WHO OWNED/OWNS THE CROWN LANDS OF HAWAI‘I?
THE ERRORS OF JON VAN DYKE’S OPINIONS

Prior to the overthrow of Hawai‘i’s Constitutional Monarchy in 1893, the King held title to the Crown lands as Trustee for his benefit and for the benefit of all of the people of Hawai‘i.

After the overthrow, the Crown lands and other public lands, proceeds, and income therefrom went initially to the Republic of Hawaii, then to the Territory of Hawaii, and then to the State of Hawai‘i. The Crown lands were to be held as a public trust “for one or more” of five purposes listed in the 1959 Act admitting Hawai‘i as a State of the United States.

As explained in the Hawai‘i Attorney General’s Opinion No. 83-2 issued on April 15, 1983, written by Charlotte E. Libman, Deputy Attorney General, to Mr. T. C. Yim. Administrator, Office of Hawaiian Affairs,

Section 5(f) of the Admission Act creates two classes of beneficiaries for whose benefit the lands and the proceeds of the ceded [Crown] lands may be used. These two classes of beneficiaries of the public land trust are: (1) native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended; and (2) the general public. In addition to the named beneficiaries, Section 5(f) of the Admission Act, restricts the manner in which the lands, proceeds and income may be used. The authorized uses to which the lands, proceeds and income of the public land trust may be put are set forth in Section 5(f) of the Admission Act as follows:

1. Support of the public schools and other public educational institutions;

2. The betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended;

3. The development of farm and home ownership on as widespread a basis as possible;

4. The making of public improvements; and

5. The provision of lands for public use. The State may use the lands described in Section 5(f) (commonly referred to as “ceded lands”) for one or more of the five stated purposes and the use for any other object constitutes a breach of trust for which suit may be brought by the United States.

HISTORY

The following briefly explains the origins and history of Hawai‘i’s Crown lands and Government lands prior to 1893.

In 1839, Kamehameha III promulgated a Declaration of Rights. In 1840, Kamehameha III promulgated a Constitution
changing the government of Hawai‘i from a monarchy/feudal aristocracy to a constitutional monarchy allocating the powers of government to (a) an executive branch, (b) a legislative branch, and (c) a judicial branch.

Both the 1839 Declaration of Rights and the 1840 Constitution stated:

The origin of the present government, and system of polity, is as follows. Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, 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 had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom.

In 1845, the Legislature and Kamehameha III commenced the division (mahele) of land process by creating a five-member Board of Commissioners to Quiet Land Titles (Land Commission) to consider and resolve all land claims. In the latter 1840s and early 1850s, Hawai‘i’s land was divided into the following four categories: (1) the King’s (Crown) lands; (2) the Government lands; (3) the Chiefs’ (ali‘i) lands; and (4) the commoners’ (maka‘ainana) lands.

After this “Great Mahele” was completed, 24% of the land went to the King (Crown lands); 37% went to the government; and 38% went to the ali‘i (Chiefs). Approximately 1% of the land went to the maka‘ainana (commoners).

William DeWitt Alexander reported that

[the records of the discussion in Council show plainly His Majesty’s anxious desire to free his lands from the burden of being considered public domain, and as such subjected to the danger of confiscation in the event of his islands being seized by any foreign power, and also his wish to enjoy complete control over his own property. Besides he clearly perceived how desirable it was that there should be a public domain, the proceeds of which should go to the national treasury, and from which his subjects could purchase the lands which they needed. Accordingly on the very day after the Mahele with his chiefs had closed, viz., the 8th of March, [1848], he proceeded "to set apart for the use of the Government the larger part of his royal domain, reserving to himself what he deemed a reasonable amount of land as his own estate." To effect this he signed and sealed two instruments, both contained in the Mahele Book, by one of which he set apart for the use and benefit of the Government certain lands specified by name, and "reserved for himself his heirs and successors forever," the remainder of the lands surrendered to him in the Mahele, as his own private estate.

An 1846 law authorized the sale of Government lands.

On March 11, 1893, James H. Blount was appointed by President Cleveland as a special commissioner to the Hawaiian Islands. In his July 17, 1893 report (Blount Report), Blount wrote:

In the distribution of lands most of it was assigned to the King, chiefs, some whites, and to the Government for its support. Of the masses 11,132 persons received 27,830 acres—about two and a half acres to an individual—called Kuleanas. The majority
received nothing. The foreigners soon traded the chiefs out of a large portion of their shares, and later purchased from the Government lands and obtained long leases on the Crown lands. Avoiding details it must be said that the native never held much of the land. . . . National tradition has done little for him and before the whites led him to education its influence was not operative. Until within the last twenty years white leaders were generally accepted and preferred by the King in his selections of cabinets, nobles, and judges, and native leadership was not wanted.

The Act of June 7th, 1848, stated that the King’s (Crown) lands were “the private lands of his Majesty Kamehameha III, to have and to hold to himself, his heirs and successors forever; and said lands shall be regulated and disposed of according to his royal will and pleasure, subject only to the rights of tenants.”

In State by Kobayashi v. Zimring, 58 Hawaii 106, 111, 566 P.2d 725, 729 (1977), in an Opinion authored by Chief Justice William S. Richardson, the Hawaii Supreme Court explained the Great Mahele (footnotes omitted):

In support of its claim to title the State advances the proposition that all private ownership stems from Land Commission Awards, Royal Patents, Land Patents or some document of title issued by the sovereign and that absent such documents, title belongs to the sovereign. A short historical survey is necessary to an understanding of the State’s argument.

It was long ago acknowledged that the people of Hawaii are the original owners of all Hawaiian land. The Constitution of 1840, promulgated by King Kamehameha III, states:

. . . KAMEHAMEHA I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and the people in common, of whom Kamehameha I was the head, and had the management of the landed property. Fundamental Law of Hawaii (1904) at 3 (emphasis added).

Responding to pressure exerted by foreign residents who sought fee title to land, and goaded by the recognition that the traditional system could not long endure, Kamehameha III undertook a reformation of the traditional system of land tenure by instituting a regime of private title in the 1840’s. . . .

A Board of Commissioners to Quiet Land Title, commonly known as the Land Commission, was created in 1846 for the “investigation and final ascertainment or rejection of all claims of private individuals,” and was empowered to make Land Commission Awards. The Minister of Interior was authorized to issue Royal Patents upon such awards, upon payment of commutation by the awardee to the government, usually set at one-third the value of the unimproved land at the time of the award. A Land Commission Award furnished as good and sufficient a ground upon which to maintain an action against any person as a Royal Patent. Act of August 10, 1854, Laws of Hawaii, 1854; RLH 1925, Vol. II at 2146-7.

