69 Hawai`i 569, 751 P.2d 1022 (1988); Restatement (Second) of Trusts § 282(2) (1959); Restatement (Third) of Trusts § 107(2)(b).

3. The issues tried by the express and implied consent of the parties are treated as if they had been raised in the plaintiffs' first amended complaint. Counts 3 and 4 of the first amended complaint, however, have been dismissed, and have not been considered by this Court. Hawai`i Rules of Civil Procedure Rule 15(b).

4. The purposes of the Hawaiian Homes Commission Act have been variously described: for the welfare of native Hawaiians; for their rehabilitation; to respond to the poverty and rapid decline of the native Hawaiian population; to establish a permanent land base for the beneficial use of native Hawaiians; to provide native Hawaiians with lands upon which to develop homes, agriculture, farms and ranches; and for the betterment of the conditions of native Hawaiians. *Rice v. Cayetano*, 528 U.S. 495, 507 (2000); *Arakaki v. Lingle*, 477 F.3d 1048, 1054 (9th Cir. 2007); *Arakaki v. State of Hawai'i*, 314 F.3d 1091, 1093 n.2 (9th Cir. 2002); *Keaukaha-Panaewa Community Ass'n. v. Hawaiian Homes Comm'n.*, 588 F.2d 1216, 1218 (9th Cir. 1978); *Kalima v. State*, 111 Hawai'i 84, 87, 137 P.3d 990, 993 (2006); *Bush v. Hawaiian Homes Comm'n.*, 76 Haw. 128, 132, 870 P.2d 1272, 1276 (1994); *Ahuna v. Dep't of Hawaiian Home Lands*, 64 Haw. 327, 336, 640 P.2d 1161, 1167 (1982).

Concerned about the condition of the native Hawaiian people, Congress enacted the Hawaiian Homes Commission Act ("HHCA") in 1921 to set aside about 203,500 acres of ceded lands for native Hawaiian homesteads. Hawaiian Homes Commission Act, 1920, 67 Pub L. 34, 42 Stat. 108 (1921); see also Rice v. Cayetano, 528 U.S. 495, 507, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000). Prince Jonah Kuhio Kalaniana'ole, Hawaii's congressional delegate at the time, was instrumental in shepherding the Act through Congress, arguing that native Hawaiians "were entitled to a share of the lands that had been 'ceded' from the Republic of Hawaii to the United States in 1898 because they had not obtained their fair share of the lands distributed during the Mahele." Jon Van Dyke, Who Owns the Crown Lands of Hawai'i? 239-40 (2008). Prince Kuhio spoke of the native Hawaiians' right to the land as follows: "Perhaps we have a legal right, certainly we have a moral right, to ask that these lands be set aside. We are not asking that what you are to do be in the nature of a largesse or as a grant, but as a matter of justice — belated justice." Id. at 241.

Under the Act, native Hawaiians (those of fifty percent blood quantum or more) could obtain 99-year leases for a dollar a year for residential, pastoral, and agricultural lots. See Native Hawaiian Rights Handbook 43 (Melody Kapilialoha MacKenzie ed., 1991). One purpose of the HHCA was to "save" the native Hawaiian race

by "tak[ing] [native Hawaiians] back to the lands and giv[ing] them the mode of living that their ancestors were accustomed to and in that way rehabilitate them." Ahuna v. Dept. of Hawaiian Home Lands, 64 Haw. 327, 336 n.10, 640 P.2d 1161, 1167 n.10 (1982) (quoting Senator John H. Wise, H. R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920)).

Nelson v. Hawaiian Homes Comm'n, 127 Hawai`i 185, 188, 277 P.3d 279, 282 (2012).

5. Article XII, section 1 of the Hawai`i Constitution states:

Anything in this constitution to the contrary notwithstanding, the Hawaiian Homes Commission Act, 1920, enacted by the Congress, as the same has been or may be amended prior to the admission of the State, is hereby adopted as a law of the State, subject to amendment or repeal by the legislature; provided that if and to the extent that the United States shall so require, such law shall be subject to amendment or repeal only with the consent of the United States and in no other manner; provided further that if the United States shall have been provided or shall provide that particular provisions or types of provisions of such Act may be amended in the manner required for ordinary state legislation, such provisions or types of provisions may be so amended. The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms and spirit of such Act. The legislature **shall make sufficient sums available** for the following purposes: (1) development of home, agriculture, farm and ranch lots; (2) home, agriculture, aquaculture, farm and ranch loans; (3) rehabilitation projects to include, but not limited to, educational, economic, political, social and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved; (4) **the administrative and operating budget of the department of Hawaiian home lands**; in furtherance of (1), (2), (3) and (4) herein, **by appropriating the same** in the manner provided by law.

