researched the diet and sexual practices of people in Harlem.[179] They have backed the Boston Symphony[180] and have supported experimentation with electronic music.[181] The foundations' unique freedom has led to some remarkable accomplishments—the eradication of hookworm, the development of vaccines, high yielding rice and a new blight resistant strain of cereal grain, a tenfold increase in the percentage of Third World students attending college, parole reforms, invaluable studies of public administration[182] . . . the list is endless.

The American people seem certain to face the 1980's with a sharp curtailment in government support for the private sector.[183] With the emphasis in governmental spending shifting to such areas as national defense and economic revitalization,[184] it is clear that areas traditionally supported by private foundations will receive a lower priority.[185] Private foundations have already had a profound impact on American society by redistributing economic resources within the private sector.[186] With slight adjustments to the present tax scheme and with a little more imagination by the private foundations, the impact foundations have on American society can be greater still.

J.H.Q.L.

[179] For example, Field Foundation (New York City, New York).
[180] For example, Rockefeller Foundation (New York City, New York).
[181] For example, Julliard Music Foundation (New York City, New York).
[182] W. RUDY, *supra* note 1, at 2.
[183] *See generally Reagan to Slash Taxes, Cut Budget by $41.4 Billion*, Honolulu Advertiser, Feb. 4, 1981, at A-1, col. 3.
[184] *Id.*
[185] *The Budget Cuts in Summary*, N.Y. Times, Feb. 19, 1981, at B-6 col. 1, B-7 col. 5.
[186] Addressing a joint session of Congress, President Ronald Reagan stated:
"Historically the American people have supported by voluntary contribution more artistic and cultural activities than all the other countries in the world put together. I wholeheartedly support this approach and believe Americans will continue their generosity. Therefore, I am proposing a savings of $85 million in the federal subsidy now going to the arts and humanities."
Reagan to Slash Taxes, Cut Budget by $41.4 Billion, supra note 207, at A-4, col. 5.

HAWAII'S CEDED LANDS*

I. INTRODUCTION

On August 12, 1898, the Republic of Hawaii ceded sovereignty to the United States,[1] together with absolute title to approximately 1,750,000 acres of Government and Crown lands constituting its public domain.[2] Under Hawaii's Organic Act,[3] these "ceded lands"—the public lands (and properties) transferred to the United States without compensation at an-

* The author feels obligated to add a word of qualification at the outset. While the topic of Hawaii's ceded lands necessarily implicates broader issues of native Hawaiian rights, this comment is narrowly limited to a discussion of the federal-state relationship in the history of the administration of the ceded lands "trust." The author does not purport to define or discuss the rights of the beneficiaries of the trust, but rather focuses on the nature of the trustee's role as it passed from the federal government to the state.

[1] Formal transfer of sovereignty under the Joint Resolution of Annexation of July 7, 1898, 30 Stat. 750 (1898) took place on August 12, 1898 [hereinafter Joint Resolution]. For an excellent compilation of documents, opinions and communications regarding Hawaii's annexation, *see* L. THURSTON, A HANDBOOK ON THE ANNEXATION OF HAWAII (no date). *See generally* 3 R. KUYKENDALL, THE HAWAIIAN KINGDOM 523-650 (1967); Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848, 861-62 (1975).

[2] J. HOBBS, HAWAII: A PAGEANT OF THE SOIL 118 (1935). Hobbs notes that the lands were valued at approximately $5,500,000, although other sources give conflicting figures. *See* L. THURSTON, *supra* note 1, at 24 (who gives the amount of acreage involved as 1,740,000 acres valued at $4,389,550 in 1894). Both Thurston and S. REP. No. 80, 86th Cong., 1st Sess. 2-3 (1959) note that the lands were mostly mountainous and waste lands of little value, since most of the arable portions had been sold or were under lease.

Congress' power over territories, including the power to acquire title (whether by purchase, treaty, gift or cession) to their public lands, exists in the United States government's sovereign capacity, although it has been traced to the article IV property clause or to the executive and legislative power to make treaties and declare war. *See* note 36 *infra*. The effect of this cession, as was that of the cession by the original thirteen states of their claims to western territories and as was explicitly described in the Joint Resolution, was to vest absolute fee title to the affected properties in the United States. "Cession" in other contexts has been used to describe a transfer of right or title to, or jurisdiction over public properties between governmental units and without need for compensation. *But see* City of Cincinnati v. Nussbaum, 14 Ohio Misc. 19, 233 N.E.2d 152 (1968) (mere suspension of state jurisdiction over certain properties until Congress abandons them and not an absolute and perpetual abandonment of jurisdiction); Interior Airways, Inc. v. Wien Alaska Airlines, Inc., 188 F. Supp. 107 (D. Alaska 1960) (irrevocable suspension of jurisdiction).

[3] Organic Act of Apr. 30, 1900, ch. 339, 31 Stat. 141 [hereinafter cited as Organic Act]. An amended version of the Organic Act has also been enacted in Hawaii. HAWAII REV. STAT. §§ 1-107 (1976).

Exhibit 9-1-2

nexation[4]—were given a special trust status under the federal government's proprietorship, due in part to the unique circumstances surrounding Hawaii's annexation.[5] So special was this trust relationship between the federal government and Hawaii that upon Hawaii's admission to statehood in 1959, the federal government relinquished title to most of these lands to the new state[6]—an act without precedent in United States history and one wholly contrary to established congressional public land policy.[7]

Section 5 of Hawaii's Admission Act[8] reflects the special history of the islands' ceded lands in the obligations it imposed upon both federal and state governments regarding the lands' administration and disposition. Section 5's key provisions declare the state successor in title to the ceded lands held by the federal government in 1959,[9] with specific exceptions.[10] These exceptions left some 400,000 acres of ceded land in federal ownership following admission, and section 5's amended provisions bound the federal government to return these lands to Hawaii when declared to be surplus to federal needs.[11] The Act additionally required the state to hold the ceded lands returned to the state by the federal government, together with their income and the proceeds from their disposition,

> as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use.[12]

The state thus succeeded the federal government as trustee of the lands, and with its newly acquired status assumed the attendant responsibilities

[4] Section 91 of the Organic Act incorporates by reference the definition of ceded lands and properties contained in the Joint Resolution. "Ceded" lands and properties, at the time of annexation, public buildings or edifices, ports, harbors, military equipment, and "all other public property of every kind and description belonging to the Government of the Hawaii Islands, together with every right and appurtenance thereto appertaining" to which Hawaii ceded and transferred absolute fee title in 1898. As used hereafter in this comment, "ceded lands" will be used to denote these public lands and properties enumerated in the Joint Resolution, together with lands subsequently acquired in exchange therefor. The latter received identical treatment under the Organic and Admission Acts as the properties actually ceded on annexation, and are therefore included in the definition.

[5] *See* text accompanying notes 82-121 *infra*.

[6] *See* Admission Act of March 18, 1959, Pub. L. No. 86-3, § 5 (b), (c) & (d), 73 Stat. 4.

[7] *See* text accompanying notes 38-60 *infra*.

[8] Admission Act, *supra* note 6.

[9] *Id.* § 5(b).

[10] Admission Act, *supra* note 6, at §§ 5(c) & (d).

[11] Admission Act, *supra* note 6, § 5(c), *as amended by* Act of Dec. 23, 1963, Pub. L. No. 88-233, 77 Stat. 472.

[12] Admission Act, *supra* note 6, § 5(f).

of holding and administering the lands for the exclusive benefit of the islands' inhabitants.[13]

In the twenty years since statehood, however, neither the federal government nor the State of Hawaii has fully met its respective obligations under the Act. As a direct consequence, the people of Hawaii have not received the full benefit of their public lands in the manner prescribed by the Admission Act. This fact is of particular significance to the state's native Hawaiian population, which is presently exerting an organized effort to claim a specific portion of the public trust for its use.[14]

This comment examines the roles assumed by the federal and Hawaii state governments with respect to the lands ceded by the latter upon its annexation. It draws together and contrasts the history of federal territorial acquisitions and the history of Hawaii's public domain to illustrate the reasons for Congress' special treatment of Hawaii's public lands. The comment then examines the brief provisions of the Admission Act in greater detail and seeks to define the current roles of both the federal and state governments vis-a-vis Hawaii's ceded lands. Finally, against this background, the comment examines and analyzes the legal and administrative problems currently impeding the effective administration of Hawaii's ceded lands under the Act.

II. Background

A review of the historical relationship between Hawaii's public lands and the federal public domain, and the historical reasons for the special treatment accorded Hawaii's public lands outside the federal public domain is necessary to properly understand the current status of Hawaii's ceded lands.[15] Such a review provides not only the essential background

[13] The Joint Resolution, *supra* note 1, required that the United States apply the income derived from the territory's ceded properties solely for the benefit of the islands' inhabitants "for educational and other public purposes."

[14] Amendments to Hawaii's State Constitution adopted in 1978 created the Office of Hawaiian Affairs and vested in its board the power to manage and administer "all income and proceeds from that pro rata portion of the trust . . . for native Hawaiians." Hawaii Const. art. XII, § 6. *See also* Hawaii Const. art. XII, § 5 (establishing the Office of Hawaiian Affairs). *See generally* T. Creighton, The Lands of Hawaii: Their Use and Misuse 220-24 (1978) (discussing the Hawaiian Native Claims Settlement Act of 1974 and the activities of the ALOHA organization—Aboriginal Lands of Hawaiian Ancestry); R. Jones, A History of the Alaska Native Claims Settlement of 1971 (1973) (comparing the native Hawaiian rights to those of the Alaskan natives to public lands); Levy, *supra* note 1 (generally discussing the numerous bases on which the native Hawaiians may make a claim for reparations in connection with the cession of public land occurring upon annexation).

[15] Authorities on the history of the federal public domain acknowledge the unique treatment accorded Hawaii's ceded lands, pointing out that Hawaii never became a part of the public domain except for its parks, public buildings and minor reservations. M. Clawson & B. Held, The Federal Lands: Their Use and Management 20 (1957); P. Gates, History of Public Land Law Development 85 (1968); C. James, Public Land Policies of the

for studying the federal government's present relationship with respect to Hawaii's ceded lands, but also a basis for commenting upon the state's present role in administering the lands as successor to their title under the Admission Act.

This opening section briefly describes the acquisition by the United States of its public domain and Congress' constitutional power to do so to provide a context for distinguishing Hawaii's situation upon annexation.

A. *The Federal Public Domain*

The "federal public domain" (or "federal lands") has been variously defined depending upon the context of its use.[16] For the purposes of the ensuing discussion, "federal public domain" refers to all lands owned by the United States and subject to administration and disposal under the general public land laws of the federal government.[17] This definition primarily encompasses those lands remaining in federal ownership from the original public domain—i.e., those which had been ceded by the original thirteen states,[18] purchased from foreign countries,[19] or acquired by treaty.[20]

Federal public land ownership commenced with an era of acquisition,[21]

UNITED STATES AND THE MAINLAND STATES 13 (1961).

[16] For example, compare the definition ascribed by M. CLAWSON & B. HELD, *supra* note 15, at 13 ("all nonurban land, title to which is held by the federal government and for which the main purpose of ownership is the management of natural resources") with that rendered by C. JAMES, *supra* note 15, at 11-12 (original national domain acquired by conquest and treaty west of the original thirteen colonies, excluding after-acquired lands for federal agency use or for the management of other portions of the public domain) and with that of B. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 7 (1939) (all lands to which the federal government held title and which were subject to sale or transfer of ownership under federal laws) [hereinafter HIBBARD].

[17] This is a slight variation of that given by B. HIBBARD, *supra* note 16.

[18] Consisting of approximately 237 million acres, this territory embraced the present states of Ohio, Indiana, Illinois, Michigan, Wisconsin, most of Alabama and Mississippi, and the portion of Minnesota lying east of the Mississippi River. The original states themselves were never a part of the national public domain, as they held their lands by outright grant from the British Crown. For detailed histories of the United States' acquisition of its public domain, *see generally* M. CLAWSON & B. HELD, *supra* note 15, at 18-20; P. GATES, *supra* note 15, at 49-85; B. HIBBARD, *supra* note 16, at 7-31; Treat, *Origin of the National Land System Under the Confederation*, in THE PUBLIC LANDS 7-14 (V. Carstensen ed. 1963).

[19] These included the Louisiana Purchase of 1803 (523 million acres purchased from France for $15 million); Florida Purchase (46 million acres from Spain in 1819 for $5 million); Texas Purchase (79 million acres from the State of Texas in 1850 for $15.5 million); Gadsden Purchase of 1853 (19 million acres from Mexico for $10 million) and the Alaska Purchase of 1867 (375 million acres from Russia for $7 million). B. HIBBARD, *supra* note 16, at 14-22, 31; P. GATES, *supra* note 15, ch. V.

[20] Red River Acquisition (30 million acres without cost); Oregon Compromise with Great Britain (1846, 183 million acres without cost); Mexico Treaty (1848, 335 million acres for $15 million). B. HIBBARD, *supra* note 16, at 19-22.

[21] The history of federal landownership has been broken down for convenience into four, overlapping eras: acquisition, disposal, reservation and management. Each of these eras is so labelled to characterize the dominant federal policy governing public land administration at the time. *See* C. JAMES, *supra* note 15, at 12-48; M. CLAWSON & B. HELD, *supra* note 15, at 16.

which began before the United States possessed a constitutional authority to manage or dispose of a public domain.[22] The thirteen original states, which had held often conflicting claims to western territories under the Articles of Confederation, transferred their claims to the national government under two land ordinances enacted in 1785 and 1787, respectively.[23] These western lands constituted the nucleus of the original public domain, and the ordinances governing their administration laid the basic policy framework for the federal government's rapid westward expansion.[24] By 1853, the United States held title to 1,462,000 acres of public domain—just over three-fourths of the country's total area at that time.[25]

The public domain has been held and administered by Congress in the exercise of its article I, section 8, clause 17[26] and article IV, section 3, clause 2[27] ("property clause") powers.[28] Generally, article I empowers

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[22] P. GATES, *supra* note 15, at 72; Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 290-91 (1976); Treat, *supra* note 18.

[23] P. GATES, *supra* note 15, at 59-74 contains a detailed discussion of the passage of both ordinances. The Ordinance of 1785 and the Northwest Ordinance of 1787 may be found in full in DOCUMENTS OF AMERICAN HISTORY 123-24 and 128-32 respectively (Commager ed. 1973).

[24] M. CLAWSON & B. HELD, *supra* note 15, at 18. *See generally* P. GATES, *supra* note 15. Essentially, the ordinances provided for the survey and disposal of public lands to generate revenue for the Confederation. Land grants for schools, however, were authorized. The Northwest Ordinance additionally established the doctrine of equal footing—newly-created states were to be admitted to the Union on equal footing with the original thirteen in their ability to self-govern and hold title to land. P. GATES, *supra* note 15, at 72. *See also* T. DONALDSON, THE PUBLIC DOMAIN: ITS HISTORY AND STATISTICS 155-56 (1970). The doctrine thus also embraced the principle that title and jurisdiction over appropriated public lands within a new state (including navigable waters and submerged lands below the high water mark) belonged to it, *see* Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836), and that the United States could not exercise a general governmental jurisdictional over the public lands within the state's boundaries. *See* Engdahl, *supra* note 22, at 293-94. The same ordinance also established the principles that incorporated territories are inchoate states whose ultimate destiny is statehood. *Id. See also* H.R. REP. No. 194, 80th Cong., 1st Sess. 10 (1947).

[25] C. JAMES, *supra* note 15.

[26] U.S. CONST. art. I, § 8, cl. 17 provides that Congress shall have power:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

See 1 Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States (1956); 2 Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States (1957) (analyzes this constitutional provision).

[27] U.S. CONST. art. IV, § 3, cl. 2 provides as follows:

> The Congress shall have Power to dispose of and make all needful Rules and Regula-

Congress to legislate exclusively over the types of real property defined therein in which a state had ceded legislative jurisdiction either prior or subsequent to the federal government's acquisition.[29]

The bulk of the public domain is governed by article IV, which grants Congress power to acquire and administer the general public domain, including ceded property not being used for article I purposes and personal property. Under classic property clause doctrine, the states, by virtue of their sovereign status, enjoy general governmental jurisdiction, including civil and criminal jurisdiction, over federal article IV lands within their respective boundaries.[30] This allows the state to regulate the manner in which private persons with the federal government's permission can use the public lands affected. This power is limited by the principle of intergovernmental immunities, by the necessary and proper clause, and by the federal government's exclusive control over the creation of private rights in its public lands.[31]

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tions respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

[28] The precise nature of these distinct though somewhat overlapping powers, traditionally the source of much confusion by scholars, is beyond the scope of this discussion. For a good analysis of the two provisions, *see* Engdahl, *supra* note 22. *See generally* PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND (1970). *See also* Haslam, *Federal and State Cooperation in the Management of Public Lands*, 5 J. CONTEMP. L. 149, 151-52 (1978); Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 250-53 (1976).

[29] Engdahl, *supra* note 22, at 288-90, 296-98, 377. Under classic principles, power over article I property was "in essence complete sovereignty," S.R.A., Inc. v. Minnesota, 327 U.S. 558, 562 (1946), and a federal enclave was treated as existing beyond the state's civil and criminal jurisdiction. Congress could exercise the full police and regulatory powers which reside in a state or municipal government for state or local purposes. *See* Palmore v. United States, 411 U.S. 388, 397 (1973) (construing Congress' power to legislate for the District of Columbia under article I). The implications of this principle of enclave extra-territoriality, for the enclave's resident's (e.g., regarding their right to vote) and the situs state (e.g., the validity of state court actions dependent on domicile; state taxes, probate laws), however, have been confusing as well as unfair. Engdahl, *supra* note 22, at 379-82 documents and discusses the Supreme Court's apparent abandonment of the classic principles in favor of treating the federal enclave as part of the situs state.

