

COMPLAINT

INTRODUCTION

1. The Department of Hawaiian Home Lands and the Hawaiian Homes Commission have breached the highest fiduciary duties owed to their beneficiaries by permitting the State of Hawai‘i, Department of Transportation to use trust lands which underlie the Mauna Kea Access Road (“MKAR”) without compensation for the past 32 years. Defendants’ collective disregard for their trust obligations, the terms of the Hawaiian Homes Commission Act (“HHCA”), and the betterment of conditions for native Hawaiians have depleted the Hawaiian home lands trust and injured its beneficiaries.

2. Plaintiffs, all beneficiaries of the Hawaiian home lands trust, file this action to stop State Defendants from continuing to use their trust lands free of charge, to require all Defendants to act in the best interest of Hawaiian home lands beneficiaries, and for damages to compensate and restore the trust following State Defendants’ decades-long use of trust lands at no charge.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the claims for relief in this action pursuant to Hawai‘i Revised Statutes (“HRS”) §§ 603-21.5, 603-21.7(1) (C), 603-21.9, 632-1, 661-1, Chapter 673, and Article XII §§ 1, 2, 3 and 4 of the Constitution of the State of Hawai‘i. All claims alleged herein are based upon and arise exclusively under state law.

4. The circuit court has jurisdiction over this matter pursuant to HRS § 604-5 because it involves claims for damages in excess of the jurisdictional minimum.

5. Venue in this circuit is appropriate pursuant to HRS § 603-36(5), where the majority of defendants are domiciled.

RIGHT OF ACTION

6. Plaintiffs have a right of action to enforce provisions related to the administration and implementation of the Hawaiian Homes Commission Act, as amended and incorporated into the Hawai‘i State Constitution, and HRS §§ 673-1 and 673-2(a).

7. Plaintiffs’ claims for relief are authorized under HRS §§ 603-21.9(1), (6) and Rule 57 of the Hawai‘i Rules of Civil Procedure.

8. Plaintiffs’ claims for monetary damages are authorized under HRS § 673-4.

9. Plaintiffs' claims for attorneys' fees and costs are authorized under HRS § 673-5.

PARTIES

10. Plaintiff Pualani Kanaka'ole Kanahele ("**Kanahele**") is a native Hawaiian who descends from the aboriginal people who occupied and exercised sovereignty in the area that now comprises the State of Hawai'i prior to 1778.

11. Kanahele resides in Hilo on Hawai'i island.

12. Kanahele is at least fifty percent native Hawaiian and is a beneficiary of the Hawaiian home lands trust.

13. Kanahele is a current lessee on Hawaiian home lands in Pana'ewa, Hawai'i island.

14. Kanahele engages in traditional and cultural practices on Maunakea.

15. Plaintiff Edward Halealoha Ayau ("**Ayau**") is a native Hawaiian who descends from the aboriginal people who occupied and exercised sovereignty in the area that now comprises the State of Hawai'i prior to 1778.

16. Ayau resides in Hilo on Hawai'i Island.

17. Ayau is at least fifty percent native Hawaiian and is a beneficiary of the Hawaiian home lands trust.

18. Ayau grew up on a Ho'olehua Hawaiian Homestead on Moloka'i and is the current lessee of that homestead.

19. Ayau engages in traditional and cultural practices on Maunakea.

20. Plaintiff Keali'i "Skippy" Ioane ("**Ioane**") is a native Hawaiian who descends from the aboriginal people who occupied and exercised sovereignty in the area that now comprises the State of Hawai'i prior to 1778.

21. Ioane resides in Mountain View on Hawai'i island.

22. Ioane is at least fifty percent native Hawaiian and is a beneficiary of the Hawaiian home lands trust.

23. Ioane applied for a Hawaiian homestead lease in 1980 and remains on the Hawai'i island homestead waiting list.

24. Plaintiffs engage in the traditional cultural practice of mālama 'āina of cultural sites at Maunakea.

25. Plaintiffs consider Maunakea lands to be the most sacred lands in all of Hawai'i.

26. Defendant State of Hawai‘i (“**State**”) is the political subdivision of the United States of America charged with faithfully administering the Hawaiian Homes Commission Act, and the Constitution of the State of Hawai‘i.