In 1847, the King together with the Privy Council determined that a land mahele, or division, was necessary for the prosperity of the Kingdom. The rules adopted to guide such division were, in part, (1) that the King shall retain all his private lands as individual property and (2) that of the remaining lands, one-third was to be set aside for the Government, one-third to the chiefs and konohiki, and one-third for the tenants. The Great Mahele was started in 1848, with the chiefs and konohiki [agents of the chiefs] first coming forward to settle their interests by agreement with the King. The Mahele agreements were essentially reciprocal quitclaims and did not convey title. Detailed claims had to be presented to the Land Commission for formal Land Commission Awards.
Once the Mahele agreements with the chiefs and the konohiki had been completed, there was to be a division of the remaining lands between the King and the Government. The King’s motives in undertaking such a division were indicated by this court in Estate of His Majesty Kamehameha IV, 2 Haw. 715, 722 (1864).

Even before the King’s division with the chiefs and konohiki, a second division between himself and the government or state was clearly contemplated, and he appears to have admitted that the lands he then held might have been subjected to a commutation in favor of the government, in like manner with the lands of the chiefs. The records of the discussion in Council show plainly his Majesty’s anxious desire to free his lands from the burden of being considered public domain, and as such, subjected to the danger of confiscation in the event of his islands being seized by any foreign power, and also his wish to enjoy complete control over his own property. Moved by these considerations and by a desire to promote the interest of his Kingdom, he proceeded with an exalted liberality to set apart for the use of the government the larger portion of his royal domain, reserving to himself what he deemed a reasonable amount of land as his own estate.

To effect this, the King signed and sealed two instruments. By one instrument, the King, having “set apart forever to the chiefs and people the larger part of my royal land, for the use and benefit of the Hawaiian Government,” retained for himself and his heirs certain designated lands, thereafter referred to as Crown Lands. By the second instrument, the King “set apart forever to the chiefs and people of my Kingdom” the remaining designated lands. Until 1865, when Crown Lands were made inalienable, Kamehameha III and his successors acted like private owners respecting such lands. The deeds executed by the King upon sale of any portion of the Crown Lands are known as Kamehameha Deeds.

The public domain, which previous to the Mahele had been all-inclusive, was diminished by withdrawals of the Crown Lands and the lands successfully claimed by chiefs, konohiki and tenants. It included, inter alia, the lands surrendered to the Government by the King, the lands ceded by the chiefs in lieu of commutation, the lands purchased by the government, and all lands forfeited by the neglect of claimants to present their claims to the Land Commission within the period fixed by law. In 1893, following the overthrow of the monarchy, the Republic declared that Crown Lands were Government property and part of the public domain.

As to lands which were overlooked in the Mahele and thus unassigned, the question arose whether they were Crown or Government Lands. This court in Thurston v. Bishop, 7 Haw. 421 (1888), adopted the position that such unassigned lands remained part of the public domain.

Following the Mahele, portions of the public domain were sold from time to time in order to provide landless citizens with land and to obtain revenues for public expenditures. Purchasers of these lands were issued documents called Grants or Royal Patent Grants.

The Resident Alien Act of 1850 permitted “resident aliens” to acquire and own Hawai‘i land in fee.

In 1852, a new Constitution was approved. It continued the Constitutional Monarchy but substantially changed parts of it.
In the *Estate of Kamehameha IV*, 2 H. 715, 725 (1864), a case involving a dispute over the distribution of the Crown Lands upon the death of Kamehameha IV, the Hawaii Supreme Court described the dispute as follows:

It is claimed on behalf of his Majesty Kamehameha V., that he, as hereditary successor to the throne, shall inherit the entire estate, both real and personal derived from his Majesty Kamehameha III., at his decease, and held by Kamehameha IV., the King lately deceased.

On the part of Queen Emma, lately the consort of his Majesty Kamehameha IV., it is claimed that all the property possessed by her late royal husband was his private property, and must descend in accordance with the general law of the Kingdom, and that she is therefore entitled to inherit one-half of his real and personal estate, after payment of his debts, and to take dower in the other half.

The Court stated:

It is admitted that from the time when Kamehameha III. separated his own property from that of the Government, in 1848, up till his death, he dealt with his reserved lands, as his own private estate, leasing, mortgaging or selling the same at his pleasure. Ever since the division, those lands, except such as have been sold, have always been known as the King’s lands, and have been managed by an agent or land steward appointed by the King.

During his Majesty’s reign, a period of nearly nine years, he constantly dealt with the lands in question as his private property in like manner as his predecessor had done. On the 30th day of November last, his Majesty died intestate.

Having stated fully all the facts and circumstances which seem to us calculated to throw light on the subject, and to guide the Court in ascertaining the intention of Kamehameha III. as declared in the instrument of reservation of the 8th March, 1848, and in giving a sound construction to the confirmatory act of the Legislative Council, it only remains for us now to announce the conclusions at which we have arrived.

In our opinion, while it was clearly the intention of Kamehameha III. to protect the lands which he reserved to himself out of the domain which had been acquired by his family through the prowess and skill of his father, the conqueror, from the danger of being treated as public domain or Government property, it was also his intention to provide that those lands should descend to his heirs and successors, the future wearers of the crown which the conqueror had won; and we understand the act of 7th June, 1848, as having secured both those objects. Under that act the lands descend in fee, the inheritance being limited however to the successors to the throne, and each successive possessor may regulate and dispose of the same according to his will and pleasure, as private property, in like manner as was done by Kamehameha III.

The Court decided that the words and actions of Kamehameha III and Kamehameha IV proved their intent that:

(1) the King’s Lands descend in fee, the inheritance being limited however to the successors to the throne;
(2) each successive King/Queen may regulate and dispose of the same according to his/her will and pleasure, as private property; and

(3) the spouse of the King/Queen is lawfully entitled to dower in the lands, except so far as he/she may have barred his/her right therein by her own act and deed.

In November 1863, after Kamehameha IV agreed to sell and Elizabeth Sinclair agreed to purchase the government lands on the island of Ni‘ihau, Kamehameha IV died. Kamehameha V completed the transaction in January 1864. These government lands did not include two large parcels of land set off for Koakanu during the Great Mahele in 1848 and a tract of land containing 50 acres previously sold to Papapa. Subsequently, Papapa and Koakanu sold their land to Sinclair.

