



Kaho'olawe Island Conveyance Commission
Consultant Report No. 1

Comprehensive Legal Research Memorandum

By:
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Comprehensive Legal Research Memorandum

Kaho'olawe Island Conveyance Commission

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October 12, 1992 Draft for comment

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KAHO'OLawe ISLAND CONVEYANCE COMMISSION

COMPREHENSIVE LEGAL RESEARCH MEMORANDUM

DRAFT: October 12, 1992

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Introduction

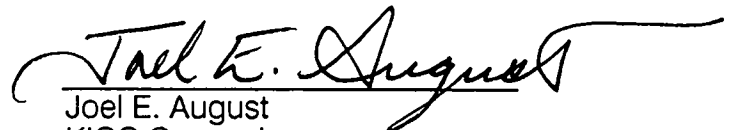
This Comprehensive Legal Research Memorandum is a compilation of research memoranda provided for the Commission from July of 1991 through August of 1992.

Topics for legal research were initially provided by the Commissioners and the Commission's staff. Some topics have been added or expanded upon to include additional information that was seen to be relevant as the work developed.

Additional legal research memoranda were provided for the Commission on topics related to administrative matters (such as the applicability of the Hatch Act to KICC staff.) That information is not included with this memorandum, but may be available from the Commission.

Comments on this draft of the memorandum are invited to be addressed to the KICC Counsel. Comments should be received not later than November 15, 1992, for consideration in preparing the final memorandum.

Wailuku, Maui, Hawaii, October 12, 1992.



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Kaho'olawe Island Conveyance Commission

COMPREHENSIVE LEGAL RESEARCH MEMORANDUM

DRAFT: October 12, 1992

I. KICC Generally

The Kaho'olawe Island Conveyance Commission (KICC) [consisting of Commission Chairman Hannibal M. Tavares, Commission Vice-Chairman Dr. Noa Emmett Aluli, MD, and Commissioners A. Frenchy DeSoto, H. Howard Stevenson and James A. Kelly] was established by the Congress of the United States to conduct studies and prepare a report regarding the Island of Kaho'olawe, Hawai'i.

A. Creation and authority

KICC was funded by the following quoted portion of the 1991 Defense Department appropriation, Pub. L. 101-511 §8118:

Sec. 8118. Notwithstanding any other provision of law, of the funds made available by this Act to the Department of the Navy, \$1,500,000, to remain available until September 30, 1992, shall be available only for the expenses of the Kahoolawe Island Commission which shall be established under the terms and conditions of S. 3088 as introduced in the Senate on September 10, 1990; *Provided*, That the Secretary of the Navy shall provide the Commission such assistance and facilities as may be necessary to carry out its proceedings.¹

Senate bill 3088, referred to in the appropriation, sought to establish a commission to study and recommend terms and conditions for returning Kaho'olawe Island, Hawai'i, from the United States to the State of Hawai'i. The funding described in the Department of Defense appropriation came via a grant from the Department of the Navy to the State of Hawai'i, administered by the University of Hawai'i.²

¹ Senate bill 3088 actually was introduced by Senator Daniel Akaka on September 20, 1990, according to 136 Congressional Record S 13508.

² The grant specifies that funding is provided for a period that terminates on September 30, 1992, while S. 3088 contemplated that KICC would function until thirty days after the submission of its final report to Congress.

According to Senate bill 3088 and the grant description, the Kaho'olawe Island Conveyance Commission (KICC) shall:

- (A) Identify portions of Kaho'olawe suitable for "restoration to a condition reasonably safe for human habitation," including lands suitable for use by the State of Hawaii for
 - (i) parks (including educational and recreational purposes)
 - (ii) the study and preservation of archeological sites and remains, and
 - (iii) the preservation of historic structures, sites and remains.
- (B) Identify portions of land suitable for restoration to a condition less than reasonably safe for human habitation, including lands suitable for
 - (i) soil conservation and plant reforestation purposes; and
 - (ii) removal or destruction of non-native plants and animals.
- (C) Estimate the cost of such restoration
- (D) Identify fences needed to enclose such areas
- (E) Estimate the cost of placing and maintaining the fences.
- (F) Evaluate the public or private entity best suited to perform the activities referred to in (B)
- (G) Estimate the total cost of performing the activities referred to in (B)

B. Additional considerations

Senator Akaka, discussing Senate bill 3088 (136 Congressional Record at S 13517) told the Senate, in part:

Kahoolawe was never settled in any meaningful way by Europeans after the arrival of Captain Cook. We know that it was home to early Native Hawaiian settlements. In an area of less than 44 square miles, over 500 archaeological and cultural sites can be found. In light of this rich heritage, Kahoolawe was placed on the National Register of Historic Places. Kahoolawe is the only island in the Hawaiian chain where the total archaeological history of the early Hawaiians remains intact. It is a gross understatement to say that the bombing of this island is inconsistent with the preservation of these archaeological sites.

Decades of bombing have turned the island into an environmental nightmare. Years of neglect have reduced Kahoolawe to a barren, forbidding landscape. Eight feet of topsoil have been lost due to wind and water erosion triggered by the impact of bombs.

My legislation proposal is based upon a 1953 Executive order which assured that Kahoolawe would be returned to the State of Hawaii. The order also guaranteed that the island would be restored to a safe condition.

Kahoolawe may be the smallest of our Hawaiian Islands, yet its importance to our heritage overshadows its small size. My bill would make the return and restoration of Kahoolawe a reality. It requires the removal of *all* explosives. This legislation is justified for overwhelming environmental, cultural and safety reasons. Under my bill, bombing will be stopped immediately. During the halt of the bombing, a "Kahoolawe Island Conveyance Commission" will determine the terms and conditions for its return. Consistent with the 1953 Executive order, the Commission will identify areas of the island to be restored to a safe condition. The U.S. military will be required to render the balance of the island to a condition that is ecologically sound.

Some areas, particularly the higher elevations, will never be habitable even if they were cleared of ordinance (*sic*). These areas should nonetheless be restored to a condition that permits reforestation, erosion control efforts, and removal of nonnative plants and animals.

For decades, the State of Hawaii, its elected officials, environmentalists, and native Hawaiian groups have asked for the return of the island. We have called for an end to the bombing. We have been rebuffed. We can no longer continue to wait.

This description of Senate bill 3088 by its author indicates that it was intended to protect archaeological and cultural sites and to remedy "an environmental nightmare." While Senator Akaka refers to the 1953 Executive Order, his description of its content and the purpose of KICC is not completely consistent with that Order's statement that upon the end of a federal need for the use of Kaho'olawe, or any part of it, the Department of the Navy should render such parts of Kaho'olawe "reasonably safe for human habitation, without cost to the Territory."

According to Senator Akaka's description, Senate bill 3088 requires that KICC identify areas of the island to be restored to a safe condition, but the Defense Department should "render the balance of the island to a condition that is ecologically sound." The latter areas (indicated by Senator Akaka to be those at higher elevations expected to be uninhabitable in any case) should be restored only to a condition that allows access for environmental restoration measures.

The Defense Department appropriation is the primary authority creating KICC. Reference to Senate bill 3088, and the comments of Senator Akaka regarding the purpose of that bill, are helpful in defining the duties of the KICC.

Senate bill 3088 was not enacted by Congress. However, its description of KICC duties was incorporated into the appropriation language and the Navy grant. The 1990 Defense Department appropriation also included the following language, in §8119:

Sec. 8119. None of the funds made available by this Act shall be available for any Military Department of the United States to conduct bombing training, gunnery training, or similar munitions delivery training on the parcel of land known as Kahoolawe Island, Hawaii.

Thus the Defense Department appropriation for fiscal year 1991 prohibited the use of Kaho'olawe for military target practice.³ That appropriation was approved by the President on November 5, 1990. However, on October 22, 1990, the President had acted on his own in a similar manner, as is shown by the following quotation from Volume 26,

³ That prohibition has been extended by similar provisions placed in Defense Department appropriations for fiscal years 1992 and 1993.

Number 43, of the Weekly Compilation of Presidential Documents, of Monday, October 29, 1990, at page 1635:

**Memorandum on the Kaho'olawe,
Hawaii, Weapons Range**
October 22, 1990

Memorandum for the Secretary of Defense

Subject: Use of the Island of Kaho'olawe, Hawaii as a Weapons Range

You are directed to discontinue use of Kaho'olawe as a weapons range effective immediately. This directive extends to use of the island for small arms, artillery, naval gunfire support, and aerial ordnance training. In addition, you are directed to establish a joint Department of Defense-State of Hawaii commission to examine the future status of Kaho'olawe and related issues.

George Bush

The October 22, 1990, memorandum prohibits the use of Kaho'olawe for military target practice and directs the Secretary of Defense to "establish a joint Department of Defense-State of Hawaii commission to examine the future status of Kaho'olawe and related issues." There is no reference to the President's memorandum in the Navy's grant to the State of Hawaii (the grant only reflects the provisions of Senate bill 3088.) Still, it is evident that the existence of the KICC also serves to satisfy the President's directive to the Secretary of Defense.

The President's more general instruction to "examine the future status of Kaho'olawe and related issues" appears to provide implied authority for KICC's inquiring into and reporting upon general areas of interest that may exceed the detailed scope of Senate bill 3088. Similar authority is found in §1(f)(2) of Senate bill 3088 (KICC shall report to Congress on the results of its studies "together with such comments and recommendations as the Commission considers appropriate.") Therefore KICC may expand upon the specific topics of Senate bill 3088, make further comments and pose additional recommendations.

C. Executive and Legislative authority

The United States Constitution reflects a concept of government divided into three separate branches.⁴ The authority of each of these branches is generally defined in Article I (*legislative*), Article II (*executive*), and Article III (*judicial*). Article I, §8

⁴ Congress has recognized that "the United States constitution and our democratic form of government was not derived from some exotic foreign land, but was modeled after the Iroquois Confederacy of Indian Nations," as described by the comments of Sen. Inouye on October 3, 1989, regarding Senate bill 978, 135 Cong.Rec. S 12386-02 *et seq.*, referring to House Concurrent Resolution 331 (1988).

provides that the "Congress shall have power to . . . make all laws which shall be necessary and proper for carrying into execution" its legislative powers.

The interaction of the President's authority with that of the Congress has been the subject of analysis usually reflecting comments such as the following, found in *Chas. T. Main Intern., Inc. v. Khuzestan Water & Power Authority*, 651 F.2d 800, 804-06 (2d Cir. 1981):

The primary issue before us is one of presidential authority. As this nation's leader and as the head of one of the three coordinate branches of the federal government, the President holds substantial powers, both express and implied, under the Constitution. These powers may be supplemented, in certain areas, by delegations of authority from Congress. Justice Jackson described the reach of presidential power, and its interaction with that of the legislative branch, in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38, 72 S.Ct. 863, 870-71, 96 L.Ed. 1153 (1952):

1. When the President acts pursuant to an express or implied authorization of Congress, his Authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power
2. When the President acts in absence of either a Congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . .⁵

President Eisenhower's February 20, 1953, Executive Order 10436 recites as its authority §91 of the Organic Act of April 30, 1900. §91 of the Organic Act allowed that public property ceded to the United States by the Republic of Hawai'i would be controlled by the Territory of Hawai'i "until otherwise provided for by Congress, or taken for uses and purposes of the United States by direction of the President . . ." The Executive Order prefaced its reference to that statutory authority with the premise

⁵ The case of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 870-71, 96 L.Ed. 1153 (1952), is apparently the seminal authority in the field of law that discusses Executive Orders, and their validity. See, eg., *Dames & Moore v. Regan*, 453 U.S. 654, 668-69, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1991).

that "it appears necessary and in the public interest" that Kaho'olawe be taken and reserved for use by the Navy.

Therefore, when Kaho'olawe was taken and placed under the jurisdiction of the Secretary of the Navy by Executive Order 10436, that order relied upon the authority of the Organic Act. The President acted pursuant to an express authorization of Congress, the first and strongest of the categories described in *Youngstown*, as quoted above. §91 of the Organic Act also provided for the return of lands taken for federal use. However, the provisions of the Organic Act became generally obsolete on March 18, 1959, as a result of the Admission Act.

Although §91 of the Organic Act was not specifically repealed (*cf.* §14 of the Admission Act, specifically repealing §92 of the Organic Act) §23 of the Admission Act provides that "[a]ll Acts or parts of Acts in conflict with the provisions of this Act, whether passed by the legislature of said territory or by Congress are hereby repealed." The federal taking and return provisions of the Organic Act would conflict with certain provisions of §5 of the Admission Act.

§5 of the Admission Act defines the grant and transfer of title of lands to the State of Hawai'i from the Territory and from the United States. §5(c) excepts from transfer to the State any lands that, as of March 18, 1959, were set aside pursuant to any Executive Order (as one of several methods of setting aside such land) for use of the United States. §5(e) provides that during the five years following admission, all land retained by the United States pursuant to §5(c) should be examined for a determination of "the facts regarding its continued need" and allowed the President to determine that land not needed should be conveyed to the State. §5(f) establishes a public trust "for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians . . ." and other purposes.

The Congressional Act of December 23, 1963 (Public Law 88-233, 77 Stat. 472) now supersedes the provision for land conveyance to the State that was initially established in §5(e) of the Admission Act (see part II.C.1.a., *infra.*) The 1963 Act allows a determination that lands retained pursuant to §5(c) of the Admission Act are surplus property. A determination that land in federal use has become surplus property is made by the Administrator of General Services "with the concurrence of the head of the department or agency exercising administration or control over such land." Such a

determination allows conveyance of the surplus property to the State by the Administrator without monetary consideration.⁶

§91 of the Organic Act authorized the President to restore to the Territory any land taken for uses of the United States. Kaho'olawe, at least when it was taken by the 1953 Executive Order, was subject to the Organic Act restoration provision.

On March 18, 1959, the possibility of returning Kaho'olawe to the new State became subject to §5(e) of the Admission Act. §23 of the Admission Act implicitly repealed the Organic Act's restoration provision (in view of its conflict with §5(e) of the Admission Act.)

Public Law 88-233 supplanted §5(e) of the Admission Act, providing the existing ordinary method for returning to the State any land previously set aside for use by the United States.

President Eisenhower's 1953 Executive Order 10436, insofar as it explicitly relies upon §91 of the Organic Act for its authority and validity, has no independent authority superior to the Congressional authority that created the Organic Act, and then subsequently changed it.

By the 1959 Admission Act, Congress altered the restoration procedure established in the Organic Act, but the new procedure still provided for a Presidential determination as to need. In 1963 Congress shifted responsibility for such a determination with regard to surplus property so that it became the responsibility of the Administrator of General Services, with the concurrence of the Secretary of the Navy.

By establishing the Kaho'olawe Island Conveyance Commission, Congress indicated its interest in considering the return of Kaho'olawe to the State by an extraordinary method, tailored to unusual circumstances, and not limited to the method established in

⁶ The Administrator may require the State to pay the estimated fair market value of improvements made on such lands after they were set aside. If the State does not agree to pay, the Administrator may sell the land and improvements, and in that case pay to the State the portion of the proceeds estimated to be equal to the value of the lands.

ordinary existing law.⁷ The Commission may recommend the basis for a specific Act of Congress defining the terms and conditions for ending military use of Kaho'olawe.⁸

There are instances where congressional delegation of authority to non-governmental entities poses a question of constitutional validity. See, e.g. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Northwestern University Law Review 62 (Fall 1990) (the separation of powers doctrine may invalidate certain congressional delegations outside the federal government even if that same grant of power can permissibly be vested in the executive branch.) In the case of the KICC, however, it does not appear that there is any basis for a conflict between the constitutionally separate powers of the Congress and the President.

The most telling indication of the absence of any such conflict is seen in the similar purposes of the Defense Department Appropriation Act, Pub. L. 101-511, §§ 8118 and 8119 (funding this Commission and prohibiting military target practice) and the President's October 22, 1990, memorandum (discontinuing use of Kaho'olawe as a weapons range and requiring a commission to examine the future status of Kaho'olawe.) Assuming neither Congress nor the President changes their stated positions, there is no evidence of conflict between those two branches of government in this matter.

Even supposing an absence of evidence of the President's similar intent regarding Kaho'olawe, Congress has authority to establish investigatory commissions for its own

⁷ As a general rule of statutory construction, a more specific statute will be given precedence and control over a more general one on the same subject. *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1988). "It is a fundamental rule of statutory construction that specific statutory language prevails over general provisions." *Union Central Life Insurance Co. v. Wernick*, 777 F.2d 499, 501 (9th Cir. 1985). Thus, any Act of Congress specifically determining the fate of Kaho'olawe on stated terms and conditions will prevail over any other general provisions of law governing the disposition of surplus property of the United States in Hawaii.

⁸ In an opinion of the U.S. Attorney General (that interprets §91 of the Organic Act), *Return to Hawaii of Lands Reserved by Executive Order for Use of War Department*, April 1, 1927, 35 Op.A.G. 205 at 207-8, it was observed that "[i]t is apparent that under existing law the President may at any time restore the land to its former status. This power is continuing and may be exercised by any incumbent of the presidential office when, in his judgment, the occasion arises; while the power of Congress to deprive him of that authority at any time and to make such disposition of the land as it deems proper is beyond question." (emphasis supplied)

purposes.⁹ Questions of constitutionality arise when some actual legislative or executive authority is delegated to another entity. In this case, the role of KICC is only investigatory and advisory, a purpose intended to assist Congress in fulfilling its constitutional duty to legislate wisely. As such, the grant to the commission is consistent with the inherent investigatory power of Congress implied by its legislative function. See, e.g., *McGrain v. Daugherty*, 237 U.S. 135, 175 (1927) ("A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information - which not infrequently is true -- recourse must be had to others who do possess it"); *Buckley v. Valeo*, 424 U.S. 1, 137 (1975) ("Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them.")

In summary, KICC was created by a specific congressional appropriation intended to determine a basis for ending federal use of Kaho'olawe. Almost simultaneously, the President formally directed the Department of Defense to act in a manner consistent with the same purpose. Kaho'olawe was taken for federal use pursuant to the authority of §91 of the Organic Act, by Presidential order. Having been formally taken for federal use, as time passed, Kaho'olawe became subject to successive statutory provisions for ending that federal use. It appears that both Congress and the President now contemplate the formal end of military use of Kaho'olawe by the enactment of a specific law designed for that particular purpose. This Commission's role in recommending the terms and conditions for such an act is well-founded and free of any constitutional restraint or infirmity.

⁹ "The power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them." *Watkins v. United States*, 354 U.S. 178, 187 (1957). "It is not an encroachment on the executive for the legislature to create a commission and designate its members to perform delegable legislative duties. . ." 16 C.J.S. *Constitutional Law* §130, page 437.

II. Kaho'olawe Generally

Kaho'olawe's geological and theological origins are described in various works, including Peter MacDonald's article *Fixed in Time: A Brief History of Kahoolawe*, Hawaiian Journal of History, Vol. 6 (1972), pages 69-90.

Documents located at the State Archives show that on November 10, 1847, Keoni Ana of the Interior Department of the Kingdom of Hawai'i wrote to Oahu Judge William Lee in response to an inquiry. The Judge was instructed regarding a convicted thief named George Morgan: "Cast him away on another land, at Kahoolawe the Island nearest Maui. That is the place they are usually sent to. Heretofore the natives who were sent there swam to Maui, could not confine them there, but a foreigner cannot accomplish such a feat."

On December 15, 1847, Namauu wrote from the Ministry of the Interior to the Hon. G. P. Judd, providing a list of the lands owned by the King. "This is what I know and heard, and very well known, as belonging to Kamehameha I, K., II, K., III." Item 5 on the list is "Island of Kahoolawe." Document 396 of the Interior Department (Lands) records of the State Archives is a list of King's Lands, also listing Kaho'olawe.

In *United States v. Mowat*, 582 F.2d 1194, 1206 (9th Cir. 1978) (affirming convictions for unauthorized entry onto the Kaho'olawe military reservation by several protestors), when the issue of the sufficiency of the government's possession of Kaho'olawe was raised defensively in the context of criminal proceedings, it was stated in *dicta* that "King Kamehameha III gave [Kaho'olawe] to the Hawaiian Kingdom in 1848 as Government Land."

The Great Mahele, or land division, is reflected in Hawai'i's legislative history as *An Act Relating to the Lands of His Majesty the King and of the Government* signed by King Kamehameha III on June 7, 1848. The law is published in the Civil Code of the Hawaiian Islands (1859), pages 374-402. Therein, at page 393, Kaho'olawe (with the notation *Mokupuni Okoa* or "the whole island") is listed among the lands accepted from the King as the lands of the Hawaiian Government, to be managed by the Minister of the Interior (but requiring the approval of the King in Privy Council to dispose of government lands to individuals.)

It is noted in *Estate of his Majesty Kamehameha IV*, 2 Haw. 715, 717 (1864), that the June 7, 1848, legislative act was simply a confirmation of the two instruments contained in the *Mahele Book*, the first describing lands reserved for the King and the

second identifying lands given to the government and the people. Those two instruments were signed and sealed by Kamehameha III on March 8, 1848.¹⁰

In the report of the commission established by the annexation resolution to study the existing state of things in Hawai'i and to recommend needed laws for the Territory (transmitted to Congress by the message of the President, Senate Doc. 16, 55th Congress, 3rd Session 1898, U.S. Misc. Pub. 1898, serial set number 3727), at pages 45 and 49, Kaho'olawe is listed in tables of government land as of September 30, 1897 (with an estimated value of \$20,000.)

Privy Council records of the Kingdom of Hawaii (also from the State Archives) refer to early attempts to obtain Kaho'olawe, including a \$400 purchase offer from Kaauwai that was refused and Kaauwai's September 25, 1854, petition to lease that was "politely declined."

On October 26, 1857, in the Privy Council, "Prince Lot read a petition for the lease of the island of Kahoolawe for 25 years for a sheep range; Postponed." On October 28, 1857, S. Spencer, Chief Clerk of the Interior Office, wrote to O.B. Merrill, Esq., to inform him that "your application for a 25 years lease of the Island of Kahoolawe was brought before the Privy Council for consideration on the 26th [and the Minister of the Interior] has been authorized to offer the lease of the whole Island at auction, as soon as its contents are ascertained."