27. The primary offices of the State are located at the Hawai‘i State Capitol, 415 South Beretania Street, Honolulu, Hawai‘i 96813.

28. Defendant Department of Transportation (“**DOT**”) is an agency of the State of Hawai‘i whose primary offices are located at Ali‘i‘aimoku Hale, 869 Punchbowl Street, Honolulu, Hawai‘i 96813.

29. Defendant Jade Butay (“**Butay**”) is the director of the State of Hawai‘i Department of Transportation.

30. In his official capacity, Butay has asserted control and legal authority over the MKAR.

31. Defendant Department of Land and Natural Resources (“**DLNR**”) is an agency of the State of Hawai‘i whose primary offices are located at Kalanimoku Building, 1151 Punchbowl Street, Honolulu, Hawai‘i 96813.

32. Defendant Suzanne Case (“**Case**”) is the director of the State Department of Land and Natural Resources.

33. In her official capacity, Case has collaborated with the DOT and Defendant Butay to assert control and authority over the MKAR.

34. Case is ultimately responsible for and directly supervises the operations of the DLNR’s Division of Conservation and Resources Enforcement (“**DOCARE**”) (collectively with the State, DOT, Butay, DLNR, and Case, the “**State Defendants**”).

35. Defendant Department of Hawaiian Home Lands (“**DHHL**”) is an agency of the State whose primary offices are located at Hale Kalaniana‘ole, 91-5420 Kapolei Parkway, Kapolei, Hawai‘i 96707.

36. The DHHL is principally in charge of administering the day to day implementation of the HHCA, as established under § 4 and § 5(f) of the Admission Act, Article XII, §§ 1, 2 and 3 of the Hawai‘i State Constitution and the HHCA.

37. Defendant Hawaiian Homes Commission (“**HHC**”) is an agency of the State of Hawai‘i whose primary offices are located at Hale Kalaniana‘ole, 91-5420 Kapolei Parkway, Kapolei, Hawai‘i 96707.

38. Defendants Patricia Kahanamoku-Teruya, Randy Awo, Pauline Namu‘o, Zachary Helm, Dennis Neves, Michael Kaleikini, and David B. Ka‘apu (“**Commissioners**”) are all duly appointed members of the HHC.

39. The HHC is charged with administering the HHCA, and is the governing entity for, and oversees the operations of, DHHL.

40. Defendant William J. Ailā, Jr. (“**Ailā**”) is the chairperson of the HHC and director of DHHL.

41. Defendants DHHL, HHC, Ailā and Commissioners (collectively “**DHHL Defendants**”) have trust responsibilities for the Hawaiian home lands and are responsible for the daily administration and management of the Hawaiian home lands trust.

42. In his official capacity, Ailā has collaborated with the State, DOT, and DLNR in asserting the DOT’s control and authority over the MKAR.

FACTUAL ALLEGATIONS

Mauna Kea Access Road

43. The MKAR, also sometimes referred to as the Mauna Kea Observatory Road, is an approximately 6.27 miles long road that begins at the intersection with Saddle Road, also known as the Daniel K. Inouye Highway (Route 200), to 125 feet past the Hale Pōhaku entrance, also known as the Onizuka Center for International Astronomy Visitor Information Station (“**Visitor Information Station**”).

44. After it reaches the Visitor Information Station, the MKAR continues as the Summit Access Road to the summit of Maunakea.

45. The Summit Access Road is located on land managed by the DLNR.

46. Hereinafter, the term “MKAR” excludes reference to the Summit Access Road.

47. The following properties bearing tax map key numbers (3) 3-8-001:003, (3) 3-8-001:007, (3) 3-8-001:019, (3) 3-8-001:021, which underlie the MKAR, are in the Hawaiian home lands trust.