The following is from "Ulukau: The Hawaiian Electronic Library" by Rile M. Moffat and Gary L. Fitzpatrick, Chapter 5, "Surveys from the Mahele", page 108:

Ni‘ihau, the westernmost of the eight main islands of Hawai‘i, has one of the simplest yet most controversial land histories of any of the islands. On February 23, 1864, by Royal Patent 2944, it was sold in its entirety by Kamehameha V to James M. and Francis Sinclair. Even before the sale, there was general dissatisfaction among the Hawaiian people with the amount of land that had been sold by Kauikeaouli [Kamehameha III] and his two successors, Alexander Liholiho [Kamehameha IV] and Lot Kamehameha [Kamehameha V]. In this particular transaction, nearly 47,000 acres—almost twice the amount granted to all maka‘ainana as kuleana awards—was placed in the hands of non-Hawaiians. Just one month before the sale, residents of Ni‘ihau petitioned the minister of Interior, G. M. Robertson, to be allowed to purchase the land instead of having it go to foreigners.

In 1864, Kamehameha V promulgated a new Constitution. It continued the Constitutional Monarchy but substantially changed parts of it.

In 1865, Sinclair purchased the ahupua‘a of Makaweli (21,844 ac.) on Kaua‘i from Victoria Kamamalu Ka‘ahumanu.

The purpose of a January 3, 1865 statute was to "relieve the Royal Domain from encumbrances and to render the same inalienable." It provided for the redemption of the then existing mortgages on the King’s (Crown) lands. It stated that the remaining lands were to be "henceforth inalienable and shall descend to the heirs and successors of the Hawaiian Crown forever" and that "it shall not be lawful hereafter to lease said lands for any terms of years to exceed thirty." It created a Board of Commissioners of Crown Lands consisting of three persons to be appointed by the King, two of whom were required to be selected from among the members of the King’s Cabinet Council. The third was to act as Land Agent and be paid out of the revenues of the Crown Lands.

Princess Ruth asserted a claim to ownership of a one-half interest in all of the King’s (Crown) Lands. Spreckels purchased Ruth’s claim. As noted by W. D. Alexander, in 1882 Kal_kaua and Gibson persuaded the legislature to pass a bill
conveying to Claus Spreckels the crown lands of Wailuku, containing some 24,000 acres, in order to compromise a claim which he held to an undivided share of the crown lands. He had purchased from Ruth Keelikolani, for the sum of $10,000, all the interest which she might have had in the crown lands as being the half-sister of Kamehameha IV., who died intestate.

In 1882, a public meeting was held where the Planters Labor and Supply Company, a company formed by plantation owners in Hawai‘i to facilitate the importation of laborers, adopted two resolutions. First, a charge that the alienation of Crown lands, extravagance of spending, and contempt for the judiciary had caused a loss of confidence in the government. Second, a request asking Kalākaua to dismiss his Cabinet. Kalākaua denied both the charges and the request.

In 1887, Kalākaua signed a new Constitution. It continued the Constitutional Monarchy but substantially changed parts of it.

**DEFINITION OF “HAWAIIAN” AND “NATIVE HAWAIIAN”**

Who is a “Hawaiian”? Who is a “Native Hawaiian”?

Hawaiians who are Native Hawaiians are recognized (1) by the Hawaiian Homes Commission Act, 1920, as amended; (2) by Section 5(f) of the 1959 Admission Act; (3) in the Native American Housing Assistance and Self-Determination Act’s programs which are available to the State of Hawaii’s Department of Hawaiian Home Lands, and (4) by Hawaii Revised Statutes (HRS) “Chapter 10. Office of Hawaiian Affairs”.

The Hawaiian Homes Commission Act describes a “Native Hawaiian” as “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.” In other words, a Hawaiian is a Native Hawaiian only when he or she is fifty-percent or more Hawaiian.

Hawaii Revised Statutes (HRS) Chapter 10 applies to the Office of Hawaiian Affairs (OHA). HRS § 10-2 states the following definitions:

“Hawaiian” means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

“Native Hawaiian” means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.
In contrast, the Apology Resolution defines a "Native Hawaiian" as an individual "who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai‘i.” In other words, an HRS § 10-2 Hawaiian - a person who has one or more Hawaiian ancestors - is a “Native Hawaiian”. Using this all-inclusive definition, the word "Native" in “Native Hawaiian” is redundant. It is also confusing and misleading because a “Native Hawaiian” is a category of Hawaiian. Most Hawaiians are not Native Hawaiians.

HRS § 10H-3 ignores HRS § 10-2’s definitions. It states in part:

Native Hawaiian roll commission. (a) There is established a five-member Native Hawaiian roll commission within the office of Hawaiian affairs for administrative purposes only. The Native Hawaiian roll commission shall be responsible for:

1. Preparing and maintaining a roll of qualified Native Hawaiians;

2. Certifying that the individuals on the roll of qualified Native Hawaiians meet the definition of qualified Native Hawaiians. For purposes of establishing the roll, a “qualified Native Hawaiian” means an individual whom the commission determines has satisfied the following criteria and who makes a written statement certifying that the individual:

   A. Is:

   (i) An individual who is a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands, the area that now constitutes the State of Hawaii;

   (ii) An individual who is one of the indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act, 1920, or a direct lineal descendant of that individual; or

   (iii) An individual who meets the ancestry requirements of Kamehameha Schools or of any Hawaiian registry program of the office of Hawaiian affairs;

   B. Has maintained a significant cultural, social, or civic connection to the Native Hawaiian community and wishes to participate in the organization of the Native Hawaiian governing entity; and

   C. Is eighteen years of age or older;

In this document, except when quoting a source, I use the definitions stated in HRS § 10-2.
In his 2008 book “WHO OWNS THE CROWN LANDS OF HAWAI’I”, Professor Jon M. Van Dyke answered the question when, on page 379, he asked a second question: “What was the trust status of the Crown lands before the [1893] overthrow?” His answer to his second question was that the Crown lands were owned by the King in trust for the benefit of “all” of the people of Hawai’i. In support of his answer he cited the following quote in “Melody K. MacKenzie, ‘The Ceded Lands Trust,’ Hawaii Bar Journal, June 2000, at 6.”

While the fee simple ownership system instituted by the Mahele and the laws that followed drastically changed Hawaiian land tenure, the Government and, subsequently, the Crown Lands were held for the benefit for [sic] the people of Hawai’i. For Hawaiians, the Government and Crown lands marked a continuation of the concept that lands were held by the ali‘i on behalf of the gods and for the benefit of all.

Note that Professor MacKenzie spoke of both the Government Lands and the Crown Lands. Presumptively, when Professor Van Dyke spoke of “these lands” he also spoke of both.

On page 380 of his book, Professor Van Dyke stated a different answer to his second question.