On November 10, 1857, Prince Lot Kamehameha wrote to Nahaloleua instructing him to proceed to Kahoolawe "to examine said land, and state in your report your opinion relative to said land, its area and value, also state what enterprise could be carried on there, whether it is suitable for raising cattle or sheep."

A letter dated December 7, 1857, written from Lahaina by P. Nahalolelua and Ioane Richardson to Prince Lot Kamehameha reported on their examination of Kaho'olawe that "from observation and study, there is about forty square miles in the Island . . . and if payment be made for the whole acreage, the reasonable rent should be two cents per acre per annum" or \$512. They reported "there is about three thousand acres of good

¹⁰ Schmitt and MacKenzie, in *Kaho'olawe: A Legal Analysis* (September 1, 1976), write at page 3 that "In the *Mahele Book*, Kaho'olawe is listed on the left hand side, indicating that in the original division between King and chiefs, it was retained by the King [a footnote refers to *Mahele Book*, page 200, State Archives.] There is also the notation 'Kahoolawe no Aupuni' (Kaho'olawe for the Government) which seems to indicate that Kaho'olawe was then given by Kamehameha III to the Hawaiian Government as Government Lands [a footnote states that the notation was signed by 'G.P. Judd'.] In any event, after that time, Kaho'olawe was treated as Government land."

land, mauka in the mountain . . . There is no fresh water there, but, the old residents stated that during rainy times fresh water may be found in small pools. . . The old residents said that sweet potatoes will grow on the mountain if planted at the right time, they said that the potatoes were good and the tubers were large. . . The old residents stated that there were naulu rains [rains without clouds] sometimes on Kahoolawe, when the trade winds blow. . . we do not believe that cattle raising on Kahoolawe would be advisable, the cattle will not live because there is no water . . . We believe that sheep will thrive if kept on the mountain, and goats are what would really be proper on all parts of that Island. There are some fishermen living on Kahoolawe, maybe not over fifteen, if the men, women and children are combined."

Ten years after Kaho'olawe became government land in 1848, the government was ready to abandon its prior use as a place of banishment. In early 1858, the government was ready to lease Kaho'olawe for private use. On February 18, 1858, the *Pacific Commercial Advertiser* included a notice of the offer of a lease for the island of Kahoolawe, consisting of about 25,000 acres. At that point, the modern history of the possession and use of Kaho'olawe can be said to have begun.

In April of 1858 it was reported that a twenty year lease of Kaho'olawe was sold at public auction to Robert C. Wyllie for the annual rent of \$505. "It is an excellent location for a sheep-farm, and not the least of its recommendations in this country is that it requires no fencing." See, *The Polynesian*, April 3, 1858, page 381. Mr. Wyllie, Minister of Foreign Affairs of the Kingdom of Hawai'i, and Chief Justice E. H. Allen, established a partnership for their Kaho'olawe sheep venture. After planning and preparing for the venture during the first year, they were sold some 2,000 sheep by a Mr. Merrill of Maui, but three fourths of those sheep were scabby. The project appears to have failed for that reason. See *The Wyllie-Allen Kahoolawe Sheep Project, Hawaiian History Society Report* (1939), at pages 46-51 (including several descriptions of the physical features of Kaho'olawe at the time of the project.) Disheartened, Mr. Wyllie then asked Chief Justice Allen to release him from the venture.¹¹

¹¹ The records of the Land Management Division of the Department of Land and Natural Resources (DLNR) contain a copy of General Lease 47-A, dated April 1, 1858, from the Minister of the Interior (signed by L. Kamehameha) to Robert C. Wyllie and Elisha S. Allen, for a term of twenty years at rent of \$505 per year, in quarterly installments. That lease shows a handwritten notation, "Pau see #115." General Lease 115 was not found in the records, although many subsequent subleases recorded in the Bureau of Conveyances refer to an original 50 year lease from the Minister of the Interior to Elisha H. Allen dated March 11, 1864. Presumably, those references are to

Charles R. Bishop wrote to the Minister of the Interior on March 12, 1874, and offered to buy the fee title (a land patent) of Kahoolawe, and the existing Allen lease, for the price of \$2,500. No further mention of that offer was found.

An article in the January 1, 1876, *Pacific Commercial Advertiser* noted the visit of King Kalakaua to Kaho'olawe, with a report that the island had 20,000 sheep and 10 horses "under the charge of two foreigners, who with their wives and children are the only human inhabitants. The island is fit only for grazing purposes, and is held under a lease to Judge Allen and others associated with him."

In 1881, it was reported that a Mr. Cummings had leased Kaho'olawe, finding some 2,000 goats and 1,000 sheep already there. His plans were to remove those animals and stock the island with cattle. "To prevent the soil from the upper part of the island being blown away, Mr. Cummings has planted a large hedge of prickly-pears." See *The Hawaiian Gazette*, August 17, 1881, at page 3. It was actually a year earlier, on March 22, 1880, that Mr. Cummings first obtained his assignment of the lease interest of E.H. Allen. See Bureau of Conveyances, *liber* 65, page 101. Mr. Cummings was the first in a series of assignees of the fifty year lease of Chief Justice Allen dated March 11, 1864.

C.S. Judd, in an article entitled *Kahoolawe* (1917 *Hawaiian Annual* at pages 117-125) writes that "the use of Kahoolawe as a place of banishment probably began about the year 1830" and that early census figures of the Kingdom of Hawai'i gave the population of Kaho'olawe as 50 in 1823 and 80 in 1832 and 1836. A U.S. exploring expedition in March 1841 "found the island uninhabited except by a few poor fishermen and fifteen convicts who, under the superintendence of Kenemoneha [Kinimaka], a Maui chief who had been condemned for forgery to spend five years in exile upon the island, lived in a village of eight huts built close to the sea."

On January 14, 1852, Maui's acting governor asked for approval of his action in taking prisoner George Morgan from Kaho'olawe to Lahaina for medical treatment. Judd speculates that removal of Morgan may have been the end of Kaho'olawe's use as a place of banishment. Judd chronicles part of the line of leaseholders that followed Chief Justice Elisha H. Allen. He also writes that "[i]t is difficult now to look back and determine with accuracy the amount of vegetation that previously existed on

General Lease 115, issued in replacement of the first Wyllie/Allen lease. An old DLNR index mentions a Lease 115 of Kaho'olawe to Elisha H. Allen for fifty years at rent of \$250 per year, with the non-specific date of March, 1864, and with a notation that on March 22, 1880, the Minister of the Interior permitted Mr. Allen to assign his lease interest to Albert D. Courtney and William H. Cummings, and a later undated note that the lease was assigned to Kynnersley and Von Tempisky.

Kahoolawe. Old Hawaiians say that sugar cane, bananas, and sweet potatoes were raised there in the early days and that wild pigs uprooted the bananas."

Judd also provides descriptions of the environment of Kaho'olawe as of 1917, referring to the algaroba tree then covering about one-third of the island as most valuable. After the first sheep venture, the second lessee brought herds of cattle, horses and pigs, and the subsequent lessees raised sheep and cattle. Over-stocking resulted in over-grazing and erosion. "In this manner the top of the island which was once covered with from four to ten feet of good soil has been reduced largely to hardpan." Judd writes,

Toward the termination of the Kahoolawe lease it became apparent that as the erosion continued the island was becoming of less and less value to the people of the Territory and that an attempt, at least, should be made to reclaim it. Naturally the first step to be taken was to rid the island of all stock and in order to hasten matters the lease, which was to expire on January 1, 1913, was taken over by the government with a remission of rent, the island was declared a forest reserve on August 25, 1910, and was placed in the hands of the Board of Agriculture and Forestry.¹²

Letters dated March 27, 1918, from the Territorial Governor refer to a March 23rd inquiry from Angus McPhee¹³ of Wailuku regarding Kaho'olawe. On April 22, 1918, Governor Pinkham wrote to the Land Commissioner stating that he had signed a proclamation withdrawing Kahoolawe from the Forest Reserve and restoring it to the public lands, and recommending that "the island be leased to a responsible lessee, who

¹² Not completely consistent with Judd's report is a June 5, 1911, letter from the acting Commissioner of Public Lands for the Territory that delivered to Governor Frear a letter from Eben Low proposing to surrender his General Lease No. 115B for the Island of Kaho'olawe. However, on April 27, 1918, the Commissioner delivered to Governor Pinkham a license to Eben Low to occupy Kaho'olawe until October 1, 1918, "for the purpose of grazing thereon such stock as he now has on the Island."

¹³ The gentleman's last name appears in many documents, alternatively spelled as *McPhee* and *MacPhee*. Angus McPhee died on July 16, 1948. His partner, Harry Baldwin, died on October 8, 1946. His daughter, Inez McPhee Ashdown, undertook a persevering campaign to obtain recognition and relief for her claim that she and her father were wrongfully deprived of the use of Kaho'olawe and the improvements they had made there by the military's continual use of the island. In one such letter, dated September 3, 1957, to the United States Secretary of the Interior, Mrs. Ashdown described how her father (an acclaimed one-armed cowboy friend of Teddy Roosevelt) first came to Hawai'i at the invitation of Eben Low to perform in a wild west show. A copy of that letter is in the file for General Lease 2341 at the offices of the Land Management Division of the Department of Land and Natural Resources. A letter in that Division's files pertaining to Mr. McPhee's first lease, General Lease 1049, refers to Eben Low stating that the lease will not be given to Mr. McPhee if Mr. Low is still his partner. That suggests that Mr. Low had fallen from grace in the view of official eyes.

will not exploit the island" subject to a "relatively large bond" and a number of suggested conditions.

On October 31, 1918, the Land Board approved a lease of Kaho'olawe to Angus McPhee, with rent of \$200 per year and rent readjustments at seven year intervals, subject to a set of conditions including a requirement that the lessee "exterminate all Goats and Sheep which are on the land." General Lease No. 1049 was issued to Mr. McPhee for a term of twenty-one years from January 1, 1919. A letter from the Governor to the Land Commissioner dated May 14, 1919, forwards "a letter from Angus McPhee in relation to a modification of the Kahoolawe Lease." On June 8, 1920, Mr. McPhee transferred General Lease 1049 to the name of Kahoolawe Ranch, a partnership of Mr. McPhee and Harry Baldwin.¹⁴ On February 3, 1928, Presidential Proclamation 1827 took 23.3 acres of land on Kaho'olawe for a lighthouse.

General Lease 1049 marked the beginning of the end of private use of Kaho'olawe.¹⁵ General Lease 1049 was cancelled on June 28, 1933, after General Lease 2341 was issued from the Commissioner of Public Lands to Angus McPhee and Harry Baldwin doing business as Kahoolawe Ranch on May 23, 1933, for a term of twenty-one years from July 1, 1933. The file for General Lease 2341 (found in the Land Management Division of the Department of Land and Natural Resources) shows that on May 10, 1941, Kahoolawe Ranch executed a renewable (until June 30, 1954) annual sublease to the United States that was further the subject of two Supplemental Agreements in March and October of 1944.

¹⁴ In a letter to Angus McPhee dated June 10, 1919, in "regard to our partnership," Eben Low stated his agreement to sell Mr. McPhee all of his stock and materials on Kaho'olawe for a price to be decided.

¹⁵ Mr. McPhee and Mr. Baldwin had a difficult time with Kaho'olawe, although one of their principal workers, Mr. McPhee's daughter Inez, insisted that they would have made a success of Kahoolawe Ranch but for intervening events. Letters dated 1927-29 found in the files of the Department of Land and Natural Resources, Land Management Division show that Kahoolawe Ranch occasionally sought approval for subleases, including a contract giving Lee St. John Gilbert and Rufus W. Robinson of Honolulu (doing business as the Kahoolawe Honey Co., Ltd.) the right to raise bees and honey on Kaho'olawe; a sublease to H. Shibata and H. Miyata of Molokai as representatives of a Japanese hui for two tracts on Kaho'olawe totalling 150 acres to be used for pineapple cultivation; and correspondence regarding the possible purchase of livestock and the whole leasehold by a Portuguese hui. In 1927 a Joint Resolution was introduced (but apparently not finally acted upon) in the Territorial Legislature by Sen. W.H. Rice (a friend of Mr. McPhee and Mr. Baldwin) proposing that Congress amend the Organic Act to provide for the sale of Kaho'olawe to a private owner.

On May 13, 1941, the *Honolulu Advertiser* reported that the Army and Navy were both seeking to acquire Kaho'olawe from the Territory as a target practice area. The article noted Kaho'olawe was "at present under lease to Baldwin interests for \$100 a year." It also reported that the military was negotiating with the lessee for a sublease.

July 14, 1943, the *Honolulu Advertiser* reported that the Territory's Board of Agriculture was considering a proposal to let Army soldiers practice marksmanship by shooting wild sheep as part of a rehabilitation plan. The DLNR file for General Lease 2341 includes a letter dated September 13, 1944, addressed to Mr. McPhee and Mr. Baldwin thanking them for agreeing during a meeting on September 5, 1944, to permit the use of Kaho'olawe for bombing by the Army Air Force. Another DLNR file letter dated May 23, 1946, from Rear Admiral Hanson to Governor Stainback states that the Navy wanted to obtain the fee title to Kaho'olawe for use as a military weapons range.

On March 17, 1947, the *Advertiser* reported that Senator Francis H.L. Brown, chairman of the Territorial Senate Agriculture and Forestry Committee, would "seek return of [the] island, now a death trap because of hundreds of duds remaining after its use as a naval bombing target and gunfire range. The island owned by the Territory, was taken over by the navy at the outbreak of war. Senator Brown said he favors lease of the island to private capital for development for any purpose that may prove profitable."

The October 1, 1947, *Advertiser* ran a report that Governor Stainback was considering cancellation of the lease, and speculated regarding the prospect of a Kaho'olawe enriched by rain:

Although the navy is still using the island as a firing range for its warships, it is under lease until 1954 to Angus MacPhee and the heirs of the late Harry Baldwin. They, in turn, subleased the isle to the federal government for military purposes for \$1 a year. . .

Colin G. Lennox, president of the board of agriculture and forestry, says that if his agency gets control of Kahoolawe, he will recommend that the army and navy be permitted to continue using it for gunnery practice, with the proviso that they begin an extermination program against the goats and sheep.

Mr. Lennox said the island's 20,000 acres are alive with unexploded shells, thus making it too dangerous for use at present. . .

With the advent of the new rain making equipment, there is a possibility that the island could become a rich asset to the territory.

The DLNR file shows that on September 12, 1952, Governor Long wrote to Rear Admiral Murray recommending that Kaho'olawe be taken for federal use by a Presidential Executive Order, stating that a draft of such an order was being prepared by Frank Hustace of the Attorney General's office. A week later the State Surveyor

was instructed to prepare a description of Kaho'olawe in anticipation of an Executive Order. On September 30, 1952, General Lease 2341 to Kahoolawe Ranch was cancelled. On November 7, 1952, the Territory issued Revocable Permit 800 to the Secretary of the Navy for the use of Kaho'olawe pursuant to §73 of the Organic Act (defining the office of the Commissioner of Public Lands), providing therein for termination of the permit upon issuance of the impending Executive Order. The third paragraph of Revocable Permit 800 includes language similar to that of the Executive Order requiring that Kaho'olawe be cleaned up to a reasonably safe condition when its use was no longer needed. (See §III.A.3, *infra*)

On February 20, 1953, President Eisenhower took Kaho'olawe for federal use by Executive Order 10436. On December 1, 1980, a federal district court consent decree provided certain rights, including periodic access to Kaho'olawe.

In §II.A.2 below there is a chart based on the best available evidence showing the title, possession and use of Kaho'olawe from the 1848 Mahele to the present.

A. Legal History

Land law in Hawai'i has a unique history of development. At the end of the eighteenth century, these islands were united into one Kingdom of Hawai'i by the conquests of Kamehameha I. Several constitutional forms of monarchy were developed thereafter. At the close of the nineteenth century the Kingdom of Hawai'i was overthrown by a Committee of Public Safety, eventually leading to Hawai'i's annexation as a Territory of the United States, and then to Statehood.

All land in the Kingdom of Hawai'i was originally deemed to be held in the name of the King for the benefit of the people. From the beginning, there was the land of the King assigned to his chiefs (the *ali'i*) and their tenants in principal divisions known as *ahupua'a*.¹⁶ In the middle of the nineteenth century, the land of Hawai'i was formally divided among the King, the government and the people.

1. Hawai'i land law overview

When the islands were conquered by Kamehameha I, he followed the example of his predecessors, and divided out the lands among his principal warrior chiefs, retaining, however, a portion in his own hands to be cultivated or managed by his own immediate servants or attendants. Each

¹⁶ "[I]n ancient Hawaii, the division of land known as an *ahupua'a* generally ran from the sea to the mountains." *Palama v. Sheehan*, 50 Haw. 298, 300, 440 P.2d 95, 97 (1968). Within that division were found the various resources ranging from the fish of the sea to the herbs and plants of the mountains. An *apana* was a portion, or lot, within the *ahupua'a*. A chief's *ahupua'a* was subdivided by the process of an *ili of the ahupua'a*; by the process of an *ili kupono*, land was removed from a chief's *ahupua'a*.

principal chief divided his lands anew and gave them out to an inferior order of chiefs or persons of rank, by whom they were subdivided again and again after (often) passing through the hands of four, five or six persons from the King down to the lowest classes of tenants. All these persons were considered to have rights in the lands, or the productions of them, the proportions of which rights were not clearly defined, although universally acknowledged.

Principles adopted by the Board of Commissioners to quiet Land Titles, page 81, quoted in *Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 718

Land titles in modern Hawaii derive from The Great Mahele (*mahele* is the Hawaiian word for division.)¹⁷ Traditionally, all land in Hawaii was owned by the people collectively. "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." 1840 Constitution of King Kamehameha III, quoted in *Liliuokalani v. United States*, 45 Ct.Cl. 418, 425 (1910). Kamehameha III undertook a land reform, under various pressures, whereby individuals could own land.¹⁸

In 1846, a Board of Commissioners to Quiet Land Title (the "Land Commission") was empowered to make Land Commission Awards based on individual claims. The Minister of the Interior was authorized to issue Royal Patents upon such awards. In 1847, the King and his council decided upon the Mahele, whereby the King retained his

¹⁷ This abbreviated history of Hawaii land law is taken from Chief Justice Richardson's opinion in *State by Kobayashi v. Zimring*, 58 Haw. 106, 566 P.2d 725 (1977) and from the opinion of Justice Robertson in *Estate of his Majesty Kamehameha IV*, 2 Haw. 715 (1864).

¹⁸ "It was the imperative necessity of separating and defining the rights of several parties interested in the lands, which led to the institution of the Board of Land Commissioners, and to the division made by the King himself, with the assistance of his Privy Council." *Estate*, 2 Haw. at 719. "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." *Ibid.* at 722. Chief Justice Richardson and others also have pointed out that the land division was contemplated at least in part as a defensive measure to protect the lands of the Kingdom from complete loss in the event of a foreign takeover (on the assumption that the foreign power would acknowledge private land ownership.) It was argued in *Liliuokalani v. United States*, 45 Ct.Cl. 418 (1910) (a claim by the Queen of Hawai'i against the United States after her overthrow) that "the King originally owning the entire public domain gave up the greater portion of it to the Government as government lands for the express purpose of preserving the remainder from the fate which finally overtook it." See synopsis of argument for claimant, at page 420.

private lands, known as Crown Lands.¹⁹ One-third of the remaining land became government land, and one-third became land of the chiefs and their agents (*konohiki*), and one-third became land of the tenants. The Great Mahele was started in 1848, first settling the interests of the chiefs and the *konohiki*. Those claims required affirmation through Land Commission Awards to establish title. Government land also was established then. Finally, land was divided among the tenants.

Government land occasionally was sold thereafter, accompanied by the issuance of Royal Patent Grants or Grants. Land not claimed or divided during the Mahele, and Crown Lands taken from Queen Lili'uokalani, remained in the public domain. Almost all private title derives from Land Commission Awards, Royal Patents, a Kamehameha Deed (conveyance to an individual from the King), a Grant or Royal Patent Grant, or other government grant. In addition to those formal documents of title, the "presumption of a lost grant" has become an accepted legal doctrine to demonstrate title to land.²⁰

Hawaiian custom and usage (defined as prescribed by custom before November 25, 1892) has been recognized in modern law as a basis for claiming land. See, HRS §1-1. Part of the established tradition of land use included access to the sea. Therefore, lands owned by the original tenants included the owner's right to gain access to the sea. *Henry v. Ahlo*, 9 Haw. 490 (1894); *Palama v. Sheehan*, 50 Haw. 298, 440 P.2d 95 (1968); *Kalipi v. Hawaiian Trust Co., Ltd.*, 66 Haw. 1, 656 P.2d 745 (1982) (gathering rights).

Common law also provides a basis for land claims, but it is secondary in force to Hawaiian custom and usage. *In re Application of Ashford*, 50 Haw. 314, 440 P.2d 76 (1968); *County of Hawaii v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973); HRS §1-1.

¹⁹ In 1893 the Crown Lands were taken by the Provisional Government after the overthrow of the monarchy.

²⁰ See *In re Title of Kioloku*, 25 Haw. 357, 365-70 (1920), *aff'd* 272 F. 856 (9th Cir. 1921); *Lalakea v. Hawaiian Irrig. Co.*, 36 Haw. 692 (1944) ("In the law of prescriptive easements, it is well established that a lost grant of easements may be presumed"); *Tanaka v. Mitsunaga*, 43 Haw. 119 (1959). In *United Congregational, Etc. v. Heirs of Kamamala*, 59 Haw. 334, 582 P.2d 208 (1970), former Chief Justice Richardson, having affirmed that title to the church land was actually vested in the State, created "an equitable right, akin to a prescriptive easement, to continue [church] use . . . In contrast to the doctrine of adverse possession, the doctrine of a presumed lost grant, arising out of adverse, exclusive, and uninterrupted possession for a substantial number of years, may be applied against the sovereign. (citation)" 582 P.2d at 213

2. Kaho'olawe Title, Possession and Use

The preceding overview of general land law in Hawaii provides a frame of reference for the specific history of Kaho'olawe. It has been generally accepted that modern legal title to Kaho'olawe traces its origins to the transfer of Kaho'olawe from lands of the King to land of the Government of the Kingdom of Hawai'i at the time of the Mahele. With the 1893 overthrow of the monarchy and subsequent annexation, Kaho'olawe became subject to an eventual taking by the President for federal use.