[30] Engdahl, *supra* note 22, at 368, citing Omaechevarria v. Idaho, 246 U.S. 343 (1918) and Bacon v. Walker, 204 U.S. 311 (1907). Haslam, *supra* note 28, at 151-52 traces the grant of police power in the states to the tenth amendment and the doctrine of enumerated powers. State law preempted federal laws where the management and protection of the federal government's proprietary interests were concerned, but not in the creation and recognition of rights in federal property. Engdahl, *supra* note 22, at 366. This preemptive capability was triggered whenever the federal government used its lands to promote extraneous ends, in contravention of one of its constitutionally enumerated powers. The Supreme Court's recent decision in Kleppe v. New Mexico, 426 U.S. 529 (1976), however, if read broadly could be construed as recognizing in Congress a broad, unrestricted legislative jurisdiction akin to that existing in the United States as sovereign over unincorporated territories. Engdahl, *supra* note 22, at 369-71; Haslam, *supra* note 28, at 152-53.

[31] Engdahl, *supra* note 22, at 341. *See also* note 36 *infra*.

The federal government's power over its article IV lands within state boundaries derives from its capacity as their proprietor and governmental sovereign.[32] Regarding the federal government's proprietary role, the Supreme Court in *Utah Power & Light Co. v. United States*[33] noted that

> [t]he inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power.[34]

Thus while the states retain civil and criminal jurisdiction over article IV lands within their boundaries,[35] the federal government may continue to manage and protect its lands in a manner consistent with its enumerated federal powers.[36] As sovereign, the United States may exercise its consti-

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[32] Engdahl, *supra* note 22, at 290-96.

[33] 243 U.S. 389, 404-05 (1917). *See* Engdahl, *supra* note 22, at 310-12 (discussing the *Utah Power & Light Co.* decision).

[34] 243 U.S. at 405.

[35] *Id.* at 404. *See* note 30 *supra*.

[36] Engdahl, *supra* note 22, at 365-66. The necessary and proper clause, together with the doctrine of intergovernmental immunities, provides for the general preemptive capacity of the federal government in the exercise of an enumerated federal power, as long as that power is not used to promote a wholly extraneous objective. Engdahl, *supra* note 22, provides one of several instructive examples:

> For example, if Congress were to offer grants to farmers on the condition that they provide farm laborers with on-farm living facilities meeting federally prescribed standards, the federal policy represented by these standards would be incapable of preempting the more stringent standards which might be prescribed for such facilities by a state.

Id. at 366. As proprietor, the federal government generally may avail itself of existing state laws, judicial remedies, and in particular federal statutes representing self-help measures in order to protect its property interests. *See, e.g.*, Cotton v. United States, 52 U.S. (11 How.) 229 (1851) (United States entitled to relief under state trespass law for taking of timber from public land); United States v. Gear, 44 U.S. (3 How.) 120 (1845) (equitable relief granted for waste in unauthorized mining on federal property). This power was extended in the late 19th century to include the enactment of laws to protect public lands from nuisances on adjoining private properties. *See* United States v. Alford, 274 U.S. 264 (1927) (federal government may legislate to prohibit acts committed on privately owned lands, here a forest fire, which endanger public forests); McKinley v. United States, 249 U.S. 397 (1919) (Secretary of War could lawfully restrict establishment of prostitution houses around military bases); Camfield v. United States, 167 U.S. 518 (1897) (federal statute forbidding private enclosure of federal lands held constitutional as applied to private landowner who fenced his lands which were intermingled with federal lands). *See also* Sax, *supra* note 28; Note, *The Government as Proprietor: The Private Use of Public Property*, 55 VA. L. REV. 1079 (1969). However, as Engdahl observes, this right to protect federal property derives from the federal government's proprietary capacity and these cases "did not negate the general principle of the controlling force of state governmental [or police] power." Engdahl, *supra* note 22, at 317. *See also* McVay v. United States, 418 F.2d 615 (5th Cir. 1973). Indeed, the federal government's role of proprietor requires it to hold the lands for the public's benefit, not as "a monarch may, for private and personal reasons," Van Brocklin v.

tutionally enumerated powers over article IV lands as it may anywhere else in the nation.[37]

In acquiring and managing the public domain, the federal government was acting in its capacity as a sovereign entity,[38] possessing title as well as exclusive governmental jurisdiction.[39] It was the absence of any other sovereign in these areas that enabled Congress to exercise "the combined powers of the general, and of a state government"[40] in legislating for these territories and in managing the public lands. Congress exercised this power during the nation's formative period primarily by conveying of vast portions of the public domain[41] to private individuals and entities (e.g., railroads) and to new states to generate revenues for federal coffers,[42] to encourage homesteading and western migration,[43] public education,[44] rec-

Tennessee, 117 U.S. 151, 158-59 (1886).

In addition to the general protective powers of a proprietor, the federal government also has exclusive control over the creation and recognition of private rights in its property. *See, e.g.*, United States v. Oregon, 295 U.S. 1, 27-28 (1935); Fasi v. King, 41 Hawaii 461 (1956); Humble Oil & Refining Co. v. Calvert, 478 S.W.2d 926 (Tex.), *cert. denied*, 409 U.S. 967 (1972). *See generally* Engdahl, *supra* note 22, at 362. The federal government is additionally empowered under article IV to obtain property by gift, bequest, devise, purchase, or by condemnation where necessary to effectuate a constitutionally enumerated federal power. *See* United States v. Burnison, 339 U.S. 87 (1950) (devise); Kohl v. United States, 91 U.S. 367 (1875) (condemnation).

[37] Engdahl, *supra* note 22, at 308. *See* Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662, 736 (1836).

[38] Delassus v. United States, 27 U.S. (2 Pet.) 117 (1829) (the sovereign acquiring an uninhabited country acquires full dominion over it). The federal government's power over territories, although traced by those relying upon the doctrine of enumerated powers to the article IV property clause, exists independently of the clause. Engdahl, *supra* note 22, at 290-91. In American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 542 (1828), this power was implied in the federal government's power to make war and treaties. *See* Church of the Latter-day Saints v. United States, 136 U.S. 1, 44 (1890). *See also* Dorr v. United States, 195 U.S. 138, 142 (1904); Downes v. Bidwell, 182 U.S. 244, 279, 291 (1900); W.C. Peacock & Co. v. Republic, 12 Hawaii 27 (1899).

[39] *See* note 38 *supra*.

[40] Engdahl, *supra* note 22, at 292, quoting American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828). As Engdahl notes, this rule, still prevailing today, *see* HMW Indus., Inc. v. Wheatley, 368 F. Supp. 915, 917 (D.V.I. 1973), is the result of the traditional construction given the article I property clause which is that the clause confers exclusive governmental jurisdiction in the United States over the lands affected. *See* Engdahl, *supra* note 22, at 289.

[41] This era of disposal, spanning over a hundred years (roughly 1787 to 1923) and involving the alienation of over 10 million acres each year, was indeed prompted by an attempt to promote and aid western settlement as well as by a recognition that the public lands were prime revenue producers. C. JAMES, *supra* note 15, at 17-31. *See generally* M. CLAWSON & B. HELD, *supra* note 15, at 22-27; B. HIBBARD, *supra* note 16, at 32-81, 116-43; P. GATES, *supra* note 15, at 61-63, 178-80, 210.

[42] *See* B. HIBBARD, *supra* note 16, at 33; P. GATES, *supra* note 15, at 51-63, 177-78.

[43] *See, e.g.*, Homestead Act, Act of May 20, 1862, 12 Stat. 392; B. HIBBARD, *supra* note 16, ch. XVII; P. GATES, *supra* note 15, ch. XV.

[44] The practice of reserving certain parcels of public land specifically for the maintenance of public schools when new states were formed started with the 1785 Land Ordinance. *See* B. HIBBARD, *supra* note 16, ch. XVI; P. GATES, *supra* note 15, at 22-27. Approximately

lamation of arid lands[45] and forestation of prairies,[46] and the development of mining[47] and railroads.[48] Public lands grants were also made to new states upon their admission.[49] When new states were created, they automatically acquired jurisdiction over the article IV properties within their respective boundaries under the doctrine of equal footing.[50] However, title only to those "common lands" vested with a public purpose, *i.e.*, navigable waters and submerged lands below the high water mark,[51] transferred to newly-admitted states under this doctrine.[52] The remainder of the public lands within the state boundaries remained in federal ownership "as a common fund for the use and benefit of the United States."[53] The federal government has continued to administer them through five principal agencies in both its proprietary and sovereign capacities.[54]

77,600,000 acres were thus granted to the states. U.S. DEP'T OF INTERIOR, PUBLIC LAND STATISTICS 7-8 (1968).

[45] *See* Desert Land Act of 1877, ch. 107, 19 Stat. 377; B. HIBBARD, *supra* note 16, ch. XX; P. GATES, *supra* note 15, at 635-43.

[46] *See* Timber Culture Act of 1873, 17 Stat. 605; B. HIBBARD, *supra* note 16, ch. XXI; P. GATES, *supra* note 15, at 399-401.

[47] *See* Mining Law of 1872, 17 Stat. 91 (and the Mineral Leasing Act, ch. 85, 41 Stat. 437 (1920)); B. HIBBARD, *supra* note 16, ch. XXV; P. GATES, *supra* note 15, ch. XXIII.

[48] The Railroad Land Grants are discussed in B. HIBBARD, *supra* note 16, at 241-54 and P. GATES, *supra* note 15, ch. XIV.

[49] *See* Act of Sept. 4, 1841, 5 Stat. 453; B. HIBBARD, *supra* note 16, at 228-33; P. GATES, *supra* note 15, ch. XIII.

[50] *See* note 24 *supra*. Under practical application of the doctrine, states carved out of lands acquired by the United States were successors to all rights of sovereignty, jurisdiction and eminent domain, except as were diminished by the United States' retention of possession and control over federally appropriated public lands. Pollard v. Hagan, 44 U.S. (3 How.) 212, 221-23 (1845). Title to common lands—all navigable waters and submerged lands below the high water mark—vested in new states by operation of the doctrine, since the original states came to hold them following the Revolution as sovereign, subject to rights surrendered by the Constitution to the United States. *Id.* at 229; Shively v. Bowlby, 152 U.S. 1, 57-58 (1894). *See* Engdahl, *supra* note 22, at 290-93; Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 476 (1970). [hereinafter cited as *Natural Resource Law*].

[51] Pollard v. Hagan, 44 U.S. (3 How.) at 229; Shively v. Bowlby, 152 U.S. 1 (1894).

[52] *See* note 37 *supra*.

[53] Shively v. Bowlby, 152 U.S. at 26, *citing* the Northwest Ordinance of 1787, ch. 28, 1 Stat. 549.

[54] The federal government presently owns approximately 761 million acres of land, U.S. BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 10 (1974), of which approximately 760 million acres constitute the present federal public domain. The Bureau of Land Management administers more than 465 million acres of these lands which have not been set aside for specific use, and the remainder falls primarily under the purview of the Forest Service of the Department of Agriculture, the Fish and Wildlife Service and the National Park Service of the Department of the Interior, and the Bureau of Reclamation. The Atomic Energy Commission and Department of Defense also control significant portions of the public domain which have been set aside. U.S. PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 20-22 (1970). Policies governing present administration of the federal public domain are generally discussed in M. CLAWSON & B. HELD, *supra* note 15, at 29-194; C. JAMES, *supra* note 15, at 39-48; U.S. PUBLIC LAND LAW REVIEW COMM'N, *supra*.

The United States' public domain was thus accumulated through this process of acquiring and retaining title to public lands. The public lands of Texas and Hawaii, however, were not subject to this process and consequently never became a part of the federal public domain in the sense of being subject to administration and disposition under the general public land laws.[55] Unlike any other acquired areas, Hawaii and Texas were independent, sovereign entities with established bodies of law governing the administration of their respective public domains. While both relinquished sovereignty to the United States,[56] Congress did not retain title to Texas' public lands, nor did it hold proprietary title to the lands of the Territory of Hawaii. Texas was allowed to retain title to its unallocated public lands because it entered the Union directly as a state, by-passing any territorial or unincorporated phase of political existence, and had an established land management system based on Spanish law.[57]

Hawaii, on the other hand, was to wait over sixty years after annexation before finally attaining statehood.[58] At the time of annexation, the islands had a history of monarchical rule[59] and a public land administration system geared towards the islands' specific landownership situation.[60] Congressional policies and laws governing the management of public lands on the continent were not immediately applicable. While the legislative history surrounding Hawaii's annexation is devoid of explicit reasons for Congress' treatment of Hawaii's lands, ultimately the federal government's refusal to embrace Hawaii's public domain into its own apparently had much to do with Hawaii's prior sovereign independence and its particular land situation.

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[55] The circumstances surrounding Texas' annexation and admission to the Union as a state, as they concern the status of its public lands at that time, are detailed by P. GATES, *supra* note 15, at 80-83; C. JAMES, *supra* note 15, at 59-61.

[56] *See* note 84 *infra*.

[57] P. GATES, *supra* note 15, at 82. The federal government was also reluctant to assume the new state's public debt during a period of relative national fiscal stability. The United States' debt, only a little more than Texas', was $15,925,000 while its surplus of income after expenditures amounted to $7,033,000. Texas' debt in fact forced the new state to sell 79 million acres west of its present boundaries to the United States only five years following annexation for a total of $16 million. M. CLAWSON & B. HELD, *supra* note 15, at 19-21; C. JAMES, *supra* note 15, at 60; B. HIBBARD, *supra* note 16, at 18-19. The new state government, optimistic that the public lands would yield large returns and ease its obligations, retained both title to its public lands and its substantial financial debt. P. GATES, *supra* note 15, at 82.

[58] *See generally* G. DAWS, SHOAL OF TIME (1968).

[59] Until Kamehameha I's unification of the islands under a single monarch in the late 18th and early 19th centuries, however, Hawaii actually consisted of several politically independent kingdoms. A kingdom typically consisted of one island, although it might have embraced several islands or only a part of one island, and it was ruled by the chief (*alii-aimoku*) who attained this status either by victory in battle or by standing next in line of succession to the throne. *See* 1 R. KUYKENDALL, THE HAWAIIAN KINGDOM 9-10 (1938).

[60] *See* R. HORWITZ, J. CEASAR, J. FINN & L. VARGHA, PUBLIC POLICY IN HAWAII: AN HISTORICAL ANALYSIS 1-57 (1969) [hereinafter cited as PUBLIC LAND POLICY].

A brief digression at this point is thus necessary to lay the groundwork for a discussion of Hawaii's own annexation to the Union. The terms upon which Hawaii was finally annexed reveal the unique place occupied by its ceded lands in Congress' public land acquisition and ownership scheme. They also established a relationship between the federal government and the new territory's public lands which had significant consequences upon Hawaii's admission as a state.

B. *Hawaii's Public Domain: Pre-Annexation*

Hawaii's annexation and cession of its public lands to the United States occurred in 1898,[61] a mere one hundred and twenty years after the islands' "discovery" by the west. Until Captain James Cook's arrival in 1778, the islanders had subsisted for centuries[62] in relative isolation from outside civilization and had developed a land tenure system reflecting both the islands' political structure and agrarian economy.[63] A change in form of government from an absolute to a constitutional monarchy in 1840,[64] and shifts in socio-economic patterns due to the influx of westerners, however, precipitated a revamping of the landholding system.[65]

The concept of a public domain existing separately from privately-owned lands in fact did not exist in Hawaii until 1848, when the ancient system of land tenure was effectively terminated by the *Great Mahele*.[66]

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[61] *See* note 1 *supra*.

[62] The Hawaiian islands were first settled by the Polynesian ancestors of the Hawaiian people between 500 and 750 A.D., with subsequent waves of immigrants arriving from the Marquesas and Tahiti between 900 and 1300. E. NORDYKE, THE PEOPLING OF HAWAII 7-10 (1977).

[63] A general discussion of ancient Hawaii and Captain Cook's arrival are found in 1 R. KUYKENDALL, *supra* note 59, at 1-20. The ancient land tenure system was in effect when the islands were discovered by Captain Cook. Under this system, the islands were divided into geographic districts (*mokus*) and further subdivided into administrative districts, the largest of which was the economically self-sufficient *ahupuaa* which ideally ran from mountain to sea. The lands were owned by the kings of the independent island kingdoms, and managed by a hierarchy of subordinates from the king's warrior chiefs to the tenant-commoners. As in feudal England, land was parcelled out by the sovereign to those chiefs who had rendered political favors, although unlike the traditional system, tenants were not bound to their landlords or to geographic locations. There was no notion of fee simple title, as initial acquisition was accomplished by conquest and allotment by the conquering sovereign, the latter being entirely revocable at will. For detailed descriptions of the ancient land system, *see generally* J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848 (1958); J. HOBBS, HAWAII—A PAGEANT OF THE SOIL (1935); A. LIND, AN ISLAND COMMUNITY 24-39 (1938).

[64] The events leading up to and including Hawaii's switchover to a constitutional monarchy, and the subsequent reform of the previously unrecorded landownership system in Hawaii are described in 1 R. KUYKENDALL, *supra* note 59, at 227-68, and PUBLIC LAND POLICY, *supra* note 60.

[65] *See* 1 R. KUYKENDALL, *supra* note 59, at 269-98.

[66] *See generally* J. CHINEN, *supra* note 63; J. HOBBS, *supra* note 2, at 40-44; 1 R. KUYKENDALL, *supra* note 59, at 287-98.