Thirty percent of the state receipts derived from the leasing of cultivated sugarcane lands under any provision of law or from water licenses shall be transferred to the native Hawaiian rehabilitation fund, section 213 of the Hawaiian Homes Commission Act, 1920, for the purposes enumerated in that section. Thirty percent of the state receipts derived from the leasing of lands cultivated as sugarcane lands on the effective date of this section shall continue to be so transferred to the native Hawaiian rehabilitation fund whenever such lands are sold, developed, leased, utilized, transferred, set aside or otherwise

disposed of for purposes other than the cultivation of sugarcane. There shall be no ceiling established for the aggregate amount transferred into the native Hawaiian rehabilitation fund.

(emphasis added).

6. Article XII, section 1 must be interpreted with due regard to: the intent of the framers and the matters sought to be remedied along with the history of the times.

Kaho'ohanohano v. State, 114 Hawai`i 302, 339, 162 P.3d 696, 733 (2007); *County of Hawai'i v. Ala Loop Homeowners*, 123 Hawai`i 391, 412-413, 235 P.3d 1103, 1124-25 (2010).

7. Article XII, section 1 cannot be interpreted in a manner that would render it devoid of any real substance and effect, or lead to an absurd result. *In Re Water Use Permit Applications*, 94 Hawai`i 97, 142, 9 P.3d 409, 454 (2000); *United Public Workers, AFSCME, Local 646 v. Yogi*, 101 Hawai`i 46, 53, 62 P.3d 189, 196 (2002).

8. The Constitutional Convention's committee report for this constitutional amendment declared: "Your committee proposal makes it expressly clear that the **legislature is to fund DHHL** for purposes which reflect the spirit and intent of the Act. **Your Committee decided to no longer allow the legislature discretion in this area.**" Stand. Comm Rep. No. 56 in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 630 (1980) (emphasis added).

9. The intent of the delegates of the 1978 constitutional convention was to require that the legislature appropriate and fund the Department of Hawaiian Home Lands for its operating expenses so that monies generated from the general leasing of Hawaiian home lands would not have to be used for operating expenses. Stand. Comm Rep. No. 56 in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 630 and 632 (1980); *Nelson*, 127 Hawai`i at 203, 277 P.3d at 297. For the purposes of fulfilling article XII, section 1, there is no legally significant distinction between money raised through a general lease and money raised through a

license, revocable permit, or any other use of Hawaiian home lands for non-homesteading purposes. *See Exh. A-67* at 11.

10. Article XII, section 1 mandates that the legislature appropriate to the Department of Hawaiian Home Lands sufficient funding to meet the department's administrative and operating budget. When the department needs to use money from the use of Hawaiian home lands to pay its operating costs because of insufficient funding from the legislature, article XII, section 1 has been violated. *Nelson*, 127 Hawai'i at 201 and 203, 277 P.3d at 295 and 297; *Nelson v. Hawaiian Homes Comm'n*, 130 Hawai'i, 162, 167, 307 P.3d 142, 147 (2013) (*Nelson II*); Debates in Committee of the Whole on Hawaiian Affairs, in 2 Proceedings of the Constitutional Convention of Hawaii of 1978 at 415, 421-22 (1980).

11. Because the Department of Hawaiian Home Lands is the only department explicitly identified in the Hawai'i State Constitution as being guaranteed a level of funding, the State cannot treat it just like every other department when it comes to making budget decisions.

12. The administrative and operating budget includes the Department of Hawaiian Home Lands' programmatic and human infrastructure costs. *Nelson*, 127 Hawai'i at 200, 277 P.3d at 294 ("the department had to raise revenue to sustain its programmatic and human infrastructure costs (administrative and operating expenses). . ."). *Cf.* testimony of Jobie Masagatani. It includes DHHL's actual administrative and operating expenses. *Nelson II*, 130 Hawai'i at 167, 307 P.3d at 147 ("[T]he State now must fund DHHL's administrative and operating expenses. As a result, DHHL will be able to shift the funds it was spending on administrative and operating expenses"). As far back as 1970 (i.e., before the 1978 constitutional convention), the State defined "operating costs" as "recurring costs of operating, supporting and maintaining authorized programs, including costs for personnel salaries and

wages, employee fringe benefits, supplies, materials, equipment and motor vehicles.” Act 185, 1970 Sess Laws at 384. *See also* HRS §37-62 (definition of “operating costs”).