Even though the 1898 Newlands Resolution and the 1900 Organic Act both clearly stated that these lands must be held in trust for the benefit of the people of Hawai’i (meaning the Native Hawaiian People), the Native Hawaiians lost actual control of these lands. In the 1993 “Apology Resolution,” the U.S. Congress characterized these events by saying that “the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government.” Although the United States assumed the public debt of Hawai’i at the time of annexation, that action was not in any sense “compensation” for the takeover of lands, because the public assets of Hawai’i were worth substantially more than the public debt, and the Crown Lands were not truly “public” but were an entitlement of the Native Hawaiian People as the beneficiaries of a trust maintained by their Monarch.

(Footnotes omitted.)

**THIRD**

On page 380 of his book, Professor Van Dyke went on to ask and answer a third question:

What was the nature of the trust established at the time of annexation (1898)? Because of its understanding that lands had been taken and transferred without consent or compensation, Congress made it clear in both the 1898 Newlands Resolution and the 1900 Organic Act that these lands must be held in trust for the inhabitants of Hawai’i, referring to the Native Hawaiians. . . .

(Footnotes omitted.)

Note that Professor Van Dyke spoke of “the Native Hawaiian People” and states “these lands must be held in trust for
the benefit of the people of Hawai’i (meaning the Native Hawaiian People)” and “must be held in trust for the inhabitants of Hawai’i, referring to the Native Hawaiians.” Translated using his definition of “Native Hawaiian”, he concludes that these lands must be held in trust for the benefit of Hawaiians.

Professor Van Dyke cited five authorities in support of his opinion that “all of the people of Hawai’i” means “only Native Hawaiians” which by his definition means only Hawaiians, that “for the benefit of the people of Hawai’i” means for the benefit of only “the Native Hawaiian People” which by his definition means only the Hawaiian people, and that “for the inhabitants of Hawai’i” means only “for the Native Hawaiians” which by his definition means only for the Hawaiians.

Contradicting his statements that “the 1898 Newlands Resolution and the 1900 Organic Act both clearly stated that [the Government and Crown Lands] must be held in trust for the benefit of the people of Hawai’i (meaning the Native Hawaiian People)” and that “Congress made it clear in both the 1998 Newlands Resolution and the 1900 Organic Act that these lands must be held in trust for the inhabitants of Hawai’i, referring to the Native Hawaiians[,]” Professor Van Dyke wrote in footnote 89 in Chapter 19 of his book at page 213:

89. The 1998 Newlands Resolution and the 1900 Organic Act did not “identify Native Hawaiians as a separate political entity, for to do so would have been inconsistent with the overall policy of destroying indigenous political sovereignty.” . . . But U.S. policy has changed and now recognizes the importance of supporting the separate political status of native communities; . . . and the references to “inhabitants” in the 1898 Newlands Resolution and the 1900 Organic Act are now seen to have recognized the special political status of Native Hawaiians . . . Any ambiguity concerning the term “inhabitants” has been cleared up in the “Apology Resolution,” . . . whereas clause 25, where the Congress referred only to the “Native Hawaiian people” when it recognized that the “crown, government and public lands” were ceded to the United States “without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government.” . . .

Assuming the truth of Professor Van Dyke’s allegation that “U.S. policy has changed and now recognizes the importance of supporting the separate political status of native communities”, Professor Van Dyke did not explain how this post-1900 change of U.S. policy could change the meaning of the unambiguous language of an 1898 Congressional Resolution and a 1900 Act of Congress or cause their unambiguous language to be ambiguous.

Assuming the twenty-fifth “Whereas” clause in the Apology Resolution had operative or legal effect, Professor Van Dyke did not explain how a 1993 Congressional Resolution could change the unambiguous meaning of the language of an 1898 Congressional Resolution and a 1900 Act of Congress.

In Chapter 20 of his book at page 218, Professor Van Dyke wrote:

The Hawaii Supreme Court explained in 1977 [State v. Zimring, 58 Hawaii 106, 124, 566 P.2d 725, 737 (1977)] that by virtue of the language in the 1900 Organic Act, “Congress provided that the United States would have no more than naked title to the public lands other than those set aside for federal uses and purposes,” adding also that “[t]he beneficial ownership of the people of
Hawaii was again acknowledged in the Admission Act.” Hawaii’s Attorney General explained later in 1982 that these provisions, taken together, meant that “while the U.S. held the naked title to the lands, the beneficial uses were severed and allowed to remain with Hawaii’s people.” [fn. 17] The Attorney General letter stated further that the reference to “inhabitants” was meant to refer to “the indigenous populations.” [fn. 18]

In footnotes 17 and 18, Professor Van Dyke wrote:

17. 1982 AG letter, supra note 7, at 5.

18. Id. See also “The Prince’s Plan is Co-Opted,” Wall Street Journal, September 9, 1991, at A-4, col. 1: “When the Hawaiian islands were later annexed to the United States [in 1898], the islands government [the Republic of Hawaii] acknowledged that this acreage belonged to native Hawaiians, and ceded it to the United States with the stipulation that it be held in trust for native Hawaiians.”

(Footnotes omitted.)

Footnote 7 in Chapter 20 at page 219 identified “[t]he Attorney General letter” as being a “Letter from Deputy Attorney General William M. Tam (approved by Attorney General Tany S. Hong) to Susumu Ono, Chair, Board of Land and Natural Resources, June 24, 1982[.]” This letter is an informal opinion letter concluding “that the submerged lands are ceded lands granted in Section 5(b) and subject to the public trust established in Section 5(f) of the [1959] Admission Act.”

In summary, the authorities cited by Professor Van Dyke in support of his conclusions are (1) the 1898 Newlands Resolution interpreted as if it had been written in 2008, (2) the 1900 Organic Act interpreted as if it had been written in 2008, (3) an informal June 24, 1982, opinion by Hawai'i’s Attorney General in response to a question about submerged lands, (4) a 1991 article in the Wall Street Journal and (5) one “whereas” clause in the 1993 Apology Resolution.

These citations, considered separately or together, do not establish that “the Crown Lands were not truly ‘public’ but were an entitlement of the Native Hawaiian People as the beneficiaries of a trust maintained by their Monarch” or that the Crown lands were owned by the King in trust for the benefit of only “the Native Hawaiian People” and not for the benefit of “all of the people of Hawai‘i”.

The 1898 Newlands Resolution states in relevant part:

The existing laws of the United States relative to public lands shall not apply to such lands 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.
This is a statement that the trust is for “the benefit of the inhabitants of the Hawaiian Islands”.

In its 1991 article, the Wall Street Journal appears to be interpreting the 1898 Newlands Resolution. Whatever its source, the opinion expressed in the article is wrong.