48. In 1964, agents and employees of Defendant State of Hawai‘i bulldozed what would become the MKAR.

49. The bulldozing took place, in part, over Hawaiian home lands controlled by DHHL Defendants.

50. The State did not obtain authorization from either DHHL or HHC to construct the

MKAR over Hawaiian home lands.

51. In 1968, the University of Hawai‘i (“UH”) built the MKAR over Hawaiian home lands.

52. UH did not obtain authorization from the DHHL Defendants or their predecessors to construct the MKAR over Hawaiian home lands.

53. None of the agencies of the State have compensated the Hawaiian home lands trust for the construction and use of the MKAR over Hawaiian home lands.

54. The MKAR is built over approximately 65.142 acres of Hawaiian home lands.

55. The MKAR is not a State, county or other public highway.

Act 14

56. In 1995, at the end of a special session, the State Legislature enacted Act 14 with the declared intention to resolve, in part, the State’s failure to compensate the Hawaiian home lands trust for the “use” of streets and roadways built on the trust lands for the benefit of the general public without compensation to the Hawaiian home lands trust.

57. Act 14 declares that it resolves “all controversies relating to the Hawaiian home lands trust which arose between August 21, 1959 and July 1, 1988.”

58. Act 14 authorized a future land exchange to compensate for the rent free “use” of acreage underlying streets and roadways improperly constructed on Hawaiian home lands trust lands by State Defendants between August 21, 1959 and July 1, 1988.

59. Since the passage of Act 14, MKAR has remained part of the Hawaiian home lands trust inventory.

60. In the 24 years that have passed since the enactment of Act 14 in 1995, neither the DHHL Defendants nor State Defendants have initiated a land exchange for the 65.142 acres of Hawaiian home lands upon which the MKAR is situated.

61. For the past 24 years, no State agency or body has compensated the DHHL Defendants for the continued use of the 65.142 acres of Hawaiian home lands trust lands under the MKAR.

62. The DHHL Defendants have not sought compensation from the State Defendants for the continued use of the Hawaiian home lands trust lands under the MKAR since July 1, 1988.

63. The DHHL Defendants have not attempted to prevent the State Defendants from

continuing to use the Hawaiian home lands trust lands under the MKAR.

DOT Asserts Control Over The MKAR

64. On March 15, 2018, the DOT purportedly approved the designation of 6.27 miles of the MKAR between the intersection with Daniel K. Inouye Highway (Route 200) up to 125 feet past the Visitor Information Center entrance as State Highway Route 210.

65. On July 15, 2019, the DOT, with the assistance of the DOCARE and the DLNR, closed the MKAR to the public to allow for the transport of equipment and materials for the construction of the Thirty Meter Telescope, allegedly pursuant to HRS chapter 264.

66. On August 30, 2019, the Department of the Attorney General, DHHL, and the DOT issued a joint statement asserting DOT control and authority over the MKAR.

67. The joint statement declared that “all claims regarding use of roads and highways crossing DHHL lands have been resolved.”

68. Defendants State of Hawai‘i, DOT, DLNR, DHHL and their respective officials, continue to assert that the DOT has control and legal authority over the MKAR.

69. DHHL Defendants continue to collaborate with, and defer to, State Defendants in matters dealing with the control and legal authority over the MKAR.

Damages Resulting From State Defendants’ Breach of Trust

70. On or about September 7, 2019, Plaintiffs exhausted all required administrative remedies prior to commencing this action by serving upon Defendants a notice to sue letter pursuant to HRS § 673-3.

71. The State Defendants use of Hawaiian home lands trust lands underlying the MKAR depleted the trust of both land and revenue.

72. The Hawaiian home lands trust was damaged as a result of the lost land and revenue, and potential associated interest or profit, which would have otherwise been paid to or included in the Hawaiian home lands trust.