13. The State’s position that article XII, section 1 only requires funding of \$1.3-\$1.6 million plus inflation would lead to absurd results. It would in effect mean that sufficient funds for DHHL’s administrative and operating budget would be limited to funding the approximately 54 staff positions that were filled in 1978. It ignores the fact that one-third of the staff doing DHHL’s important work in 1978 were paid for outside of DHHL’s budget. In other words, \$1.3-\$1.6 million was plainly insufficient for DHHL to pay all the employees for the work it was doing in 1978. The State’s position ignores the constitutional convention delegates’ recognition that DHHL needed far more resources and DHHL’s over-reliance on its own funds.

14. The legislature satisfies its constitutional obligation only through general fund appropriations. In determining whether the legislature has fulfilled its constitutional obligation, the State cannot rely on:

- a. money that is not actually appropriated, *see* Article XII § 1 (“...by appropriating the same in the manner provided by law”);
- b. money derived from the general leasing of Hawaiian home lands, *see* Stand. Comm Rep. No. 56 in 1 Proceedings of the Constitutional Convention of Hawaii of 1978 at 631-632 (1980) (“DHHL cannot afford to lease more acreage to the general public for the purposes of generating income to accommodate a minimal employee level. It is clear to your Committee that the intent and spirit of the Act would be better served by releasing the department of its present burden to generate revenues through the general leasing of its lands. Your Committee decided that through legislative funding this dilemma would be resolved. In that manner more lands could be made available to the intended beneficiaries.”), and *Nelson*, 127 Hawai`i at 203, 277 P.3d at 297 (“It is clear that the

constitutional delegates intended to require appropriation of ‘sufficient sums’ to relieve DHHL of the burden of general leasing its lands to generate administrative and operating funds. . . .”);

- c. money in Department of Hawaiian Home Land trust and special funds, *see* Debates in Committee of the Whole on Hawaiian Affairs, in 2 Proceedings of the Constitutional Convention of Hawaii of 1978 at 411 (“fund itself”), 415 (“fund its own way”), 423 (“own funds”) (1980), Exhibit 1 at 44, Hawaiian Homes Commission Act § 225, 1998 Haw. Sess. Laws Act 27, Admission Act §4(3) and Hawai`i State Constitution Article XII § 1 (“The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms and spirit of [the Hawaiian Homes Commission Act]”);
- d. interest and investment income earned by DHHL, *see* Debates in Committee of the Whole on Hawaiian Affairs, in 2 Proceedings of the Constitutional Convention of Hawaii of 1978 at 414 (“Time Certificates of Deposit”), Admission Act §4(3) and Hawai`i State Constitution Article XII § 1 (“The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms and spirit of [the Hawaiian Homes Commission Act]”), Hawaiian Homes Commission Act § 225;
- e. money that is derived from Act 14 funds, *see* Act 14 § 6, Session Laws of Hawai`i 1995, Special Session at 701 (“Payments made under this Act shall not diminish funds that the department is entitled to under article XII, section 1, of the Constitution of the State of Hawaii.”) and Exhibit B-43;
- f. money derived from the rental, licensing, permitting, or use of Hawaiian Home Lands or waters;
- g. money that is directly or indirectly raised from the assets of the Hawaiian Home Lands Trust; or
- h. federal funds.

15. The State incorrectly assumed that:
- a. all expenditures from the Hawaiian Home-Development Fund are related to the development of homestead lots. *See* HHCA § 213(e) (“for such consultant services as may be contracted for under this Act”);
 - b. the term “other administration expenses” found in HHCA § 213(f) is identical to the term “administrative and operating” found in Article XII, section 1 of the Hawai`i State Constitution;
 - c. the independent auditors’ category “Administration and support services” includes all of DHHL’s administrative and operating expenses;
 - d. the word “and” in the term “administrative and operating budget” means “but not,” *see Nelson*, 127 Hawai`i at 197-198, 277 P.3d at 291-292 (“The words in a constitutional provision are also ‘presumed to be used in their natural sense.’”); and
 - e. “programmatic” costs are not “administrative and operating” costs: *But see Nelson*, 127 Hawai`i at 200, 277 P.3d at 294 (“the department had to raise revenue to sustain its programmatic and human infrastructure costs (administrative and operating expenses). . .”).