The following is the only part of the Attorney General’s June 24, 1982, informal letter that is relevant to Professor Van Dyke’s questions:

The third paragraph [of the 1898 Newlands Resolution] placed a special trust on the ceded lands and their revenues. Acknowledging that Hawaii had a well-established land tenure system and that the U.S. was receiving all the public lands free, Congress recognized that the use [of] the public lands should continue to inure to the benefit of Hawaii’s inhabitants. Thus while the U.S. held the naked title to the lands, the beneficial uses were severed and allowed to remain with Hawaii’s people. Except for the example of Texas which had also been an independent sovereign nation prior to statehood, the U.S. had never allowed new states to sever the beneficial uses and retain them for the indigenous population. It was unique in public law. . . .

This is a statement that the trust is for “the benefit of Hawaii’s inhabitants” and “Hawaii’s people” including its indigenous population. It is not a statement that the trust is for the benefit of only “the indigenous population”.

The 1900 Organic Act states in relevant part:

(3) The term “public lands” includes all lands in the Territory of Hawaii classed as government or crown lands previous to August 15, 1895, or acquired by the government upon or subsequent to such date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; except (1) lands designated in section 203 of the Hawaiian Homes Commission Act, 1920, (2) lands set apart or reserved by Executive order by the President, (3) lands set aside or withdrawn by the governor under the provisions of subdivision (q) of this section, (4) sites of public buildings, lands used for roads, streets, landings, nurseries, parks, tracts reserved for forest growth or conservation of water supply, or other public purposes, and (5) lands to which the United States has relinquished the absolute fee and ownership, unless subsequently placed under the control of the commissioner and given the status of public lands in accordance with the provisions of this Act, the Hawaiian Homes Commission Act, 1920, or the Revised Laws of Hawaii of 1915, and

(4) . . .

. . .

(e) All funds arising from the sale or lease or other disposal of public land shall be appropriated by the laws of the government of the Territory of Hawaii and applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation, approved July 7, 1898.
This is a statement that the trust is for “the benefit of the inhabitants of the Territory of Hawaii”.

As noted above, Professor Van Dyke expresses his opinion that

[any ambiguity concerning the term “inhabitants” has been cleared up in the “Apology Resolution,” . . ., whereas clause 25, where the Congress referred only to the “Native Hawaiian people” when it recognized that the “crown, government and public lands” were ceded to the United States “without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government.

Professor Van Dyke’s opinion is wrong for two reasons. First, the word “inhabitants” is not ambiguous. Second, in Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163, 175 (2009), the U.S. Supreme Court decided that the Apology Resolution does not convey any rights or make any legal findings in support of Hawaiian claims and its thirty-seven “whereas” clauses have no operative or legal effect. In its opinion, the Supreme Court stated in part:

Rather than focusing on the operative words of the law, the court below directed its attention to the 37 “whereas” clauses that preface the Apology Resolution. See 107 Stat. 1510–1513. “Based on a plain reading of” the “whereas” clauses, the Supreme Court of Hawaii held that “Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands.” 117 Haw., at 191, 177 P. 3d, at 901. That conclusion is wrong for at least three reasons.

First, “whereas” clauses like those in the Apology Resolution cannot bear the weight that the lower court placed on them. As we recently explained in a different context, “where the text of a clause itself indicates that it does not have operative effect, such as ‘whereas’ clauses in federal legislation . . ., a court has no license to make it do what it was not designed to do.” District of Columbia v. Heller, 554 U.S. ___, ___, n. 3 (2008) (slip op., at 4, n. 3). See also Yazoo & Mississippi Valley R. Co. v. Thomas, 132 U. S. 174, 188 (1889) (“As the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up”).

FOURTH

The Apology Resolution’s twenty-fifth “Whereas” clause cited by Professor Van Dyke states:

Whereas the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government[.]

Another of the Apology Resolution’s “Whereas” clauses states:

Whereas, the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum[.]

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It is reasonable to conclude that this reference to “national lands” is a reference to “crown, government and public lands of the Kingdom of Hawaii”.

Paragraph “(1)” of the Apology Resolution’s “Acknowledgment and Apology” section states in relevant part:

SECTION 1. ACKNOWLEDGMENT AND APOLOGY.

The Congress -

(1) on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii on January 17, 1893, acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people;

According to Professor Van Dyke's analysis, Hawaiians own all “crown, government and public lands of the Kingdom of Hawaii” because in 1893, pre-overthrow, Hawaiians had sovereignty over Hawai‘i and its government. Thus, the ultimate question is: In 1893, pre-overthrow, did Hawaiians have sovereignty over Hawai‘i and its government? The answer is no.

“Sovereignty” is defined as having supreme authority within a territory. It is the power to rule and make laws enforceable within a geographic area.

In 1810, Native Hawaiians were the “supreme authority”. They had total control. Between 1810 and 1893, pre-overthrow, the decisions made and not made by Hawaiian ali‘i and actions taken and not taken by Hawaiian ali‘i allowed other non-Asians in Hawai‘i to become a substantial part of the control group to the point where, in 1893, pre-overthrow, a mix of Hawaiians and other non-Asians in Hawai‘i, particularly those qualified to vote, had sovereignty.

Hawai‘i’s government started in 1810 as a monarchy/feudal aristocracy. Kamehameha III’s 1840 Constitution commenced a constitutional monarchy. This constitutional monarchy was modified by new Constitutions in 1852, 1864 and 1887.

The United States government was not involved in Kalākaua’s approval of the 1887 Constitution. Kalākaua and Liliʻuokalani recognized the validity of the 1887 Constitution and governed in accordance with it.

Under the 1887 Constitution, there were four Cabinet members - Minister of Finance, Minister of Foreign Affairs, Attorney General and Minister of the Interior. A Cabinet member could be removed upon a vote of want of confidence passed by a majority of all the elective members of the Legislature. Each Cabinet member held a seat, ex-officio, in the Legislature with the right to vote except on a question of want of confidence in him.
The following is a list of the members of the Cabinet and the dates of their appointment. Predecessors were out-of-office prior to the appointment of successors.

F  Minister of Finance
FA  Minister of Foreign Affairs
AG  Attorney General
I  Minister of the Interior

F  6-30-86  Paul Puhiula Kanoa
FA                  Robert James Creighton
AG                  John T. Dare
I                   Walter Murray Gibson

FA  10-13-86 Walter Murray Gibson
AG                  John Lot Kaulukou
I                   Luthur Aholo

AG  10-22-86 Luther Aholo

AG  11-15-86 Antone Ross

F  7-1-87  Godfrey Brown
FA                  William Lowthian Green
AG                  Clarence W. Ashford
I                   Lorrin Andrews Thurston

FA  12-28-87 Jonathan Austin
I  9-27-88  Jonathan Austin

I  10-27-88 Lorrin Andrews Thurston

F  7-22-89  Samuel Mills Damon

FA  6-17-90  John Adam Cummins
AG                  Arthur P. Peterson
I                   Charles Nicholas Spencer
The 1887 Constitution specified in its Article 78:

Wherever by this Constitution any Act is to be done or performed by the King or the Sovereign, it shall unless otherwise expressed, mean that such Act shall be done and performed by the Sovereign by and with the advice and consent of the Cabinet.
In the case of *In re Authority of the Cabinet*, 7 Haw. 783 (1889), the Hawaii Supreme Court agreed with the following statements:

The Government in all its departments must be conducted by the Cabinet, who will be solely and absolutely responsible for such conduct.