Several reliable sources provide information describing the title, possession and use of Kaho'olawe by various parties. On the following pages is a chart of such parties, with the starting date of their interest (based on the most accurate or reliable evidentiary source, listed as the first of the references) and with reference to some of the common or special sources that describe or mention the party's interest. The common sources of information referred to (by number) in the chart are:

1. State Archives (using the name and land indices)
2. Bureau of Conveyances (citing: *liber*/page, date)
3. Land Management Division, Department of Land and Natural Resources
4. Judd, *Kahoolawe*, 1917 Hawaiian Annual, pages 117-125
5. Schmitt & MacKenzie, *Kaho'olawe: A Legal Analysis* (September 1, 1976)
6. MacDonald, Peter, *Fixed in Time: A Brief History of Kahoolawe*, 6 *Hawaii Historical Journal* (1972), pages 69-90
7. September, 1979, U.S. Navy Supplemental Environmental Impact Statement

The §II.A.1 narrative, above, establishes a context for these details. Whenever possible, citation is made to an actual instrument of record. While it is possible that one or more parties' interests have escaped notice, the cited sources agree upon the general identities and sequence of Kaho'olawe lessees.

That Kaho'olawe has been Government land since the Great Mahele has not been seriously questioned. While there is some evidence that Kaho'olawe may have been designated initially, but briefly, as Crown Land in the *Mahele Book*, it is evident from the June 7, 1848, *Act Relating to the Lands of His Majesty the King and of the Government*²¹ that the whole of Kaho'olawe was included among the lands accepted from the King as Government land.

From March 11, 1864, until Kaho'olawe was made a forest reserve in 1910, all the listed parties were a succession of assignees of the leasehold interest of Chief Justice

²¹ See Civil Code of the Hawaiian Islands (1859), page 393.

Elisha H. Allen. Eban P. Low held both that assigned interest (until 1910) and also was a named permittee of the Territory in 1918-19.

The United States initially sublet Kaho'olawe from Kahoolawe Ranch on May 10, 1941, then eventually became a permittee of the Territory and finally obtained use of Kaho'olawe in 1953 by means of President Eisenhower's Executive Order 10436.

The Protect Kaho'olawe Ohana obtained periodic access rights (and other related interests) by means of a 1980 Consent Decree entered in a federal district court action.

Kaho'olawe -- Chart of Title, Possession and Use

<i>Party</i>	<i>Date(s)</i>	<i>Reference(s)</i>
King's land	pre-1848	(1) Document 396; 11/10/1847 Namauu letter to Judd
Government Land	6/7/1848	Mahele Book, page 200; Act of June 7, 1848; <i>U.S. v. Mowat</i> , 582 F.2d 1194
Robert C. Wyllie & Elisha H. Allen	4/1/1858	(3) General Lease 47-A <i>The Polynesian</i> , 4/3/1888 at page 381;
Elisha H. Allen	1/1/1863	(3) Index reference to General Lease 115; Reference to this 50 year lease is found throughout most of the subsequent pre-1910 assignments
W.H. Cummings & A.D. Courtney	3/22/1880	(2) 65/101, 5/10/1880; (3) Index reference to General Lease 115
W.H. Cummings	5/3/1880	(2) 65/103, 5/10/1880
Randall Von Tempsky	2/20/1886	(2) 98/149, 3/8/1886;
Randall Von Tempsky and C.S. Kynnersley and J.R.S. Kynnersley	3/30/1886	(2) 107/78, 4/27/1887; (2) 106/425, 9/8/1888; (6) page 74

The overthrow of the Kingdom of Hawai'i on January 17, 1893, led to creation of the Provisional Government and eventually to the declaration on August 14, 1895, that all government and crown lands were public lands of the Republic of Hawai'i.

Kaho'olawe -- Chart of Title, Possession and Use, continued

<i>Party</i>	<i>Date(s)</i>	<i>Reference(s)</i>
B.F. Dillingham	4/28/1899	(2) 192/214, 5/2/1899; (4) page 119
The Territory of Hawai'i was incorporated into the United States with the passage of the Organic Act on April 31, 1900, the United States having succeeding to the title to all public lands of the former Republic.		
C.C. Conradt	12/21/1903	(4) page 119
Eben P. Low	12/28/1906	(4) page 119
Forest Reserve	8/25/1910 to 4/20/1918	(4) page 119; (1) 4/22/1918 letter from Gov. Pinkham
Eben P. Low	4/27/1918	(1) 10/1/1918 letter from Land Commissioner
Angus McPhee	1/1/1919	(3) General Lease 1049 ²²
Kahoolawe Ranch	6/8/1920 7/1/1933	(3) Transfer of Lease 1049; (3) General Lease 2341 ²³

²² During the term of General Lease 1049 there was a July 1, 1919, twenty year sublease to Lee St. John Gilbert and Rufus W. Robinson of Oahu for raising bees and a March 15, 1929, ten year sublease (that was abandoned) to H. Shibata and H. Miyata for pineapple cultivation of 150 acres.

²³ The twenty-one year term of General Lease 2341 began on July 1, 1933, but was terminated on September 30, 1952, when Revocable Permit #800 was given to the Navy in contemplation of the issuance of Executive Order 10436.

Kaho'olawe -- Chart of Title, Possession and Use, continued

<i>Party</i>	<i>Date(s)</i>	<i>Reference(s)</i>
United States of America	5/10/1941 3/1/1944 10/18/1944	(3) Sublease of General Lease 2341 from Kaho'olawe Ranch to the Army -- reference in file of General Lease 2341; (5) page 6 (appendix copy); (3) Supplemental Agreement; (3) Supplemental Agreement; ²⁴
Department of the Navy	10/31/1945 11/7/1952	(7) page 3-2, sublease; (5) page 6 (appendix copy); (3) Revocable Permit #800 ²⁵
United States of America	2/20/1953	Executive Order 10436
Protect Kaho'olawe Ohana	12/1/1980	Consent Decree (access, etc.)

B. Related Considerations

The legal history of Kaho'olawe has developed within the greater history of Hawai'i. That history has been subject to diverse interpretations, determined largely by the perspectives of various authors. Certain facts, while subject to diverse interpretations, can be established as generally accepted based upon the available evidence. Those facts, and their alternative interpretations, are matters of interest with regard to the Commission's inquiry.

Depending upon one's perspective, (a) the lands of the former Kingdom of Hawai'i were annexed by the United States's acceptance of the Republic of Hawai'i's offer after Queen Lili'uokalani's abdication, or (b) the lands of the Kingdom of Hawai'i were wrested away from the Queen by agents and armed forces of the United States.

²⁴ "[T]o enable the Government to carry out unrestricted military operations."

²⁵ General Lease 2341 was cancelled on September 30, 1952.

Since 1898, the prevailing point of view reflected in most official United States legislative, adjudicative and other authority accepts the former description, thus characterizing Hawaiian lands as having been *ceded* to the United States.

However, for several years after the overthrow of Queen Lili'uokalani in 1893, the interpretation of that event expressed by the President of the United States was not in harmony with subsequent annexationist interpretations. During that time, United States documents²⁶ reflect an opinion that the lands of the government and Kingdom of Hawai'i were wrested away from Queen Lili'uokalani by a small group of American businessmen residing in Honolulu, with the wrongful support of the United States minister and American armed forces. That interpretation is a fact of American history, supported by extensive evidence found in the official archives of the United States and scholarly works.

Consideration of the pre-annexation interpretation expressed by President Cleveland is relevant for the purpose of appreciating this fine point: to what degree should Kaho'olawe be viewed as having been *ceded* to the United States, as opposed to the view that it was *taken* by the United States (with the rest of the Hawaiian Islands.) That fine point may merit comment in the Commission's investigatory findings and conclusions and its recommendations to Congress.

1. Ceded lands

The concept of *ceded lands* plays an important role in the modern history of Hawai'i, and can be said to form the legal basis for Navy control of Kaho'olawe.

On September 9, 1897, the Senate of the Republic of Hawai'i passed a resolution that consented to and ratified an annexation treaty "concluded at Washington on the 16th day of June, A.D. 1897." Article I of that treaty states in part, "The Republic of Hawaii hereby cedes absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies . . ." Article further II provides in part, "The Republic of Hawaii also cedes and hereby transfers to the United States the absolute fee and ownership of all public, government, or crown lands . . ." Article VII provided that the treaty should be ratified upon the respective advice and consent of the parties' senates.

On July 7, 1898, Congress passed a joint resolution (the Newlands resolution.) Its preamble stated, in part, "Whereas the Government of the Republic of Hawaii having, in

²⁶ See, e.g., President Cleveland's Message Relating to the Hawaiian Islands and J. Blount, Report to United States Congress: Hawaiian Islands, Exec. Doc. No. 47, 53rd Cong. 2d sess., 1893 (Serial Set 3224.)

due form, signified its consent, in the manner provided by its constitution to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, government, or crown lands . . ." The joint resolution then determined that "said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof . . ."

The Kingdom of Hawai'i had been overthrown in January of 1893 by a provisional government that subsequently constituted itself as the Republic of Hawai'i. Through that new government, in 1898, by those measures quoted above, government land in Hawai'i (such as Kaho'olawe) was ceded to the United States. Most subsequent authorities simply recite some of the events in Hawai'i during the period from 1893 to 1898, questioning neither the associated facts nor any ethical implications as to their propriety. For example, the opinion in *United States v. Mowat*, 582 F.2d 1194 (9th Cir. 1978), *certiorari* denied 99 S.Ct. 458, affirmed the conviction of several defendants for unauthorized entry onto the Kaho'olawe military reservation. Part of their appeal challenged the legitimacy of the federal government's possession of Kaho'olawe. The opinion's discussion of that issue follows.

The Government's claim of ownership here is based on a series of legal documents dealing with the island's status after King Kamehameha III gave it to the Hawaiian Kingdom in 1848 as Government Land.

In 1898, the United States accepted the cession by the government of Hawaii of the "absolute fee and ownership of all public, Government, or Crown lands . . ." Two years later, the Hawaiian Organic Act of 1900 provided that the public property ceded to the United States by Hawaii in 1898 should remain in the possession, use and control of the government of the Territory or be "taken for the uses and purposes of the United States by the direction of the president * * *". . .

[¶] Apparently recognizing that on their face these documents provide sufficient Government control, the defendants first argue that at least the 1898 and 1900 agreements were invalid because they were made by "illegal revolutionaries." In light of Congress' recognition of the government of the Republic of Hawaii as the established government, the acceptance of the validity of the transfer agreements by both the United States and Hawaiian Supreme Courts (see *United States v. Fullard-Leo*, 331 U.S. 256, 67 S.Ct. 1287, 91 L.Ed. 1474; *Bishop v. Mahiko*, 35 Haw. 608 (1940)), and the failure of defendants to make a record on this argument below, we reject this challenge as frivolous.

In earlier cases, acceptance of the monarchy's overthrow and annexation are similarly described with only a brief recitation of the factual circumstances. In *Hawaii v. Mankichi*, 190 U.S. 197 (1903), it was held by a majority of the U.S. Supreme Court that a criminal conviction in a court of Hawai'i during the interim period between the annexation resolution and the formal creation of the Territory of Hawai'i was not tainted by its inconsistency with requirements of the U.S. Constitution.

By a joint resolution adopted by Congress, July 7, 1898, 30 Stat. 750, known as the Newlands resolution, and with the consent of the Republic of Hawaii, signified in the manner provided in its constitution, the Hawaiian Islands, and their dependencies, were annexed "as a part of the territory of the United States, and subject to the dominion thereof" . . . Though the resolution was passed July 7, the formal transfer was not made until August 12, when, at noon of that day, the American flag was raised over the government house and the islands ceded with appropriate ceremonies to a representative of the United States. Under the conditions named in this resolution the Hawaiian Islands remained under the name of the "Republic of Hawaii" until June 14, 1900, when they were formally incorporated by act of Congress under the name of the "Territory of Hawaii." 31 Stat. 141. . . .

In fixing upon the proper construction to be given to this resolution, it is important to bear in mind the history and condition of the islands prior to their annexation by Congress. Since 1847 they had enjoyed the blessings of a civilized government, and a system of jurisprudence modelled largely upon the common law of England and the United States. Though lying in the tropical zone, the salubrity of their climate and the fertility of their soil had attracted large numbers of people from Europe and America, who brought with them political ideas and traditions which, about sixty years ago, found expression in the adoption of a code of laws appropriate to their new conditions. Churches were founded, schools opened, courts of justice established, and civil and criminal laws administered upon substantially the same principles which prevailed in the two countries from which most of the immigrants had come.

190 U.S. at 209-211

Presenting the issue at hand more squarely, deposed Queen Lili'uokalani sued the United States in the former federal Court of Claims in a case decided against her in 1910. She sought recovery of the value of Crown Lands annexed by the United States. The reported synopsis of her argument shows that she claimed an equitable life interest

²⁷ The two cases cited in this opinion do not stand for the premise that the annexation of Hawai'i was legal (and in fact the opinion only refers to them as examples that the validity of the transfer of sovereignty has been *accepted*.) *U.S. v. Fullard-Leo*, 331 U.S. 256 (1947), affirms the decision of the 9th Circuit affirming a Hawaii U.S. District Court's quieting of title to Palmyra Island in certain individuals, contrary to a claim of the United States that Palmyra Island was ceded land subject to federal taking. *Bishop v. Mahiko*, 35 Haw. 608 (1940), does not address such questions.

in Crown Lands as the private property of the monarch of the Kingdom of Hawaii. She *did not* ask the court to decide the propriety of the overthrow nor the degree of United States complicity. She *did* ask the court to recognize that the provisional government had wrongfully extinguished rights of private property. She argued that "a court of equity is primarily a court of conscience, and [] the claim of an unconscientious retention of the rights of the petitioner is one which particularly appeals to such a court." *Liliuokalani v. United States*, 45 Ct.Cl. 418, 421 (1910). The opinion of the court quoted extensively from *Estate of his Majesty Kamehameha IV*, 2 Haw. 715, 717 (1864). It held that,

The claimant became Queen of the islands on January 20, 1891, succeeding her brother, King Kalakaua. On January 17, 1893, she yielded her authority over the islands by an instrument in writing, abdicated her throne, and was succeeded in authority by the provisional government. On July 4, 1894, said provisional government was succeeded by a government known as the Republic of Hawaii, and thereafter the Hawaiian Islands were peaceably, upon request, on August 12, 1898, annexed to and became a part of the United States of America. . .

[¶] At the April term of the Supreme Court of Hawaii in 1864 the nature and extent of the King's title in the crown lands was squarely before the court, and the court in an exceedingly able opinion held that under [the 1848 Act of Kamehameha III] "the lands descended in fee, the inheritance being limited, however, to the successors of the throne . . ."

[¶] The act of 1865 further curtails the title vested in the King. The preamble of the act recites expressly the nature and extent of the King's tenure, "for the purpose of maintaining the royal state and dignity," followed by appropriate legislation to thereafter prevent their alienation or incumbrance. . .

[¶] [Crown Lands] belonged to the office and not to the individual. . .

It seems to the court that the crown lands acquired their unusual status through a desire of the King to firmly establish his Government by commendable concessions to his chiefs and people out of the public domain. The reservations made were to the Crown and not the King as an individual. The crown lands were the resourceful methods of income to sustain, in part at least, the dignity of the office to which they were inseparably attached. When the office ceased to exist they became as other lands of the Sovereignty and passed to the defendants as part and parcel of the public domain.

45 Ct.Cl. at 425-29

To date, no court of the United States has found it appropriate to deny the validity of the annexation of Hawai'i as an American territory.²⁸ Without rearguing the

²⁸ In 22 Opinions of the Attorneys General 574 at 631-2 (1900): *Hawaii -- Public Lands* (Griggs, 1899), the U.S. Attorney General, during the time between the annexation resolution and the Organic Act, advised the President of the United States that "[t]he existing government of Hawaii very clearly, by the resolution of annexation, parted with

points decided by these cases, it is evident that they rely upon a tightly circumscribed view of events surrounding the overthrow of the monarchy. The concept of *ceded lands* has by long use become a part of the legal, historical and political vocabulary of the State of Hawaii. It is extremely unlikely that any court or any Congress would be willing to undo what has been done in terms that would substantially affect Hawai'i's present status as a State. However, that leaves unresolved those questions raised by President Cleveland with regard to the ethical situation created as a result of the actions of the United States minister and armed forces.

2. Native Hawaiians Study Commission

Title III, §§301-307 of Public Law 96-565 of December 22, 1980 (94 Stat. 3323-3326) established the Native Hawaiians Study Commission (NHSC) to study the culture, needs and concerns of Native Hawaiians. The Commission's report to Congress was submitted in two volumes dated June 23, 1983. The first volume, containing the majority report, provides an analysis of Hawaiian culture, social conditions and history, including the historic events that led to Hawai'i's annexation. The majority report perpetuates the general reasoning of post-1898 authorities interpreting the legality of United States control of ceded lands in Hawai'i.

Volume 2 presents a dissenting report. It provides a detailed analysis similar to the findings and conclusions of the United States President in 1893. The dissenting report asserts anew the initial belief that the overthrow of Hawai'i's Queen Lili'uokalani by a group of American businessmen residing in Honolulu was accomplished only through the wrongful participation of the United States minister and armed forces.

a. Majority Report

With regard to the events of 1893, volume 1 states, at page 28:

To summarize the Commission's findings with regard to the overthrow of the Hawaiian monarchy: Based upon the information available to it, the Commission concluded that [American] Minister [to Hawai'i] John L. Stevens and certain other individuals occupying positions with the U.S. Government participated in activities contributing to the overthrow of the Hawaiian monarchy on January 17, 1893. The Commission was unable to conclude that these activities were sanctioned by the President or Congress. In fact, official government records lend support to the conclusion that Minister Stevens' actions were not sanctioned.

Besides the findings summarized above, the Commission concludes that, as an ethical or moral matter, Congress should not provide for native

all ownership of the public lands of Hawaii. Indeed, it is scarcely an adequate expression of the fact to say that it parted with the ownership, because that government, as a sovereign power, was dissolved and ceased to exist."

Hawaiians to receive compensation either for loss of land or of sovereignty. Reviewing the situation generally, including the historical changes in Hawaii's land laws and constitution before 1893, the Hawaiian political climate that led to the overthrow, the lack of authorized involvement by the United States, and the apparent limited role of United States forces in the overthrow, the Commission found that on an ethical or moral basis, native Hawaiians should not receive reparations.

It is one of those generally recognized facts of history that United States officials participated in activities contributing to the overthrow of the Hawaiian Kingdom. The annexationist perspective ignores or justifies that participation. The NHSC majority report perpetuated the annexationist perspective, but recommended that there be some emphasis upon generally available social benefits for Native Hawaiians, such as job training and assistance in finding housing, so that they might better escape their disadvantaged social and economic circumstances.

b. Dissenting Report

The NHSC dissent is entitled *Claims of Conscience: A Study of the Culture, Needs and Concerns of Native Hawaiians*. The dissent reviews evidence showing that prior to 1893, United States government officials viewed Hawai'i as a place of great commercial and military importance, a place that attracted annexation interest. It shows how the overthrow of the Kingdom of Hawai'i by a small group of annexation-minded Americans was compelled by the prevailing views of the times (e.g. social Darwinist ethnocentricity combined with Manifest Destiny expansionism) and accomplished with American support.

Consistent with annexationist views and interests, on December 1, 1881, Secretary of State James G. Blaine wrote to James M. Comly, the American Minister to Hawai'i,²⁹ "The decline of the native Hawaiian element in the presence of newer and sturdier growths must be accepted as an inevitable fact, in view of the teachings of ethnological history. And as retrogression in the development of the Islands can not be admitted without serious detriment to American interests in the North Pacific, the problem of replenishment of the vital forces of Hawai'i presents itself for intelligent solution in an American sense --not in an Asiatic or British sense..."

²⁹ See President Harrison's Message Transmitting Correspondence respecting relations between the United States and the Hawaiian Islands from September, 1820, to January, 1893, *Foreign Relations of the United States* 1894, Senate Ex. Doc. No. 77, 52nd Congress, 2nd session, at page 169.

American influence in the Kingdom of Hawai'i had grown strong.³⁰ There were several factors that led the American minority to fear rule by Queen Lili'uokalani, including the Scottish father and English education of the heir to her throne, and her expressed wish to replace the "Bayonet Constitution" that had been previously imposed in 1887 by threats of force from the same Americans calling themselves the Committee for Public Safety.³¹

On Sunday, January 15, 1893, the Committee for Public Safety informed members of the Queen's cabinet that they considered the throne vacant. Later that day, the Committee proposed annexation of Hawai'i by the United States, then sought and received a promise of support from the United States Minister to Hawai'i, John L. Stevens. That evening the Committee for Public Safety put together a provisional government to replace the Kingdom.

The following afternoon, on orders from Minister Stevens, a company of United States Marines was put ashore in Honolulu from the U.S.S. Boston.³² At 9:00 pm, those troops took up quarters at Arion Hall, next to the government building. That evening the Committee for Public Safety named persons to fill the positions created in its provisional government. Sanford B. Dole left his position as an associate justice of the Hawai'i Supreme Court to serve as President of the provisional government.

Early the next morning, Tuesday, January 17, 1893, Dole presented Minister Stevens with a letter describing the Committee's plans. Dole later reported that Stevens then said to him, "I think you have a great opportunity." When the Cabinet of Queen Lili'uokalani visited Stevens, he told them that the Queen would not receive his help, but that the Committee would be protected by the American marines.