16. The legislature has failed to appropriate sufficient sums to the Department of Hawaiian Home Lands for its administrative and operating budget in violation of its constitutional duty to do so. This failure includes every fiscal year since at least 1992. While this Court draws this conclusion based solely on the evidence presented at trial, it notes that the Hawai`i Supreme Court observed:

We agree with the Plaintiffs that, "the State has failed, by any reasonable measure, under the undisputed facts, to provide sufficient funding to DHHL[.]" The State's track record in supporting DHHL's success is poor, as evidenced by the tens of thousands of qualified applicants on the waiting lists and the decades-long wait for homestead lots. *See generally, A Broken*

Trust: The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians (1991). With the benefit of 35-90 years of hindsight, it is clear that DHHL is underfunded and has not been able to fulfill all of its constitutional purposes.

Nelson, 127 Hawai`i at 205, 277 P.3d at 299.

[T]he State now must fund DHHL's administrative and operating expenses. As a result, DHHL will be able to shift the funds it was spending on administrative and operating expenses towards fulfilling its trust duties to its beneficiaries.

Nelson II, 130 Hawai`i at 167, 307 P.3d at 147.

17. The DHHL Defendants' duty of loyalty is to the beneficiaries of the Hawaiian Home Lands Trust – not the governor or the Department of Budget and Finance. *Ahuna v. Dep't of Hawaiian Home Lands*, 64 Haw. 327, 340, 640 P.2d 1161, 1169 (1982).

18. The DHHL Defendants have a trust duty to take all reasonably necessary steps to ensure that DHHL receives all the funding to which it is constitutionally entitled. *Kaho'ohanohano*, 114 Hawai`i at 325, 162 P.3d at 719; *Ahuna*, 64 Haw. at 338, 640 P.2d at 1168; *Hawaii Carpenters' Trust Funds v. Aloe Development Corp.*, 63 Haw. 566, 576-7, 633 P.2d 1106, 1112-3 (1981). *Cf. In re Water Use Permit Applications*, 94 Hawai`i 97, 143, 9 P.3d 409, 455 (2000).

19. This duty includes a duty to file a lawsuit to obtain the funding the Department of Hawaiian Home Lands is entitled to under article XII, section 1 of the Hawai`i Constitution. *Kaho'ohanohano*, 114 Hawai`i at 325, 162 P.3d at 719. Restatement (First) of Trusts § 177.

20. The Hawai`i Supreme Court has stated that “[i]t is within the power, and is the duty, of a trustee to institute action and proceedings for the protection of the trust estate and the enforcement of claims and rights belonging thereto, and to take all legal steps which may be

reasonably necessary with relation to those objectives[.]” *Kaho'ohanohano*, 114 Hawai`i at 326, 162 P.3d at 720 (quoting *Brisnehan v. Cent. Bank & Trust Co.*, 134 Colo. 47, 299 P.2d 113, 115 (1956) (citation omitted)).

21. As to a trustee’s duty to file suit against a third party, the Restatement of Trusts states, “the trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust.” Restatement (First) of Trusts § 177. Comment c to § 177 explains:

It is not the duty of the trustee to bring an action to enforce a claim which is part of the trust property if it is reasonable not to bring such an action, owing to the probable expense involved in the action or to the probability that the action would be unsuccessful or that if successful the claim would be uncollectible owing to the insolvency of the defendant or otherwise.

Cmt. c. to Restatement (First of Trusts) § 177; *see also* Cmt. c. to Restatement (Second) of Trusts § 177 (same).

22. Prior to 2012, the DHHL Defendants breached their trust duties by failing to seek from the legislature all the funding the Department of Hawaiian Home Lands needs for its administrative and operating budget. It was beyond the bounds of reasonable judgment for the DHHL Defendants to not request from the legislature all the money it needed for its administrative and operating budget. No rationalization justified the DHHL Defendants’ conduct. *Kealoha v. Machado*, 131 Hawai`i 62, 77, 315 P.3d 213, 228 (2013); *Kaho'ohanohano*, 114 Hawai`i at 325, 162 P.3d at 719, *Nelson II*, 130 Hawai`i at 168, 307 P.3d at 148.