Your Majesty shall in future sign all documents and do acts which under the laws or the Constitution require the signature or acts of the Sovereign, when advised so to do by the Cabinet, the Cabinet being solely and absolutely responsible for the signature of any document or act so done or performed by their advice.”

In the appeal of *In re Responsibility of Cabinet*, 8 Haw. 566 (1890), the Hawaii Supreme Court decided that it was not necessary for the Cabinet to be unanimous. Only three of the four votes were required.

The Legislature consisted of the Nobles, Representatives and Cabinet members sitting together.

Twenty-four Nobles were to be elected, six from the Island of Hawai‘i, six from the Islands of Maui, Moloka‘i and Lana‘i, nine from the Island of O‘ahu, and three from the Islands of Kaua‘i and Ni‘ihau. The term of each Noble was six-years and one-third of each division were elected biannually. The only persons eligible to be Nobles were not less than twenty-five year old subjects of the Kingdom who 1) had resided in Hawai‘i for not less than three years, and (2)(a) were the owners of taxable property in the Kingdom of the value of three-thousand dollars over and above all encumbrances, or (b) were in receipt of an annual income of not less than six-hundred dollars. The word “denizen” was not mentioned. The only persons authorized to vote for Nobles were not less than twenty-year old male residents of the Hawaiian Islands who (1) were of Hawaiian, American or European birth or descent, (2) paid their taxes, (3) resided in the Kingdom not less than three years and in the district not less than three months immediately preceding the election, (4) owned and possessed, in their own right, taxable property in the Kingdom of the value of not less than three thousand dollars over and above all encumbrances, or actually received an income of not less than six hundred dollars during the year next preceding their registration for the election, (5) caused their names to be entered on the list of voters for Nobles for their Districts, (6) took an oath to support the Constitution and laws, and (7) provided, however, that the requirements of a three years residence and of ability to read and comprehend an ordinary newspaper, printed in the Hawaiian, English or some European language, shall not apply to persons residing in the Kingdom at the time of the promulgation of this Constitution, if they shall register and vote at the first election which shall be held under this Constitution.

Twenty-four Representatives were elected biennially. The only persons eligible to be Representatives were not less than twenty-one year old male subjects of the Kingdom, who (1) knew how to read and write either the Hawaiian, English or some European language, (2) understood accounts, (3) had been domiciled in the Kingdom for at least three years, the last of which was the year immediately preceding their election, and (4) owned real estate within the Kingdom of a clear value, over and above all encumbrances, of at least five hundred dollars, or had an annual income of at least two hundred and fifty dollars.
derived from any property or some lawful employment. The only persons authorized to vote for their district Representatives were not less than twenty-year old males domiciled in Hawaii for no less than one year preceding the election who (1) were “of Hawaiian, American, or European birth or descent”, (2) paid their taxes, (3) if born since the year 1840, knew how to read and write the Hawaiian, English or some European language, (4) caused their names to be entered on the list of his district, (5) took an oath to support the Constitution and laws, and (6)

provided, however that the requirements of being domiciled in the Kingdom for one year immediately preceding the election, and of knowing how to read and write either the Hawaiian, English or some European language, shall not apply to persons residing in this Kingdom at the time of the promulgation of the Constitution, if they shall register and vote at the first election which shall be held under this Constitution.

The King appointed all of the members of the Hawaii Supreme Court for life. The members of the Hawaii Supreme Court and the years of their service were:

William Little Lee 1852–1857; Chief Justice 1852-1857;
John (Keoni) Papa 1852–1864;
Lorrin Andrews 1852–1854;
Elisha Hunt Allen 1857–1877; Chief Justice 1857-1877;
George Morrison Robertson 1855-1863, 1864-1867;
Robert Grimes Davis 1864–1868;
James W. Austin 1868–1869;
Hermann A. Widemann 1869–1874;
Charles C. Harris 1874–1881; 1877–1881; Chief Justice 1877-1881;
Albert Francis Judd 1874–1900 1881–1900; Chief Justice 1881-1900;
Lawrence McCully 1877–1892;
Benjamin H. Austin 1881–1885;
Edward Edward Preston 1885–1890;
Richard Fredrick Bickerton 1886–1895;
Abraham Fornander 1886–1887; and
Sanford B. Dole 1887–1893.

At page 148, Professor Van Dyke wrote:

… The 1890 census reported that 13,593 were registered to vote, and of these 8,777 were listed as “natives” and another 777 were “half-castes” - that is, part Hawaiians. Of the remainder, half (2,091) were Portuguese Laborers.

(Footnotes omitted.)
At page 149, Professor Van Dyke wrote that about two-thirds of the voters for representatives were Hawaiians and... Hawaiians comprised more than a third of the voters for nobles. In the February 1890 election, the National Reform Party, led by Robert W. Wilcox, who voiced the dissatisfaction of the Native Hawaiians about the 1887 Constitution and rallied their political enthusiasm, particularly in Honolulu, won fourteen out of the twenty-four seats in the House of Representatives and took all nine of the seats for Nobles on O'ahu (but lost the other fifteen seats on the neighbor islands). The National Reform Party was able to organize the Legislature (the Nobles and Representatives met together as one body), elect its President and control its committees, and force the members of the "reform" Cabinet, led by Lorrin Thurston, to resign.

The February 1892 election did not break down along racial lines. The elections of 1892 produced a strange assembly, in which no party had a majority. Wilcox and his group formed the Liberal Party, along with people like the Ashford Brothers, who had been active in promoting the [1887] Bayonet Constitution, and they were critical of Queen Lili'uokalani and called for a constitutional convention. Three conservative parties supported the Queen and stability, generally opposing a constitutional convention and supporting a new trade agreement with the United States. The Liberal Party won only thirteen seats, with the other parties holding thirty-five. Native Hawaiians held twenty-five of the forty-eight seats in the... Legislature that met during 1892-93. These results certainly do not indicate that the Native Hawaiians had lost control of the Kingdom. Even with the limiting property and income restrictions governing the voting for the Nobles, Native Hawaiians continued to play the dominant role in decision making, and the election also confirmed that the Queen continued to have broad support.