³⁰ The commission established by Congress through the Organic Act reported in 1898 that there were approximately 4,000 Americans among the 110,000 inhabitants of the Hawai'ian Islands. "It will, of course, be observed that this entire population of 110,000 is dominated, politically, financially, and commercially by the American element." See the Commission report transmitted to Congress by the message of the President, Senate Doc. 16, 55th Congress, 3rd Session (1898), U.S. Misc. Pub. 1898, at page 3.

³¹ Uncited facts set forth in this section are condensed from chapters 2 and 3 of the dissenting report, at pages 54-79, and the sources cited therein. Contemporary accounts of the same events, stated from the point of view of Honolulu businessmen involved in displacing the monarchy, can be found in articles in *The Daily Pacific Commercial Advertiser* editions for January 12th-19th, 1893.

³² It was reported in the *Pacific Commercial Advertiser* on Monday, January 16, 1893, that the U.S.S. Boston had just arrived at Honolulu from Hilo on the preceding Saturday.

The Committee then took possession of the government building. It was proclaimed that the Queen was overthrown and replaced by a provisional government "to exist until terms of union with the United States of America have been negotiated and agreed upon." Late that afternoon, Stevens recognized the provisional government, and so informed the Queen.

At that time, the monarchy was still extant, and in control of the palace and the police station. The Queen was confronted with the difficult situation of a rebellion supported by American armed forces. She consulted with members of her cabinet, and they in turn were in communication with the adverse parties. Faced with substantial American armed forces deployed against her, the Queen yielded *to the United States*.

Queen Lili'uokalani wrote that "since the troops of the United States had been landed to support the revolutionists, by the order of the American minister, it would be impossible for us to make any resistance." That evening, the Queen declared "I yield to the superior force of the United States of America, whose minister plenipotentiary, His Excellence John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the said provisional government. [¶] Now to avoid any collision of armed forces and perhaps the loss of life, I do under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands."

On February 1, 1893, in response to a request of the provisional government, Stevens placed the provisional government under the protection of the United States, moved the marines into the government building, and hoisted the American flag over Hawai'i. Two weeks later President Harrison sent a treaty of annexation to the Senate, with a message denying any U.S. involvement in the overthrow of the monarchy.

About two weeks after that, Grover Cleveland was inaugurated as President and withdrew the treaty "for the purpose of re-examination." President Cleveland sent James H. Blount as his emissary to Honolulu, to investigate the situation. Blount ordered U.S. troops back to their ship, ordered the American flag lowered, and began his full investigation of the American role in the overthrow.

President Cleveland's *Message Relating to the Hawaiian Islands*, was based upon James Blount's *Report to United States Congress: Hawaiian Islands* (both recorded as Executive Document Number 47, 53rd Congress 2d session, 1893, Serial Set 3224.) Secretary of State Walter Q. Gresham had advised Cleveland that resubmission of the

annexation treaty was unadvisable because Stevens was directly responsible for the revolution. Cleveland sent Albert S. Willis as the new minister to Hawaii with orders to express the President's regret for Stevens' misconduct and to request of the provisional government that the Queen be restored. Dole told Willis to mind his own business.

Cleveland then reported the facts of the overthrow to Congress, and left matters in its hands. Cleveland's message said, "the one controlling factor in the whole affair was unquestionably the United States Marines, who [were] drawn up under arms and with artillery in readiness."³³

Cleveland's message to Congress concluded, "If a feeble but friendly state is in danger of being robbed of its independence and its sovereignty by a misuse of the name

³³ President Cleveland's message, at pages 23-24, further stated to Congress:

The lawful government of Hawaii was overthrown without the drawing of a sword or the firing of a shot by a process every step of which, it may be safely asserted, is directly traceable to and dependent for its success upon the agency of the United States acting through its diplomatic and naval representatives.

But for the notorious predilections of the United States Minister for annexation, the Committee of Safety, which should be called the Committee of Annexation, would never have existed.

But for the landing of the United States forces upon false pretexts respecting the danger to life and property the committee would never have exposed themselves to the pains and penalties of treason by undertaking the subversion of the Queen's Government.

But for the presence of United States forces in the immediate vicinity and in position to afford all needed protection and support the committee would not have proclaimed the provisional government from the steps of the Government building.

And finally, but for the lawless occupation of Honolulu under false pretexts by the United States forces, and but for Minister Stevens's recognition of the provisional government when the United States forces were its sole support and constituted its only military strength, the Queen and her Government would never have yielded to the provisional government, even for a time and for the sole purpose of submitting her case to the enlightened justice of the United States. . .

[¶] I mistake the American people if they favor the odious doctrine that there is no such thing as international morality and there is one law for a strong nation and another for a weak one, and that even by indirection a strong power may with impunity despoil a weak one of its territory.

By an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress, the Government of a feeble but friendly and confiding people has been overthrown. A substantial wrong has thus been done which due regard for our national character as well as the rights of the injured people requires we should endeavor to repair.

and power of the United States, the United States can not fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation..."

Subsequently, Senator John T. Morgan's Foreign Relations Committee held hearings on the Hawaiian question. Unable to reach a majority opinion, Morgan issued a report condoning Steven's actions and recognizing the provisional government. Morgan wrote, "Hawaii is an American state, and is embraced in the American commercial and military system. This fact has been frequently and firmly stated by our Government and is the ground on which is rested that peculiar and far-reaching declaration so often and so earnestly made, that the United States will not admit the right of any foreign government to acquire any interest or control in the Hawaiian Islands that is in any way prejudicial or even threatening toward the interest of the United States..." In 1894 both houses of Congress passed resolutions declaring that there should be neither restoration of the Queen nor annexation.

President Cleveland was followed in office by annexationist President McKinley. The provisional government had by then constituted itself as the Republic of Hawaii, and it again offered a treaty of annexation. Lacking the necessary two-thirds majority of Senate votes to ratify such a treaty, Congress annexed Hawai'i as a territory by passing a joint resolution. Annexation was never ratified by a popular vote of Hawai'i's citizens.

The introduction to the dissenting report of the Native Hawaiians Study Commission includes (on page vi) this observation:

It is our belief that a misdeed occurred when the Hawaiian monarchy was overthrown in 1893. An open and searching examination of the past and its possible misdeeds should never be taken as a personal affront. Rather, one of the great strengths of the United States has been the ability to rededicate itself to principles sometimes compromised in the past.

c. Congressional Hearings

Following submission of the two volumes of the NHSC report in 1983, the response of several Congressional Committees has indicated that the question of culpability in the overthrow of Queen Lili'uokalani is by no means settled. Congress has not formally acted upon the reports, other than by means of those several committee hearings.

Four Congressional hearings have directly or indirectly addressed the conflicting elements of the two NHSC reports: (a) the April 16-20, 1984, hearings of the Senate Committee on Energy and Natural Resources, (Senate Hearing 98-1257, parts 1 and 2); (b) the May 3, 1984, Oversight Hearing before the House Committee on Interior and Insular Affairs (House Serial No. 98-44); (c) the August 26, 1988, hearing of the Senate

Select Committee on Indian Affairs, (Senate Hearing 100-985); and (d) the August 7, 1989, Joint Hearings before the Senate Select Committee on Indian Affairs and the House Committee on Interior and Insular Affairs (Senate Hearing 101-555, part 1.)

Hearings on the subject of the Native Hawaiians Study Commission were held in Hawai'i by the Senate Committee on Energy and Natural Resources on April 16th, 17th, 18th and 20th, 1984. The chairman, Senator Matsunaga, initially recounted the history of the creation of the NHSC. Awareness of a need to study the issues surrounding the overthrow of Hawai'i's monarchy, and the idea of creating a commission to do so, had been expressed in the Congress from at least the early 1970's. Twenty-five minutes before the adjournment of the 96th Congress on December 4, 1980, an amendment to create the NHSC was added to the bill creating Kalaupapa National Historic Park. It was signed by President Carter on December 22, 1980. Senator Matsunaga stated, "A nine-member study commission was appointed by President Carter, but summarily was dismissed and replaced by President Reagan with his own appointees." Report page 3.

The Oversight Hearing before the House Committee on Interior and Insular Affairs in Washington, D.C., on May 3, 1984, was held for the sole purpose of considering the reports of the Native Hawaiian Study Commission, and particularly "the differences between the majority and the minority reports of the Commission, relative to the historical events surrounding the 1893 overthrow of the Hawaiian Government and the involvement of the United States in those events."³⁴ NHSC chair Kina'u Boyd Kamali'i testified then with regard to those matters:

In particular, I wish to direct your attention this morning to the section of that chapter [of the majority report entitled *Diplomatic and Congressional History: From Monarchy to Statehood*] subtitled "The Fall of the Monarchy and Annexation of Hawaii," pages 289 through 301.

These 13 pages, two of which are a decisive memorandum from the author, Mr. William Dudley, of the Naval Historical Society, bear the full burden of this volume I's findings, conclusions, and recommendations on the most important topic of this study.

Further, this section, self-described as "particularly critical and sensitive," offers a clear example of the errors of approach and methodology and flawed interpretation which characterizes the entire volume I.

I believe that Mr. Dudley, in a memorandum dated March 2, 1983, offers the most damaging critique of the historical methodology used in preparing this crucial section.

As noted by Mr. Dudley, he lacked sufficient time -- 6 to 8 weeks--lacked sufficient access or funding to primary documents and archival collections -- relying basically on single secondary source and lacked

³⁴ The quotation is from introductory comments of the committee chairman, Rep. Jim Moody, at Report page 1.

sufficient unquestioned objectivity as a Government-related historian whose department was historically and directly involved in the events reviewed.

Report page 5

The NHSC chair then recited written testimony from Dr. Pauline King of the University of Hawaii history department (previously presented during Senator Matsunaga's April hearings) concluding "It would appear that the Majority Report was planned with certain conclusions already in mind and certain recommendations expected to be made. Then the historian was given the responsibility to write an essay which would support the political decision already arrived at. . . . Secondary sources and a swift review of available documents negates the product of the historian for the majority Commissioners in Volume I." Report page 6.

Testimony from historical research experts was generally critical of the methodology and substance of the majority report's analysis of the overthrow. University of Texas at Austin history professor Dr. William R. Braisted, a specialist in naval diplomatic history, noted that "Mr. Dudley, who is the author of the historical material on the fall of the Hawaiian monarchy, frankly states that he was limited in . . . guidelines given to him. He indicates that he was advised that he should confine himself to secondary sources. . . . [¶] From Mr. Dudley's presentation, it is clear that Minister Stevens and the American naval forces exerted a determining influence in the overthrow of the Hawaiian monarchy. I think you feel that in reading it, and I feel that it is too weak to merely use the word 'encouraged,' as was the case in the majority report. [¶] Because of the limitations imposed on his research, however, he sheds little light on the attitude of the Government in Washington and upon how that attitude may have influenced Stevens and the Navy in Honolulu." Report pages 8-9.

Dr. Peter B. Sheridan, Jr., an Analyst in American National Government (whose primary area of responsibility is the political development of American territories) for the Congressional Research Service of the Library of Congress testified regarding "the research methodology and conclusions of the historical section of the report of the Native Hawaiians Study Commission that addresses the questions of the overthrow of the Hawaiian monarchy and the annexation of Hawaii by the United States."

Even granting the time constraints and lack of travel funds available to the authors, it does not seem unreasonable on a subject of such magnitude and complexity that the authors might have made use of several manuscript collections in the Library of Congress. . . .

The authors might also, for the benefit of future scholars, have listed manuscript holdings and other repositories. For example, the Maine Historical Society in Portland has the papers of John L. Stevens, U.S. Minister to

Hawaii, and the State Archives of Hawaii has several collections of interest on the topic. . .

The report also omits any reference to several scholarly articles, inclusion of which might have enlarged on the reasons for the overthrow of the monarchy and which might have provided broader perspective and balance to the historical section.

There are also, I think, some odd sources used as references. On page 328 of Volume I, for example, Claude Julien's "American Empire," published in 1971, is cited as a source for the reason why a joint resolution was used instead of a treaty in the annexation of Hawaii. Julien's work is primarily concerned with American foreign policy since 1900. In its 417 pages, there are only two pertinent references to Hawaii. . .

While there appear to be no major misstatements of basic fact in the brief account of the overthrow of the monarchy and the annexation of Hawaii, there also appears to be no preponderance of evidence in the historical record to support incontrovertible conclusions about the history of the overthrow of the monarchy and the annexation by the United States. . .

In situations in which the history of events and reasons for them are unclear and the record uncertain and ambiguous, rigorous scholarship and exhaustive research are predicates to drawing far-reaching and definitive statements and conclusions, if these are possible at all.

Lacking historical clarity and certainty, or at least a preponderance of evidence one way or another, standards of historical research suggest prudence and qualification in reaching conclusions.

It is unfortunate that constraints of time may have worked against these standards in this instance and may have contributed to the drawing of conclusions about the history of the United States annexation and overthrow of the Hawaiian monarch that are neither universally agreed to nor indisputable from the record.

Report pages 12-14

On August 26th and 31st, 1988, the Senate Select Committee on Indian Affairs held an oversight hearing on Native Hawaiian reparations and mental health care needs in Honolulu, chaired by Sen. Inouye. In his opening comments, Sen. Inouye stated:

The 1983 Native Hawaiians Study Commission Report found that there was insufficient evidence to support the claim that the U.S. Government acted illegally during the events surrounding the overthrow of the Hawaiian monarchy. Based on these findings, the majority report concluded that there was no basis for reparations to the Hawaiian people.

As soon as the commission report was released, it was severely criticized by scholars and lawyers and, of course, Hawaiian leaders. The criticism focused on the dubious findings of fact related to the historical role of the United States. Particularly compelling was the testimony of the Library of Congress on the procedures employed by the commission in reaching their conclusions. Obviously the commission report must be dealt with in a way that overcomes this problem.

Report pages 1-2

Sen. Inouye outlined several options that might be available to deal with the problem created by the NHSC majority report. One approach would be to have Congress enable Hawaiians to bring the issue before the U.S. Court of Claims. A second

approach would use a concurrent resolution of Congress "to create a Congressionally appointed commission to study the historical events surrounding the overthrow of the monarchy and to make recommendations based on its findings." Finally, legislation could establish another Presidentially appointed commission to restudy the historical events. Sen. Inouye preferred the latter option, "To undo this Presidentially appointed [NHSC] commission report, I believe it would take another report issued by a Presidentially appointed commission." Report page 2.

Witnesses commenting upon the various options generally shied away from the Court of Claims approach³⁵ and some even disputed the idea of spending any time re-working the NHSC report (favoring instead immediate reparations legislation.) Moses Keale testifying for the Office of Hawaiian Affairs (OHA) spoke in favor of such an immediate remedial approach. He continued, "If however, it is necessary to have some new body look at this claim before Congress acts, we have several suggestions . . . [¶] The most appropriate new body to examine our claims would be one comprised of some individuals appointed by the national government and some appointed by the Hawaiian people [through OHA]." Report page 8. Then-Representative (now Senator) Akaka and others spoke in support of another Presidentially appointed commission or a new Congressional study commission to address the issues.

The August 7, 1989, Joint Hearings before the Senate Select Committee on Indian Affairs and the House Committee on Interior and Insular Affairs were held in Honolulu with Sen. Inouye presiding. The actual subject of those hearings was the Hawaiian Homes Commission Act, but the testimony presented also addressed the NHSC reports in the context of land claims.

In most Congressional testimony addressing the historical analysis relied upon by the NHSC majority report, the work of historian William Dudley was critically scrutinized. Mr. Dudley himself contributed to that criticism of his work. In Volume I, at page 265, of the NHSC report, Mr. Dudley's work is introduced in these terms:

Because this section [analysis of the causes of the fall of the monarchy and annexation] is particularly sensitive and crucial to this study, the Commissioners have determined that review by a professional historian with qualifications in the relevant historical period is essential. Therefore, the section on United States-Hawaiian relations between 1893 and 1900 has been

³⁵ A modern Court of Claims would undoubtedly be influenced by the precedent of that court found in *Liliuokalani v. United States*, 45 Ct.Cl. 418 (1910) (sustaining a demurrer as to the Queen's claims for the value of a life estate in Hawai'i crown lands annexed by the United States.)

prepared by William Dudley, chief of Research in the Historical Research Branch of the Naval Historical Center, and Lt. Donna Nelson of his staff.

On pages 289-91 of NHSC Volume I is reprinted a March 2, 1983, memorandum from Mr. Dudley to Carol Dinkins, an NHSC commissioner, responding to critical comments from the public regarding his contribution to the draft NHSC report. In that memorandum, Mr. Dudley states:

When your request was received last May, we responded within the guidelines of that request, namely: that within six to eight weeks we produce a 15 to 20 page, double-spaced report, footnoted, on "what forces caused the monarchy to fall and what forces led to the annexation of Hawaii to the United States as a Territory in 1898." The request also stated that "reliance on secondary sources will be sufficient for our review."

. . . The most cogent criticisms argued that primary source research in both public and private archives was much to be preferred to reliance on secondary sources, and that several questions regarding the fall of the monarchy and annexation should have been treated in greater depth and detail. I concur with these sentiments. . .

Some commentators objected to the fact that federal historians were asked to provide research on a subject which involved the actions of the U.S. Government and its armed forces. . . It is conceded, however, that it would have been more appropriate had the Commission requested this work be undertaken by a non-government historian so that there might have been no question about the appearance or substance of objectivity.

In 1984, Mr. Dudley provided Mrs. Kamali'i, formerly NHSC chairperson, copies of the research instructions and related materials he had received from Commissioner Dinkins (Mrs. Kamali'i made that material a part of the report of the 1984 Oversight Hearing before the House Committee on Interior and Insular Affairs, at pages 40-51.) The instruction letter dated May 25, 1982, enclosed a list of five secondary references and two pages from a standard history text with the comment that it would be helpful as background.³⁶ In his letter to Mrs. Kamali'i, Mr. Dudley observes "It is worth noting that the date of the [enclosed secondary source reference] list, January 7, 1982, was more than five months before they contacted us."

The Congressional hearings reported testimony generally supportive of the premises that (a) the historical analysis relied upon by the NHSC majority report was insufficient to support the majority report's conclusions, (b) some subsequent report would be

³⁶ The two pages of text material provided as background with Mr. Dudley's instructions came from John A. Garraty's *The American Nation* and included a statement that Queen Lili'uokalani "abolished the existing constitution under which the white minority had pretty much controlled the islands and attempted to rule as an absolute monarch." The fear that Queen Lili'uokalani *might do* what the quoted text reports in error that she did was a principal justification advanced at the time of the overthrow.

required to set the record straight and (c) a more accurate report would in all likelihood be consistent with the historical analysis provided in the dissenting report.

The insufficiencies of the majority report's historical analysis have been fairly well detailed. The creation of a new commission for the specific purpose of setting the record straight has been favored in Congressional hearings, but that idea has not been further acted upon. However (if an appropriate metaphor may be allowed) the conflicting reports of the Native Hawaiians Study Commission lay in the path of this Commission's work like unexploded ordnance, posing potential hazards for the unwary.

Native Hawaiian interests in the return of Kaho'olawe inevitably raise issues such as the culpability of the United States in the overthrow of the monarchy. Such issues and interests are pertinent to this Commission's work. Resolution of the question of United States culpability in the overthrow of the Kingdom of Hawai'i may exceed the scope of this Commission's described duties. However, an awareness of the question of culpability in its historical context is essential to fair consideration of Native Hawaiian interests in Kaho'olawe. Primary source research conducted for this Commission has produced information and materials supportive of the historical findings of the NHSC dissenting report. Those findings, in turn, are supportive of the assertion of certain Native Hawaiian interests relating to the return of Kaho'olawe.

It is within the scope of this Commission's described duties to include in its report to Congress some reference to the historical events surrounding the overthrow of the Kingdom of Hawai'i and the implications of those events with regard to Native Hawaiian interests that merit consideration in the return of Kaho'olawe. In doing so, KICC may wish to make appropriate reference to the reports of the Native Hawaiians Study Commission and the reports of Congressional hearings on those reports.

3. Executive Orders in Hawai'i's history

Many Executive Orders and Presidential proclamations have affected Hawai'i. A survey of compiled sources³⁷ provides reference to two hundred forty-four such federal executive actions during the years from 1898 to 1964, inclusive. A list of those actions

³⁷ The compiled sources of federal executive actions affecting Hawai'i that were examined include: Lord, Vaughn and Baker, *Presidential Executive Orders (Numbered 1-8030, 1862-1932)*, Volumes I (The List) and II (The Index); Lord (editor), *List and Index of Presidential Executive Orders (Unnumbered Series 1879-1941)*; *Revised Laws of Hawaii 1915*, pages 20-22; *Revised Laws of Hawaii 1925*, pages 61-63; *Revised Laws of Hawaii 1935*, pages 33-36; *Revised Laws of Hawaii 1945*, pages 16-17; *Revised Laws of Hawaii 1955*, pages 9-12; *Code of Federal Regulations Consolidated Index for Title 3, The President, 1936-1965*; and miscellaneous *Code of Federal Regulations* volumes pertaining to Presidential proclamations and Executive Orders.

is provided at the end of this section.³⁸ The federal executive actions on the list have been divided into four groups of sixty-one each and categorized as: (A) takings of land for federal use, (B) returns of land from federal use and (C) miscellaneous actions. The following numbers result:³⁹

<u>Group</u>	<u>Actions</u>	<u>Years</u>	<u>Takings</u>	<u>Returns</u>	<u>Miscellaneous</u>
1.	1-61	1898-1918	31	9	25
2.	62-122	1918-1930	14	31	17
3.	123-183	1930-1942	4	26	31
4.	184-244	1943-1964	6	45	9

It is evident that during the period following annexation, federal executive actions were primarily concerned with the taking of land for federal use and with miscellaneous housekeeping chores. The period following the first World War saw a relatively smaller number of housekeeping and land taking actions and a significantly greater number of land returns to the Territory. In the third period land takings dropped to a very low level. During the final period, most federal executive actions accomplished the return of land, with some miscellaneous actions and a few land takings.