73. The total compensation for use of the MKAR since 1988 through the present and continuing through final judgment in this action exceeds the jurisdictional minimum in an amount to be proven at trial.

CLAIMS FOR RELIEF

COUNT 1: DHHL DEFENDANTS' BREACH OF TRUST

74. Plaintiffs hereby reallege and incorporate by reference all the above allegations.

75. The DHHL Defendants promulgated Hawai'i Administrative Rules § 10-2-19, which provides:

Duties of commissioners as trustees. As trustees, it shall be the duty of commissioners to: (1) Act exclusively in the interest of beneficiaries under the act; (2) Hold and protect the trust property for beneficiaries under the act; (3) Exercise such care and skill as a person of ordinary prudence would exercise in dealing with one's own property in the management of Hawaiian home lands; and (4) Adhere to the terms of the trust as set forth in the act.

76. As trustees, DHHL Defendants have the duty to act loyally in the exclusive interest of beneficiaries and within the defined purposes of the Hawaiian home lands trust, including duties to promote the self-determination of native Hawaiians and the preservation of the values, traditions, and culture of native Hawaiians, pursuant to HHCA §101.

77. As trustees, DHHL Defendants are obligated to hold, protect, care for, and maintain trust property, including the Hawaiian home lands that underlie the MKAR.

78. As trustees, DHHL Defendants must act as prudent landowners, using reasonable skill and care to make trust property, including the land underlying the MKAR, productive.

79. HHCA § 204 provides that all Hawaiian home lands shall be under the control of the Commission to be used and disposed of in accordance with the HHCA.

80. Hawaiian home lands trust lands shall only be sold or leased in the manner and for the purposes set forth in the HHCA. HHCA § 205.

81. "The powers and duties of the governor, the commissioner of public lands, and the board of public lands . . . shall not extend to lands having the status of Hawaiian home lands, except as specifically provided in [the HHCA]." HHCA § 206.

82. Act 14 does not extinguish the DHHL Defendants' trust obligations regarding the MKAR.

83. Act 14 does not apply to claims regarding the uncompensated use of trust lands arising after July 1, 1988.

84. By permitting the State Defendants' use of the MKAR for free, through its actions and omissions, DHHL Defendants breached their trust duties.

85. The DHHL Defendants further breached their trust duty to make Hawaiian home lands trust property productive by failing to (a) exercise such care and skill as a person of ordinary prudence would exercise in dealing with one's own property, including but not limited to allowing State Defendants to exercise control over the MKAR; and (b) take reasonably affirmative steps to demand payment for the use of the lands underlying the MKAR, for the period after July 1, 1988 until the present.

86. DHHL Defendants' breaches of trust harm Plaintiffs' interests as beneficiaries of the HHCA by failing to fully promote the self-determination of native Hawaiians and the preservation of the values, traditions, and culture of native Hawaiians.

87. DHHL Defendants' failure to fulfill their Hawaiian home lands trust obligations harmed and continue to harm the Hawaiian home lands trust and all beneficiaries thereof, including Plaintiffs.

COUNT 2: STATE DEFENDANTS' BREACH OF TRUST

88. Plaintiffs hereby reallege and incorporate by reference all the above allegations.

89. Pursuant to HRS § 673-1, the State of Hawai'i waived its immunity for any breach of trust or fiduciary duty resulting from the acts or omissions of its agents, officers and employees in the management and disposition of trust funds and resources of the Hawaiian home lands trust under Article XII, §§ 1, 2, and 3 of the Constitution of the State of Hawai'i.

90. Under the Hawai'i State Constitution, the State Defendants have trust responsibilities for the Hawaiian home lands at Maunakea.

91. All Defendants must uphold the most exacting fiduciary standards in the administration of their trust duties pursuant to this State's adoption of the HHCA in the Constitution of the State of Hawai'i under a compact with the United States. *Ahuna v. Dep't of Hawaiian Home Lands*, 64 Haw. 327, 337, 640 P.2d 1161, 1168 (1982).