...In the 1890 election, Native Hawaiians had effectively wrested control of the Kingdom from those who had foisted the [1887] Constitution on the Kingdom and efforts were underway during the years that followed to reassert a stronger role for the Monarchy. Those who now claim that the Native Hawaiians had lost control of the Kingdom prior to the 1893 overthrow are wrong.

(Footnotes omitted.)

At page 148, Professor Van Dyke wrote:

In 1890, the Legislature approved amendments to the Constitution to reduce the amount of property one had to own to vote for the Nobles from $3,000 to $1,000, to allow only "subjects" instead of mere "residents" to vote, and to require Nobles to be male. But these provisions were never adopted, because the 1892 Legislature did not reconsider and confirm them, as required by Article 82 of the 1887 Constitution... .

(Footnotes omitted.)

The facts stated by Professor Van Dyke evidence the error of his statement that "[t]hose who now claim that the Native Hawaiians
had lost control of the Kingdom prior to the 1893 overthrow are wrong.”

When “about two-thirds of the voters for representatives were Hawaiians and ... Hawaiians comprised more than a third of the voters for nobles”, it follows that about one-third of the voters for representatives and about two-thirds of the voters for nobles were non-Hawaiians. These facts show that Hawaiians did not have the votes to control the legislature.

The facts that the February 1892 election (1) did not break down along racial lines, (2) produced a strange assembly, in which no party had a majority, (3) elected thirteen legislators who were members of the Liberal Party, were critical of Queen Liliʻuokalani, and sought a constitutional convention, (4) elected twenty-five Hawaiian legislators, (5) elected twenty-three non-Hawaiian legislators, and (6) elected thirty-five legislators from three conservative parties that “supported the Queen and stability”, generally opposed a constitutional convention and supported a new trade agreement with the United States show that Hawaiians did not control the government.

The following statements by Liliʻuokalani in Hawaii’s Story By Hawaii’s Queen at pages 216, 218, confirm the conclusion that in 1892 Hawaiians did not play the dominant role in decision making.

In the month of August [1892] the Reform party began their policy of dismissing the ministry. They made promises to Mr. Cummins of the National Reform, and Bush, Wilcox, and Ashford, of the Liberal party, and P. P. Kanoa of seats in the cabinet if they joined their party, and they did so, besides taking Kamauoha, Iosepa, and another member with them, which made the Reform party very strong.

... It was a practice among some of the native members to sell their votes for a consideration. This was taught them by the Thurston party. They would come to me and then return to that party and repeat all that was said, for which they were usually paid something. The Liberals won and the cabinet was voted out, partly because they were so sure of their success and on account of their own corrupt practices.

The July 17, 1893, Report of U.S. Special Commissioner James H. Blount to U.S. Secretary of State Walter Q. Gresham Concerning the Hawaiian Kingdom Investigation states that

[i]the minister of finance informs me that the taxes paid by Americans and Europeans amount to $274,516.74; those by natives, $71,386.82; half castes, $26,868.68; Chinese, $87,266.10; Japanese, $67,326.07; other nationalities, $729.82.

He also informs me that the acreage on which taxes are paid by various nationalities is:

Europeans and Americans, 1,052,492 acres; natives, 257,457 acres; half castes, 531,545 acres; Chinese, 12,324 acres; Japanese, 200 acres; other nationalities, none.

The surveyor-general reports the Crown lands for 1893 as containing 915,288 acres. Of these he reports 94,116 acres available
for lease. Of this latter number only 47,000 acres are reported to be good arable land. He likewise reports the Government land as containing 828,370 acres. He reports these estimated in 1890 to be worth $2,128,850. The annual income from them is $67,636. Of this income, $19,500 is from wharfage and $7,800 from rent of land with buildings thereon.

The cane and arable land is estimated at 35,150 acres.

It is important here to recall his statement made to the legislature in 1891, in the following language:

Most Government lands at the present time consist of mere remnants left here and there, and of the worthless and unsalable portions remaining after the rest had been sold.

In 1893, pre-overthrow, non-Hawaiians were Cabinet officers (appointed by the Queen but removable upon a vote of want of confidence passed by a majority of all the elective members of the Legislature), legislators (elected by qualified male voters), Supreme Court Justices (appointed by the King/Queen for life subject to impeachment), and other government officials.

The facts show that the Hawaiians did not vote as a unified group, did not have control of the Legislature, did not have the votes to change the 1887 Constitution, did not control the Cabinet, did not control the Hawaii Supreme Court, and did not control the economy. The Queen was the nominal Chief Executive. The Cabinet controlled the Queen.

The facts show that, in 1893, pre-overthrow, neither the Hawaiians nor the other non-Asians in Hawai‘i had control of Hawai‘i’s government. Together they had control. That is why Lili‘uokalani sought to change the Constitution but failed. It is also why a few non-Hawaiians instigated the overthrow.

**FIFTH**

On March 18, 1959, President Eisenhower signed “An Act to Provide for the Admission of the State of Hawai‘i into the Union[.]” Section 5 of the 1959 Admission Act states:

(a) Except as provided in subsection (c) of this section, the State of Hawaii and its political subdivisions, as the case may be, shall succeed to the title of the Territory of Hawaii and its subdivisions in those lands and other properties in which the Territory and its subdivisions now hold title.

(b) Except as provided in subsections (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 public property, 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. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.
(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State 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. 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. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

(g) As used in this Act, the term "lands and other properties" includes public lands and other public property, and the term "public lands and other public property" means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded.

As amended in 1978, Article XII of the Hawaii State Constitution states in part:

12.4
Public trust

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.

12.5
Office of Hawaiian Affairs; establishment of board of trustees

There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members.
Powers of board of trustees

The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board.

In addition to asking "[w]hat was the trust status of the Crown Lands before the [1893] overthrow?" and "[w]hat was the nature of the trust established at the time of annexation (1898)?", Professor Van Dyke asked on page 381 "[w]hat was the nature of the trust confirmed in the Admission Act at the time of statehood (1959)?"

In Hawaii v. Office of Hawaiian Affairs, the United States Supreme Court partially answered this question when it stated that “we must not read the Apology Resolution's nonsubstantive 'whereas' clauses to create a retroactive 'cloud' on the title that Congress granted to the State of Hawaii in 1959.”