Where previously all lands were owned by the conquering chief or reigning king, the *Mahele*—or division—was an unprecedented recognition and separation of rights in the kingdom's lands between the king, his chiefs, and the tenants.[67] Under the *Mahele* the king retained all of his private lands, subject to the rights of tenants to a fee simple title to a portion of those lands which they had occupied and cultivated.[68] These lands—the Crown lands[69]—consisted of approximately one million acres and were treated as the personal property of the ruling monarch until the overthrow of the monarchy in 1893.[70] One and a half million acres of land

[67] J. CHINEN, *supra* note 63, at 15. The 1840 Constitution's Bill of Rights laid the groundwork for such a declaration by defining property rights in the people and by noting that the king's lands were not his own private property—a first recognition that the commoners had an interest in the kingdom's lands. *Id.* at 7-8; *see* L. THURSTON, THE FUNDAMENTAL LAW OF HAWAII 1-9 (1904). In 1845, a Board of Commissioners to Quiet Land Titles was created to assess the validity of claims to lands presented to it and to make awards to successful claimants. To guide it in carrying out its discretionary function, the commission issued a set of seven principles, together with prefatory statements which laid out the commission's understanding of the nature of rights in the land existing at that time. It declared that the king (or the government), the chiefs, and the tenants were the three classes of people in the kingdom with vested rights in the land. *See* Act of Oct. 26, 1846, [1847] Hawaii Laws 81, in REV. LAWS OF HAWAII 1925 app. at 2124, 2126. It was not until the *Mahele*, however, that the actual division of lands along these lines occurred. *See* 1 R. KUYKENDALL, *supra* note 59, at 269-98; J. CHINEN, *supra* note 63, at 8-15.

[68] The two instruments by which Kamehameha III reserved the Crown and Government lands, recorded in The *Mahele* Book, Office of the Commissioners of Public Lands, Territory of Hawaii, appear translated in English in *In re* Estate of His Majesty Kamehameha IV, 2 Hawaii 715 (1864). These final acts of the *Mahele* were confirmed by the Act of June 7, 1848, [1848] Hawaii Laws 22, in REV. LAW HAWAII 1925 app. 2152-76.

The King had segregated his private lands from government lands in an attempt to protect them from foreign domination in the event of conquest. 4 PRIVY COUNCIL RECORD 250-308 (1847). *See In re* Estate of His Majesty Kamehameha IV, 2 Hawaii 715 (1864).

Regarding the tenants' rights in the lands, *see In re* Kakaako, 30 Hawaii 666 (1928); Harris v. Carter, 6 Hawaii 195 (1877); Act of Aug. 6, 1850, § 1, Hawaii Laws 202, in REV. LAWS HAWAII 1925 app. at 2141; Levy, *supra* note 1, at 848, 855-56 (1975). The 1850 Act authorized Hawaii's Land Commission to grant fee simple title to native tenants to any part of the Crown, Government or *konohiki* (those divided among chiefs) lands which they had really cultivated, together with a houselot of not more than a quarter of an acre in size. While thousands of small *kuleana* awards were made before 1855, J. CHINEN, *supra* note 63, at 31, notes, however, that the tenant-commoners actually received less than one percent of the kingdom's land despite earlier promises of one-third. The *kuleanas* totalled less than 30,000 acres. *See* Levy, *supra* note 1, and 1 R. KUYKENDALL, *supra* note 59, at 288-94.

[69] In the *Great Mahele*, the lands were designated as the "King's" lands. However, in the Act of January 3, 1865, they were re-designated the "Crown" lands to indicate that the lands belonged to the king as sovereign and not as an individual. J. Chinen, Crown Lands, in Encyclopedia of Hawaii (1976) (unpublished manuscript in the State of Hawaii Archives) [hereinafter cited as Crown Lands].

[70] *See* Liliuokalani v. United States, 45 Ct. Cl. 418 (1910) (holding that the Crown lands belonged to the office and not the individual). J. CHINEN, *supra* note 63, at 27; Levy, *supra* note 1, at 855. Chinen notes that the Crown lands were freely sold, leased and mortgaged by Kamehameha III and his successors for the support of the Crown until rendered inalienable by Act of January 3, 1865, [1864] Hawaii Laws 70, in REV. LAWS HAWAII 1925 app. at 2178,

were set aside "to have and to hold to my chiefs and people forever" as Government lands.[71] These lands were to be "managed, leased, or sold, in accordance with the will of [the] Nobles and Representatives, for the benefit of the Hawaiian Government, and to promote the dignity of the Hawaiian Crown."[72] The remaining one and a half million acres of the kingdom's lands were awarded to the chiefs and again were subject to tenants' rights.[73]

Ultimately, it was only the Crown and Government lands which constituted the public domain ceded to the United States in 1898,[74] although

which had been passed to "relieve the Royal Domain from encumbrances and to render the same inalienable." *Id.* at § 3. However, the lands were available for leases not to exceed thirty years under the Act which allowed the monarchs to realize income from them. PUBLIC LAND POLICY, *supra* note 60, at 6. As a result, some 76 lessees had leasehold arrangements controlling 752,931 acres of Crown and Government lands by 1890. *Id.* at 137.

When finally made available again for purchase or lease under the Constitution of the Republic, however, the Crown lands had been severed from the throne without compensation to the ruling line and had merged with the Government lands to become a part of the public domain. *See* Liliuokalani v. United States, 45 Ct. Cl. 418 (1910) (holding that the former queen upon the overthrow of the monarchial government had become divested of her title to the Crown lands and was not entitled to compensation therefor under the new constitution); Constitution of 1894, art. 95, [1895] Hawaii Laws 118, in L. THURSTON, THE FUNDAMENTAL LAWS OF HAWAII 237; *see also* Territory v. Kapiolani Estate, Ltd., 18 Hawaii 640 (1908); Territory v. Puahi, 18 Hawaii 649 (1908) (title to Crown and Government lands may not be questioned by courts); PUBLIC LAND POLICY, *supra* note 60, at 5-6.

For a discussion of the history of Crown lands, *see* T. SPAULDING, CROWN LANDS OF HAWAII (Occasional Papers No. 1, University of Hawaii 1923).

[71] *See In re* Estate of His Majesty Kamehameha IV, *supra* note 68, at 723, quoting in translation one of two instruments entered into The *Mahele* Book, *supra* note 68. Between 1848 and Hawaii's annexation in 1898, the Government lands were rapidly alienated, PUBLIC LAND POLICY, *supra* note 60, at 161-63, 186-87, to produce revenues which were used by the government to finance its operation. J. CHINEN, *supra* note 63, at 27. Official acts of the Hawaiian Legislature in 1846 and 1850 had opened the door to sales of Government land and land purchases by aliens. *See* Law of Apr. 27, 1846, ch. 7, §§ 1-3, Hawaii Laws 99-103, in REV. LAWS HAWAII 1925 app. at 2190; Resolution of Nov. 7, 1846, § 6, 2 [1847] Hawaii Laws 71; and Act of Aug. 6, 1850, § 4, Hawaii Laws 203, in REV. LAWS HAWAII 1925 at 2142, respectively. Levy, *supra* note 1, at 857 n.62 states that thousands of acres of land fell into the hands of foreigners as a direct result. By May 1, 1850, over 27,000 acres of Government lands had been sold. J. HOBBS, *supra* note 2, at 54. By 1899, patents to over 728,000 acres had been issued. REPORT OF SUBCOMMITTEE ON PACIFIC ISLANDS AND PORTO RICO ON LAND SYSTEM IN HAWAII WITH RECOMMENDATIONS OF COMMITTEE, 57th Cong., 2d Sess. 5 (1902) [hereinafter cited as SUBCOMMITTEE ON PACIFIC ISLANDS AND PORTO RICO]. *See* M. Vause, Twenty Years of Contest Over the Public Lands: 1900-1921, at 137 (1962) (unpublished thesis in University of Hawaii Library). *See also* PUBLIC LAND POLICY, *supra* note 60, at 186-87.

[72] Keoni Ana, G.P. Judd, M. Kekauanaoa, I. Piikoi, Report on the Mahele (March 30, 1848) *quoted in* 1 R. KUYKENDALL, *supra* note 59, at 289. *See also* Kenoa v. Meek, 6 Hawaii 63 (1871).

[73] *See* note 68 *supra*.

[74] The public domain also consisted of land "that had come under the government's control by purchase, escheat, exchange, or through exercise of eminent domain." PUBLIC LAND POLICY, *supra* note 60, at 6.

by then a significant portion of the arable lands had either been sold or leased.[75] Subsequent to the kingdom's conversion to the Republic of Hawaii in 1893, the lands were administered by a Board of Commissioners of Public Lands[76] which was authorized to "lease, sell, or otherwise dispose of the public lands, and other properties, as [it] may deem best for the *protection of agriculture*, and the general welfare of the Republic."[77] (Emphasis added). The 1895 Land Act governing the lands' administration, hailed as a "great advance on all previous legislation in Hawaii,"[78] contained provisions reflecting a dominant homesteading policy and a commitment to the development of agriculture.[79] Restrictions were placed on leases as well as on sales of land to maximize family farming opportunities while at the same time to avoid haphazard and unbalanced disposition of the public domain.[80] Thus by 1898, Hawaii had a corpus of lands constituting its public domain administered under carefully considered public land policies.[81]

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[75] *See* note 2 *supra*.

[76] *See* CIVIL CODE OF 1897, § 169 (Hawaii). The Board consisted of three commissioners, including the U.S. Minister of the Interior and two members appointed by the Republic's president and approved by the cabinet.

[77] *Id.*; PUBLIC LAND POLICY, *supra* note 60, at 6.

[78] Dole, *Hawaiian Land Policy*, in HAWAIIAN ALMANAC AND ANNUAL FOR 1898, at 125 (1898).

[79] These objectives were shared by (or perhaps ultimately derived from) Republic President Sanford B. Dole, who was also to become the territory's first governor and whose recommendations for implementation of the policy favoring them came after a thorough assessment of Hawaii's land situation. Observing that the large plantations were typically awarded leases to the best available lands, and convinced the continental pattern of homesteading (rather than plantation development) was in Hawaii's best interest, Dole recommended a homesteading policy which was ultimately reflected in the Act. The Act made land available to families in various forms—homestead leases, right of purchase leases, cash freeholds and special sales agreements. *See* PUBLIC LAND POLICY, *supra* note 60, at 8. Homesteading, of course, had been a dominant theme of federal public land policy in the mid-19th century, *see* notes 39 & 41 *supra*, and the Homestead Act of 1862, *supra* note 41, has been described as one of the most far-reaching pieces of land legislation in its impact on the country's development. *See* C. JAMES, *supra* note 15, at 24, who also describes the Act and its impact at 24-27; for other descriptions and analyses of the Act *see* PUBLIC LAND POLICY, *supra* note 60, at 6-15; J. HOBBS, *supra* note 2, at 111-17; T. CREIGHTON, THE LANDS OF HAWAII: THEIR USE AND MISUSE 202 (1978). The Republic was also attempting to prevent the passing of title to the public lands to speculators. H.R. REP. No. 305, 56th Cong., 1st Sess. 14 (1900).

[80] *See* PUBLIC LAND POLICY, *supra* note 60, in which the authors describe the various restrictions, including a time limitation of 21 years on general leases and a requirement that public land could not be sold in parcels larger than 1,000 acres. Ninety-eight parcels of land containing 46,594.22 acres were disposed of either by long-term lease or sale under the 1895 Act before annexation. H.R. REP. No. 305, *supra* note 78, at 14-15. By 1898, the public domain had diminished to approximately 1,750,000 acres of Crown and Government lands. J. HOBBS, *supra* note 2.

[81] PUBLIC LAND POLICY, *supra* note 60, at 61. The land policy reflected in the 1895 Act had been debated for "well over half a century prior to annexation," and was specifically aimed at developing agriculture and making the most productive use of remaining public land. *Id.*

C. *Hawaii's Public Domain: Annexation*

The key event in the history of Hawaii's ceded lands is Hawaii's annexation to the United States as a territory in 1898.[82] It was at this time that

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[82] Others have pointed out that perhaps the *Great Mahele* and not annexation is the key event. *See* M. Vause, The Hawaiian Homes Commission Act, 1920: History and Analysis (1968) (unpublished thesis in University of Hawaii Library). This view is derived largely from congressional testimony and debate over the Hawaiian Homes Commission Act of 1920, ch. 42, 42 Stat. 108 (1921). Briefly, it was urged by native Hawaiians testifying before Congress that the Crown lands at the *Mahele* were impressed with a trust in favor of the common people. The United States, as successor-trustee of the Hawaiian monarchy, was thus obligated to establish the Hawaiian Homes Commission to provide for the beneficiaries of the trust—the native Hawaiians. M. Vause, *supra*, at 25. However, there is also evidence that Congress rejected this trust theory and instead was motivated by humanitarian reasons in establishing the Hawaiian Homes Commission. M. Vause, *supra*, at 162. In any event, if the *Great Mahele* is indeed the source of the trust relationship, then the obligations and responsibilities of the federal and state governments, as successor-trustees, arguably go beyond the Organic Act or the Admission Act.

Based solely upon the *Great Mahele*, it would be difficult to argue that the King intended to give the common people, other than individual tenants-in-possession, any interest in the Crown lands. *See generally* Crown Lands, *supra* note 69. Unlike the chiefs' lands, for which the King was required to execute a quitclaim deed and the chief to register his claim with the Land Commission in order to vest title in the claimant, the Crown lands were not subject to any conveyancing process as it was believed that the King already owned them. J. CHINEN, *supra* note 63, at 27; Harris v. Carter, 6 Hawaii 195, 206 (1877).

King Kamehameha III treated Crown lands as personal property, freely alienating portions and using the revenues for personal needs. His heir, King Kamehameha IV, Liholiho, similarly treated the lands as personal property. In fact, Liholiho saw it necessary for his consort, Queen Emma, to sign all documents relating to the lands. J. Chinen, Hawaiian Lands 13, in Encyclopedia of Hawaii (1976) (unpublished manuscript in the State of Hawaii Archives). Liholiho in turn devised the lands to King Kamehameha V, whereupon Queen Emma sued for her dower rights. In *In re* Estate of His Majesty Kamehameha IV, 2 Hawaii 715 (1864), the Hawaii Supreme Court held that although the Crown lands vested fee simple title in the Crown, as distinguished from the personalty of the Crown, Queen Emma was "lawfully entitled to dower in the reserved lands." *Id.* at 726. Further, the sovereign was entitled to "regulate and dispose of the same according to will and pleasure, as private property." *Id.* The legislature, in response to the court's decision, established an annuity fund to compensate Queen Emma for the loss of her dower. 1864-65 Hawaii Sess. Laws 71.

Subsequently, in the Act of January 3, 1865, the legislature declared that the Crown lands "shall be henceforth inalienable and shall descend to the heirs and successors of the Hawaii Crown forever." 1864-65 Hawaii Sess. Laws 69, 70. Enacted to protect the King's estate, the Act also divested the King of whatever legal title or possession he had in the Crown lands. Liliuokalani v. United States, 45 Ct. Cl. 418, 426 (1910). With such enactment, the ability of the reigning sovereign to treat the Crown lands as his own personal property terminated. Clearly, a better case can be made for the Act of January 3, 1865 as creating a trust in the Crown lands for the benefit of the people of Hawaii than the *Great Mahele*.

However, others would argue that even the *Great Mahele* and subsequent legislative acts are irrelevant to creation of the trust—instead, that the ancient land tenure system and the Hawaii Constitution of 1840 must be examined. *See* Van Dyke, Chang, Aipa, Higham, Marsden, Sur, Tagomori, & Yukumoto, *Water Rights in Hawaii*, in LAND AND WATER MANAGEMENT IN HAWAII 148, 154 (1979). The argument is that the king in pre-Western Hawaii was seen as merely a trustee over the lands who derived his ultimate authority from the gods. *Id.*

Hawaii's public domain acquired its ceded status, and title thereto was transferred to the United States without cost. The Joint Resolution of Annexation,[83] which contained Congress' acceptance of Hawaii's cession of sovereignty and land, officially defined the original relationship between the federal government and Hawaii's public domain.[84]

The Joint Resolution of Annexation itself is a fairly brief document. It first announces the Republic's absolute cession of sovereignty.[85] It then declares the simultaneous cession and transfer "to the United States the absolute fee and ownership of all public, government, or Crown lands,

at 148. This notion was codified in the Hawaii Constitution of 1840 which changed the government from an absolute to a constitutional monarchy. The Constitution read in part:

> Kamehameha I, was the founder of the kingdom, and to him belonged all of the land . . . though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and he had management of the landed property.

Thus, while the *Great Mahele* was promulgated by the king in conjunction with the Privy Council, by introducing the foreign concept of private land ownership, it reflected more the philosophy of the foreigners inundating the islands. In short, the trust relationship presently existing between the state and the people arose from the indigenous political system, and all subsequent events, including the annexation and admission, are irrelevant.

[83] Joint Resolution, *supra* note 1.