23. Insofar as the years of underfunding by the State continued to place DHHL in the intolerable position of having to use the Department’s own funds (including revenue from general leasing of Hawaiian home lands to non-beneficiaries) to pay for its administrative and operating expenses, it was beyond the bounds of reasonable judgment for the

DHHL Defendants to not take action, to not file suit against the State and to oppose Plaintiffs in this case as to the claim that the State violated its constitutional duty to provide sufficient funding to DHHL. *Kealoha v. Machado*, 131 Hawai`i 62, 77, 315 P.3d 213, 228 (2013); *Kaho'ohanohano*, 114 Hawai`i at 325, 162 P.3d at 719. The DHHL Defendants breached their trust duties by failing to file suit against the State for the legislature's failure to appropriate sufficient sums of general funds for DHHL's administrative and operating budget.

24. Injunctive relief is appropriate when the plaintiffs have prevailed on the merits, the balance of harms favors injunctive relief and it is in the public interest. *See e.g. Office of Hawaiian Affairs v. Housing and Community Development*, 117 Hawai`i 174, 211-12, 177 P.3d 884, 921-2 (2008) *reversed on other grounds*. The plaintiffs have prevailed; the public interest is vindicated when the letter and spirit of our constitution are properly implemented; and given the harm experienced by the beneficiaries of the Hawaiian Home Lands Trust, the balance of harms favors injunctive relief. *Cf. Nelson II*, 130 Hawai`i at 168, 307 P.3d at 148. Although the circumstances of this case are unusual, properly tailored injunctive relief is appropriate in this case. *Cf. Guinn v. Legislature of the State*, 71 P.3d 1269, 1272 (Nev. 2003).

25. Because Plaintiffs have prevailed in this case as to counts 1 and 2, Plaintiffs may file a taxation of costs (including for deposition transcripts, court transcripts, court filing fees, travel expenses for witnesses, intrastate travel for counsel to meet with Plaintiffs, copying costs, long distance telephone charges, and postage, but not fees) with the clerk after final judgment has been entered pursuant to HRCF Rule 54(d)(1), HRS §§ 607-9 and 607-24, *Kamalu v. ParEn, Inc.*, 110 Hawai`i 269, 132 P.3d 378 (2006) and *Nelson II*, 130 Hawai`i at 173, 307 P.3d at 153. Defendants are jointly and severally liable for these costs. Given the

State's obligation to provide sufficient funds for the Department of Hawaiian Home Lands' operating costs, Plaintiffs may collect the entire sum from the State of Hawai'i.

26. To the extent that the Conclusions of Law constitute Findings of Fact, they shall be so deemed.

ORDER

It is hereby declared and ordered that:

1. The State of Hawai'i has failed to provide sufficient funds to the Department of Hawaiian Home Lands for its administrative and operating budget in violation of the State's constitutional duty to do so under article XII, section 1 of the Hawai'i Constitution.

2. The State of Hawai'i must fulfill its constitutional duty by appropriating sufficient general funds to the Department of Hawaiian Home Lands for its administrative and operating budget so that the Department does not need to use or rely on revenue directly or indirectly from general leases to pay for these expenses.

3. Although what is "sufficient" will change over the years, the sufficient sums that the legislature is constitutionally obligated to appropriate in general funds for DHHL's administrative and operating budget (not including significant repairs) is more than \$28 million for fiscal year 2015-16.

4. Prior to 2012, the DHHL Defendants breached their trust duties by failing to take all reasonable efforts – including filing suit – to obtain all the funding it needs for its administrative and operating budget.

5. The defendants shall prospectively fulfill their constitutional duties and trust responsibilities. They are enjoined from violating these obligations.

6. Judgment on Counts 1 and 2 shall be entered in favor of Plaintiffs and against the State Defendants (as to Count 1) and the DHHL Defendants (as to Count 2).

DATED: Honolulu, Hawai`i, November 27, 2015.

Jeannette H. Castagnetti
Judge of the above-entitled Court

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Richard Nelson III, et al. vs. Hawaiian Homes Commission, et al., Civil No. 07-1-1663-08 JHC;
In the Circuit Court of the First Circuit Court, State of Hawaii; Findings of Fact, Conclusions of
Law and Order