The six land takings during the final phase of actions on the list include one in 1940 and Kaho'olawe in 1953. In 1964, just before the end of statutory authority allowing the taking of land in Hawai'i by federal executive action, President Johnson took four land tracts for military purposes. During that same period there was the highest number of land returns to Hawai'i.

A greater proportion of the pre-1940 executive actions were accomplished by presidential proclamations. Some actions were identified as Executive Orders while they actually were drafted in the form of proclamations. A few early actions were accomplished by proclamations or Executive Orders that were not numbered for identification. Many land transfers for federal use were accomplished by the

³⁸ The search of principal compilations to accumulate information regarding the federal executive actions shown on this list was not exhaustive. No special effort was made to verify the accuracy of those compilations, although research for the portion of the memorandum discussing specific examples revealed a few errors in those compilations. This leads to the conclusion that the data shown on the list may not be complete or even completely accurate. The data is nonetheless helpful in providing a general overview of the use of federal executive actions in Hawai'i's history.

³⁹ Some actions affected more than one category, e.g. Executive Order 2335 of March 16, 1916, accomplished both a taking and a returning of land.

proclamations and orders of Territorial governors (not included in this list.) Most federal executive actions affecting Hawai'i have been accomplished by Executive Orders.

Federal executive actions in Hawai'i, both Presidential proclamations and Executive Orders, have been revised and undone over the years by several means, including subsequent executive actions and Acts of Congress. A few examples will be described for purposes of illustration.

President Truman's July 15, 1952, Executive Order 10375 returned to the Territory certain land comprising Round Top Military Reservation on Oahu. That land was taken by Executive Order 978 on November 24, 1908 (as modified by Executive Orders 4667 of June 13, 1927, 5931 of October 8, 1932, and 6948 of January 17, 1935. Although not mentioned in Executive Order 10375, the original Executive Order 978 also was modified by Executive Order 4179-A of March 20, 1925.) President Truman's Executive Order 9872 of July 15, 1947, eliminated the reservation of a right to construct a railroad connecting Fort DeRussy with the Honolulu Rapid Transit line that had been imposed upon land returned to the Territory (by Executive Order 7658 of July 15, 1937) because "it now appears that there is no necessity for the construction of said railroad..."

President Eisenhower's Executive Orders 10453, 10454 and 10496 came just after the taking of Kaho'olawe in 1953. All three of those actions returned lands to the Territory. Executive Orders 10453 and 10454 were issued on May 18, 1953. The former returned lands at Fort Ruger taken by Executive Order 395-A of January 18, 1906 (as modified by Executive Order 6408 of November 7, 1933, and Executive Order 10268 of July 5, 1951.) The latter returned lands from Schofield Barracks originally taken by an unnumbered Executive Order on July 20, 1899 (as modified by Executive Orders 1137 of November 15, 1909; 1242 of August 23, 1910; 2800 of February 4, 1913; 5771 of January 4, 1932; and 9995 of September 2, 1948.)

Executive Order 10496 of October 14, 1953, returned to the Territory certain lands on Oahu that had been reserved for military use pursuant to previous Executive Orders. The affected lands included part of Pupukea Military Reservation taken by Executive Order 5240 on December 14, 1929; all of Kaaawa Military Reservation taken by Executive Order 4679 on June 29, 1927; and two parts of the Fort Ruger Military Reservation taken by Executive Order 4679 of June 29, 1927, and Executive Order 6408 of November 9, 1933. Some of those affected lands also had been the subject of exchanges for privately-owned land. Apparently it was the net land remaining in federal control that was returned.

These Executive Orders refer to §91 of the Organic Act as the basis for their authority, as does Executive Order 10436 of February 20, 1953, taking Kaho'olawe. It should be noted that Executive Order 10436, in taking Kaho'olawe, specifically excepted from that taking the portion of Kaho'olawe previously set aside for a lighthouse pursuant to proclamation 1827 of February 3, 1928. The Executive Order taking Kaho'olawe also established additional requirements, including the eradication of cloven-hoofed animals, the allowance of access for Territorial officials, and placing Kaho'olawe in a reasonably safe condition when federal use ended.

Early land takings lacked the benefit of the explicit authority set forth in §91 of the Organic Act of 1900. President McKinley's Proclamation 22 of November 2, 1898, reserved for naval purposes the "water lying between the Bishop Estate and the line of Richard Street including the site of prospective wharves" and other waterfront sites in Honolulu. The premise recited by the proclamation for such taking was the joint resolution of annexation's cession of sovereignty and the provision therein that Congress should enact special laws for the management and disposition of land in Hawai'i. President McKinley's proclamation cited a public necessity for the taking and did so "until such time as the Congress of the United States shall otherwise direct." President McKinley's Proclamation 8 of November 10, 1899,⁴⁰ also recited the annexation resolution as authority for taking additional lands for naval purposes "subject to such legislative action as the Congress of the United States may take with respect thereto..."

President Theodore Roosevelt's proclamation 45 of December 28, 1903, citing the authority of §91 of the Organic Act, took all Hawaiian light-houses and light-house equipment for the United States. However, the same President Roosevelt's proclamations of December 4, 1908, do not mention the Organic Act but instead are phrased as were the earlier proclamations of President McKinley. The two 1908 proclamations rely upon the annexation resolution in taking the island of Pu'uki'i on the south side of Hana Bay and land at Kahala Point on Kauai "subject to such legislative action as the Congress of the United States may take..." Apparently, in the drafting of some later proclamations, the authority of the Organic Act was overlooked simply by reliance upon the form of earlier actions.

The last Executive Orders affecting land in Hawai'i were issued by President Johnson. On August 15, 1964, he issued Executive Orders 11165 (taking Fort Schafter

⁴⁰ No explanation has been found for the sequential inconsistency of the fact that President McKinley's Proclamation 8 came about a year *after* his Proclamation 22.

land), 11166 (taking Makua Military Reservation land) and 11167 (taking Pohakuloa Training Area land.) Finally, on August 19, 1964, Executive Order 11172 took land for the Kapalama Military Reservation. The enabling authority cited in these four Executive Orders is §5(d) of the Admission Act. That section provides that "at any time during the five years following the admission of Hawaii into the Union, [federally controlled public lands may] be set aside by Act of Congress or by Executive Order of the President, made pursuant to law, for the use of the United States" as federal land. Hawai'i became a State on August 21, 1959. The Land Conveyance Act (the Act of December 23, 1963, 77 Stat. 472) became the law controlling the return of public lands to Hawai'i as of August 21, 1964. As of that date, five years after the admission of Hawai'i into the Union, there was no statutory authority for taking land from Hawaii by federal executive action. Thus, the last four Executive Orders taking land in Hawai'i were issued by President Johnson just a few days before such authority ended.

Executive Orders have been applied to many purposes in addition to land transfers. President Truman's Executive Order 9645 of October 24, 1945, terminated the authority established in Executive Order 9489 of October 18, 1944, providing for the designation of a Hawai'i military commander authorized to prescribe military areas in the Territory. President Hoover's Executive Order 5281 of February 17, 1930, created an air-space reservation over Pearl Harbor, prohibiting navigation therein by any civil aircraft except by permission of the Navy. President Coolidge's June 7, 1927, Executive Order 4661 ordered a four hour workday on Sundays at Pearl Harbor Naval Station.

President Wilson's April 5, 1917, Executive Order 2584 established defensive sea areas at numerous places, including Honolulu. President Wilson's January 25, 1919, Executive Order 3027 stated in its entirety "All Executive Orders heretofore issued for the establishment of Defensive Sea Areas are hereby revoked."

President Coolidge, in Executive Order 4143 of January 28, 1925, returned to the Territory land near Keaahala Military Reservation "for the purpose of a roadway, and for no other purpose, and in the event the same is not or ceases to be so used, it shall revert to the United States ..." President Coolidge's Executive Order 4274 of July 25, 1925, returned land from Schofield Barracks "as a site for public schools" with a reverter provision if such use was not accomplished within two years. By Executive Order 4113 of December 22, 1924, President Coolidge returned land at Punchbowl for use as a school site without any restrictive terms or conditions.

Land taken from Hawai'i for federal use has been returned by Act of Congress. The Act of April 3, 1952, Public Law 296, affected land on Oahu that had been set

aside for military purposes by Executive Order 2335 of March 6, 1916, and modified by Executive Order 9861 of May 31, 1947. The law returned to the Territory that parcel of land and all improvements, and provided that the Territory could convey the land to Hawaiian Electric Company in exchange for land of equal value, and that the land obtained thereby would "have the same status and be subject to the same laws as the ceded land given in the exchange."

The Act of June 5, 1952, Public Law 377, provided for the Secretary of the Navy to convey to the Territory, without compensation, all of the federal interest in the former Kahului Naval Air Station, consisting of about 1,341 acres with improvements. The Act required that the conveyance impose certain terms and conditions, including that the land should be used for public airport purposes and that the existing improvements be maintained for such purposes, and that in time of war the United States should have free use of the facilities, or repossess it upon thirty days notice.⁴¹

These Congressional Acts stand as precedents for a conveyance upon certain terms and conditions of lands that had been previously set aside for federal use. It is evident from this review of the history of federal executive actions that land in Hawai'i, and other public matters, were freely affected in a broad variety of ways by such actions apparently according to whatever circumstances required at the time.

⁴¹ Similar conditions were imposed by Executive Order 9582 of June 30, 1945, and Executive Order 7893 of May 21, 1938, with regard to lands returned exclusively for airport use at Upolu Point on the Big Island. However, lands comprising Homestead Field on Molokai and the military airfield at Hilo were returned to the Territory by Executive Orders 10383 and 10384, respectively, on August 11, 1952, without any restrictive covenants.

List of Executive Orders and proclamations affecting Hawai'i

<u>Type</u>	<u>No.</u>	<u>Date</u>	<u>Reference</u>	<u>Description</u>
A	1.	11/2/98	30 Stat 1786	proclamation 22 taking wharf sites
C	2.	12/31/98		EO 110 voiding cable contract
C	3.	5/13/99		EO 116 cancelling election
A	4.	7/20/99	31 Stat 1959	EO (unnumbered) taking land
C	5.	9/11/99		EO 121 voiding land transactions
C	6.	9/18/99		EO 122 discontinuing vessel registry
A	7.	10/10/99		proclamation (unnumbered) taking land
A	8.	11/10/99	33 Stat 2329	proclamation 8 taking land
A	9.	12/19/99		EO (unnumbered) taking land
A	10.	1/5/00		EO (unnumbered) taking land
C	11.	6/22/00		EO 130-A thru D affirming franchise
A	12.	12/28/03		proclamation 45 taking lighthouse
A	13.	1/18/06		EO 395-A taking land
C	14.	5/11/07		EO 633 regarding communications
A	15.	10/27/08		EO 962 taking land
A	16.	11/24/08		EO 978 taking land
A	17.	12/4/08		proclamation 826 taking lighthouse
A	18.	12/4/08	35 Stat 2208	proclamation 827 taking lighthouse
A	19.	12/4/08		proclamation 828 taking lighthouse
A	20.	12/4/08		proclamation 829 taking lighthouse
A	21.	12/4/08		proclamation 830 taking lighthouse
A	22.	12/24/08		proclamations taking land
A	23.	1/15/09		EO 1008 taking land
C	24.	2/3/09		EO 1019 re game preserve
C	25.	5/25/09		EO 1077 regarding communications
B	26.	7/1/09		EO 1106 returning land
C	27.	11/15/09		EO 1137 modifying EO of 7/20/99
A	28.	3/12/10	37 Stat 1741	EO 1175 taking land
C	29.	3/25/10		EO 1181 transferring land
A	30.	8/23/10		EO 1242 taking land
C	31.	10/31/10		EO 1261 transferring land
A	32.	5/26/11		EO 1362 taking land
AB	33.	6/26/11		EO 1377 taking and returning land
A	34.	2/7/12		proclamation 1179 taking land
B	35.	3/27/12		EO 1507 returning land
B	36.	5/11/12		EO 1531 returning land
C	37.	6/3/12		proclamation correcting taking
A	38.	7/6/12	39 Stat 1751	EO 1559 taking land
C	39.	9/23/12		EO 1613 restricting harbor entry
A	40.	4/28/13		EO 1767 taking land
A	41.	11/9/14		EO 2075 taking land
A	42.	10/4/15		proclamation taking land
B	43.	10/6/15		EO 2253 returning land
C	44.	2/21/16		EO 2323 transferring lands
AB	45.	3/6/16		EO 2335 taking and returning land
C	46.	5/11/16		EO 2381 transferring land
B	47.	9/29/16	39 Stat 1769	EO 2464 returning land
B	48.	1/26/17		EO 2521 returning land

<u>Type No.</u>	<u>Date</u>	<u>Reference</u>	<u>Description</u>
C 49.	2/14/17	39 Stat 1817	proclamation 1356 changing reservation
A 50.	3/28/17		EO 2564 taking land
A 51.	3/28/17		EO 2565 taking land
A 52.	3/28/17		EO 2566 taking land
B 53.	4/4/17		EO 2581 returning land
C 54.	4/5/17		EO 2584 re sea defensive area
C 55.	7/2/17	40 Stat 1680	proclamation re military service
C 56.	8/30/17		EO 2694 boundaries redefined
C 57.	10/13/17		EO 2732 transferring land
C 58.	2/4/18		EO 2800 revising boundary
C 59.	3/2/18		EO 2815 re liquor control
C 60.	5/28/18	40 Stat 1785	proclamation re military service
C 61.	6/18/18	40 Stat 1801	proclamation re military service

C 62.	6/24/18	40 Stat 1804	proclamation 1463 re land cultivation
A 63.	7/2/18		EO 2900 taking land
	64.		EO 2901
C 65.	10/10/18	40 Stat 1858	proclamation re military service
A 66.	10/21/18		EO 2978 taking land
C 67.	1/25/19		EO 3027 re sea defensive areas
C 68.	3/25/19		EO 3067 redefining boundaries
B 69.	4/8/19		EO 3070 returning land
B 70.	4/30/19		EO 3080 returning land
B 71.	4/8/19	41 Stat 1742	proclamation 1517 returning land
B 72.	6/2/19	41 Stat 1750	proclamation returning land
C 73.	9/15/19		EO 3166 transferring leper tender
A 74.	9/29/19		EO 3171 taking land
B 75.	12/2/19		EO 3193 returning land
B 76.	2/17/20	41 Stat 1786	proclamation 1556 returning land
A 77.	11/24/20		EO 3358 taking land
B 78.	5/25/22	42 Stat 2270	proclamation 1627 returning land
A 79.	7/27/23		EO 3885 taking land
B 80.	6/26/24		EO 4036 returning land
B 81.	7/21/24		EO 4052 returning land
B 82.	12/22/24	43 Stat 1978	proclamation returning land
B 83.	12/22/24		EO 4113 returning land
C 84.	1/13/25		EO 4126 exchanging lands
B 85.	1/28/25		EO 4143 returning land
AB 86.	3/20/25		EO 4179-A returning & taking land
B 87.	7/25/25		EO 4274 returning land
C 88.	10/8/25		EO 4319 abolishing customs port
B 89.	12/2/25		EO 4351 returning land
C 90.	2/25/26		EO 4385 regarding customs ports
B 91.	6/5/26		EO 4455 returning land
A 92.	7/24/26	44 Stat 2619	proclamation taking land
BC 93.	9/4/26		EO 4504 returning land and redefining boundaries
C 94.	10/29/26		EO 4535 correcting EO 2900
A 95.	11/19/26		EO 4545 taking land
A 96.	4/21/27		EO 4635 taking land
A 97.	4/30/27		EO 4640 taking land

<u>Type</u>	<u>No.</u>	<u>Date</u>	<u>Reference</u>	<u>Description</u>
C	98.	6/7/27		EO 4661 re Saturday work hours
C	99.	6/13/27		EO 4667 redefine boundary (mod 978)
A	100.	6/29/27		EO 4679 taking land
AB	101.	7/4/27		EO 4684 returning & taking land
B	102.	7/7/27		EO 4685 returning land
C	103.	7/11/27		EO 4686 transferring land
B	104.	7/11/27		EO 4689 returning land
A	105.	9/12/27		EO 4718 taking land
B	106.	10/25/27	45 Stat 2938	proclamation returning land
A	107.	11/15/27		EO 4760 taking land
C	108.	2/2/28		EO 4802 boundaries redefined
A	109.	2/3/28	45 Stat 2938	<i>proclamation 1827 taking Kaho'olawe lighthouse</i>
B	110.	2/27/28	45 Stat 2941	proclamation returning land
A	111.	9/14/28	45 Stat 2968	proclamation taking land
B	112.	10/27/28	45 Stat 2974	proclamation returning land
B	113.	12/19/28	45 Stat 2982	proclamation returning land
B	114.	3/8/29	46 Stat 2981	proclamation returning land
C	115.	5/17/29		EO 5119 redefining boundary
B	116.	6/6/29		EO 5132 returning land
B	117.	7/11/29		EO 5155 returning land
B	118.	7/16/29		EO 5157 returning land
C	119.	8/21/29		EO 5174 boundary correction
C	120.	12/14/29		EO 5240 boundary correction
B	121.	1/24/30		EO 5265 returning land
B	122.	1/24/30		EO 5266 returning land
<hr/>				
C	123.	2/17/30		EO 5281 air space reservation
B	124.	7/25/30		EO 5405 returning land
B	125.	7/25/30		EO 5406 returning land
C	126.	7/31/30		EO 5414 boundaries redefined (re EO 2900)
C	127.	11/14/30		EO 5487 redefining boundaries
B	128.	11/14/30	46 Stat 3039	proclamation returning land
B	129.	12/26/30		EO 5521 returning land
B	130.	10/27/31	47 Stat 48	proclamation returning land
B	131.	1/7/31		EO 5528 returning land
B	132.	2/18/31		EO 5561 returning land
C	133.	4/22/31		EO 5607 redefining boundaries
A	134.	4/28/31		EO 5613 taking land
B	135.	6/4/31		EO 5637 returning land
C	136.	8/24/31		EO 5692 redefining boundaries
C	137.	8/24/31		EO 5693 redefining boundaries
B	138.	9/16/31		EO 5715 returning land
C	139.	1/4/32		EO 5771 redefining boundaries
B	140.	1/8/32	47 Stat 61	proclamation returning land
C	141.	10/8/32		EO 5931 modifying EO 978
C	142.	11/7/33		EO 6408 modifying EO 395-A
B	143.	11/29/33		EO 6468 returning land
B	144.	12/12/33		EO 6493 returning land
B	145.	1/20/34		EO 6570 returning land
C	146.	2/16/34		EO 6584 transferring land

<u>Type No.</u>	<u>Date</u>	<u>Reference</u>	<u>Description</u>
B 147.	3/6/34		EO 6630 returning land
C 148.	6/30/34	49 Stat 3400	proclamations re sugar tax
C 149.	6/27/34		EO 6750-A re National Recovery Act
C 150.	8/23/34		EO 6831 recreating customs port
C 151.	1/17/35		EO 6948 modifying EO 978
B 152.	4/22/35		EO 7024 returning land
B 153.	9/6/35		EO 7176 returning land
C 154.	10/26/35		EO 7215 transferring land
A 155.	2/20/36		EO 7299 taking land
C 156.	2/28/36		EO 7305 re farm loans
C 157.	12/3/36	1 FR 2472	EO 7503 boundaries redefined
C 158.	3/15/37	2 FR 629	EO 7576 boundaries redefined
B 159.	3/27/37	2 FR 720	EO 7588 returning land
B 160.	7/15/37	2 FR 1475	EO 7658 returning land
C 161.	7/17/37	2 FR 1499	EO 7665 redefining boundaries
A 162.	2/2/38	3 FR 307	EO 7804 taking lands
B 163.	5/18/38	3 FR 1159	EO 7891 returning lands
B 164.	5/21/38	3 FR 1177	EO 7893 returning lands
B 165.	5/21/38	3 FR 1437	EO 7911 returning lands
C 166.	11/1/38	3 FR 2615	EO 8000 boundary correction
BC 167.	5/3/39	4 FR 1903	EO 8109 returning land and correcting boundary
B 168.	5/22/39	4 FR 2099	EO 8140 returning land
C 169.	5/26/39	4 FR 2179	EO 8143 re sea defensive area
C 170.	1/15/40	5 FR 207	EO 8320 boundary correction
B 171.	2/25/40	5 FR 819	EO 8353 returning land
B 172.	4/12/40	5 FR 1432	EO 8393 returning land
C 173.	8/27/40	5 FR 3403	EO 8527 transferring land
C 174.	10/1/40	54 Stat 2745	proclamation 2430 re military service
A 175.	12/19/40	5 FR 5215	EO 8616 taking land
C 176.	2/14/41	6 FR 1014	EO 8681 re sea defensive area
C 177.	2/14/41	6 FR 1015	EO 8682 re sea defensive areas
B 178.	3/29/41	6 FR 1765	EO 8724 returning land
B 179.	8/25/41	6 FR 4397	EO 8870 returning land
C 180.	12/18/41	6 FR 6569	EO 8983 appointing study commission
C 181.	12/20/41	6 FR 6675	EO 8987 re sea defensive area
C 182.	12/27/41	55 Stat 1713	proclamation 2532 re maritime area
C 183.	4/13/42	7 FR 2826	proclamation affecting Sugar Act
C 184.	6/2/42	7 FR 93	EO 9006 certifying emergency area
C 185.	2/14/43		EO 9299 re wage and salary adjustments
C 186.	7/21/43	8 FR 10339	EO 9362 transferring FCC land to USN
C 187.	10/18/44	9 FR 12831	EO 9489 designating military command
C 188.	10/19/44	58 Stat 1158	proclamation 2627, ending martial law
B 189.	1/31/45	10 FR 1641	EO 9517 returning land
B 190.	4/27/45	10 FR 4685	EO 9545 returning land
C 191.	6/30/45	10 FR 8197	EO 9581 re labor board
B 192.	6/30/45	10 FR 8197	EO 9582 returning land
C 193.	10/24/45	10 FR 13255	EO 9645 terminating EO 9489
B 194.	12/29/45	11 FR 55	EO 9671 returning land
C 195.	5/14/46	11 FR 5209	proclamation 2691 ending maritime