[84] Earlier treaty agreements had been drafted by both nations in 1851 (joint resolution), 1854, 1893, and 1897. H.R. REP. No. 1355, 55th Cong., 2d Sess. 1 (1898). By 1873, annexation had apparently become a dominant topic of interest between both countries because of a shared concern "that some measure should be taken up by the Hawaiian Government to effectively stay the decline in the prosperity of the country, evidenced in decreasing exports, revenues, population, whale fishing, and an increasing public debt." Letter from Henry A. Pierce, Minister at Honolulu, to Hamilton Fish, Secretary of State, (Feb. 17, 1873), *quoted in* H.R. REP. No. 1355, *supra*. Article 34 of the Republic's 1894 Constitution specifically authorized the government's president to negotiate for cession, which then President Sanford Dole did. These negotiations, however, coming after the ouster of Queen Liliuokalani from the throne, are themselves controversial. An investigation instigated by U.S. President Grover Cleveland and conducted by Special Commissioner to Hawaii James Blount revealed that the revolution that ultimately produced the Republic's 1894 Constitution was the result of a conspiracy between revolutionary leaders and U.S. Minister to Hawaii John L. Stevens. *See* H.R. REP. No. 1355, *supra*. Advocates of native Hawaiian rights have seized upon this conclusion to question the legality of the 1898 annexation resolution and 1897 treaty. These advocates claim that the annexation was negotiated by illegal revolutionaries who were not representative of the Hawaiian people, and consequently that Hawaii's lands were taken illegally without compensation by the United States government. The court in United States v. Mowat, 583 F.2d 1194 (9th Cir. 1978) rejected this claim on three grounds: (1) that Congress recognized the government of the Republic of Hawaii as the established government; (2) that the United States and Hawaii Supreme Courts accepted the validity of certain transfer agreements (*citing* United States v. Fullard-Leo, 331 U.S. 256, 270 (1947); Bishop v. Mahiko, 35 Hawaii 608 (1940)); and (3) that the defendants had failed to make a record of the argument at the trial court level. The question of whether the "Hawaiian Government" at the time of the final annexation negotiations truly represented the Hawaiian people is still open. *See generally* R. JONES, *supra* note 14, at 26-28; CREIGHTON, *supra* note 14, at 221-23.

[85] Joint Resolution, *supra* note 1. *See* C.A.B. v. United States, 235 F. Supp. 990 (D. Hawaii 1965), *aff'd*, 352 F.2d 735 (9th Cir. 1968) (cession of rights of a nation).

public buildings, or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands."[86] The document then notes Congress' acceptance of cession, declares annexation and the vesting of public property rights in the United States, and immediately thereafter states:

> [that] the existing land laws of the United States relative to public lands shall not apply to such land in the Hawaiian Islands, but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.[87]

The Joint Resolution provided for an interim government and ordered that the Republic's municipal legislation not inconsistent with any existing federal laws, treaties or the United States Constitution was to remain in effect until Congress provided for a territorial government.[88]

Title to Hawaii's public domain thus passed to the United States, but on terms reflecting a significant departure from the usual federal practice of tucking newly-acquired public lands into the federal domain and securing their revenues for federal coffers.[89] By providing for the enactment of special public land laws, Congress sought to avoid a major disruption of the islands' land ownership and utilization schemes that would have resulted with the immediate application of existing federal policies and laws attuned to continental landholdings.[90] Moreover, by requiring that pro-

[86] Joint Resolution, *supra* note 1.

[87] *Id.*

[88] Paragraph 4 of the Joint Resolution provided that the existing civil, judicial, and military powers of local officials be vested in United States presidential designees until Congress provided for a permanent territorial government.

The provision allowing Hawaii's municipal legislation to remain in force provided the basis for local officials' claims that they were authorized to continue disposing of the public lands until Congress dictated otherwise. *See* text accompanying notes 93-95 *infra*.

[89] *See* text accompanying notes 36-54 *supra;* PUBLIC LAND POLICY, *supra* note 60, at 61-62; H.R. REP. No. 305, 56th Cong., 1st Sess. (1900). This was not so, however, under the first treaty of annexation drafted in 1854, which provided in Article VI that the ceded public domain would be subject to the federal public land laws. Reprinted in H.R. REP. No. 305 *supra*.

[90] PUBLIC LAND POLICY, *supra* note 60, at 61. The policies underlying Hawaii's 1895 Land Act, giving rise to the specific provisions of the Act, did not of course precisely match those dominating at the federal level at the turn of the century. *See* M. CLAWSON & B. HELD, *supra* note 15, at 27-30, which describes the dominant federal public land policies of the late 19th and early 20th centuries as those of reservation and management. The specific pieces of legislation governing the disposition of the federal public domain, moreover, were not tailored to the circumstances then existing in the islands. The Homestead Act of 1862, *supra* note 43, for example, was intended to encourage an intense settlement and development of the largely unsettled west, which would ultimately lead to the admission of additional states

ceeds and revenues from the public lands be applied to local educational and public purposes, Congress stripped the federal government's title of its beneficial aspects and maintained the Hawaiian government's practice of using those proceeds and revenues for public and governmental purposes.[91] Thus the federal government had become in effect trustee of the lands ceded by Hawaii, holding absolute but "naked" title for the benefit of the people of Hawaii.[92]

The two-year interim between Hawaii's annexation and Congress' provision for its territorial government was a period of confusion over the precise status of title to the ceded domain.[93] Despite the clear language in which cession of the public lands was couched, Hawaiian officials maintained that the Joint Resolution did not expressly negate the force of Hawaii's land laws which existed at the time of annexation.[94] Believing that

and continental unification. Its original terms allowed "almost any adult [to] acquire title to 160 acres of public domain by filing on it, improving it, and residing on it for five years." C. JAMES, *supra* note 15, at 24. By contrast, Hawaii's land laws immediately prior to annexation contemplated a more controlled disposition of the public lands for homesteads in light of a scarcity of arable agricultural land and its concentration in large plantation owners. PUBLIC LAND POLICY, *supra* note 60, at 5-12.

[91] H.R. REP. No. 80, 86th Cong., 1st Sess. 3 (1959). This proviso in fact had early been established as a term of annexation. See, for example, the letter from Henry A. Pierce, Minister at Honolulu, to Hamilton Fish, Secretary of State (Feb. 17, 1873), *reprinted in* H.R. REP. No. 1355, *supra* note 84. Therein Pierce discussed the possibility of annexation on terms which included, as "consideration of said cession," the federal government's assumption of Hawaii's public debt, pension for the King and his chiefs, and the bestowal "upon the cause and for the benefit of education, public schools, and the nation's hospitals the proprietorship and revenues of the Crown and public lands." The proviso had taken its final form by the last two annexation treaties drafted under President Harrison in 1893 and under President McKinley in 1897, respectively. The treaties are reprinted in H.R. REP. No. 1355, *supra* note 84. An interesting comparison may be made with the first formal treaty of annexation drafted in 1854. Article VI of that treaty provided that the United States would confirm the King's prior grants of land for educational purposes and match them in land grants for common schools, seminaries, and universities. *Reprinted in* H.R. REP. No. 305, *supra* note 89.

[92] 22 Op. Att'y Gen. 574 (1899); 22 Op. Att'y Gen. 627 (1899).

[93] The provision authorizing the continued use of the Republic's municipal legislation, including the land laws, was regarded as allowing those laws to remain in effect. PUBLIC LAND POLICY, *supra* note 60, at 16. *But see* 22 Op. Att'y Gen. 627, *supra* note 92, stating that after annexation, the Republic existed as an organized government only for the purposes of municipal legislation which governed relations among people, which did not include a power of dominion over the public domain.

[94] PUBLIC LAND POLICY, *supra* note 60, at 16. The authors of PUBLIC LAND POLICY analyze this period of uncertainty between annexation and the Organic Act and offer four reasons for the mistaken assumption of the Hawaiian officials: (a) the confusion over the Joint Resolution's provision regarding municipal legislation; (b) in appointing former Republic President Dole as temporary governor, President McKinley did not address the question of power over the public lands; (c) responses to Governor Dole's inquiries regarding his power to issue land patents and deeds under Hawaiian laws consisted of ambiguous references back to the uninstructive Joint Resolution; and (d) American officials in Hawaii apparently were under the same impression as the Hawaiian government that management power rested in the latter. *Id.* at 15-19. *See* H.R. REP. No. 305, *supra* note 89, at 4-5 in which the

the Hawaiian government continued to hold title to and administrative control over the public domain, Hawaiian authorities continued to sell and lease the lands contained therein under 1895 Land Act and 1897 Civil Code procedures until September 28, 1899. On that date, President McKinley issued an executive order immediately suspending Hawaiian public land transactions.[95] An opinion by the United States Attorney General maintained that the Joint Resolution had stripped the Republic of its title and interest in the public domain, and that Congress' failure to legislate immediately did not reinvest Hawaii's government with its former power of disposition.[96] The underlying basis of that order, however, was a documented concern that unbridled alienation of the public domain would result in the loss of choice lands eyed for federal military purposes.[97] This concern led to a second official response from President McKinley that was to have important consequences for the islands—the "setting aside" of certain large parcels of public land on Oahu for military use.[98]

Hawaii's Organic Act of 1900,[99] a lengthy document establishing Hawaii's territorial government, confirmed the cession of public lands effected by the Joint Resolution and provided the promised "special laws" for their administration. In empowering the territorial government to administer the lands, however, the Act also clarified Congress' intent to treat Hawaii's lands as an adjunct to rather than an integral part of the federal public domain. Section 91 of the Act, one of two sections directly

Committee on Territories describes the visible consequences of this confusion and of the lack of legislative power in the Hawaiian government generally.

[95] PUBLIC LAND POLICY, *supra* note 60, at 19. The order had been prompted by a formal opinion by United States Attorney General Griggs, 22 Op. Att'y Gen. 574 (1899) which had been prepared in response to plans by the Hawaiian government to sell a 50-acre parcel of land on the island of Hawaii at a public auction. Griggs declared that disposal of the public domain was exclusively within Congress' power. He read the Joint Resolution's provision for the enactment of special land legislation as not extending life to Hawaii's previous land laws, but merely impressing on the United States' title a "special trust" which restricted the use to which the revenues could be put. *See also* Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523 (1827) (upon ceasing of sovereignty in former government, that goverment's laws based on public policy and regarding disposition of the public domain also cease to be in effect), *cited in* 22 Op. Att'y Gen. 574 (1899).

[96] 22 Op. Att'y Gen. 574 (1899).

[97] *See* Letters from Commander of United States Army in Hawaii (Feb. 7, 1899) and from United States Special Agent Sewall (Feb. 14, 1899) to the Secretary of State, in Archives of the United States, Army Records 213729, quoted in part and discussed in PUBLIC LAND POLICY, *supra* note 60, at 17-18.

[98] Five executive orders were issued between 1898 and 1900 setting aside land for use by the federal government. One of these, issued on July 20, 1899, reserved more than 15,000 acres of public land on Oahu including what eventually became Fort Shafter and Schofield Barracks. *See* REV. LAWS HAWAII 1915, at 20-22. Approximately 287,000 acres were set aside during this period. T. CREIGHTON, *supra* note 14, at 204. For a list of executive orders setting aside public lands between annexation and 1955, *see* Chronological Note of Federal Acts Affecting Hawaii, REV. LAWS HAWAII 1955, at 9-12.

[99] Organic Act, *supra* note 3.

pertaining to ceded lands,[100] provided in pertinent part:

> [t]hat, except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation . . . shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii.[101]

"Illegal" sales made by the Hawaiian government during the interim were ratified,[102] and the ban on territorial disposals of public lands lifted.[103] A proviso additionally required that revenues from lands set aside for federal use but which were instead leased, rented, or granted on revocable permit to private parties be placed in the territory's treasury for enumerated public purposes.[104] Most significantly, however, the Organic Act solidified the special trust status of the islands' ceded public lands by providing that the proceeds from the territory's sale, lease or other disposal of them be retained by the territory[105] and applied for uses beneficial to the islands' inhabitants "as are consistent with the joint resolution of annexation, approved July 7, 1898."[106] Finally, the Act stipulated that Hawaii's laws "relating to public lands, the settlement of boundaries, and the issuance of patents on land commission awards" would continue in effect until superseded by Congress.[107]

[100] The other section, § 73, contained the "special laws" which detailed the procedures for the public lands' administration and disposition.

[101] Organic Act, *supra* note 3, § 91. The section also authorized the President to transfer to the territory title to those public lands being used "for the purposes of water, sewer, electric, and other public works, penal, charitable, scientific, and educational institutions, cemeteries, hospitals, parks, highways, wharves, landings, harbor improvements, public buildings, or other public purposes."

[102] The Organic Act, *supra* note 3, § 73(4)(c) states:

> Subject to the approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian government in conformity with the laws of Hawaii, between the 7th day of July 1898, and the 28th day of September, 1899, are hereby ratified and confirmed.

[103] *Id.*

[104] Organic Act, *supra* note 3. *See* note 101 *supra* for the enumerated public purposes.

[105] Two separate funds were established for receipt of revenues and proceeds generated by the public lands in the territory's possession. A "land-reserve" fund held monies generated by leases and was applied to "public ways, schoolhouses, etc." SUBCOMMITTEE ON PACIFIC ISLANDS AND PORTO RICO, *supra* note 70. A second fund, the "land-sales" fund, constituted a sinking fund administered by the treasury of the territory.

[106] Organic Act, *supra* note 3, § 73(4)(e). *See also* 1 REV. LAWS HAWAII 1955, at 566, § 99-20 which reaffirms the force of this section.

[107] A number of amendments to §§ 73 and 91 additionally allowed the President to restore the ceded status to lands previously set aside, authorized the President to transfer title to the territory for a number of public purposes, and authorized the territory to transfer

The territorial government had in effect become a conduit of Congress.[108] For all practical purposes the ceded lands had not changed hands. Building on Hawaii's existing land administration scheme,[109] Congress prescribed several significant changes in the Organic Act to insure widespread use of public lands for settlement and homesteading.[110] Otherwise, the territory was given direct control over the public lands and was authorized to dispose of them as a governmental entity where the federal government could not do so directly.[111] The federal government continued to hold absolute title to the public domain, but did so only "in trust" for the islands' people.

As used by the United States Attorney General in defining the relationship established between the United States and Hawaii with respect to its ceded lands,[112] "in trust" referred to the fact that the Organic Act had limited the uses of both the lands and their revenues to those beneficial to the islands' inhabitants and not to the nation as a whole.[113] In short, the federal government was holding the ceded domain in trust for the future state of Hawaii,[114] just as it had held entire territories (although

title to any city or county. PUBLIC LAND POLICY, *supra* note 60, at 65. *See* Act of May 27, 1910, ch. 258, 36 Stat. 444 (amending Organic Act, *supra* note 3, at § 73) and 36 Stat. 447 (amending Organic Act, *supra* note 3, at § 91); Act of Jan. 31, 1922, ch. 42, 42 Stat. 360. *See also* United States v. Marks, 187 F.2d 724 (9th Cir. 1951) (leased public lands subject to taking under § 91 for national as well as for territorial uses); United States v. Chun Chin, 150 F.2d 1016, 1017 (9th Cir. 1945); 39 Op. Att'y Gen. 460 (1940) (President's authority to set aside land for military purposes was recognized by Congress by Act of Jan. 31, 1922, ch. 42, 42 Stat. 360, which allowed transfers for other public purposes).

[108] *See* National Bank v. Yankton, 101 U.S. 129, 133 (1879) (cession of absolute sovereignty at annexation puts the new territory into a relationship with the United States government analogous to that of a county to a state, and Congress may legislate for it as a state for its municipalities); United States v. Marks, 187 F.2d 724 (9th Cir. 1951) (territory has quasi-trustee relationship toward paramount owner of the public lands, though often their interests are indistinguishable); Alesna v. Rice, 69 F. Supp. 897 (D. Hawaii 1947), *injunction dissolved*, 74 F. Supp. 865, *cert. denied*, 338 U.S. 814 (1949) (Congress gave Hawaii, under its Organic Act, a form of organization more like that of a state than it had previously given to any like area, gave the local government broad domestic powers, and separated the local government from the operation within the territory of a federal government); County of Oahu v. Whitney, 17 Hawaii 174, 180-81 (1905).

[109] Congress adopted Hawaii's homesteading laws by reference, *see* Organic Act, *supra* note 3, at § 73(4)(C), and made certain changes which are discussed in PUBLIC LAND POLICY, *supra* note 60, at 21-25. *See Hearings Before the Senate Subcommittee on Territories & Insular Affairs*, 83d Cong., 1st Sess. 21 (1953) (remarks of Nils Tavares).

[110] Lease terms and restrictions and conditions were severely restricted in an apparent attempt to curb the accumulation of choice lands in the hands of plantation owners. *See* PUBLIC LAND POLICY, *supra* note 60; J. HOBBS, *supra* note 2, at 119-22.

[111] S. REP. No. 675, 88th Cong., 1st Sess. 1 (1963).

[112] 22 Op. Att'y Gen. 574 (1899); 22 Op. Att'y Gen. 627 (1899).

[113] *See* note 95 *supra*.

[114] This view is strengthened by the fact that Hawaii was annexed as an incorporated territory, Hawaii v. Mankichi, 190 U.S. 197, 211, 220 (1902); Downes v. Bidwell, 182 U.S. 244 (1900), which has generally been interpreted as putting a territory on the statehood track or as a declaration of intent to make the incorporated territory a state. *See* J. MATTHEWS, THE

not unappropriated public lands) on the continent for hypothetical future states.[115] This trust relationship, therefore, is not to be confused with that arising from the established common law public trust doctrine,[116] which recognizes that certain types of property owned by a government in its sovereign capacity are held in trust for the public's benefit.[117] The trust may be analogized to that by which the United States was ward of title to certain lands originally occupied by Indians,[118] although circumstances

AMERICAN CONSTITUTIONAL SYSTEM 338 (2d ed. 1940); *Hearings on Territories and Insular Affairs, supra* note 111, at 102. As an incorporated territory, a government could not "disincorporate" itself from the Union, nor could the national government unilaterally separate the territory. J. MATTHEWS, *supra*.

[115] *See* note 50 *supra;* Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845) (which describes the United States' temporary holding of title in terms of a trust).

[116] *See generally* Olson, *The Public Trust Doctrine: Procedural and Substantive Limitations on the Government Reallocation of Natural Resources in Michigan,* 1975 DET. C.L. REV. 161 (1975); *Natural Resource Law, supra* note 45; Note, *Proprietary Duties of the Federal Government Under the Public Land Trust,* 75 MICH. L. REV. 586 (1977) [hereinafter cited as *Proprietary Duties*]. The public trust doctrine generally protects the right of the public to natural resources or lands, including access and use of the property, and promotion of environmental and recreational objectives. *Proprietary Duties, supra,* at 598. *See also* County of Hawaii v. Sotomura, 55 Hawaii 176, 517 P.2d 57 (1973).