On pages 257 and 258, Professor Van Dyke wrote his answer to his question:

... In Section 5(b) of the 1959 Admission Act, Congress transferred about 1.4 million of the roughly 1.75 million acres of Public Lands (the former Crown and Government Lands) to the new State of Hawai‘i (which included the Hawaiian Home Lands). But the State of Hawai‘i received only “naked” title to these Public Lands, along with the fiduciary responsibilities of a trustee. In Section 5(f) of the Admission Act, Congress stated explicitly that these transferred lands are to be held as a “public trust” by the State and that the revenues generated by these lands are to be used for the following five specific purposes:

- 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 a widespread basis as possible,
- for the making of public improvements, and
- for the provision of lands for public use.

These carefully crafted provisions were based on the clear recognition that Native Hawaiians had continuing claims to these lands and that they must be held in trust until those claims are finally resolved.
Here again, as he did in other parts of his book, Professor Van Dyke quoted a sentence using the words “Native Hawaiian” as defined in the Hawaiian Homes Commission Act, 1920, as amended, and then interpreted it as if it used the words “Native Hawaiian” as defined in the Apology Resolution.

Professor Van Dyke ignored the part of Section 5(f) that says “[s]uch 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[].” Clearly, Section 5(f) authorizes, but does not require, the State to spend trust funds “for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended”. These carefully crafted provisions were based on the clear recognition that Hawaiians did not have continuing claims to these “lands, proceeds, and income”.

The relationship between the Admission Act’s Public Land Trust and the State Constitutional and statutory sections creating the Office of Hawaiian Affairs (OHA) is explained in the Hawai‘i Attorney General’s Opinion No. 83-2 issued on April 15, 1983, written by Charlotte E. Libman, Deputy Attorney General, to Mr. T. C. Yim, Administrator, Office of Hawaiian Affairs. It states in part as follows:

May the legislature, consistent with Section 5(f) of the Admission Act and Article XII of the State Constitution, authorize OHA to use funds derived from the Public Land Trust (Section 5(f) of the Admission Act) to better the conditions of Hawaiians as defined in Hawaii Revised Statutes, Section 10-2(5)? We answer in the negative.

Section 5(f) of the Admission Act creates two classes of beneficiaries for whose benefit the lands and the proceeds of the ceded lands may be used. These two classes of beneficiaries of the public land trust are: (1) native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended; and (2) the general public. In addition to the named beneficiaries, Section 5(f) of the Admission Act restricts the manner in which the lands, proceeds and income may be used. The authorized uses to which the lands, proceeds and income of the public land trust may be put are set forth in Section 5(f) of the Admission Act as follows:

1. Support of the public schools and other public educational institutions;

2. The betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended;

3. The development of farm and home ownership on as widespread a basis as possible;

4. The making of public improvements; and

5. The provision of lands for public use. The State may use the lands described in Section 5(f) (commonly referred to as “ceded lands”) for one or more of the five stated purposes and the use for any other object constitutes a breach of trust for which suit may be brought by the United States. By characterizing native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, as meaning any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778, [see Hawaiian Homes Commission Act, 1920, Section 201(a) (7)], “Hawaiians,” as defined in HRS § 10-2(5) are clearly excluded as beneficiaries of the public land trust for whose special benefit the lands and proceeds, described in Section 5(f) of the Admission Act, may be used.
Prior to the Constitutional Convention of 1978, the State’s practice had been to channel the benefits of the public land trust, by and large, to the Department of Education, which satisfied one or more of the trust purposes, since the general public, as well as native Hawaiians, benefit by education. (See I Proceedings of the Constitutional Convention of Hawaii, 1978, Standing Committee Report No. 59, Aug. 29, 1978, p. 643; Committee on the Whole Report, No. 13, September 5, 1978, p. 1017).

A review of the Proceedings of the Constitutional Convention of 1978 relating to the Committee on Hawaiian Affairs, indicates that the framers of Article XII of the Constitution of the State of Hawaii addressed their deliberations to the following concerns:

First, the State had never used the ceded lands or proceeds or a portion thereof, to specifically better the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended.

Second, based on data submitted to the Committee on Hawaiian Affairs, there appeared to be justification for the State to address the needs of Hawaiians, regardless of blood quantum, as an aboriginal class of people, separate and apart from members of the general public.

Various amendments to the State Constitution, intended to remedy the aforementioned concerns, were presented to the electorate for its approval by the 1978 Constitutional Convention.

The electorate ratified the proposed amendments to the State Constitution, which amendments created, inter alia, the Office of Hawaiian Affairs (OHA), in order to discharge the State’s assumed responsibility to native Hawaiians and Hawaiians.

Article XII, Sections 5 and 6 of the State Constitution created OHA and delineated, in general terms, the powers of the Board of Trustees, which exercises control over OHA.

However, in order to properly understand Article XII, Sections 5 and 6 of the State Constitution, those sections must be read in pari materia with Article XII, Section 4 of the State Constitution.

Article XII, Section 4 of the Constitution of the State of Hawaii, states in relevant part:

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.

This provision accords constitutional recognition to the two classes of beneficiaries of the public land trust, i.e. native Hawaiians and the general public and is consistent with the “Compliance with Trust” provision of the State Constitution.

Article XII, Section 5 of the State Constitution, classified another group of persons, as distinguished from native Hawaiians, as defined in Section 5(f) of the Admission Act, and the general public, designating them as “Hawaiians,” to be accorded special treatment, in order to better their conditions.

In reviewing the relevant sections of Article XII of the State Constitution together with Section 5(f) of the Admission Act, the following observations in support of our answer to the question posited, are apparent:

First, the public land trust created by Section 5(f) of the Admission Act is clearly distinguishable from the public trust created by Article XII of the State Constitution, as to named beneficiaries and objectives to be achieved. Second, although “native Hawaiians” are beneficiaries under both trusts, OHA, as a State agency, is limited to fulfilling the State’s trust obligation to better the condition of native Hawaiians, pursuant to Section 5(f) of the Admission Act. The State, through other departments, agencies, boards and/or commissions must fulfill its responsibility to the general public, as far as the other authorized uses of the ceded lands and proceeds are concerned. Third, OHA is constitutionally required to manage and administer the pro rata portion of funds derived from the public land trust for the betterment of conditions of native Hawaiians, and must seek funds from other sources, to better the conditions of Hawaiians, as
defined in HRS § 10-2(5). Fourth, the Constitution limits the activities of OHA to native Hawaiian and Hawaiian programs, services, and concerns, and thus OHA, could not, on behalf of the State, discharge the State’s responsibility to the general public, to use the proceeds from the public land trust for one or more of the other four enumerated purposes set forth in Section 5(f) of the Admission Act. Fifth, if the Legislature authorizes OHA to use, for Hawaiians, a portion of the pro rata share of funds derived from the public land trust for native Hawaiians, such legislation would diminish or limit the benefits of native Hawaiians and would be violative of Article XVI, Section 7 and Article XII, Section 4 of the State Constitution.