<u>Type</u>	<u>No.</u>	<u>Date</u>	<u>Reference</u>	<u>Description</u>
B	196.	7/15/46	11 FR 7761	EO 9752 returning land
B	197.	10/26/46	11 FR 12697	EO 9795 returning land
B	198.	5/31/47	12 FR 3557	EO 9860 returning land
B	199.	5/31/47	12 FR 3558	EO 9861 returning land
B	200.	7/15/47	12 FR 4747	EO 9872 returning land
B	201.	8/13/47	12 FR 5517	EO 9884 returning land
B	202.	1/17/48	13 FR 261	EO 9927 returning land
B	203.	4/21/48	13 FR 2191	EO 9951 returning land
B	204.	9/2/48	13 FR 5169	EO 9995 returning land
B	205.	3/10/49	14 FR 1154	EO 10041 returning land
B	206.	3/26/49	14 FR 1391	EO 10047 returning harbor
B	207.	5/24/49	14 FR 2741	EO 10058 returning land
B	208.	6/2/49	14 FR 2913	EO 10060 returning land
B	209.	3/8/50	15 FR 1263	EO 10115 returning land
C	210.	4/12/50	15 FR 2097	EO 10121 transferring title
B	211.	7/5/51	16 FR 6607	EO 10268 returning land
B	212.	12/3/51	16 FR 12303	EO 10309 returning land
B	213.	4/12/52	17 FR 3259	EO 10342 returning land
B	214.	7/15/52	17 FR 6459	EO 10375 returning land
B	215.	7/31/52	17 FR 7107	EO 10378 returning land
B	216.	8/11/52	17 FR 7361	EO 10383 returning land
B	217.	8/11/52	17 FR 7361	EO 10384 returning land
B	218.	8/30/52	17 FR 7959	EO 10389 returning land
B	219.	11/5/52	17 FR 10099	EO 10404 returning land
B	220.	11/14/52	17 FR 10495	EO 10411 returning land
B	221.	11/17/52	17 FR 10497	EO 10413 returning Kure Island
B	222.	11/25/52	17 FR 10755	EO 10414 returning land
C	223.	12/17/52	17 FR 11217	EO 10419 transferring land
A	224.	2/20/53	18 FR 1051	EO 10436 taking Kaho'olawe
B	225.	5/18/53	18 FR 2895	EO 10453 returning land
B	226.	5/18/53	18 FR 2895	EO 10454 returning land
B	227.	10/14/53	18 FR 6586	EO 10496 returning land
A	228.	4/22/54	19 FR 2397	EO 10528 taking wharf area
B	229.	2/15/55	20 FR 1007	EO 10597 returning land
B	230.	4/19/55	20 FR 2645	EO 10603 returning land
B	231.	5/11/55	20 FR 3246	EO 10612 returning land
B	232.	12/8/55	20 FR 9287	EO 10648 returning land
B	233.	4/2/56	21 FR 2135	EO 10664 returning land
B	234.	4/23/56	21 FR 2647	EO 10665 returning land
B	235.	4/27/56	21 FR 2801	EO 10666 returning land
B	236.	11/16/56	21 FR 9007	EO 10688 returning land
B	237.	2/8/57	22 FR 859	EO 10698 returning land
B	238.	5/14/57	22 FR 3433	EO 10711 returning land
B	239.	7/3/57	22 FR 4743	EO 10719 returning land
B	240.	8/20/59	24 FR 6867	EO 10833 returning land
A	241.	8/15/64	29 FR 11801	EO 11165 taking Fort Schafter land
A	242.	8/15/64	29 FR 11083	EO 11166 taking Makua Military Reservation land
A	243.	8/15/64	29 FR 11805	EO 11167 taking Pohakuloa Training Area land
A	244.	8/19/64	29 FR 11997	EO 11172 taking Kapalama Military Reservation land

C. Possible Recommendations

Subsection (e) of Senate bill 3088 §1 requires a study to recommend terms and conditions for the conveyance of Kaho'olawe to the State. Possible future uses of Kaho'olawe as identified by Senate bill 3088 are in two general classes: (1) areas rendered reasonably safe would be suitable for use as parks (including educational and recreational purposes), the study and preservation of archeological sites and remains, and the preservation of historic structures, sites and remains; (2) areas remaining less than reasonably safe would be suitable for uses such as soil conservation, plant reforestation and removal or destruction of non-native plants and animals. Senate bill 3088 also requires that KICC's study must estimate restoration and related costs, identify needed fences and evaluate the public or private entity best suited to perform the activities described for the less than reasonably safe areas.

§1(f)(2) of Senate bill 3088, requires that the Commission "shall submit to the Congress a final report on the results of the study referred to in subsection (e), together with such comments and recommendations as the Commission considers appropriate." Those recommendations may be expected to result in a special Act of Congress determining the future of Kaho'olawe.

A special act of Congress regarding the immediate disposition of Kaho'olawe will probably be necessary in view of decontamination and liability considerations affecting the Island. For example, such an act would be necessary if a conveyance would be contrary to the requirement of 42 USC §9620 that such a deed must include a covenant stating that "all remedial action necessary to protect human health and the environment with respect to any [hazardous] substance remaining on the property has been taken" *before* Kaho'olawe is conveyed by the United States. See §III.A.1.c(3), *infra*, regarding existing federal statutory requirements for the decontamination of sites containing unexploded ordnance and hazardous and toxic waste.

1. Method of conveyance

Historically, federal land conveyances to the State of Hawai'i have been made subject to a variety of terms, depending upon how the lands came to be in federal possession (e.g., ceded lands taken for federal use pursuant to the Organic Act, lands obtained by condemnation and lands purchased by the United States) and how the lands were to be used (e.g., unrestricted uses, lands used pursuant to specific federal laws such as for highways or parks, and easements.)

The conveyance of Kaho'olawe may be similarly accomplished, with the deed itself reciting and incorporating the terms and conditions of any existing or specially enacted

federal statute. Following are a few illustrations of how lands have been treated in the past under various laws affecting the Territory and State of Hawai'i.

On July 21, 1960, pursuant to Admission Act §5(e) (providing a five year period for determining the ceded lands taken for federal use that should be returned to the State) the Secretary of the Army, on behalf of the United States of America, executed a quitclaim deed to the State of Hawai'i, conveying two parcels of land. This deed, recorded in the Bureau of Conveyances of the Hawai'i Department of Land and Natural Resources at *liber* 3915, pages 64-67, returned 24 acres of land in Wahiawa, Oahu, that were used by the United States as a portion of Schofield Barracks Military Reservation.

The deed cites the property's title history as "being a part of the public property ceded and transferred to the United States of America under the Joint Resolution of Annexation of July 7, 1898" and then cites a chain of Executive Orders setting aside (and subsequently affecting) areas related to the two parcels.⁴² The deed provides "that the above-described property shall be held in accordance with Section 5(f)" of the Admission Act and states that pursuant to Admission Act §5(e) the two parcels "have been reported to the President and determined by the President to be no longer needed by the United States." The deed also notes two easements.

A quitclaim deed was executed by the Administrator of General Services on September 4, 1979, citing both the Federal Property and Administrative Services Act of 1949 (63 Stat. 377, at deed page two, "assigned to the General Services Administration for disposal pursuant" thereto)⁴³ and "more particularly" the 1963 Hawai'i Land Conveyance Act (Public Law 88-233, 77 Stat. 472, also at deed page two, having been "duly determined to be surplus") conveying less than an acre of land at Pouhala to the State of Hawai'i. The deed is recorded in the Bureau of Conveyances at *liber* 15189,

⁴² Those Presidential Executive Orders include an unnumbered Order of July 20, 1899 (taking 14,400 acres of land for the Schofield Barracks Military Reservation); Order 1137 of November 15, 1909 (modifying boundaries of the land taken by the July 20 1899, Order); Order 1242 of August 23, 1910 (taking land); Order 2800 of February 4, 1918 (revising boundary); Order 4274 of July 25, 1925 (returning land); Order 4351 of December 2, 1925 (returning land); Order 5771 of January 4, 1932 (redefining boundaries); Order 6570 of January 20, 1934 (returning land); Order 9995 of September 2, 1948 (returning land); Order 10454 of May 18, 1953 (returning land); Order 10665 of April 23, 1956 (returning land); and Order 10719 of July 3, 1957 (returning land).

⁴³ U.S. Code Title 40, chapter 10, *Management and Disposal of Government Property*, 40 USC §§471 *et seq.*, is largely a creation of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377). 40 USC §484 governs the disposal of surplus federal property. §484(a) provides that the Administrator of General Services "shall have supervision and direction over the disposition of surplus property."

pages 581-586. The property consisted of crown land set aside by Executive Order Number 1894 of the Territorial Governor on August 21, 1959, and former Oahu Railway and Land Company rights-of-way, and the deed was made subject to certain easements and rights-of-way of record. The conveyance also was made subject to a condition subsequent calling for reverter to the federal government in the event of noncompliance with certain federal civil rights laws and other regulations.

On September 14, 1990, citing the same Federal Property and Administrative Services Act of 1949 and "more particularly" the 1963 Hawai'i Land Conveyance Act, a quitclaim deed was executed by the Administrator of General Services conveying land at Waimanalo to the Hawai'i Department of Land and Natural Resources (DLNR). An unrecorded copy of this deed was provided by the DLNR Land Management Division. The conveyance was made subject to compliance with civil rights laws and regulations, the United States retaining a right to judicial enforcement of that covenant.

On October 29, 1990, the Secretary of the Army, on behalf of the United States, conveyed a parcel of approximately 37 acres by quitclaim deed to the State Department of Transportation. The parcel was a portion of the Kapalama Military Reservation that had been obtained by the United States through a condemnation action in the 1940's. The deed includes a covenant required by 42 USC §9620 (CERCLA, the Superfund Act) disclosing the fact that hazardous substances may have been stored on the premises and warranting that all required remedial action has been taken prior to conveyance, and that any further remedial action found to be necessary will be conducted by the United States. The conveyance cites as its authority the Military Construction Authorization Acts of 1988-91 and Act 73 of the 1989 Hawai'i Legislature which authorized and appropriated general obligation bond funds for the acquisition of approximately sixty-seven acres of the Kapalama Military Reservation. The grant specifies several reservations of interests and easements.

Conveyances of ceded lands taken by Executive Order pursuant to the Organic Act usually rely upon general federal property law and the Hawai'i Land Conveyance Act of 1963, invoking a prerequisite finding that the land is determined to be surplus. Such conveyances usually are made by quitclaim deeds that may incorporate by reference the requirements of additional federal statutory provisions and regulations, including provisions for judicial enforcement or reverter to the United States.

a. Hawai'i Land Conveyance Act

§5(e) of the Admission Act, Public Law 86-3, 73 Stat 4 (1959), provides:

(e) Within five years from the date Hawaii is admitted into the Union, each Federal agency having control over any land or property that is retained by the United States pursuant to subsections (c) and (d) of this section shall report to the President the facts regarding its continued need for such land or property, and if the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii.⁴⁴

On October 28, 1963, the U.S. Bureau of the Budget wrote both the House and Senate asking that Congress enact legislation "to revise the procedures established by the Hawaiian Statehood Act ... for the conveyance of certain lands to the State of Hawaii ..." The Committees on Interior and Insular Affairs of the House (Report 972, December 4, 1963) and Senate (Report 675, December 3, 1963) favorably reported the draft legislation submitted by the Bureau of the Budget, without amendment. As a result, Senate Bill 2275 was ultimately enacted and approved on December 23, 1963, creating Public Law 88-233, 77 Stat. 472 (the Hawai'i Land Conveyance Act of 1963.)⁴⁵ The law establishes a procedure to be used following the five year period provided in Admission Act §5(e) for the return of surplus federal lands to the State. The letter from the U.S. Bureau of the Budget states in part:

There is forwarded herewith a draft of legislation to revise the procedures established by the Hawaiian Statehood Act, Public Law 86-3, for the conveyance of certain lands to the State of Hawaii, and for other purposes. The proposal would provide an equitable means for eventually returning to the State of Hawaii certain surplus Federal lands which it would otherwise be unable to receive because of the provisions of the Hawaii Statehood Act (Public Law 86-3; 73 Stat. 4).

We believe that Hawaii has a unique claim on the lands and property involved since they were originally given to the United States by the Republic or the Territory of Hawaii. That claim and the special status of those lands and property have been recognized by the United States for many years. In essence, the proposal would provide for the continuation of a 60-year practice

⁴⁴ Admission Act §5(f) establishes a public trust "for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians . . ." and other purposes. Lands conveyed to the State from the United States are required to be held as part of that §5(f) trust.

⁴⁵ Public Law 88-233 was not actually given a name by Congress (in the same manner as some legislative proceedings acquire a formal popular name.) A marginal note in the Statutes at Large describes the law as "Hawaii. Land Conveyance." The text of the enactment is preceded with the introduction: "To revise the procedures established by the Hawaii Statehood Act, Public Law 86-3, for the conveyance of certain lands to the State of Hawaii, and for other purposes." Lacking a popular name from Congress, the Act is just Public Law 88-233, no simpler reference being formally prescribed. Herein, Public Law 88-233 is referred to as the Hawai'i Land Conveyance Act of 1963.

of returning those lands and property when they were no longer needed by the United States.

* * *

However, after the conclusion of the current 5-year review, it appears that Hawaii will no longer be entitled to the return of the lands it originally gave to the United States. Thus, absent new legislation, the State of Hawaii will be denied those lands to which the territory was entitled during its 60 years of existence, and there will be a significant departure from the heretofore accepted concept of the special trust status of those lands.

Section 1 of the draft legislation is intended to correct this inequity and, in effect, to provide a procedure whereby the ceded and other lands and properties which are set aside may continue to be returned to the State of Hawaii whenever they become surplus to Federal needs. We believe such an action is fully justified in keeping with the manner in which the lands and properties were acquired and the history of the special trust status in which they have been held.

See House Report 972 at pages 4-6, and Senate Report 675 at pages 5-7

The Congressional committee reports described how, despite the Admission Act's five year period (until August 21, 1964) for analysis of the continued need for federal lands in Hawaii and for the return of those lands to the State when no longer needed, only about 400 of about 410,000 acres under federal control at the time of statehood had been returned to the State in 1963 when the new law was considered. The Admission Act "failed to cover the case of property that ceases to be needed after August 21, 1964. It is this that makes necessary and desirable enactment of [the new law.]" House Report 972 at page 2.

Both reports review the history of land title in Hawaii from the 1898 annexation resolution that made Hawaii a Territory of the United States.⁴⁶ The resolution provided that "[t]he existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands" and that revenue and proceeds from the newly acquired territorial land "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other purposes." 30 Stat. 750. The resolution

⁴⁶ On September 9, 1897, the Senate of the Republic of Hawai'i passed a resolution that consented to and ratified an annexation treaty "concluded at Washington on the 16th day of June, A.D. 1897." Article I of that treaty states in part, "The Republic of Hawaii hereby cedes absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies . . ." Article II further provides in part, "The Republic of Hawaii also cedes and hereby transfers to the United States the absolute fee and ownership of all public, government, or crown lands . . ." On July 7, 1898, Congress passed a joint resolution (the Newlands resolution) determining that "said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof . . ."

further provided that Congress should enact special laws for the management and disposition of the lands ceded to the United States, and for that purpose required that "[t]he President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper." *Ibid.*

The product of the latter mandate was a commission report transmitted to Congress by the message of the President [Senate Doc. 16, 55th Congress, 3rd Session (1898), U.S. Misc. Pub. 1898] that eventually led to enactment of the Hawaii Organic Act of April 30, 1900, 31 Stat. 141. §91 of the Organic Act placed ceded lands in the control of the Territorial government, except lands that would be taken by the President for use by the United States. Provision also was made for the return to Hawaii of such lands taken for federal use. "The special trust status of those lands was further made clear in that there was no provision for their sale by the United States and in that any revenues secured by the United States from the rental of those lands taken for Federal use had to be returned to the Territory." Senate Report 675, page 6.

Both Congressional reports emphasize that lands ceded to the United States at the time of annexation "have always been treated differently than the other public lands of the United States. History clearly indicates that those lands were regarded as having been held in a special trust status by the United States for the benefit of the Hawaiian people." *Ibid.* The new 1963 Act would "maintain the residual interest of the State of Hawaii, long recognized in Federal law and practice, in lands and property which were ceded to the United States by the Republic of Hawaii at the time of annexation or were set aside for Federal use from land owned by the Territory of Hawaii." House Report 972, page 3.

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

Senate Report 675 at page 2

The Hawai'i Land Conveyance Act of 1963 thus created a unique law for returning surplus federal land in Hawaii to the State, thereby perpetuating the well established

special treatment of such lands. The effect of the 1963 Act was to extend beyond August 21, 1964, a mode of treatment that had been recognized in principle in the annexation resolution, the Organic Act and the Admission Act. It provided for "the continuation of a 60-year practice of returning those lands and property when they were no longer needed by the United States." Senate Report 675 at page 5.

The 1963 act requires that after August 21, 1964, federal lands (excluding parks) determined to be surplus by the Administrator of General Services, with the concurrence of the agency administering such land, should be conveyed to the State. If the State does not want the land, or does not want to compensate the United States for the value of permanent improvements, then the land can be sold and an amount of money representing the value of the land would then be paid to the State.⁴⁷

The Act provides that any lands and proceeds so conveyed or paid to the State become part of the public trust established by §5(f) of the Admission Act for the support of the public schools and other public educational institutions, for the betterment of the conditions of Native Hawaiians, for the development of farm and home ownership on a widespread basis, and for public use.

The Hawai'i Land Conveyance Act of 1963 is the law that, upon a determination of no further federal need for its use, would govern the return of Kaho'olawe to the State *in the absence of any subsequent Act of Congress*. That presently controlling law allows the federal Executive branch to return Kaho'olawe to the State, but does not preclude the federal Legislative branch from making a new law.

By establishing the Kaho'olawe Island Conveyance Commission, and particularly by requiring that KICC recommend terms and conditions for the return of Kaho'olawe, Congress has indicated its willingness to consider that the end of Kaho'olawe's federal use as a military weapons range may be subject to new legislation tailored to special circumstances for that specific purpose, and not limited to the ordinary method established in the Hawai'i Land Conveyance Act. Such a law would take precedence

⁴⁷ A November 19, 1963, letter from the Bureau of the Budget (attached to Senate Report 675 at 10-14) refers to the 28,800 acres of Kaho'olawe as ceded lands acquired as a Navy target area in 1953. The letter observes that while an estimated average value of ceded lands in 1963 would be about \$93 per acre, the actual value of good urban or suburban land on Oahu would average at least \$100,000 per acre. However, "the major ceded tract on Kaho'olawe Island is probably of very little value because it has been heavily contaminated as a target area." *Ibid.* at 11.

over the Act of 1963, thereby making appropriate exceptions to that (and other) federal statutes.⁴⁸

b. Specific Act of Congress

Kaho'olawe is ceded land.⁴⁹ It was part of the real property ceded to the United States by the Republic of Hawai'i after the overthrow of the Kingdom of Hawai'i. On April 30, 1900, Congress passed the Organic Act to define the fundamental laws affecting the Territory of Hawai'i. §91 of the Organic Act allowed that public property ceded to the United States by the Republic of Hawai'i would be controlled by the Territory of Hawai'i "until otherwise provided for by Congress, or taken for uses and purposes of the United States by direction of the President . . ." President Eisenhower's February 20, 1953, Executive Order 10436, taking and reserving Kaho'olawe for use by the Navy, recites §91 of the Organic Act as its authority.

The provisions of the Organic Act were generally replaced on March 18, 1959, when the Admission Act created the State of Hawai'i. §5 of the Admission Act accomplished a general grant and transfer of title of lands to the State of Hawai'i from the Territory and from the United States. §5(c) excepts from that transfer of title to the State any lands that, as of March 18, 1959, were set aside pursuant to any Executive Order (or any of the several methods provided for setting aside such land) for use of the United States. Title to Kaho'olawe was therefore retained by the United States under §5(c), as the Island had been set aside previously for federal use.

"Public lands within a territory are under the control of Congress, not the territorial government, and while holding lands as a territory, the United States has all the powers of a sovereign, and may grant rights in and titles to land which normally would go to a state on its admission to the Union. Nor is the situation changed by the

⁴⁸ As a general rule of statutory construction, a more specific statute will be given precedence and control over a more general one on the same subject. *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980). "It is a fundamental rule of statutory construction that specific statutory language prevails over general provisions." *Union Central Life Insurance Co. v. Wernick*, 777 F.2d 499, 501 (9th Cir. 1985). Thus, any Act of Congress specifically determining the fate of Kaho'olawe on stated terms and conditions will prevail over other general provisions of law, such as that governing the disposition of surplus property of the United States in Hawai'i.

⁴⁹ In *An Act Relating to the Lands of His Majesty the King and of the Government* signed by King Kamehameha III on June 7, 1848, (legislation formalizing the government's side of the *Great Mahele*) Kaho'olawe (with the notation *Mokupuni Okoa* or "the whole island") is listed among the lands accepted from the King as land of the Hawaiian Government.

admission of the territory into the Union as a state." 63A AmJur2d *Public Lands* §14 (1984) at page 500.

Article IV, §3 of the U.S. Constitution provides:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State formed by the Junction of two or more States, or Parts of States; without the Consent of the Legislature of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

In this Constitutional section are found both the provision for the admission of new states and the provision for Congressional control of federal lands. The U.S. Supreme Court has interpreted the latter Congressional power in several cases, holding in an early opinion that "[w]ith respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made." *Gibson v. Choteau*, 80 U.S. (13 Wall.) 92, 99, 20 L.Ed. 534 (1871). The passage of time has not diminished the Court's view of absolute Congressional power over federal lands.

Not only does the Constitution (Art. IV, §3, cl. 2) commit to Congress the power "to dispose of and make all needful rules and regulations respecting" the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired.