[117] Light v. United States, 220 U.S. 524 (1911); *Proprietary Duties, supra* note 118, at 598. Historically the doctrine has been applied to navigable waters and submerged lands up to the high water mark, *Natural Resource Law, supra* note 50 at 556; but the doctrine has been extended to also protect parklands, Stephenson v. County of Monroe, 43 A.D.2d 897, 351 N.Y.S.2d 232 (1974) and wildlife, Geer v. Connecticut, 161 U.S. 519 (1896).

[118] As the acquiring sovereign of lands originally occupied by Indians, the United States generally recognized the Indian's right of use and occupancy although fee remained in the United States. R. JONES, *supra* note 14, at 2. The United States additionally has often assumed the trustee role with respect to lands originally occupied by Indian tribes which the Indians ceded by treaty. In United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498 (1913), for example, the Court recognized the right of the Mille Lac Chippewas to damages for the United States' wrongful disposal of lands held in trust. The lands had been disposed of under the general federal public land laws, in violation of the trust which required deposit of the proceeds from their sale in the United States treasury to the credit of the tribe. The Court in Ash Sheep Co. v. United States, 252 U.S. 159 (1920) and Minnesota v. Hitchcock, 185 U.S. 373 (1902) recognized the nature of the trust created by document in which the Indians ceded their claims as follows:

> Whether or not the government became trustee for the Indians or acquired an unrestricted title by the cession of their lands depends in each case upon the terms of the agreement or treaty by which the cession was made . . . . It was obvious that the relation thus established by the act between the government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the cestui que trust.

Id. at 164.

> The cession was not to the United States absolutely but in trust . . . . The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the treasury of the United States to the credit of the Indians.

Id. at 394. As in the case of Hawaii's ceded lands, the lands affected by these treaties thus remained outside the federal public domain in that they were not subject to administration or disposition under the general federal public land laws and policies. *See* Ash Sheep Co. v. United States, 252 U.S. 159 (1920).

surrounding acquisition of those Indian lands differ from those surrounding Hawaii's annexation.[119] Finally, the trust relationship here must be distinguished from that existing between the federal government and those "common lands" acquired from foreign powers or other states before new states succeeded to their title.[120] What was held in trust under the Organic Act was not title to common lands, but title to unappropriated public lands, the very type of property to which the United States normally retained title whenever new states were formed. Moreover, "in trust" here refers to the ability of the islands' inhabitants to make immediate use of the land and proceeds, and not merely prospectively to the vesting of title in the new state at the time of admission.

Congress thus did not treat Hawaii's ceded lands as part of the federal public domain. While title was in the United States, administration of the ceded lands was governed by a separate body of law enacted to accommodate Hawaii's specific land history and needs. Also, the sole beneficiaries of any income realized therefrom were the people of Hawaii. In fact, the legislative history of an amendment to Hawaii's 1959 Admission Act would indicate at least in retrospect a congressional view that Hawaii had retained a residual interest in its ceded domain.[121] Whether Congress in 1963 was accurate in its belief that the federal government had not received absolute title at annexation is not important here. What is significant is the special treatment accorded the ceded lands because it ultimately determined the relationship between the Hawaiian government and those lands upon statehood. When Hawaii entered the Union, it would become trustee of its "returned" ceded domain and specifically accountable to the federal government in the performance of its unique trust duties.

[119] Possessory rights of legal force in the Indians based on aboriginal occupancy have been subject entirely to their recognition by the sovereign owner of the land—the United States government. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288-91 (1955) (in dictum). The United States became sovereign of whole sections of territory by transactions with foreign powers or through cession of claims by states, *see notes* 18-20 *supra.* Claims of native peoples for reparations have thus derived from the fact of their prior occupancy and the subsequent claim of legal title by the acquiring (or conquering) sovereign without compensation. *See generally* R. JONES, *supra* note 14; Levy, *supra* note 1, at 848; D. BROWN, BURY MY HEART AT WOUNDED KNEE (1970). Both Levy and Jones argue in favor of reparations for the native Hawaiians, based on the fact that Hawaii's lands were taken without compensation and without consent of the indigenous population. Jones concedes, however, that the Hawaiians' claim is distinguishable from the other native peoples' (e.g., the Indians and the Alaskan native peoples) in that the Hawaiian people were able to own land in fee prior to annexation. *Supra* at 32-33. These rights were left untouched by § 73 of Hawaii's Organic Act, which provided in subsection (4)(c) that the land laws regarding the recognition of title in public land (thus implicitly existing title itself) would remain intact.

[120] *See* 4 Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); Engdahl, *supra* note 22, at 292-94.

[121] *See* note 149 *infra.*

III. The Current Status of Hawaii's Ceded Lands

The federal government's role of trustee of Hawaii's ceded public domain ended for the most part in 1959—the year of Hawaii's admission to the Union. At that time, legal title to most of the ceded lands passed to Hawaii and the new state was given the responsibility of holding the conveyed ceded lands in trust for the benefit of the islands' inhabitants. The Admission Act of 1959[122] thus not only marks a pivotal point in the lands' history of ownership, but also stands as the document embodying the current status of title to the ceded domain and the state's responsibilities as successor trustee. The following subsections describe the Admission Act's provisions dealing with the lands and focus specifically on procedures for the conveyance of ceded lands remaining in federal ownership. The final section will deal with a major and perhaps the most controversial aspect of the state's role in administering the conveyed ceded lands—the public trust. These conveyance and public trust provisions of the Act—repositories of the current federal and state responsibilities towards the ceded domain, respectively—have given rise to several legal and administrative problems impeding proper administration of the lands. Resolution of these problems, as well as the formulation of any new policy regarding the lands and their use, must be based on a reading of the Admission Act which takes into account the special history of Hawaii's ceded domain.

A. *The Admission Act of 1959*

At least seventeen attempts had been made by Hawaii's territorial legislature since 1903 to secure Hawaii's admission to the Union,[123] making Hawaii's case the longest considered and most thoroughly studied in the history of statehood proposals.[124] The provisions of the 1959 Act covering the "return" of the originally ceded public lands to the new state[125] thus reflected a mixture of the public domain's history in federal hands, several decades of tabled statehood acts, and a considerable amount of compromise. They also marked a clear departure from the established federal practice of admitting new states without giving them title to unappropriated public lands within their boundaries.[126] These provisions require

[122] Admission Act, *supra* note 6.

[123] 105 Cong. Rec. 3858 (1959). Since 1920, approximately 66 bills were introduced in Congress seeking the same end, and over 22 congressional investigations on the question of admission were conducted from 1935. *See* Appendix B, H.R. Rep. No. 32, 86th Cong., 1st Sess. 68-69 (1959). *See also* Appendix C, for a list of the 34 printed volumes of House and Senate hearings and reports on the subject of statehood for Hawaii from 1933.

[124] S. Rep. No. 80, 86th Cong., 1st Sess. 5 (1959).

[125] *See* Admission Act, *supra* note 6, §§ 5 and 6.

[126] *See* text accompanying notes 48-52 *supra*. The Admission Act's legislative history in

description at this juncture in order to delineate the federal government's duty to "return" ceded lands and the state's responsibilities in administering them.

The earliest form of the 1959 Admission Act receiving serious congressional consideration appeared in 1947.[127] Its terms even then provided for returning ceded lands to the state, although they required Congress to retain title for five years after admission before it would revert to the state.[128] Some remainders of the federal practice of making land grants to newly-admitted states[129] were present: Hawaii was allowed to choose 180,000 acres of public land in lieu of "any and all grants provided for new states by provision of law other than this Act."[130] Congress' intent to perpetuate the special status of the ceded domain, however, was clear. Not only was it assumed most of the unreserved ceded domain would ultimately be returned to Hawaii,[131] but under the Act, the public lands chosen by Hawaii at admission would have been held as a public trust, together with their proceeds and income, for the benefit of Hawaii's people.[132]

fact reveals a good amount of dispute within Congress and the federal agencies over whether Hawaii should be allowed to become such an exception. The Department of Interior vigorously opposed Hawaii's entrance on superior footing even in 1947 when the Admission Act did not provide for any outright conveyances of the entire ceded domain not previously set aside (except for the 180,000 acre grant). *See* Letter from the Department of Interior to the Committee on Public Lands (March 5, 1947), *reprinted in* H.R. Rep. No. 194, 80th Cong., 1st Sess. 14-17 (1947). The Interior Department felt that the federal government should retain and administer the public domain in Hawaii as it had on the continent, making land grants for schools and other public purposes upon Hawaii's admission, but retaining general administrative power over both the lands and their revenues. *Id.* at 16. Similarly, in 1953, the prior federal practice of admitting states by requiring a relinquishing of their title and claims to the unappropriated public domain, and promising 5% of their proceeds to the state was noted, along with the fact that Hawaii would become the first exception to this practice. *Hearings on Territories & Insular Affairs, supra* note 109, at 731. Again the feeling was expressed that Hawaii should be admitted on equal footing and subject to federal public land policies and administration. *Hearings on Territories & Insular Affairs, supra*, at 732-33 (remarks of Senator Malone).

[127] H.R. 49, 80th Cong., 1st Sess. (1947).

[128] During this five-year period, Congress was to decide on the procedure for their disposition after the Senate Committee on Public Lands and the House of Representatives had jointly studied the situation. If no disposition was made, title would automatically vest in Hawaii except to those lands reserved by the federal government for specific federal use. *Id.* § 4(a). According to the chairman of Hawaii's Statehood Commission, this five-year period was in effect a compromise to pacify those who might otherwise delay statehood if the public domain was granted outright to the new state. *Hearings on Territories & Insular Affairs supra* note 109 (remarks of Nils Tavares).

[129] *See* note 49 *supra*.

[130] H.R. 49, *supra* note 127 at § 4(c). "Public lands" referred to those identified in § 73(3) of the Organic Act.

[131] *See* Letter to the Committee on Public Lands (March 5, 1947), *reprinted in* H.R. Rep. No. 194, 80th Cong., 1st Sess. 14-17 (1947); *Hearings on Territories & Insular Affairs, supra* note 109.

[132] The trust provision in House Bill number 49 is virtually identical to that which was

The final version of the Admission Act of 1959 contained even stronger expressions of an intent to return the ceded lands to Hawaii.[133] Section 5, with which this discussion is primarily concerned, first names the new state as successor in title to lands and properties then held by the territory.[134] It then declares that

> [e]xcept as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other property,[135] and to all lands defined as "available lands' by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of The State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union.[136]

Specifically excepted from this grant were ceded lands and those acquired in exchange for ceded lands[137] which were set aside[138] as of the date of admission for federal use.[139] By implication, also excluded were lands acquired by the federal government after annexation.[140] Title to ceded lands that the federal government controlled by permit, lease or written or verbal permission was retained with the possibility of its vesting in the state if not set aside for federal use within five years.[141]

The ceded lands set aside by the federal government upon admission,

adopted as § 5(f) of the 1959 Admission Act, down to the very wording of the five enumerated trust purposes. *See* H.R. 49, *supra* note 129, at § 4(d). *See also* H.R. 2535, 84th Cong., 1st Sess. § 103(C) *reprinted in* H.R. REP. No. 88, 84th Cong., 1st Sess., at 24-25 (1955) (identical trust provision except that "native" Hawaiians shows here as "indigenous" Hawaiians).

[133] The 180,000 acre grant was dropped as a term of the Act in 1955 when the grant of all except set aside or controlled ceded land was added. *See* H.R. 2535, *supra* note 132.

[134] Admission Act, *supra* note 6, § 5(a).

[135] These included only those lands that had been ceded under the Joint Resolution of Annexation or those acquired in exchange for ceded lands. *See* Admission Act, *supra* note 6, § 5(g). Those lands acquired after annexation, whether by condemnation, purchase, donation, escheat, or otherwise, together with those lands set aside and retained by the United States or controlled by the United States at admission and not returned within five years are subject to disposal under the Federal Property & Administrative Services Act of 1949, 40 U.S.C. §§ 471-544. The Act allows for the free return of public lands to governmental entities when declared surplus to federal needs and when the entity can first demonstrate a planned permissible health, educational, or airport use proposed for the land. *See* 40 U.S.C. § 484(k)(1) (amended 1976). It also authorizes the grant of surplus land at 50% estimated market value for recreational and park purposes, and the return of surplus land at 100% market value for other purposes at public auction.

[136] Admission Act, *supra* note 6, § 5(b).

[137] Admission Act, *supra* note 6, § 5(g).

[138] The "setting aside" of lands for federal purposes was originally authorized by the Joint Resolution of Annexation and implemented by § 91 of the Organic Act. 24 Op. Att'y Gen. 600 (1903). It has generally been understood that the term in the Organic Act referred to ceded lands taken for the uses and purposes of the United States. *See* United States v. Marks, 187 F.2d 724, 730 (9th Cir. 1951); H.R. REP. No. 831, 77th Cong., 1st Sess. 1-2 (1941); S. REP. No. 576, 77th Cong., 1st Sess. 1-2 (1941). *See also* HAWAII CONST. art. XVI, § 6 (recognizing vesting of title in federal government to lands set aside immediately prior to admission).

[139] Admission Act, *supra* note 6, § 5(c). 287,078.44 acres of a total 4,105,000 acres comprising the state's area had been so set aside at the time of statehood by congressional act, executive order, or presidential or gubernatorial proclamation. PUBLIC LAND POLICY, *supra* note 60, at 68.

[140] The federal government acquired by purchase, condemnation, gift, or donation approximately 28,000 acres of land after annexation, PUBLIC LAND POLICY, *supra* note 60, at 68, the most important of which is presently a portion of Fort DeRussy located at the west end of Waikiki. Section 5 did not explicitly deal with the status of these lands, also known as "fee lands," upon admission. Moreover, the separate use of "public land and other properties" and "land and other properties" within the same section caused some to believe that a different meaning was intended the latter as distinct from the former, despite the identical definition given them in Admission Act, *supra* note 6, § 5(g). The state's desire to have after-acquired lands included in the reporting-free conveyance requirement of § 5(e) originally centered on a certain 203 acres of land acquired by condemnation which it desired for public housing units. The need for clarification of the status of these lands led to the issuance of two conflicting state and federal attorney general opinions, Legal Memorandum of the Attorney General of the State of Hawaii, October 18, 1960, *reprinted as* Exhibit J to Complaint, Hawaii v. Gordon, 373 U.S. 57 (1973) (*per curiam*) and 42 Op. Att'y Gen. of the United States No. 4 (1961), respectively, the latter denying that Admission Act, *supra* note 6, § 5(e) extended to anything other than ceded properties (and lands acquired in exchange therefor). The state followed with an original action in the United States Supreme Court, Hawaii v. Gordon, 373 U.S. 57 (1963) (*per curiam*) which was dismissed on sovereign immunity grounds. This suit was originally filed as State v. Bell, Bell then being the Budget Director. At the time of oral argument, however, Kermit Gordon replaced David E. Bell as Budget Director, and as a result, became the named defendant. *See* text accompanying notes 173-81 *infra*. Although state political leaders refused to allow the issue to rest, later attempts to modify the Admission Act, *supra* note 6, § 5(e) through direct legislation in Congress introduced by Senator Hiram Fong and strategies designed to gain the fee lands in other ways either failed or failed to materialize. The account of the state's internal battle over the fee lands given in PUBLIC LAND POLICY, *supra* note 60, at 84-91 indicates that some of this failure was attributable to differences between the Republican and Democratic parties on the question of proper strategy to be employed for obtaining the return of public lands.

[141] Admission Act, *supra* note 6, § 5(d). These lands amounted to 177,412.74 acres. PUBLIC LAND POLICY, *supra* note 60, at 68. The authors note on page 67 that "[t]he provisional character of the title to this land is extremely important since most of this land eventually went back to the federal government." However, the United States Attorney General, 42 Op. Att'y Gen. No. 4 (1961), at 56-57 denied that conditional title was held in the State of Hawaii or defeasible title in the United States.

The apparent intent of this provision was to allow the military sufficient time within which to safeguard its interests in Hawaii and to assess its need for more land. Letter from Navy Dep't to the Committee on Interior & Insular Affairs (Jan. 26, 1959) *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 1372-73. The Department of Defense, in 1963, proposed a three-year extension to the five-year period given Congress and the President within which to act. The department felt such an extension necessary due to legal problems impeding the issuance of executive orders setting aside lands for defense purposes. Letter from General Counsel of the Dep't of Defense to Kermit Gordon, Director, Bureau of the Budget (Aug. 7, 1963) (pertaining to the proposed Pub. L. No. 88-233). Congress did not adopt this proposal. *See* Pub. L. No. 88-233, *supra* note 11 (*amending* the Admission Act, *supra* note 6).

excluding after-acquired lands regardless of whether they were set aside, were subject to disposal under section 5(e) of the Admission Act.[142] Section 5(e) as originally drafted required that within five years of admission each federal agency controlling set aside ceded land in Hawaii report to the President the "facts regarding its continued need for such land or property."[143] If the President then determined that the United States did not further need the land or property, it was to be conveyed to the State of Hawaii. Guidelines governing the contents of the agencies' reports and the procedures for reporting were issued by the Bureau of the Budget.[144]

Section 5(e), however, was subsequently amended by Congress on December 23, 1963.[145] The amendment essentially abolished the five-year deadline, extending without limitation the possibility of the federal government's relinquishing title, without cost to the state, to section 5(c) and (d) ceded lands retained by the federal government.[146] Dispensing with all reporting or assessment requirements, the brief 1963 Act provided for the

[142] PUBLIC LAND POLICY, *supra* note 60, at 70-71 contains a list of the parcels released to the state under § 5(e) between 1960 and 1964, together with the date of their return and acreage. According to its estimates, the federal government had returned approximately 595.4 acres of land.