92. As trustees, the State Defendants are obligated to adhere to the terms of the HHCA and may not use trust lands in a manner inconsistent with the HHCA.

93. As trustees, the State Defendants may not use trust property without compensation to the Hawaiian home lands trust.

94. "[N]o state statute or county ordinance or county charter provisions can affect [Hawaiian home] lands unless in conformity with the [HHCA]." Attorney General Opinion, October 23, 1987.

95. The MKAR is legally under the control of DHHL Defendants, and not State Defendants, pursuant to HHCA §§ 204(a) and 206.

96. A highway, road, street, or other right-of-way is not a state highway unless it is properly designated for inclusion in the State Highway System. *Santos v. Pereira*, 2 Haw. App. 387, 390, 633 P.2d 1118, 1122 (1981); Attorney General Opinion, June 10, 1986.

97. DHHL Defendants did not properly authorize the dedication of the MKAR as a public highway, road, street, or other public right of way.

98. The State Defendants have not acquired, constructed, maintained, and administered the MKAR in accordance with all state law, as described in HRS §§ 264-1(a) and 264-43.

99. The MKAR is not a State highway.

100. The MKAR is not a public highway.

101. Because the MKAR is not a State highway pursuant to HRS § 264-1, the DOT has no legal authority to exercise control over the MKAR.

102. State Defendants have breached their trust duties by exercising control and legal authority over the MKAR by designating the MKAR as part of the State Highway System.

103. State Defendants have breached their trust duties by taking and using Hawaiian home lands trust lands without compensation.

104. As trustees, State Defendants were obligated to obtain a lawful right to use Hawaiian home lands trust property from DHHL Defendants before exercising control and allocating trust property for their own use.

105. State Defendants have also breached their trust duty by making use of the MKAR rent free without regard to making Hawaiian home lands trust property productive.

106. As trustees, State Defendants are liable for their continued use of the MKAR without paying rent to DHHL Defendants since July 1, 1988.

107. Since that date, State Defendants have breached their trust duties by failing to timely pay compensation for their use of Hawaiian home lands trust lands underlying the MKAR.

108. These breaches of trust result from the acts or omissions of State Defendants' agents, officers, and employees in the management and disposition of trust resources of the Hawaiian home lands trust.

109. These breaches do not arise from any attempt to realize maximum revenues to the trust.

110. These breaches do not involve the administration of the Hawaiian home lands trust in the sole interest of its native Hawaiian beneficiaries.

111. State Defendants were not taking action which would provide primary benefits to Hawaiian home lands trust beneficiaries while providing a collateral benefit to non-beneficiaries.

112. Accordingly, State Defendants' acts and omissions directly resulted in a deprivation of revenues to the Hawaiian home lands trust, since 1988, including but not limited to interest thereon, all of which have damaged this trust to the detriment of its beneficiaries in an amount to be proven at trial and in excess of the jurisdictional minimum.

113. Act 14 does not apply to this claim of liability against State Defendants.

114. State Defendants are liable for all damages and costs incurred by Hawaiian home lands trust due to the acts and omissions specified above.

115. State Defendants' failure to fulfill their trust obligations harmed, and continues to harm, the Hawaiian home lands trust and all beneficiaries thereof.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for relief as follows:

A. Declare that DHHL Defendants have breached their trust obligations and have failed to adhere to the terms of the HHCA by failing to redress State Defendants' rent free use of the MKAR;

B. Declare that State Defendants have breached their trust obligations by using Hawaiian home lands underlying the MKAR without compensation to the Hawaiian home lands trust and in violation of the HHCA;

C. Declare that the control over the Hawaiian home lands underlying the MKAR rests solely with the DHHL Defendants;

D. Declare that the MKAR is not a state highway;

E. Declare that unless State Defendants properly comply with the HHCA and its trust duties, they may not exercise control or legal authority over the MKAR;