Utah Power & Light Co. v. United States, 243 U.S. 389 at 404, 37 S.Ct. 387, 61 L.Ed. 791 (1917)

In keeping with its earlier decisions, the Supreme Court has more recently held that "[t]he power over the public land thus entrusted to Congress [in Article 4, §3, cl. 2 of the Constitution] is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.' Thus Congress may constitutionally limit the disposition of the public domain to a manner consistent with its view of public policy." *U.S. v. San Francisco*, 310 U.S. 16, 29-20, 60 S.Ct. 749, 84 L.Ed. 1050 (1940). See also, *FPC v. Idaho Power Cor.*, 344 U.S. 17, 73 S.Ct. 85, 97 L.Ed. 15 (1952), holding that the power of Congress over public lands under Article 4, §3, cl. 2 is without limitations.

Lower federal courts, of course, have followed the settled view of the Supreme Court in this regard.

Art 4, §3, Cl. 2 of the Constitution ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .") entrusts Congress with power over the public land without limitations; it is not for the courts to say how that trust shall be administered, but for Congress to determine. Necessarily, then, the U.S. Government may sell public land or withhold it from sale. Thus, the consent of the state is not required for Congress to withdraw large bodies of land from settlement. That a power may be injuriously exercised is no reason for a misconstruction of the scope and extent of that power.

The responsibility of Congress to utilize the country's assets in a way that it decides is best for the future of the nation is a sort of trust, but not in the sense that a private trustee holds for the benefit of the trust's beneficiaries.

State of Nevada, Etc. v. United States, 512 F.Supp. 166, 172 (D.Nev. 1981) (citations omitted), *affirmed* 699 F.2d 486 (9th Cir. 1983)

Even if the result was an inequitable loss of the State's recognized residual interest in lands held in a special trust by the United States for the benefit of the Hawaiian people, the exclusive constitutional power of Congress to control public lands of the United States is so pervasive and well-established that a court is likely to decide with regard to Kaho'olawe that Congress may even injuriously exercise its authority within the scope and extent of that power. Congress has exclusive Constitutional authority to enact specific legislation to dispose of and make needful rules and regulations with respect to Kaho'olawe.

c. State's theories of return

Representatives of the State of Hawai'i have expressed to the Commission several legal theories regarding Kaho'olawe. During testimony before the Commission on April 25, 1991, Norma Wong of the Office of State Planning testified:

First, with respect to conveyance and jurisdiction: Kaho'olawe is ceded land currently under federal control. It is so defined under Section 5C of the Admission Act and further under Section 5E. In other words, under these provisions, and under the provisions of Public Law 88-233 [the Hawai'i Land Conveyance Act of 1963] Kaho'olawe must be returned to the State of Hawai'i as part of the public trust established by Section 5F.

Under Public Law 88-233 the federal government does not have the power to convey ceded land in fee to any other entity except to the State of Hawai'i. Upon its return, though, the state has several options with respect to the management of the island.

During an attorneys' conference held by KICC counsel at the U.H. Law Library on December 13, 1991, Deputy Attorney General William Tam stated that the Hawai'i Land Conveyance Act is directly related to the Admission Act, and that a state cannot be

burdened by any alteration of an admission act.⁵⁰ KICC counsel provided a memorandum for the Commission on January 3, 1992, addressing those comments and testimony.

Regarding the January 3rd memorandum of KICC counsel, Hawai'i Attorney General Warren Price, III (on page 4 of his letter dated March 13, 1992) wrote, "It is argued that Congress' plenary power over United States property is so broad that no restriction can apply to stop Congress from legislating a different disposition than that now provided by the Admission Act and [the Hawai'i Land Conveyance Act of 1963.] This is not true. . . . When Kaho'olawe is declared surplus, the island must be conveyed to the State." A literal reading of the State's theories leads to a conclusion that Kaho'olawe must be returned pursuant to the Hawai'i Land Conveyance Act of 1963 or, alternatively, any special Act of Congress affecting Kaho'olawe would require approval by the State to be valid.

At KICC public hearings, some political concerns have been expressed in terms contrary to the State's wishes regarding the return of Kaho'olawe, particularly in calling for Kaho'olawe's availability to serve unique Native Hawaiian cultural interests. The alternatives preferred by those persons include that Kaho'olawe should be placed in the custody of some entity other than the State, or that it should be returned to the State only with special, restrictive conditions regarding its use and future.

Thus, on one side, some members of the public are urging that Kaho'olawe should not be freely deeded to the State. On the opposite side, the State is urging that the Congress can consider nothing else.

The Attorney General's letter compels this query: if the State, on the basis of the theories described in Mr. Price's March 13th letter, challenges in court a unique Act of Congress disposing of Kaho'olawe, then what would be the State's likelihood of success in having such an Act declared invalid?⁵¹

⁵⁰ It is true that Congressional power over public land has its Constitutional limits. In *Louisiana v. Mississippi*, 202 U.S. 1, 40-41, 26 S.Ct. 408, 50 L.Ed. 913 (1906), the U.S. Supreme Court observed that "Congress, after the admission of Louisiana, could not take away any portion of the State and give it to the State of Mississippi. The rule, *Qui prior est tempore, potior in jure*, applied, and section three of Article IV of the Constitution does not permit the claims of any particular State to be prejudiced by the exercise of the power of Congress therein conferred."

⁵¹ It is unlikely that the State would insist upon or seek to enforce its asserted right to approve legislation creating unique terms and conditions for the return of Kaho'olawe to the State if those terms were agreeable.

The query suggests two alternatives:⁵²

(1) If the State should have a reasonable likelihood of success in challenging unilateral, special legislation by Congress, the Commission then at least must consider the possibility of such a legal challenge in formulating its recommendations to Congress. In that case, KICC recommendations could be constrained to propose conveyance pursuant to the Hawai'i Land Conveyance Act of 1963 or else only subject to approval by the State. The Commission's recommendations also could then be obliged to reject alternatives preferred by those opposing conveyance to the State or favoring terms not agreeable to the State.

(2) If the State should have only a minimal likelihood of success in challenging some unilateral, special Congressional Act, then the Commission has more freedom to recommend terms and conditions that would be reflected in a special Act of Congress applying only to Kaho'olawe. Also, in that case, the Commission has more freedom to report further appropriate comments and recommendations, including some or all of the alternatives that may not be agreeable to the State.

Attorney General Price's March 13th letter describes several theories. Those theories further a legitimate political argument that the State has a strong equitable interest in Kaho'olawe. Mr. Price's first theory is based upon evidence of extensive negotiations between representatives of the Territory and the federal government regarding the terms of Executive Order 10436.

Archival evidence shows how Territorial officials extracted conditions requiring the eventual de-dudding of Kaho'olawe, despite federal resistance. Mr. Price (letter page 2) concludes those negotiations resulted in "terms especially crafted to ensure that the island would be suitable for rehabilitation and that the island as public lands would be returned to the control of the government in Hawaii."

Substantial evidence illustrates how the terms of Executive Order 10436 were carefully and extensively negotiated by Territorial and federal officials. See §III.A.3, *infra*, regarding those negotiations. Territorial officials ultimately prevailed in their efforts to require de-dudding upon a contemplated eventual end of federal control. The terms of Executive Order 10436 explicitly require federal *de-dudding* of Kaho'olawe. However, those same terms are silent with regard to the *return* of Kaho'olawe when there is no longer a need for the Island's use as a military reservation.

⁵² As an initial premise, it should be kept in mind that there is a strong general judicial predisposition to presume and preserve the validity of legislation. See, e.g., *U.S. v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (a facial challenge to a legislative act must establish that under no set of circumstances could the act be valid.)

When there is intrinsic ambiguity in the provisions of a written document, courts look to extrinsic sources of information to understand the intent of the persons using the terms in question.⁵³ The following language appearing in paragraph 4 of Executive Order 10436 may be susceptible to the use of extrinsic evidence to aid in understanding the intent of the parties:

4. When there is no longer a need for the use of the area hereby reserved, or any portion thereof, for naval purposes of the United States, the Department of the Navy, shall so notify the Territory of Hawaii, and shall, upon seasonable request of the Territory, render such area, or such portion thereof, reasonably safe for human habitation, without cost to the Territory.

The parol evidence rule could be invoked to exclude evidence of contemplated acts that are not integrated into the document itself.⁵⁴ The phrase *reasonably safe for human habitation* may convey sufficient ambiguity to allow reference to extrinsic evidence regarding its meaning, notwithstanding that rule. That evidence would define the phrase as an elaboration of the concept of de-dudding. The same evidence *also* would indicate that Territorial officials contemplated Kaho'olawe's eventual return to the Territory at the end of its federal use.

When those terms were being negotiated, §91 of the Organic Act provided the ordinary method for such returns. Under then-existing law, Kaho'olawe's return when there was no longer a need for federal use would have been presumed even while not

⁵³ See, e.g., *U.S. for Use and Benefit of Union Building Materials v. Haas & Haynie Corporation*, 577 F.2d 568 (9th Cir. 1978) (extrinsic evidence is properly admitted to help ascertain the intended meaning of ambiguous writings); *Fuji v. Osborne*, 67 Haw. 322, 687 P.2d 1333 (1984) (construing legal documents is a matter of law, but where such a document is ambiguous then resort can be had to facts and materials that may be helpful in interpreting the document); *Airgo, Inc. v. Horizon Cargo Transport, Inc.*, 66 Haw. 590, 670 P.2d 1277 (1983) (a contract is ambiguous in the context of determining whether extrinsic evidence will be admissible to interpret the contract when terms of the contract are reasonably susceptible to more than one meaning); *Graham v. Washington University*, 58 Haw. 370, 569 P.2d 896 (1977) (extrinsic evidence may be considered to determine the true intent of the parties if there is any doubt or controversy as to the meaning of language in a contract.)

⁵⁴ The parol evidence rule "is one of substantive law setting forth the well-settled principle that an agreement reduced to writing serves to integrate all prior agreements and negotiations concerning the transaction ... [and] bars evidence of collateral agreements that would vary or alter the written terms ... [and] precludes consideration of extrinsic evidence..." *Cosmopolitan Financial Corp. v. Runnels*, 2 Haw.App. 33, 625 P.2d 390, 395 (1981) (holding that evidence of a contemporaneous oral agreement was outside of the parol evidence rule and invalidated a promissory note guaranty on grounds of public policy because it showed that the agreement was made to deceive a state bank examiner.)

stated. Evidence of that situation according to Organic Act §91 would be available to a court. However, evidence of contemplation of Kaho'olawe's return would exceed the scope of the ambiguity and would substantially exceed the words of the Executive Order itself. Thus, extrinsic evidence of an intent to require Kaho'olawe's return as part of the negotiated terms of the Executive Order could be inadmissible for the purpose of proving that unstated intent as some parol element of the agreement. It is unlikely that a court would enforce such an unstated requirement of the Executive Order.

State of Hawaii v. United States, 676 F.Supp. 1024, 1029 (D.Haw. 1988) *affirmed* 866 F.2d 313 (9th Cir. 1989), granted summary judgment for the United States and the Navy on the basis of a statute of limitations in an action of the State (represented by Mr. Price) seeking to quiet title to Lualualei lands used by the Navy. Judge Fong's opinion describes how ceded lands could be taken for federal use under §91 of the Organic Act.

On January 21, 1930, by Executive Order No. 382, the [Territorial] Governor set aside lot 7A of the Lualualei lands for a U.S. Naval Reservation for a[n] ammunition depot under the control and management of the Navy. The order contained conditional language returning the land to the control of the Territory if it ceased to be required or used for purposes of the Navy Department. On June 30, 1930, by letter, the Secretary of the Navy accepted control and jurisdiction of the land, but advised that should the land cease to be required or used by the Navy, its return to the Territory would have to depend on the law and circumstances at the time. The Governor acknowledged the letter and asserted that it seemed only reasonable that the land should be restored to the control and management of the Territory if the Navy no longer needed it.

The Governor apparently requested further consideration of the matter. On November 12, 1930, the Secretary of the Navy advised the Governor that according to the U.S. Attorney General, the insertion of a conditional return clause in an Executive Order of the President reserving lands of the Territory for use of the War Department would be ineffective and improper. It followed that, if the President could not insert a conditional return clause, then the Secretary of the Navy could not accept one.

676 F.Supp. at 1029 (footnotes omitted)

Judge Fong's opinion refers to 35 Ops. Atty. Gen. 205 for the premise that provisional return terms of an Executive Order would be ineffective and improper.⁵⁵

⁵⁵ Judge Fong's opinion, 676 F.Supp. at 1030, then describes how Admission Act §5(c) made ceded lands in federal control "subject only to the limitations imposed by the instrument setting them aside." The opinion, 676 F.Supp. at 1031, also describes how "In 1963, hearings were held on a Senate bill that would eliminate the [Admission Act's] five year deadline for conveying surplus property to the State." The issue decided by Judge Fong concerned technicalities of notice of an adverse claim and the statute of limitations for quiet title actions against the United States. While the case could be cited for its historical descriptions, neither Judge Fong's 1988 decision nor the 1927 U.S. Attorney General's opinion would be binding upon a court considering the

That April 1, 1927, opinion of Attorney General John G. Sargent addressed to the Secretary of War stated, "Any provision in an Executive order which, in terms, imposes a limitation upon the future action of the President who made it, or of his successors, or of Congress, would be ineffective and would not add to or subtract from the powers now vested or which may hereafter be vested by law in the President."

Attorney General Sargent answered the Secretary of War's inquiry as to whether Executive Orders reserving lands in Hawai'i "may properly include a paragraph providing that when the lands have ceased to be of active practical use for the War Department, or for the purpose for which set aside, they shall be returned to the Territory." Mr. Sargent's opinion was premised upon his interpretation of §91 of the Organic Act providing that the President could take land in Hawai'i for federal use and that "any such public property so taken for the uses and purposes of the United States may be restored to its previous status by direction of the President."

Because the power to restore land to its former status "is continuing and may be exercised by any incumbent of the presidential office when, in his judgment, the occasion arises" and because of "the power of Congress to deprive him of that authority at any time and to make such disposition of the land as it deems proper," Mr. Sargent felt it would be improper to insert a provision affecting future land dispositions.

Mr. Sargent's opinion cites no authority other than the Organic Act. However, it has been established that "[a]n Executive Order issued by the President under duly delegated Congressional authority, is part of the law of the United States with the same effect as a federal statute." *Santin Ramos v. U. S. Civil Service Commission*, 430 F.Supp. 422, 425 (1977), citing *Givens v. Zerbst*, 255 U.S. 11, 41 S.Ct. 227, 65 L.Ed 475 (1921) (holding that a general order of the President is a part of the law of the land that the court judicially notices without averment or proof), and other authority. In this case, the authority of Executive Order 10436 is also enhanced by §5(c) of the Admission Act. That section provides:

Any lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive Order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawaii shall remain the property of the United States subject only to the limitations, if any, imposed under (1), (2), (3), or (4), as the case may be.

limitations created by Executive Order 10436 and §5(c) of the Admission Act, although it could be argued that the descriptions and opinions merit consideration and weight.

Mr. Price's March 13th letter also relies upon §5(c) of the Admission Act. Kaho'olawe had been set aside for federal use pursuant to Executive Order 10436 prior to the date that Hawai'i was admitted into the Union. On page 2 of his March 13th letter, Mr. Price writes, "Thus, §5(c) makes the terms of the Executive Order binding on the federal government by incorporation through the Statehood Act which is a compact between the United States and the people of Hawaii..."

It can be established quite readily that a limitation contained in paragraph 4 of Executive Order 10436 imposes a federal obligation to de-dud Kaho'olawe. The Attorney General contends that Kaho'olawe's return also must be considered a limitation implied by the Executive Order and therefore imposed by Admission Act §5(c). That contention could be more persuasive if Kaho'olawe's return was addressed by the Executive Order. The issue raised by this theory of Mr. Price is the existence of a compact in §5(c) of the Admission Act sufficient to limit the broad constitutional powers of Congress.

This theory of the Attorney General contrasts the Constitutional power of Congress to control property belonging to the United States with a theory generally described in *Boeing Aircraft Co. v. Reconstruction Finance Corp.*, 25 Wash.2d 652, 171 P.2d 838, 842, 168 A.L.R. 539 (1946), appeals dismissed by 330 U.S. 803, 67 S.Ct. 972, 91 L.Ed. 1262 (1947) and 330 U.S. 803, 67 S.Ct. 972, 91 L.Ed. 1262 (1947). The *Boeing* decision was not cited by the Attorney General. In a state declaratory judgment action, the *Boeing* plaintiff tested the validity of real property taxes assessed against its leased aircraft manufacturing facility. The Reconstruction Finance Corporation (RFC), a government-chartered entity, leased back to Boeing seventy-five acres of land Boeing had bought and conveyed to RFC. The lease required Boeing to pay all applicable taxes. The federal law creating RFC had declared it would be exempt from all taxation *except* ordinary property tax assessments.

Washington State's 1946 *Boeing* decision observes how the enabling act that led to the admission of Washington as a state contained a provision for the non-taxation of federal land. "[A]fter the state had accepted the terms of the enabling act by framing and passing a constitution, and Congress had approved the constitution, and the president of the United States had issued a proclamation to that effect, each government was bound by the provisions of that enabling act." 171 P.2d at 842. Washington's legislature later enacted a law providing for the taxation of federal property to the extent permitted by federal law. The *Boeing* opinion held property taxation was legitimate in that case as it had been authorized by Congress. The opinion

treats the earlier non-taxation provision of the state's enabling act as subject to renegotiation by Congress and the state.

No federal cases have been found that elaborate favorably upon the possible limitation of Congressional powers suggested by the *Boeing Aircraft* decision's general holding that "each government was bound by the provisions" of an admission act as a federal-state compact. Federal courts have addressed such matters in terms suggesting that a limitation of *Congressional* powers is unlikely to be found. Relevant federal cases also address federal-State compacts generally in the context of Hawai'i's Admission Act.

Provisions regarding the Hawaiian Homes Commission Act described in §4 of the Admission Act are by express terms a compact between the federal government and the State. See *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F.2d 1216 (9th Cir. 1978), *certiorari denied* 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979) (footnote 12, 588 F.2d at 1227, stating in relevant part that the "language from section 4 clearly indicates that the substance of the compact was Hawaii's agreement to adopt the Commission Act as a provision of its constitution and not to amend the Act without the consent of Congress.)

Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 739 F.2d 1467, 1472 (9th Cir. 1984), held that the trust created by Admission Act §5(f) also stands as a compact between the federal government and the State: "the trust obligation is rooted in federal law, and power to enforce that obligation is contained in federal law [citation]. Congress imposed the trust obligation as a condition of statehood and as 'a compact with the United States'" (citing Admission Act §4.)

In *Price v. Hawaii*, 764 F.2d 623, 628 (9th Cir. 1985), *certiorari denied* 474 U.S. 1055, 106 S.Ct. 793, 88 L.Ed.2d 771 (1986), the federal Ninth Circuit Court of Appeals cited its previous holding that the trust established by §5(f) of the Admission Act may be considered an implied compact between the federal government and the State and stated "this trust obligation is expressly protected from any amendments by the State legislature unless the United States has consented to those amendments" (also citing Admission Act §4.) The *Price* decision then cites cases involving the construction of *interstate* compacts (created pursuant to Article I, §10, clause 3 of the U.S. Constitution) and holds that "Congress' role in the formation of a compact between the United States and a State is at least as great as Congress' role in approving a compact between two States."

Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959), is one of the interstate compact decisions cited in *Price*. The case decided that an interstate compact served to waive the sovereign immunity of the two states involved. Justice Douglas's opinion in the *Petty* case, 359 U.S. at 279, holds that construction of such a compact presents a question of federal law that is ultimately to be decided by the U.S. Supreme Court: "In making that interpretation we must treat the compact as a living agreement ..." Justice Frankfurter's dissenting opinion, 359 U.S. at 285, states, "A Compact is, after all, a contract. Ordinarily, in the interpretation of a contract, the meaning the parties attribute to the words governs the obligations assumed in the agreement."

Justice Frankfurter's statement from *Petty* is quoted in *Texas v. New Mexico*, 482 U.S. 124, 107 S.Ct. 2279, 96 L.Ed.2d 105 (1987), a case involving disputed water allocation claims under the 1949 Pecos River Compact, with the comment that a compact "remains a legal document that must be construed and applied in accordance with its terms." 482 U.S. at 128, citing *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 71 S.Ct. 557, 95 L.Ed. 713 (1951). The *Texas* opinion, 482 U.S. at 129, further explains that "A court should provide a remedy if the parties intended to make a contract and the contract's terms provide a sufficiently certain basis for determining both that a breach has in fact occurred and the nature of the remedy called for."

The *West Virginia* case, also an opinion written by Justice Frankfurter, holds that West Virginia was obliged to participate financially in a pollution control compact it had agreed to, even while the Supreme Court of West Virginia said that it should not be so obliged. "Two prior decisions of this Court make clear, however, that we are free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States." 341 U.S. at 28

The Attorney General may wish to rely upon judicial interpretations of the express compact of §4 of the Admission Act, and the related compact found in §5(f) of the Admission Act to assert the existence of a compact between the federal government and the State in Admission Act §5(c). However, while those judicial interpretations have protected the compacts from amendment by the State legislature without United States consent, the Attorney General applies §5(c) to protect the terms of Executive Order 10436 from amendment by the United States Congress without the State's consent.

In determining the validity and efficacy of conditions affixed by Congress in the admission of states, there are three classes of conditions to be distinguished, namely, first, provisions which are fulfilled by the admission of the state; second, compacts or affirmative legislation intended to operate

in futuro, which is within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operates to restrict the powers of such new state in respect of matters which would otherwise be exclusively within the sphere of state power.