[143] Admission Act, *supra* note 6, § 5(e).

[144] U.S. BUREAU OF THE BUDGET, BUDGET CIRCULAR No. A-52 (Nov. 14, 1960) [hereinafter BUDGET CIRCULAR] By Exec. Order No. 10530, 19 Fed. Reg. 2709 (1954) and subsequent amendments, *see* Exec. Order No. 10889, 25 Fed. Reg. 9633 (1960) and Exec. Order No. 10960, 26 Fed. Reg. 7823 (1961), the President generally delegated his final authority in matters concerning § 5(e) disposals to the Director of the Bureau of the Budget. This delegation included that of authority vested in the President by § 40 of the Hawaii Omnibus Act of July 12, 1960, Pub. L. No. 86-624, 74 Stat. 422, to prescribe reporting procedures, and also final authority to determine whether lands were no longer needed by the United States.

The Bureau's policy guidelines provided generally that land would not retained when:

a. It is not being used by the controlling agency and there are no firm plans for future use;

b. The costs of operation and maintenance are substantially higher than for other suitable properties of equal or less value which are, or can be made, available to the Federal Government without direct cost;

c. It is being leased to private individuals or enterprises and there are no firm plans for future Federal use; or

d. It is being used by the Government to produce goods or services which are available from private enterprise, except when it is demonstrated clearly in each instance that it is not in the public interest to obtain such requirements from private enterprise.

BUDGET CIRCULAR, *supra*. The federal government was to give priority to requests for specific parcels of land made by the Governor of Hawaii. Also, the state was allowed to offer sites for the relocation of federal facilities if the land upon which they were originally situated was desired by the state. These guidelines have continued in force since their issuance. Interview with James Detor, Land Management Division, State of Hawaii Dep't of Land & Natural Resources (March 27, 1980).

[145] Pub. L. No. 88-233, *supra* note 11. *See* Appendix.

[146] Pub. L. No. 88-233, *supra* note 11, also applied to Sand Island and the "reefs in connection therewith." For a full illustration of the lands affected by the change in § 5(e), see PUBLIC LAND POLICY, *supra* note 60, at 73-78.

conveyance of lands to Hawaii "[w]henever . . . [they] are determined to be surplus property by the Administrator of General Services with the concurrence of the head of the department or agency exercising administration or control over such lands."[147] The most important effect of the Act, and not coincidentally the intent of its drafters, was the rescue from extinction of Hawaii's "long-recognized residual interest in such lands."[148] Otherwise, at the end of the five-year period, title to lands not conveyed would vest absolutely in the federal government.[149]

[147] Pub. L. No. 88-233, *supra* note 11, at § (a)(i). Governor John A. Burns, responding to a draft of S. 2275, 88th Cong., 1st Sess. (1963) which eventually became Pub. L. No. 88-233, *supra*, expressed his concern over the lack of any such reporting provision in a letter to Mr. Harold W. Seidman, Bureau of the Budget, dated July 16, 1963. Therein he proposed the following amendment to § (a)(1):

> At every five-year interval from August 21, 1964, each Federal agency having control over any land or property that is retained by the United States pursuant to subsections (c) and (d) of Section 5 of the Hawaii Statehood Act (Public Law 86-3, 86th Congress) shall report to the Administrator the facts regarding its continued need for such land or property, and if the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii as hereinafter provided.

Congress did not accept his proposed change. In fact, the legislative history of the Senate bill is devoid of any stated concern for mandatory reporting procedures that would provide some measure of accountability to the General Service Administrator's discretionary task. S. REP. No. 675, 88th Cong., 1st Sess. (1963).

[148] S. REP. No. 675, *supra* note 147.

[149] Governor Burns apparently had acquiesced in the original five-year limitation of the Admission Act, *supra* note 6, § 5(e) when negotiating for statehood, reasoning that once statehood had been attained, Hawaii's congressional delegation could secure the needed changes. Interview with Hawaii Supreme Court Chief Justice William Richardson (Feb. 29, 1980). They were, of course, only partly successful.

The legislative history of Pub. L. No. 88-233, *supra* note 11, is replete with references to this Act as being grounded in the special status given the ceded domain by the federal government upon annexation. The Director of the Bureau of the Budget, for example, states in its communication to the President concerning Draft 1 of S. 2275 that:

> [a]bsent new legislation, the State of Hawaii will be denied those lands to which the territory was entitled during its 60 years of existence, and there will be a significant departure from the heretofore accepted concept of the special trust status of those lands.
>
> We believe such action is fully justified in keeping with the manner in which the lands and properties were acquired and the history of the special trust status in which they were held.

Letter from Director, Bureau of the Budget to the Honorable Lyndon B. Johnson (Oct. 18, 1963). S. REP. No. 675, *supra* note 147, itself states that:

> [i]f S. 2275 is not enacted, the above-described lands, which the Federal Government received by the voluntary cession and donation of the people of Hawaii and for which it paid no compensation, would be subject to disposal under the Federal property laws after August 21, 1964, when they became surplus. Under the terms of the statehood act, Hawaii would thus lose its *long-recognized residual interest* in such lands, and the 60-year practice of returning such lands to Hawaii when they are no longer needed would be terminated. Such a result would in effect be a "reverse land grant" that would be *highly inequitable in view of the history of the subject lands and the spirit and intent of the statehood act.* (emphasis supplied)

The final major subsection of section 5 spells out the state's role in the administration and disposition of lands conveyed to Hawaii under subsections (b) and (e). Perhaps the single most controversial provision of the Admission Act, section 5(f) requires the state to hold the lands conveyed, as well as the proceeds from their disposition and income they generate,

> as a public trust for the support of the public schools and other educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.[150]

Thus, up until 1980, the Department of Land and Natural Resources, the state agency charged with the administration of the public domain,[151] utilized two separate accounts as repositories for revenues derived from dispositions of ceded lands.[152] Such dispositions were made pursuant to the statutorily prescribed procedures applicable to dispositions of the public domain in general.[153]

Section 5 of the Admission Act thus transferred legal title to the ceded domain not appropriated for federal use to Hawaii. The current status of

[150] Admission Act, *supra* note 6, § 5(f). *See generally* V. BLOEDE, PUBLIC LANDS AS A PUBLIC TRUST (1962); M. UYEHARA, THE HAWAII CEDED LAND TRUSTS: THEIR USE AND MISUSE (1977); FINANCIAL AUDIT OF THE DEPARTMENT OF LAND & NATURAL RESOURCES with the assistance of Office of the Legislative Auditor, State of Hawaii, Peat, Marwick, Mitchell & Co., (No. 79-1, January 1979) [hereinafter cited as AUDIT]. HAWAII CONST. art. XVI, § 7 requires compliance with the public trust terms of § 5(f).

[151] HAWAII REV. STAT. § 171-3 (1976). *See also* HAWAII REV. STAT. § 26-13 (describing the department under the heading of executive departments, defining its composition, functions and authority).

[152] HAWAII REV. STAT. § 171-18, passed in 1962 as implementing legislation for § 5 of the Admission Act, established the public land trust (fund) for the receipt of funds derived from the sale, lease or other disposition of ceded-reconveyed or §§ 5(c) and 5(d) reconveyed land. The section also repeats the trust provision of § 5(f). HAWAII REV. STAT. § 171-19 designates a special land and development fund as recipient of proceeds from the disposition of "public lands," subject to the provisions of the Hawaiian Homes Commission Act of 1920, as amended (requiring 30% of receipts derived from leasing of ceded and non-ceded sugar cane lands and water licenses to be deposited in the Hawaiian Home loan fund, § 213), and § 5(f) of the Admission Act (all proceeds from ceded lands essentially to go to the public trust fund).

[153] Interview with James Detor, Land Management Division, State of Hawaii Dep't of Land & Natural Resources, in Honolulu (March 27, 1980). The laws concerning the administration of the state's general public domain, which includes fee lands and condemned lands of which the state is now owner (not as trustee), are contained in chapter 171 of the Hawaii Revised Statutes.

ceded land remaining in federal ownership, however, is unclear despite the relatively unambiguous language of section 5(e)'s amended conveyance provision. A literal reading of the provision may in fact produce a result inconsistent with Congress' intent and the lands' history of ownership in federal hands. Section 5(e), as amended, thus merits closer attention in establishing the current status of ceded lands, especially since the federal government has retained title to a considerable portion of the ceded domain.

B. Current Conveyance Procedures Under the Admission Act

Pursuant to section 5 of the Admission Act, the federal government in 1959 granted title to Hawaii to all but approximately 400,000 acres[154] of the originally 1,750,000 acres of ceded land.[155] Of the 400,000 acres, approximately 220,000 acres were administered as national parks,[156] 60,000 acres were located in military installations,[157] and the remaining 120,000 acres or so, held under permission, permit or license by the federal government under section 5(d) of the Act, were controlled exclusively by the Defense Department.[158] Technically, the Admission Act terminated the federal government's trustee role vis-a-vis the public domain ceded by Hawaii. The federal government had transferred the trust corpus, and the only lands remaining under its control and ownership were those it set aside or retained for its use as sovereign as specifically authorized by the Joint Resolution, the Organic Act, the Admission Act and the Hawaii State Constitution.[159] Thus it might be concluded that section 5(e)'s conveyance procedure, as revised by Pub. L. No. 88-233, did not impose any

[154] PUBLIC LAND POLICY, *supra* note 60, at 105 (after subtracting the 28,234.73 acres of after-acquired land from the total). The rounded figure represents 287,078 acres of ceded lands set aside by the federal or territorial governments for federal use, and some 117,412 acres of ceded lands controlled by the federal government at statehood, title to which had been retained in the United States.

[155] *See* J. HOBBS, *supra* note 2 and accompanying text.

[156] These lands were set aside by Act of Sept. 13, 1960, Pub. L. No. 86-774, 74 Stat. 881 (Haleakala National Park); Act of July 26, 1955, Pub. L. No. 177, 376 (City of Refuge National Historical Park); Act of Aug. 1, 1916, Pub. L. No. 171, 39 Stat. 432 (Hawaii National Park).

[157] PUBLIC LAND POLICY, *supra* note 60, at 68.

[158] *Id.* at 72-75. The authors, at page 75, note the tenacity of the Defense Department in its intention to retain control of all of this acreage, whether by setting the lands aside before the deadline or through 65-year leases to the federal government. 87,236 acres of the total 120,000 acres were indeed set aside, and became susceptible to the provisions of the Pub. L. No. 88-233, *supra* note 11, requiring conveyance at no cost to the state when declared surplus. For a complete inventory of lands held by the federal government upon Hawaii's admission, *see* Office of the Commissioner of Public Lands, *Inventory of Public Lands Set Aside to the United States by Acts of Congress, Executive Orders and Proclamations* (updated).

[159] *See* note 138 *supra*.

extra conditions either on the federal government's retained ceded landholdings or on their return.

The Admission Act, its legislative history, and history itself, however, dictate otherwise. While the scope of section 5(e)'s reporting requirement was contested by the state and federal governments in the early 1960's[160] (and never resolved), it was generally accepted through acquiescence by both that section 5(e) extended exclusively to ceded lands or lands received in exchange therefor. The very exclusion of after-acquired or fee lands from the reporting requirement and their exclusion from section 5(f)'s trust provision reflects Congress' historical view that the public lands ceded by Hawaii at annexation did not become a part of the federal public domain and instead "belonged" to the islands' people.[161] This view has more recently been articulated by Congress and United States Attorney General Robert Kennedy as Hawaii having had a "long-recognized residual interest"[162] in those lands, "and possibly even had acquired the legal title" upon annexation.[163] Hence the need to set aside lands for federal use arose, for if legal title to the ceded domain had vested in the United States, the act of setting aside lands would be redundant. Indeed, no such setting aside was necessary for after-acquired or fee lands:[164] legal title vested with no trust strings attached, and today these lands are subject to disposal as part of the federal public domain under the Federal Property and Administrative Services Act of 1949.[165] The greatest evidence of a continuing congressional recognition that the ceded domain ultimately belonged to the Hawaiian people, however, was the abolition of the five-year limitation on the return of surplus ceded lands originally contained in section 5(e).[166] The legislative history of Pub. L. No. 88-233 in fact contains clear expressions of an intent to prevent inequitable federal retention of lands that were ceded at no cost to the federal government and which had thus acquired a special trust status.[167]

In sum, the federal government continues to hold the remaining ceded lands within its ownership under the amended section 5 "in trust." It thus has an affirmative obligation to review federal needs for and to return unused lands, both in good faith and on an ongoing basis, to the state. The problem, however, is that Pub. L. No. 88-233 which provides for the return of surplus ceded land is not couched in those terms.[168] While the law requires the General Services Administrator [hereinafter

[160] *See* note 140 *supra.*

[161] *See* 42 Op. Att'y Gen. No. 4 at 46, 55 (1961); .S. REP. No. 675, *supra* note 147.

[162] S. REP. No. 675, *supra* note 147.

[163] 42 Op. Att'y Gen. No. 4 at 51 (1961).

[164] *Id.* The Attorney General observed that no instances of "setting aside" after-acquired property have ever been recorded.

[165] 40 U.S.C. §§ 471-544 (1949). *See* note 137 *supra.*

[166] Pub. L. 88-233, *supra* note 11.

[167] S. REP. No. 675, *supra* note 147.

[168] Pub. L. No. 88-233, *supra* note 11, at § (a)(i). *See* Appendix.

referred to as Administrator] to convey to the state title to ceded lands "whenever" they are declared surplus to federal needs, there is no express requirement that the Administrator review agency needs for lands within a certain time frame.[169] Also, there is no provision rendering the Administrator otherwise accountable in its decision-making.

These loopholes in the law have several important consequences for the State of Hawaii. First the absence of a time limitation on reporting and assessment means that the Administrator may effectively hold off state requests or conveyances indefinitely, as transfer of title must occur only when the lands are declared surplus. "When" is not limited, nor is there now any requirement that federal agencies assess and report their need for ceded land under their control. The declaration of surplus and subsequent conveyance of lands is thus wholly within the discretion of the Administrator.[170] Second, it may encourage federal agencies to use ceded lands no longer needed for purposes other than those for which they were originally set aside and thereby unduly delay the return of essentially surplus lands to the state. While it is standard federal procedure to grant any federal agency an opportunity to use general public domain land no longer needed by its former controlling agency before it is offered for sale,[171] this practice does not comport with Congress' intent with respect to the ceded domain—to reserve the lands and their proceeds exclusively for their sole beneficiaries, the Hawaiian people.

Finally, the non-mandatory nature of Pub. L. No. 88-233 makes it difficult for the State of Hawaii to hold the Administrator legally accountable for a perceived failure to perform its functions. While it is conceivable that the Administrator might be charged with an abuse of discretion in failing to declare unused lands surplus and conveying them, or with failing to act in good faith and with best efforts in accordance with the intent and purpose of the law, evidentiary problems would be insurmountable. Moreover, Hawaii's ability to sue the executive branch to compel administrative action regarding public lands has been severely limited by the decision of the United States Supreme Court in *Hawaii v. Gordon.*[172]

[169] *See* note 148 *supra.* By contrast, the Federal Property & Administrative Services Act of 1949, 40 U.S.C. §§ 471-544, which governs lands in the general federal public domain requires the maintenance of inventory controls, "continuous survey" of property for determination of possible excesses, and immediate reporting and transfer out of such excess property. 40 U.S.C. §§ 483(b)-483(c), *supra.*

[170] Dep't of Land & Natural Resources Land Management Division Head, James Detor, in an interview on March 27, 1980, represented that the Administrator and the federal agencies are guided in the determination of surplusage by the same criteria established by the Bureau of the Budget when § 5(e) (original unamended version) was in force. *See* note 144 *supra.* Like Public Law 88-233, however, the circular containing these guidelines did not prescribe a reporting deadline since such dealine was set out in the Admission Act, § 5(e).

[171] This is normal procedure under the Federal Property & Administrative Services Act of 1949, *supra* note 165, at § 483(b)-483(c); GENERAL SERVICES ADMINISTRATION, DISPOSAL OF SURPLUS REAL PROPERTY FOR PUBLIC AND PRIVATE USE 2 (April 1978).

[172] 373 U.S. 57 (1963). *See* note 140 *supra.*

Gordon was an original action filed by the state against the Director of the Bureau of the Budget,[173] precipitated by a disagreement between the state and federal government over the types of land affected by section 5(e)'s reporting and conveyance requirement. United States Attorney General Robert Kennedy had issued an opinion in 1961 stating that only ceded lands and those acquired in exchange therefor would be subject to section 5(e).[174] The Director of the Bureau of the Budget so advised federal agencies in its circular detailing the reporting requirements under section 5(e).[175] The opinion and advice conflicted with the state's position, reflected in an earlier state attorney general's opinion,[176] that section 5(e) applied additionally to after-acquired lands—those acquired through purchase, condemnation or gift. The state's complaint thus sought an order requiring the Bureau to withdraw its advice to the federal agencies, to determine whether a certain 203 acres of condemned land was needed by the United States, and if not, to convey the land to the state.[177] The Supreme Court, in a per curiam opinion, however, dismissed the suit on the basis of the sovereign immunity doctrine:

> We have concluded that this is a suit against the United States and, absent its consent, cannot be maintained by the State. The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.[178] [citations omitted][179] Here, the order requested would require the Director's official affirmative action,

[173] The Budget Director, under the unamended § 5(e), had been delegated the power by the President to receive and assess the agency reports and to determine whether unused lands were to be declared surplus and returned to the state. It also had the power to promulgate guidelines to guide it in its functions. *See* note 144 *supra*.

[174] 42 Op. Att'y Gen. No. 4 (1961), *see* note 140 *supra*.