F. Order DHHL Defendants to fulfill their trust duties with respect to the Hawaiian home lands underlying the MKAR;

G. Order State Defendants to fulfill their trust duties with respect to the Hawaiian

home lands underlying the MKAR;

H. Order State Defendants to remedy the depletion of Hawaiian home lands trust assets caused by their rent free use of the MKAR by providing the DHHL Defendants fair compensation, including, but not limited to, monetary damages for the past and ongoing use of the MKAR, and any future costs to calculate those damages;

I. Enjoin State Defendants from asserting control or authority over the MKAR unless and until they have complied with their trust duties and the terms of the HHCA;

J. Enjoin State Defendants from declaring the MKAR to be a state highway, or otherwise relying on its determination that the MKAR is a state highway, so long as the DHHL Defendants retain their control over the lands underlying the MKAR pursuant to HHCA § 204;

K. Award land and/or money damages to restore the Hawaiian home lands trust in amounts to be determined by the finder of fact or at trial;

L. Award Plaintiffs their reasonable attorneys' fees and costs in bringing this action to protect Hawaiian home lands trust assets;

M. Provide for such other and further relief as the Court shall deem just and proper.

DATED: Honolulu, Hawai'i, February 13, 2020.

/s/ ALAN T. MURAKAMI
ALAN T. MURAKAMI
DAVID KAUILA KOPPER
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Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PUALANI KANAKA‘OLE KANAHELE,)	CIVIL NO. _____
EDWARD HALEALOHA AYAU, KELI‘I)	(Other Civil Action)
IOANE,)	
)	SUMMONS
Plaintiffs,)	
)	
vs.)	
)	
STATE OF HAWAI‘I; DEPARTMENT OF)	
TRANSPORTATION; JADE BUTAY, in)	
his official capacity as director of the)	
Department of Transportation;)	
DEPARTMENT OF LAND AND)	
NATURAL RESOURCES; SUZANNE)	
CASE, in her official capacity as the director)	
of the Department of Land and Natural)	
Resources; DEPARTMENT OF)	
HAWAIIAN HOME LANDS; HAWAIIAN)	
HOMES COMMISSION; WILLIAM AILĀ,)	
JR., in his official capacity as the director of)	
the Department of Hawaiian Home Lands)	
and Chair of the Hawaiian Homes)	
Commission; PATRICIA KAHANAMOKU-)	
TERUYA, RANDY AWO, PAULINE)	
NAMU‘O, ZACHARY HELM, DENNIS)	
NEVES, MICHAEL KALEIKINI, and)	
DAVID B. KA‘APU, in their official)	
capacities as members of the Hawaiian)	
Homes Commission,)	
)	
Defendants.)	

SUMMONS

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to file with the court and serve upon the Native Hawaiian Legal Corporation, Plaintiffs’ attorneys, whose address is 1164 Bishop Street, Suite 1205, Honolulu, Hawai‘i 96813, an answer to the COMPLAINT, which is herewith

served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service.

If you fail to make your answer to the COMPLAINT within the twenty (20) day time limit, judgment by default will be taken against you for the relief demanded in the COMPLAINT.

There shall be no personal delivery of the COMPLAINT between 10:00 p.m. and 6:00 a.m. on premises not open to the public, unless a judge of the district or circuit courts permits, in writing on this Summons, personal delivery during those hours.

A failure to obey this Summons may result in an entry of default and default judgment against the disobeying person or party.

DATED: Honolulu, Hawai'i, _____.

CLERK OF THE ABOVE-ENTITLED COURT

In accordance with the Americans with Disabilities Act and other applicable state and federal laws, if you require a reasonable accommodation for a disability, please contact the ADA Coordinator at the First Circuit Court Administration Office at PHONE NO. 539-4333, FAX 539-4322, OR TTY 539-4853, at least ten (10) working days prior to your hearing or appointment date.