[175] BUDGET CIRCULAR No. A-52, *supra* note 144.

[176] Legal Memorandum of the Attorney General of the State of Hawaii, October 18, 1960, *reprinted as* Exhibit J in Complaint, Hawaii v. Gordon, 373 U.S. 57 (1963) (per curiam).

[177] 373 U.S. 57, 58.

[178] The rationale behind the rule, articulated in Minnesota v. Hitchcock, 185 U.S. 373 (1901), is that

> [t]he officers named as defendants have no interest in the lands or the proceeds thereof . . . . If whether a suit is one against a State is to be determined, not by the fact of the party name as Defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the U.S. is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.

Id. at 387. *See generally* Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946); Cranston, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and the Parties Defendant*, 68 MICH. L. REV. 389 (1970); Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-lands Cases*, 68 MICH. L. REV. 867 (1970).

[179] The Court cited as support Dugan v. Rank, 372 U.S. 609 (1963); Malone v. Bowdoin, 369 U.S. 643 (1962); and Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949).

> affect the public administration of government agencies, and cause as well the disposition of property admittedly belonging to the United States. The complaint is therefore dismissed.[180]

Just as in *Oregon v. Hitchcock*,[181] cited by the Court as support for its dismissal of the complaint, the state here could not sue absent an act of Congress waiving immunity of the United States or consenting to suit. Following *Gordon*, Hawaii Senator Hiram Fong attempted to secure the United States' consent to suit by Hawaii in protection of its interest in the ceded lands.[182] This attempt consisted of a proposed additional section to Pub. L. No. 88-233 declaring such consent, but apparently the proposal was quashed before reaching the floor of the Senate due to party differences.[183]

While an examination of the intricacies of the sovereign immunity doctrine is outside the scope of this discussion, it may be concluded that *Bell* would pose a major obstacle to an original suit against the Administrator for the conveyance of specific ceded properties to Hawaii.[184] The state's

[180] Citing Oregon v. Hitchcock, 202 U.S. 60 (1906).

[181] *Id.*

[182] PUBLIC LAND POLICY, *supra* note 60, at 91.

[183] *Id.* Senate President Mansfield removed Fong's bill from the Senate consent calendar at the request of Daniel Inouye, the then junior senator from Hawaii, notwithstanding the Senate Judiciary Committee's unanimous support for the bill. "On this point the Honolulu Star Bulletin, Nov. 1, 1963, reported: '. . . The Executive Committee of the Oahu Republican County Committee characterized this as partisan politics at its ugliest.' " *Id.*

[184] The recent cases cited in *Gordon* dealing with the sovereign immunity doctrine in the context of judicial review of administrative action recognized an exception to the bar of sovereign immunity—where the case involved action which either exceeded the officer's statutory authority or was unconstitutional. *See supra* note 179. The facts of State v. Gordon, however, indicate that neither was involved.

The Administrative Procedure Act additionally would probably not afford the state standing to sue the federal government. *See* 5 U.S.C. §§ 701-706, Pub. L. No. 89-554, 80 Stat. 392 (1966). Section 701 of the Act provides that action of "each authority of the Government of the United States" is subject to judicial review except where a statute explicitly prohibits it or where "agency action is committed to agency discretion by law." The Court in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971) noted that the latter exception was to be narrowly construed, *citing* Berger, *Administrative Arbitrariness and Judicial Review*, 65 COL. L. REV. 55 (1965): "The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945)." 401 U.S. at 410. Statutory directives involving discretionary determinations by the Director of Transportation were held to be "law", thus giving plaintiffs standing to sue under the Act. Arguably, the state here would be able to claim that its suit is not barred by section 701 since there is no indication of a congressional intent to restrict access to judicial review since the General Services Administrator may be bound by "law", i.e., Pub. L. No. 88-233, § (a)(i). 401 U.S. at 410 (*citing* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) and Brownell v. We Shung, 352 U.S. 180 (1956); *see* Barlow v. Collins, 397 U.S. 159 (1970). The nature of the Administrator's discretion here, however, differs in extent from that possessed by the Transportation Department Director in *Citizens of Overton Park*. The Administrator's duty to convey lands declared surplus is not governed

only real alternative, other than direct appeal to the President, would lie in attempts by its congressional delegation to promote the return of desired ceded lands through legislation.[185]

This is not to say, however, that the federal government has in fact been negligent in performing its legal and historical obligations towards the ceded lands under its control. In 1970, President Richard Nixon issued an executive order[186] to each executive agency requiring a complete survey and assessment of need for all federally-owned lands within its control. The resulting Department of Defense's analysis of Hawaii lands under its control[187] included the identification of some nine thousand acres of ceded and non-ceded land which could eventually be released.[188] A fairly thorough update of long-range military property requirements in Hawaii [hereinafter referred to as MILPRO-HI],[189] made at the request

by any time restraints or guidelines in Pub. L. No. 88-233 itself (although arguably the circular could constitute the "law"). Moreover, it has been held that § 701 of the Act does not constitute a blanket waiver of sovereign immunity or consent to suit. *See* Sierra Club v. Hickel, 467 F.2d 1048 (6th Cir. 1972), *cert. denied*, 411 U.S. 928 (1973); Littell v. Morton, 445 F.2d 1207 (4th Cir. 1971); State v. Udall, 417 F.2d 1310 (9th Cir. 1956). *But see* Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961) (§ 701 waives sovereign immunity in actions to which it applies).

[185] Interview with Hawaii Supreme Court Chief Justice William Richardson, in Honolulu (Feb. 29, 1980). Not even this route has proven successful in putting forth the state's case. For example, Hawaii's congressional delegation did attempt to secure the return of some Bellows Air Force Station land, *see* text accompanying notes 196-201 *infra*, when informed that such land was not programmed for release in MILPRO-HI, the Defense Department's 1976 study of military needs for public lands in Hawaii. *See also* note 189 and accompanying text *infra*. Interview with Jack Kaguni, Dep't of Land & Natural Resources, in Honolulu (Apr. 2, 1980).

[186] Exec. Order No. 11,508, 35 Fed. Reg. 2855 (1970), which was superseded by Exec. Order No. 11,724, 38 Fed. Reg. 16837 (1973) and then Exec. Order No. 11,954, 42 Fed. Reg. 2297 (1977). However, these orders were not the result of any diligent attempt to facilitate land conveyances under Pub. Law No. 88-233. Rather, they were a part of President Nixon's scheme to leave a legacy of parks by requiring a 10% cutback in federal land holdings in the state. Interview with Jack Kaguni, *supra* note 185.

[187] The study, entitled Facilities Requirements Evaluation, State of Hawaii (Project FRESH) represents the first of such comprehensive assessments of military property needs in Hawaii. It considered projected force levels, availability of housing and other facilities, the opportunities for consolidating military facilities, and the feasibility of releasing unused real estate. *Cf.* U.S. DEP'T OF DEFENSE, QUESTIONABLE ASPECTS OF THE MILITARY'S STUDY OF LAND NEEDS IN HAWAII (1975) (questioning methodological inconsistencies in the arrival at statistics regarding land use and criticizing the study generally for failing to accurately project land use needs).

[188] *See* Appendix C, MILPRO-HI, *supra* note 185, quoting from Project FRESH. Approximately 4,3000 acres of land was ceded, and of that total only 1,385 acres were returned to the state between 1972 and 1979.

[189] MILPRO-HI is perhaps the single most complete inventory of federal ceded landholdings in Hawaii which is readily accessible to the general public. It can be obtained through the Legislative Reference Bureau at the State Capitol. Most of the retained ceded lands, excluding those administered as national parks, are controlled by the Department of Defense. Land statistics available from the BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS (1974) fail to distinguish between ceded and non-ceded lands, and the Department's own inventory exists as the only copy. *See* note 158 *supra*.

of the Deputy Assistant Secretary of Defense in 1976, recommended the release of twenty-seven parcels of land totalling 2,944 acres.[190] While concededly neither of these efforts was made pursuant to the federal government's section 5(e) responsibilities, and while the resulting net return of ceded land has been relatively small,[191] the significant fact remains that the Defense Department has had to justify its retention of ceded land twice within the past decade. This is essentially what Governor John Burns had sought by way of a reporting requirement for Pub. L. No. 88-233.[192] Moreover, State Department of Land and Natural Resources officials have commented favorably on the federal government's general willingness to cooperate in returning surplus lands, whether ceded or not, and whether or not requested to do so by the state.[193]

There are, however, a few exceptions which illustrate both the deficiency of section 5(e), as amended, and the need to read the federal government's obligation to return the lands in light of its prior relationship with them.[194] The most important of these exceptions in terms of location, size and use potential, is situated on the southeast coast of Oahu. Bellows Air Force Station consists of 1,495 acres of land, of which 1,457 acres, or roughly ninety-seven percent, is ceded.[195] Aside from Air Force transmitter facilities that are being considered for consolidation elsewhere,[196] Bellows is not used by the federal government except for infrequent and spacially-confined Marine Corps amphibious assault training.[197] Apart from the transmitter facilities, beach cottages, minor

[190] MILPRO-HI, *supra* note 185, at 5. All but approximately 700 acres of the lands, however, were classified as fee lands.

[191] *See* note 188 *supra*.

[192] *See* note 147 *supra*.

[193] Interview with James Detor and Jack Kaguni, Land Management Division of the Dep't of Land & Natural Resources, in Honolulu (March 27, 1980); Interview with Jack Kaguni, *supra* note 186.

[194] *Id.*

[195] MILPRO-HI, *supra* note 185, at E-66. Of the remaining land, 36 acres are owned in fee (having been condemned) and two acres are held under easement.

[196] A relocation of the facilities to consolidate them with those presently located at Lualualei, Oahu, has been determined technically feasible although costly at this time. Such a move would leave Bellows at the sole disposal of the Marine Corps. MILPRO-HI, *supra* note 186, at E-67.

[197] This training takes place roughly twice a year and over approximately 600 acres of Bellows land. Interview with Jack Bauer, General Services Administration Representative in Hawaii (March 10, 1980); *see* MILPRO-HI, *supra* note 185, at E-66 to 67. The Marine Corps bases its claim of need on the loss of a lease and permit to former training areas and restrictions on uses of others. MILPRO-HI, *supra*. Moreover, Bellows is adjudged as the only suitable Defense Department site in Hawaii suitable for amphibious training. While MILPRO-HI notes other military users of Bellows such as the 25th Infantry Division and the Hawaii Army National Guard, the study does not indicate the amount of time spent using the area, or the amount of acreage used. Indeed, MILPRO-Hi indicates that the Marine Corps is the dominant user.

facilities, a National Guard Armory and Marine Corps vehicle maintenance facilities, the bulk of Bellows' land remains unoccupied and unused throughout the year.

The State of Hawaii, on the other hand, has an active interest in the Waimanalo lands. Apart from the immense, unutilized acreage for which the state has already proposed uses, Bellows contains a two and a half mile strip of white sand beach to which the public presently has only limited access.[198] Yet, despite the planned transmitter relocation, the absence of long-range federal plans for use of the entire acreage,[199] and the unused status of a substantial portion of these lands, the federal government has categorically denied specific requests by the state for a grant or lease of even negligible parcels of Bellows land.[200] At the very least, any unnecessary retention of these ceded lands violates their special trust status and the spirit of the law under which they were originally received by the federal government.

The Admission Act's conveyance procedure must therefore be construed, like any other provision of the Act, in light of Congress' intent and the lands' special history of ownership. The state's probable inability to render the Administrator accountable for its action or inaction heightens the federal government's obligation to interpret its duty accordingly. The federal government's commitment to returning all surplus ceded lands is apparent not only from the legislative history of section 5 and Pub. L. No. 88-233, but also from the unique treatment given the lands when they were first transferred to the federal government. The one thread binding the annexation and admission acts in the treatment of ceded lands, in fact, has been the federal government's position that the benefits of the land and proceeds therefrom must inure solely to the people of Hawaii. Section 5(e), as amended, should thus be read as requiring a good faith effort to continually assess the need for ceded lands in federal ownership and also a prompt return of lands declared surplus.

[198] The beach is open to the public on weekends and holidays under permit issued by the federal government to the City and County of Honolulu.

[199] The only future use planned thus far is the present Marine Corps activity on an increased scale. MILPRO-HI, *supra* note 186, at E-66 to 67.

[200] Interview with Jack Kaguni, *supra* note 185, in which he also noted an attempt by the department two years ago to secure a ten-acre parcel of Bellows land for a parking area to service the Waimanalo Civic Center. The federal government refused to convey, much less to lease, the area despite the fact that the lands requested were not being used or occupied. Other unsuccessful attempts through Hawaii's delegation to Congress were made four to five years ago to secure the return of larger portions of Bellows. *See also* note 185 *supra*.

It must be noted, however, that the federal government did voluntarily return approximately 77 acres of ceded land, including the beach area at the Waimanalo end of Bellows in 1974. The area has since been developed by the state as a public park.

IV. State Administration of the Public Trust: The Trust Fund

At statehood title to most of the ceded public domain returned to the islands, putting it exclusively under state jurisdiction. Section 5(f) of the Admission Act requires the state to hold ceded lands and their proceeds and income as a public trust for five enumerated purposes.[201] The state's role thus virtually mirrors that assumed by the federal government at annexation; *i.e.*, the state, as proprietor-trustee, is required to manage the corpus and use its income for the benefit of Hawaii's people. That this relationship derived ultimately from the federal government's prior treatment of the land is seen not only in the similarity of roles, but also in the provisions of section 5(f) which allow the federal government to hold the state accountable for a breach of trust.[202] V. Carl Bloede, Assistant Researcher at the Legislative Reference Bureau, in 1962 summed up the state's duty as trustee in this manner:

> The public trust concept applicable to Hawaii state lands may be reasonably compared to a charitable trust, e.g. the Bishop Estate Trust, wherein the obligation is imposed upon the trustee to manage the corpus of the trust and make the net benefits therefrom available to the Cestui Que Trust (beneficiary). Although the corpus may be invested, or sold and the proceeds reinvested, every precaution must be employed by the trustee in the administration of the trust to preserve the value of the corpus. And this trust concept requires on the part of the State, acting as trustee, proper conservation, development and utilization of the public lands, and that they be held or used, or the proceeds therefrom if alienation were deemed desirable in the interests of the public, for the development of the public schools and other public projects, for the benefit and improvement in conditions of the native Hawaiians, and the development of or stimulus to farm and homeownership wherever required, and the making of public improvements.[203]

The State Department of Land and Natural Resources was statutorily charged with the receipt and administration of ceded lands as a part of

[201] *See* text accompanying note 150 *supra*.

[202] Admission Act, *supra* note 6, § 5(f). *See generally* V. Bloede, *supra* note 150; *M. Uyehara, supra* note 150. *See also* S. Rep. No. 675, 88th Cong., 1st Sess. 1 (1963), quoted in part at note 150 *supra*.

Governor William Quinn's address to the first state legislature on April 25, 1961 also conveyed his understanding that the trust had passed from federal to state hands:

> It is our position that the ceded lands of Hawaii are a public trust to be held and managed in trust for the people of Hawaii. Up to the time of statehood, the United States was the trustee of this public trust, and now the State of Hawaii has assumed this responsiblity. Under accepted trust doctrine, the trustee must hold the trust inviolate and cannot convert it to his own benefit.

Special Message on Federal Lands in Hawaii by Governor William F. Quinn to the First Legislature of the State of Hawaii, April 25, 1961.

[203] V. Bloede, *supra* note 150, at 9-10.

its larger role of managing the state's general public domain.[204] The Department's functions, as they pertain to ceded lands, are thus limited by section 5. Until recently, however, the Department had not been administering the public trust in conformance with the spirit of the Admission Act, the letter of its implementing statutes, or general trust principles.

The *Financial Audit of the Department of Land and Natural Resources* [hereinafter referred to as *Audit*],[205] completed by the Office of the Legislative Auditor and Peat, Marwick, Mitchell & Co. in 1979, identified errors by the state which have led to the virtual frustration of the public trust mandated by section 5(f).[206] The primary malfeasance consists of a failure to properly earmark the revenues and income from ceded lands.[207] Section 5(f) clearly requires that they be held as a public trust, and Hawaii Revised Statutes section 171-18, which implements section 5(f), directs that these monies be set aside from funds received from the disposition of general public lands.[208] A special public trust fund was in fact created.

At the same time, Hawaii Revised Statutes section 171-19 established a special land and development fund for all proceeds from the disposition of the general public domain, subject to the restrictions of the Hawaiian Homes Commission Act of 1920, as amended, and section 5(f).[209] The discretionary purposes for which this fund could be used without legislative authorization relate to the maintenance and disposition of the lands themselves and not the public benefits under sections 171-18 and 5(f).[210]

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[204] The Department of Land & Natural Resources was officially established by the first state legislature in 1962. *See* 1962 Hawaii Sess. Laws ch. 32, §2. Its function and powers are prescribed in HAWAII REV. STAT. ch. 171 (1976) and HAWAII REV. STAT. § 26-15 (1976).

[205] A Report to the Governor and the Legislature of the State of Hawaii, AUDIT, *supra* note 150.

[206] The AUDIT focused on a number of deficiencies in the Department's management and control of the public domain, all stemming from what the report characterizes as its assumption of a "passive and reactive" role in caring for the domain and unsystematic management. *An Overview by the Legislative Auditor of the Financial Audit of the Department of Land and Natural Resources* 1. These deficiencies, all of which adversely affect the manner in which the public trust is administered, include:

> the absence of an accurate inventory of public lands, and inadequate land classification system, the lack of assurance that the State is receiving a fair return for the use of its lands, the extensive and questionable use of permits for the use of public lands, and the inadequate monitoring and enforcement of lease contract terms and conditions.

Id. at 1. The remainder of the present discussion, however, is confined to an examination of one of the problems identified by the AUDIT not mentioned in its *Overview* though amply discussed in the main report, namely, the improper disposition of revenues and income from ceded lands.

[207] AUDIT, *supra* note 150, at 31-37.

[208] *See* note 152 *supra*. Revenues from sales of ceded remnants to abutting landowners were also to be placed in the public trust fund.

[209] *Id.*

[210] HAWAII REV. STAT. § 171-19 (1976) authorized the Board of Land and Natural Resources to use the special fund for the following purposes (where used without prior legislative consent):

> (1) To reimburse the general fund of the State for advancements heretofore or hereafter made therefrom, which are required to be reimbursed from the proceeds of sales, leases, licenses, or permits derived from public lands;
>
> (2) For the incidental maintenance of all lands under the control and management of the board, including the repair of improvements thereon, not to exceed $100,000 in any fiscal year;
>
> (3) To repurchase any land, including improvements thereon, in the exercise by the board of any right of repurchase specifically reserved in any patent, deed, lease, or other documents or as provided by law;
>
> (4) For the payment of all appraisal fees; provided, that all such reimbursable fees collected by the board shall be deposited in a separate fund;
>
> (5) For the payment of publication notices as required under this chapter, provided that all or a portion of the expenditures may be charged to the purchaser or lessee of public lands or any interest therein under rules and regulations adopted by the board;
>
> (6) For the planning and construction of roads and trails along state rights-of-way not to exceed $5,000 in any fiscal year;
>
> (7) For the payment to private land developer or developers who have contracted with the board for development of public lands under the provisions of section 171-60.

Id.

The two funds were clearly intended for distinct and separate purposes. The criteria for determining whether proceeds from the disposition of public lands are to be deposited into the public trust fund or into the special land and development fund is solely whether the lands are ceded.

The Department, however, has failed to make this distinction since statehood,[211] and instead has been depositing monies from the leases of public lands (whether ceded or not) into the public trust fund, and those from sales of the same into the special land and development fund.[212] In fiscal year 1978-79, for example, approximately $5.4 million was received by the public trust fund, representing receipts from leases, licenses and sales of wood, rock and sand.[213] Of that figure, approximately $122,000 was transferred to the Hawaiian Homes administration fund, and the remainder was deposited in the state general fund in reimbursement for general fund monies it advanced for educational purposes.[214] $1.5 million in land sale receipts and interest, on the other hand, was placed into the special fund, and approximately $850,000 of that sum was appropriated

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[211] AUDIT, *supra* note 150, at 32-33.

[212] Additionally, revenues from the sales of non-ceded remnants made to abutting landowners, required by HAWAII REV. STAT. § 171-19 (1976) to be placed in the general fund, were instead being deposited into the special land and development fund. *See also* AUDIT, *supra* note 150, at 32.

[213] DEP'T OF LAND & NATURAL RESOURCES, STATE OF HAWAII, ANNUAL REPORT TO THE GOVERNOR FOR 1978-79, at 66 (1980) [hereinafter cited as ANNUAL REPORT].

[214] *Id.* The transfer in 1979 of the approximately $5.3 million to reimburse the fund for educational expenditures and the consistent practice of the Department and the legislature was verified by James Detor, Head of the Department's Land Management Division. Interview with James Detor, *supra* note 153; AUDIT, *supra* note 150, at 34 n.10.

for uses as prescribed in section 171-19.[215]

The confusion surrounding the funds is traceable in great part to dicta in a 1961 state attorney general opinion.[216] The dicta addressed the prior applicable law pertaining to public land sales which required that proceeds from sales of public lands be placed in a special fund for each county.[217] Observing that no provision had been made for the disposition of monies from leases and licenses from ceded lands, the attorney general concluded that those funds would have to be held in the trust fund until appropriated by the legislature in accordance with section 5(f) of the Admission Act. The Department of Land and Natural Resources apparently read this interpretation of section 99-21 as requiring two funds based on a sale-lease dichotomy. The use of two such funds for receipt of ceded land proceeds under the territorial government[218] may have reinforced this view. However, the mistaken impression should have been finally corrected by the repeal of section 99-21,[219] and the establishment of two separate funds distinctly defined in content and purpose.

The practice of depositing monies according to the sale-lease dichotomy, however, continued up until the year the *Audit* was released—1979.[220] The reason given for this failure to conform to both the statutes and the Admission Act is most disturbing: the "DLNR is unable to distinguish ceded public lands from non-ceded public lands."[221] In fact, between statehood and 1979, no attempt had been made by the Department to compile a comprehensive inventory of the state's public lands, much less one distinguishing between its ceded and non-ceded portions.[222] Notwithstanding the difficulty of assembling such an inventory

[215] ANNUAL REPORT, *supra* note 213, at 68. It is worth noting that the special land and development fund steadily increased from approximately $1.7 million in 1970 to approximately $6.8 million in 1977. In February, 1978, however, over $6 million was transferred into the general fund following the issuance of an attorney general's opinion that Act 195, 1975 Hawaii Sess. Laws 447 required such transfer of excess unless the Department could prove a specific need for the funds. *See* Memoranda from the State Attorney General to the Board of Land and Natural Resources (Nov. 3, 1977; Dec. 22, 1977; March 4, 1977; and Feb., 1978).

[216] Letter from Attorney General to Dep't of Accounting and General Services Comptroller (May 1, 1961); AUDIT, *supra* note 150, at 34-35.

[217] 1 REV. LAWS HAWAII 1955 § 99-21.

[218] *See* note 105 *supra*.

[219] The repeal was effected in 1962 by passage of HAWAII REV. STAT. §§ 171-18 to -19 (1976).

[220] In fact, the Department may have to continue its present manner of disposing of revenues until its proposal for changing it is adopted by the legislature. *See* text accompanying note 230 *infra*.

[221] AUDIT, *supra* note 150, at 35.

[222] *Id.* The Department does have a rough knowledge of total acreage involved and a fairly detailed knowledge of the land owners. AUDIT, *id.* at 6-13. It also keeps tabs on the amount and general location of public land returned by the federal government. *See* note 158 *supra*. The Department keeps its inventory updated, although no official updated version has appeared since statehood. However, there is no single inventory containing accurate descriptions of the parcels, adequately classifying them, and distinguishing them on a ceded/non-ceded basis.

given the deficiencies in existing records,[223] it is still curious, in light of the requirements of section 5(f), that such an inventory does not exist at the present time.

Moreover, this absence of an inventory and confusion of funds have impeded the very administration of the public trust described in section 5(f). First, because the Department cannot use the ceded/non-ceded distinction in recording receipts (as there is no inventory), there is no way of verifying the accuracy of its figures for each fund,[224] much less of determining which monies belong to each of the respective funds. This works to the particular disadvantage of the public trust fund as most of the public lands' income derive from ceded lands.[225] Thus, secondly, the wrongful deposits may have resulted in expenditures of public trust monies for the purposes of the special land and development fund, or vice versa. In fact, monies available for the trust purposes may have been completely lost when the special fund was stripped of its $6 million "excess" by the Department of Budget and Finance in 1978.[226] Again, however, it is impossible to assess the extent to which the expenditures may have been wrongfully applied or lost. Finally, until a comprehensive inventory of ceded and non-ceded land is completed, the monies (and their total amount) available for section 5(f) public purposes cannot be precisely determined. Moreover, because section 5(f) requires the state to hold the ceded lands separately in trust, the state's failure to identify its trust corpus is yet another facet of its breach of its section 5(f) obligations.

When faced with its scorecard of deficiencies in 1979, however, the Department quickly admitted to its past failings and set out to rectify them. During the 1979 legislative session, it sponsored a bill that became law authorizing the expenditure of funds to develop an accurate land inventory system on magnetic tape. At this writing, the system design is about

[223] *See* AUDIT, *supra* note 150, at 35-36. The report notes the difficulty, for example, of ascertaining boundaries which were only roughly defined at annexation and in some cases defined by geographic features (*e.g.* certain trees, streams) which are difficult or impossible to identify and locate today. Records or maps which might have provided some aid are largely nonexistent. Indeed, the difficulty may be traced to the time of the *mahele* when rights of the people in the land were identified for the first time in Hawaii. *See* text accompanying notes 67-73 *supra*, as the *mahele* was made without a survey. J. CHINEN, THE GREAT MAHELE 20 (1957).

[224] AUDIT, *supra* note 150, at 33. This was proven by the inability of Peat, Marwick, Mitchell & Co. to attest to the fairness and accuracy of the Department's financial statements for fiscal year 1975-76 in the AUDIT. AUDIT, *id.* at 51.

[225] Interview with James Detor, *supra* note 193. Mr. Detor also testified to this fact at a hearing before the Senate Committee on Economic Development, Energy and Natural Resources on February 29, 1980, concerning Senate Concurrent Resolution No. 21 (Requesting the DLNR to Make as One of Its Priorities the Development of an Accurate Land Inventory That Includes a Categorization of Ceded and Nonceded Lands).

[226] *See* note 215 *supra*.

ten percent complete, and the Department estimates that it will take approximately two more years to finish.[227] The prospect of accomplishing a classification of ceded and non-ceded lands in the immediate future, however, remains bleak. Echoing the *Audit*'s observations, the Department points out that records, land maps or other documents that may otherwise aid in such a classification are virtually non-existent, and that where they do exist, they are often inadequate and inaccurate.[228] It may thus be some time before the precise extent of the lands and revenues subject to the section 5(f) public trust can be ascertained.

In addition to the land inventory, the Department has taken steps to eliminate the improper disposition of ceded and non-ceded land revenues. Its solution, which was debated but later tabled during the 1980 legislative session, calls for the elimination of the special land and development fund and the deposit of proceeds from the disposition of all public lands, whether ceded or not, into the public trust fund.[229] Because most of the proceeds received are traceable to ceded lands, it is reasoned that the merging of funds into the public trust is the most expedient way of resolving the current mishandling of funds which allows the continued fulfillment of section 5(f) trust obligations.[230] Indeed, the *Audit* itself had recommended this solution as a means of avoiding the necessity of distinguishing between ceded and non-ceded lands.[231] It had also concluded that the special fund's abolition should not cause serious disturbance to state programs as neither the legislature nor the Department had made extensive use of its funds in the past.[232]

If eventually passed into law, the Department's proposal could mean immediate life for the public trust contemplated by the Admission Act. The trust corpus itself will have been enlarged beyond the limits defined by the Act, but surely its drafters would not argue against such an addition and the concommitant increase of income available for the section 5(f) beneficiaries. As observed by the *Audit*, even in the absence of an inventory which distinguishes between ceded and non-ceded lands, the public trust fund could be administered so as to protect the public. In fact, this solution would appear to insure the beneficiaries against a sweeping transfer of "excess" funds into the general fund such as that which occurred in 1978. Completion of the inventory being developed at the moment will only increase the level of efficiency with which the trust fund and public domain itself are managed, and perhaps increase the trust corpus and its available benefits.

[227] Interview with Susumu Ono, Director of the Dep't of Land & Natural Resources (Feb. 29, 1981).

[228] *See* note 223 *supra*.

[229] S.B. 2170, 10th Hawaii Leg., 2d Sess. (1980).

[230] Written testimony submitted by Susumu Ono in support of Senate Concurrent Resolution No. 21, *supra* note 225, dated February 29, 1980.

[231] AUDIT, *supra* note 150, at 37.

[232] *Id.*

V. CONCLUSION

The federal government's unique treatment of Hawaii's ceded lands at annexation has shaped the current relationship between the federal and state governments, and Hawaii's ceded domain. The federal government's remaining legal obligation to return unused ceded land must be broadly interpreted in light of Congress' intent to reserve them exclusively for the benefit of the people of Hawaii. The state, now trustee, must tend to their proper administration and disposition to insure that the benefits of the land in fact inure to the people as prescribed by the Admission Act.[233] Not only must it maintain a proper trust fund, but it must insure that its actions with regard to the administration and disposition of the lands themselves comport with its fiduciary obligation to maintain and preserve the trust corpus for its beneficiaries.[234]

The beneficial use of the proceeds themselves will ultimately involve policy decisions to be made by the Department of Land and Natural Resources, the state legislature, and the people of Hawaii. The language of section 5(f) of the Admission Act allows the state to choose the manner in which the proceeds are allocated between the listed purposes.[235] Since statehood, the public trust proceeds have been transferred to the state's

[233] *But see* note 82 *supra*.

[234] The Department of Land & Natural Resources disposes of the ceded domain under the same laws applicable to the general public domain. *See* note 153 *supra*. The problems discovered by the authors of the AUDIT concerning the Department's disposition of the general public domain encompass ceded lands. *See* note 206 *supra* and the AUDIT generally.

[235] Admission Act, *supra* note 6, § 5(f). The legislative history of section 5(f) indicates that these purposes were merely an expansion of the Joint Resolution's general prescription that the ceded lands proceeds be used "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other purposes." Joint Resolution, *supra* note 1. The Congressional reports which accompanied their respective statehood bills in 1959 perfunctorily stated, with reference to section 5(f)'s purposes, that "[t]he use of and benefits from the granted lands will remain the same as they now are." S. REP. No. 80 at 3; H.R. REP. No. 32 at 5, 86th Cong., 1st Sess. 5 (1959). On paper in 1959, the benefit and uses referred to were those originally declared in the Joint Resolution and adopted by reference in the Organic Act and later in territorial laws. *See* Organic Act, *supra* note 3, § 73(e); REV. LAWS HAWAII 1955 § 99-21, *reprinted in* 1 HAWAII REV. STAT. 28 (1976). In practice, the territory had been applying the ceded lands revenues and proceeds for the support of its public schools and other public purposes, including the betterment of the conditions of native Hawaiians. See, for example, H.R. REP. No. 88, 84th Cong., 1st Sess. 8 (1955) ("At present, the Territory administers these lands and receives all income from them for the support of public schools and for the betterment of indigenous Hawaiians.").

The legislative history of the section is equally void of any language suggesting a mandatory duty on the state's part to use the proceeds for each of the purposes each year, if at all. *See* M. UYEHARA, *supra* note 150. Indeed, the preoccupation of statehood proponents in Congress lay with securing the lands and proceeds in the first place for the new state so that it might continue using them for the public benefit as it had as a territory. No single purpose was mandatory, and moreover, each purpose was so broadly phrased that the public at large would certainly benefit from the application of funds to any particular one.

general fund to reimburse it for educational expenditures.[256]

However, recent constitutional amendments have reserved a pro rata portion of the public trust fund for the state's new Office of Hawaiian Affairs (OHA).[257] These monies will be applied to cover OHA's annual operating expenditures and thus will allow the native Hawaiians to have "a receptacle for any funds, land, or other resources earmarked for or belonging to native Hawaiians and to create a body that could formulate policy relating to all native Hawaiians to make decisions on the allocation of those assets belonging to native Hawaiians."[258]

The allocation of funds to OHA falls squarely under section 5(f) as a proper trust purpose. Most significantly, however, the initiative taken by the native Hawaiian population to secure monies available to them is illustrative of the manner in which the benefit of the ceded lands may be channelled to the public. As the sole legal beneficiaries of Hawaii's ceded domain, Hawaii's people must take an active part in seeing to a complete return of the ceded lands, and deciding the uses to which the ceded lands and their proceeds will be put in the future.

S.L.M.

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[256] *See* AUDIT, *supra* note 150, at 34.

[257] HAWAII CONST. art. XII, § 4, facilitates the reservation of funds by first redefining section 5(f)'s trust provision in terms of beneficiaries, not uses, as follows:

> *Section 4.* The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

Article XII, section 5, establishes the Office of Hawaiian Affairs, and section 6 empowers the Board of Trustees to hold "all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians."

[258] STAND. COMM. REP. No. 59, 3d Hawaii Const. Conv. 4 (1978).

Appendix

LAND CONVEYANCE—HAWAII

PUBLIC LAW 88-233; 77 STAT. 472

[S. 2275]

An Act to revise the procedures established by the Hawaii Statehood Act Public Law 86-3, for the conveyance of certain lands to the State of Hawaii, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

(a) (i) Whenever after August 21, 1964, any of the public lands and other public property as defined in section 5(g) of Public Law 86-3 (73 Stat. 4, 6), or any lands acquired by the Territory of Hawaii and its subdivisions, which are the property of the United States pursuant to section 5(c) or become the property of the United States pursuant to section 5(d) of Public Law 86-3, except the lands administered pursuant to the Act of August 25, 1916 (39 Stat. 535), as amended, and (ii) whenever any of the lands of the United States on Sand Island, including the reef lands in connection therewith, in the city and county of Honolulu, are determined to be surplus property by the Administrator of General Services (hereinafter referred to as the "Administrator") with the concurrence of the head of the department or agency exercising administration or control over such lands and property, they shall be conveyed to the State of Hawaii by the Administrator subject to the provisions of this Act.

(b) Such lands and property shall be conveyed without monetary consideration, but subject to such other terms and conditions as the Administrator may prescribe: *Provided,* That, as a condition precedent to the conveyance of such lands, the Administrator shall require payment by the State of Hawaii of the estimated fair market value, as determined by the Administrator, of any buildings, structures, and other improvements erected and made on such lands after they were set aside. In the event that the State of Hawaii does not agree to any payment prescribed by the Administrator, he may remove, relocate, and otherwise dispose of any such buildings, structures, and other improvements under other applicable laws, or if the Administrator determines that they cannot be removed without substantial damage to them or the lands containing them, he may dispose of them and the lands involved under other applicable laws, but, in such cases he shall pay to the State of Hawaii that portion of any proceeds from such disposal which he estimates to be equal to the value of the lands involved. Nothing in this section shall prevent the disposal by the Administrator under other applicable laws of the lands subject to conveyance to the State of Hawaii under this section if the State of Hawaii so chooses.