81A C.J.S. *States* §4(b) (1977), page 277

The Admission Act compacts previously recognized by the Ninth Circuit (*Keaukaha-Panaewa* and *Price*, *supra*) are of the type restricting the powers of the State. The Attorney General wishes to construe Admission Act §5(c) as a compact within the scope of the conceded powers of Congress over the subject intended to operate in the future, but with a binding effect upon Congress. The CJS article states that with such compacts "the provisions, being only those which it is already within the power of Congress to enact, derive their force from the existing powers of Congress under other provisions of the Constitution, rather than from any compact or consent by the state, and are valid as, and in so far as they are proper federal legislation, regardless of the form in which they are enacted." *Ibid.*, citing *Coyle v. Smith*, 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853 (1911).

In the *Coyle* case it was held that while the Oklahoma Enabling Act designated a preliminary site for the State capital, that provision ceased to be a limitation upon the power of the state after its admission. "Whatever force such provisions have after the admission of the State may be attributed to the power of Congress over the subjects, derived from other provisions of the Constitution, rather than from any consent by or compact with the State." 221 U.S. at 570. Determination of the site of a state capital was held to be a matter within the power of the State rather than the Congress.

The case of *Pollard's Lessee v. Hagan*, 3 How. [44 U.S.] 212, is a most instructing and controlling case. It involved the title to the submerged lands between the shores of navigable waters within the State of Alabama. . .

The court held that the stipulation in the act under which Alabama was admitted to the Union, that the people of the proposed State "forever disclaim all rights and title to the waste or unappropriated lands lying within the said territory, and that the same shall remain at the sole and entire disposition of the United States," cannot operate as a contract between the parties, but is binding as law. As to this the court said:

"Full power is given to Congress 'to make all needful rules and regulations respecting the territory or other property of the United States.' This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation.

"And all constitutional laws are binding on the people, in the new states and the old ones, whether they consent to be bound by them or not. Every constitutional act of Congress is passed by the will of the people of the United States, expressed through their representatives, on the subject-matter of the enactment; and when so passed it becomes the supreme law of the land, and operates by its own force on the subject-matter, in whatever State

or Territory it may happen to be. The proposition, therefore, that such a law cannot operate upon the subject-matter of its enactment, without the express consent of the people of the new State, where it may happen to be, contains its own refutation, and requires no further examination. The propositions submitted to the people of the Alabama Territory, for their acceptance or rejection, by the act of Congress authorizing them to form a constitution and state government for themselves, so far as they related to the public lands within that Territory amounted to nothing more nor less than rules and regulations respecting the sales and disposition of public lands..."

221 U.S. at 571-72 (quoting from 44 U.S. at 224)

The U.S. Supreme Court, in *Coyle*, 221 U.S. at 574, further stated, "It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States, or with Indian tribes situated within the limits of such new state, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject..."⁵⁶

Thus, it may be argued that there is no compact attributable to §5(c) of the Admission Act enforceable to *limit Congressional powers* because that section merely represents an exercise of the constitutional powers of Congress, and those powers cannot be limited by their mere exercise. Such an argument would distinguish any such alleged limitations upon Congress from the expressly stated compact in §4 (Hawaiian Homes Commission) and the implied compact recognized to exist in §5(f) (trust lands) that serve to impose limitations upon the powers of the State.

According to the interstate compact decisions cited above, the U.S. Supreme Court would ultimately decide whether Congress and the State intended to make Admission Act §5(c) a contract and whether the contract's terms provide a sufficiently certain basis for determining that a breach has in fact occurred. Assuming §5(c) could be construed as a contract that would limit the Constitutional powers of Congress with regard to Kaho'olawe by elevating the terms of Executive Order 10436 to the status of a federal-State compact, the problem remains that Executive Order 10436 does not contain terms

⁵⁶ This text is quoted for the same conclusion in *U.S. v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913) (Congressional power to prohibit the introduction of intoxicating liquors into Pueblo Indian lands of New Mexico derives from the U.S. Constitution and not from any compact with the State expressed in the terms of an admission act.)

that control how or if Kaho'olawe should be conveyed when it is determined to be surplus federal land. While the terms of the Executive Order might be construed to provide a sufficiently certain basis for determining that de-dudding of Kaho'olawe is required, those terms probably could not provide the basis for any further obligations. The question of how Kaho'olawe should be treated when it is determined to be surplus federal land is not answered by the terms of §5(c) and Executive Order 10436.

As previously indicated, the existing federal statute that controls the treatment of surplus federal lands in Hawai'i is the Hawai'i Land Conveyance Act of 1963. As ordinary statutory law, that Act would be subject to change or exception by a special Act of Congress pertaining only to Kaho'olawe. The State Attorney General also relies upon the federal-State compact theory to elevate the status of the Hawai'i Land Conveyance Act of 1963 beyond the point where it can be construed as ordinary statutory law that would be subject to change or exception by Congress without the State's consent. Mr. Price writes at page 3 of his March 13th letter that the Hawai'i Land Conveyance Act of 1963 "simply removed the five-year deadline [set forth in Admission Act §5(3)] for determining *when* retained Hawaii public lands would be returned to the State [pursuant to the Admission Act]."

The legislative history of the 1963 Act supports the view that Congress considered Hawai'i's ceded lands to be unique and deserving of eventual return to the State. The idea and substance of the law were directly obtained from an October 28, 1963, letter from the U.S. Bureau of the Budget to both the House and Senate.⁵⁷ That history⁵⁸ (see §II.C.1(a) *supra*) contradicts the contention that it is ultimately the authority of §5(e) of the Admission Act that now determines the fate of Kaho'olawe.

The premise of the 1963 Act was that Hawai'i's right to the return of ceded lands would end after the conclusion of the five year review period provided by §5(e) of the Admission Act. Congress stated, "If [the proposed legislation] is not enacted, the

⁵⁷ Agency letters buried within the legislative history of federal acts have, once unearthed, set significant precedent. The seminal case in most airport noise litigation is *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed. 2d 547 (1973). Justice Douglas's opinion for the majority delineates the nature of federal preemption of state and local control in aviation matters. The single exception to complete preemption, known as the *airport proprietor* doctrine, evolved from a comment in a Department of Transportation letter found in the legislative history of amendments to the Federal Aviation Act of 1958, 49 U.S.C. §§1301 *et seq.*

⁵⁸ Report 972 of the House Committee on Interior and Insular Affairs (December 4, 1963) and Report 675 of the Senate Committee on Interior and Insular Affairs (December 3, 1963) comprise the legislative history of the 1963 Act.

above-described lands, which the Federal Government received by the voluntary cession and donation of the people of Hawaii and for which it paid no compensation, would become subject to disposal under the Federal property laws after August 21, 1964, when they become surplus." Senate Report 675 at page 2.

The legislative history can be reasonably interpreted to limit the applicability of any compact between the federal government and the State of Hawai'i to that 5 year period contemplated by Admission Act §5(e). A federal court considering the validity of an Act of Congress disposing of Kaho'olawe would hear such arguments in opposition to the State's position. Anticipating a court's interpretation of the legislative history of the 1963 Act, it is probable the court would yield to judicial reluctance to invalidate legislative acts upon any but the most compelling grounds and would hold that Kaho'olawe's fate is not determined by §5(e) of the Admission Act.

The Attorney General's letter (at page 4) implicitly acknowledges that the State's consent was not required before the Land Conveyance Act of 1963 could become effective. The fact that Congress acted unilaterally in creating the 1963 Act suggests that the Act cannot be construed as a change or modification of any federal-State compact that now could serve to limit Congressional power regarding Kaho'olawe. As a general federal law presently controlling the disposition of surplus federal lands in Hawai'i, the Land Conveyance Act of 1963 is subject to change or exception by a specific Congressional Act relating to Kaho'olawe.

The State maintains that Congress has recognized its residual interest in ceded lands and has recognized a trust relationship between the federal and State governments in that regard. Page four of the March 13th letter states "the return of ceded lands to Hawaii is done so in recognition of the federal government's discharge of its own trust duty incurred in the Treaty and later the Joint Resolution of Annexation of 1898. The federal government may not unilaterally absolve itself of the trust duty which it undertook in 1898. For this reason alone, surplus ceded lands must be returned to the State of Hawaii and not to any other entity. . . [¶] The State of Hawaii's residual interest in the public lands ceded to the United States in 1898 is a vested trust interest which may not be unilaterally abrogated by Congress or the United States."⁵⁹

⁵⁹ The Joint Resolution of Annexation of July 7, 1898, 30 Stat. 750 (whereby formal transfer of sovereignty took place on August 12, 1898) ratified and recited the text of the annexation treaty dated June 16, 1897, including the following: "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

While considering the Hawai'i Land Conveyance Act, Congress observed that Hawai'i's ceded lands "have always been treated differently than the other public lands of the United States. History clearly indicates that those lands were regarded as having been held in a special trust status by the United States for the benefit of the Hawaiian people." Senate Report 675 at page 6. The 1963 act would "maintain the residual interest of the State of Hawaii, long recognized in Federal law and practice, in lands and property which were ceded to the United States by the Republic of Hawaii at the time of annexation or were set aside for Federal use from land owned by the Territory of Hawaii." House Report 972 at page 3.

In *Price v. Hawaii*, 921 F.2d 950 (9th Cir. 1990), it was observed that the State's obligation under the Admission Act's §5(f) trust is not determined in the same manner as that of an ordinary private trustee. The State was defending itself from claims of Native Hawaiian appellants that it had abused the trust.

The centerpiece of appellants' cases is their claim that we must, in effect, treat the State as a private trustee would be treated...

Under the Act, the ceded lands are to be held upon a public trust... However, nothing in that statement indicates that the parties to the compact agreed that all provisions of the common law of trusts would manacle the State as it attempted to deal with the vast quantity of land conveyed to it...

Given that, it would be error to read the words "public trust" to require that the State adopt any particular method and form of management for the ceded lands... [1] [O]ur reading of section 5(f) rests on the apparent decision by the parties involved in the Act that the State and its officials would proceed with a certain degree of good faith and need not be held to strict trust administration standards.

921 F.2d at 954-56

The trust obligation recognized in the 1897 annexation treaty and the 1898 Joint Resolution of Annexation was "for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." §73(e) of the Organic Act required that funds derived from public lands serve to benefit the same persons and purposes. The Admission Act's explicit trust obligation requires that assets derived from ceded lands

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 purposes."

benefit education, Native Hawaiians, farm and home ownership and the public.⁶⁰ As formalized in §5(f), that trust doctrine makes the State the trustee, not the beneficiary, of the trust obligation. Those provisions will not serve to restrict Congress from acting unilaterally, as it sees fit, with regard to Kaho'olawe.

That explicit trust obligation should not be confused with "a 60-year practice of returning those lands and property when they were no longer needed by the United States" recognized in the legislative history of the Hawai'i Land Conveyance Act of 1963. While both the trust obligation and the established practice trace their origins to the same events in history, neither the trust obligation nor the long-standing practice would restrict the discretion of Congress to dispose of public lands.

In *State of Nevada, Etc. v. United States*, 512 F.Supp. 166, 172 (D.Nev. 1981), *affirmed* 699 F.2d 486 (9th Cir. 1983), Nevada raised an issue of "whether federal proprietary discretion over the public lands is essentially unlimited ..." That issue was characterized by the appellate court as "one aspect of the movement which has come to be known as the 'Sagebrush Rebellion' protesting federal ownership of land in western states." 669 F.2d at 487. Dismissal of Nevada's claims was affirmed on the grounds of mootness, since the federal moratorium on private settlement of federal lands that had prompted the suit had been rescinded. However, the district court's opinion is informative. Nevada asserted its expectancy upon admission as a state that unused federal lands would be conveyed to the state or individuals. The expectancy was premised upon allegations that the United States held the public lands in trust and that the equal footing doctrine required such disposal. The federal district court disagreed, citing the plenary authority of Congress, as described in §II.C.1(b), *supra*.

The State's March 13th letter also states that "any attempt by Congress to change the terms of the Admission Act and the United States' established duty under the 1898 Joint Resolution of Annexation would raise serious questions under the Equal Footing doctrine. *Utah Division of State Lands v. U.S.*, 482 U.S. 193, 107 S.Ct. 2318 (1987)."

The cited judicial doctrine and case refer to a theory holding that new states must be admitted on an equal footing with the original thirteen states. The *Utah* case held that title to the bed of Utah Lake passed to the state under the equal footing doctrine

⁶⁰ It was observed by U.H. law professor Jon Van Dyke during the December, 1991, Kaho'olawe attorney's conference that the original beneficiaries of the trust were the inhabitants of Hawai'i in 1898. Thus, a modern Hawaiian sovereign entity would more closely approximate the character of those beneficiaries than does the present general population of the State of Hawai'i.

upon Utah's admission to the Union in 1896. The Supreme Court held that preadmission federal reservation of the lakebed had not been accomplished, a factual situation not analogous to the federal reservation of Kaho'olawe under Executive Order 10436 and Organic Act §91.⁶¹

The equal footing doctrine, as stated by the U.S. Supreme Court in cases such as *Pollards Lessee v. Hagan*, 4 (3 How.) U.S. 212 (1845), evolves from earlier provisions of the Continental Congress and deeds of cession of western lands to the United States that became a provision common in statehood acts. §1 of the Admission Act provides in part that the State of Hawai'i "is declared admitted into the Union on an equal footing with the other States in all respects whatever. . ."

When a new state is admitted, it is so admitted with all of the powers of sovereignty and jurisdiction which pertained to the original states, and such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union which would not be valid and effectual if the subject of congressional legislation after admission. In other words, all states, upon their admission into the Federal Union, stand upon an equal footing, irrespective of the limitations upon the previous territorial government. The doctrine that new states must be admitted on an "equal footing" with the old ones does not rest on any express provision of the Constitution, but on what is considered and has been held by the Supreme Court to be the general character and purpose of the union of the states, as established by the Constitution -- a union of political equals.

72 AmJur2d States §13 (1974) at page 418

However, admission on an equal footing "negatives any implied, special limitation of any of the paramount powers of the United States in favor of a state." See *United States v. Texas*, 339 U.S. 707, 717, 70 S.Ct. 918, 94 L.Ed. 1221 (1950), holding that the State of Texas could not claim offshore boundaries greater than any other state, notwithstanding the fact that the independent Republic of Texas, prior to statehood, had established a substantially greater offshore boundary. Thus, even if the Admission Act recognized that the State of Hawai'i has an ongoing expectancy of a residual interest in unused federal lands,⁶² the equal footing doctrine could be applied in the negative to

⁶¹ Cf., *United States v. Alaska*, 423 F.2d 764 (9th Cir 1970), *certiorari denied* 400 U.S. 967, 91 S.Ct. 363, 27 L.Ed.2d 388 (1970), holding that a 1941 Executive Order accomplished the reservation of a lakebed in taking land from the Territory of Alaska for a wildlife refuge area, notwithstanding the State of Alaska's equal footing argument.

⁶² Such a recognition is most likely to be found in Admission Act §5(e), providing a five year period for the return of federally reserved lands to the State of Hawai'i.

the end that such a right could not be expanded so greatly that it created an extraordinary limitation upon the Constitutional powers of Congress.

Having asserted those theories, the Attorney General's letter concludes that "When Kaho'olawe is declared surplus, the island must be conveyed to the State. Such a conveyance would be consistent with the intent of the parties when Executive Order No. 10436 was negotiated and with the terms of the Executive Order as finally written. It would be consistent with the historical treatment since 1900 of federal controlled ceded lands found to be surplus. It would be consistent with the intent of Congress as set out in the Admission Act of 1959 and the Land Conveyance Act of 1963."

Those points are sufficient to support an argument that a return of Kaho'olawe to the State would be politically appropriate. However, those points are not sufficient to successfully support a contention that Congress is *compelled* to return Kaho'olawe to the State pursuant to existing law or else obtain the State's consent to enact a special law for Kaho'olawe. Those points are not sufficient to successfully support litigation intended to defeat the validity of a unilateral Congressional Act concerning Kaho'olawe.

The Commission has a wide range of possible recommendations to Congress, in view of the exclusive Constitutional powers given to Congress and the limited legal scope of theories that could restrain those Constitutional powers. Appropriate recommendations regarding the method of conveyance of Kaho'olawe reasonably premised upon the studies, research and hearings conducted by the Commission may be reported to Congress without fear of substantial legal limitations.

2. Transition options

The premise of the study described in §1(e) of Senate bill 3088 is that KICC will recommend terms and conditions for the conveyance of Kaho'olawe to the State of Hawai'i. Senate bill 3088 §1(f)(2) requires the Commission to report on its study of Kaho'olawe's environmental restoration requirements "together with such comments and recommendations as the Commission considers appropriate."

An evaluation of appropriate options that may be considered leads to the following three broad categories: (a) environmental restoration, (b) jurisdiction and (c) liability. Existing federal law generally indicates how these categories would be viewed absent any special circumstances or new legislation.

With regard to *environmental restoration*, Kaho'olawe would be treated as a contaminated site according to existing law (as described in §III.B.1.a., *infra.*) While such law would require the removal of contamination posing a hazard to human health or the environment, the environmental restoration effort required by existing law would

not be as extensive as the scope of effort reflected in Senate bill 3088, nor would its accomplishment receive a very high priority. Under existing law, funds to remove hazardous contamination would come from Defense Department appropriations and the restoration work would be managed by a military agency.

As to *jurisdiction*, existing law (as described in §II.C.1., *supra*) gives Congress unfettered control and management of federal lands, but also contemplates conveyance to the State of Hawai'i of surplus ceded lands taken for federal use. However, no conveyance can take place until the removal of hazardous contamination is accomplished. If less than complete decontamination is accomplished, use restrictions would be required as part of the conveyance. Use restrictions might also be imposed for reasons such as the protection of significant archeological sites.

With regard to *liability*, existing law (as described in §III.A., *infra*) places the burden squarely upon the federal government. Obligations such as the entire cost of decontamination, any residual decontamination efforts that may become necessary and legal liability for injuries resulting from failure to accomplish decontamination are imposed upon the United States.

Senate bill 3088 provides for the Commission to go beyond the limits of existing law in making its report. Therefore, KICC is free to recommend, for example, that extensive environmental remediation work (as contemplated in Senate bill 3088) should be accomplished as expeditiously as possible according to a special Congressional act (hereinafter referred to as the Kaho'olawe Act) with a special appropriation intended to fully restore Kaho'olawe without delay. As a further example, Kaho'olawe's unique history suggests that it would be appropriate to establish a local oversight committee composed of experienced and interested community representatives to participate in the restoration and management efforts.

As contemplated by Senate bill 3088, Congress, through the Kaho'olawe Act, is free to address the topics of environmental restoration, jurisdiction and liability according to the terms and conditions made most compelling by the Commission's studies. Congress, having provided for an extraordinary study of Kaho'olawe, can provide for exceptions to existing requirements of federal law that would otherwise apply in an ordinary situation.

(a) Environmental restoration

There is a well-developed scheme of environmental restoration work under existing federal law. Restoration work, whether military or civilian, is usually accomplished according to procedures defined by the Superfund law and Environmental Protection Agency (EPA) regulations. While the federal entity responsible for the work may vary

according to the status of the site, the work itself usually proceeds according to a standard process of site assessment followed by remedial investigation, design and action under an inter-agency agreement (IAG). For military sites, the parties to an IAG usually include the Department of Defense (DOD), the EPA and the state.⁶³

The substance of an IAG typically provides that, on the basis of an analysis of the site and existing potential health and environmental hazards, contractors will be paid to conduct restoration work relative to on-site supervision and general administrative control commonly associated with federal services contracts. Site analysis provides the standards for design and performance of the work. Specific work project administration, including fiscal management, oversight of necessary environmental studies, applications for permits and the processing of contracts, and the presence of project managers and expert consultants for on-site supervision assure that the work is competently undertaken. Public participation and a dispute resolution process are usually provided.

For Kaho'olawe, the work necessary for environmental restoration can be broadly defined as including (a) the removal of unexploded ordnance (UXO); (b) the decontamination of hazardous and toxic waste (HTW, including UXO residue); (c) the placing and maintenance of fences, signs and access paths during and after the accomplishment of UXO and HTW decontamination; and (d) the soil conservation, water resources development and revegetation/reforestation effort required to heal the damage caused by many years of environmental abuse on Kaho'olawe.

Studies completed for the Commission (for example the site assessment and remedial action plan developed by Ballena Systems with regard to the removal of UXO) have already suggested a path of environmental restoration procedures. Those studies can serve as a basis for much of the necessary assessment and remedial investigation and design work. The environmental restoration work required for Kaho'olawe is not

⁶³ The preliminary assessment and remedial investigation phases of the usual environmental restoration process involve determinations of fact to help decide whether a site is contaminated and whether restoration work will be done. In the case of Kaho'olawe, contamination is a known fact and restoration is assumed. An IAG usually is executed under EPA practice when actual restoration work is ready to proceed. DOD practice starts the cooperative process earlier with the execution of a pre-IAG Federal Facilities Agreement (FFA) during the investigation phase. Although the term IAG is used in this discussion, it is intended also to include any further remedial investigation that is necessary; therefore the term FFA may be more technically accurate. However, as the concept of an IAG is more widely understood and applied, that term is used for these purposes, with a more expansive scope intended.

extraordinary or unusual in view of the extensive national efforts already underway. Necessary skills and expertise are available from both government agencies and the private sector. In fact, the Commission has been informed that Kaho'olawe is attractive to some of those agencies for use as a pilot site to develop and refine certain types of restoration work.

Therefore, in order to proceed with environmental restoration on Kaho'olawe, the principal challenge is to describe in the Kaho'olawe Act the requirement for and general structure of a hybrid interagency agreement (IAG) to define how a special appropriation is to be received, administered, applied and supervised. Under existing law, the most likely candidate to administer a pilot decontamination project on Kaho'olawe is the office of the Defense Environmental Restoration Program (DERP), or its designee, using a special appropriation to the Environmental Restoration, Defense (ER,D) account.

Defense Department agencies that could participate in the decontamination effort include the Indian Head, Maryland, Naval Explosive Ordnance Disposal Technology Center (to coordinate and provide access to state of the art UXO technology and procedures); the Army Corps of Engineers' Huntsville, Alabama, Mandatory Center of Expertise (MCX, to coordinate and provide administrative and management expertise); and military laboratories such as the U.S. Army Toxic and Hazardous Materials Agency and the Naval Civil Engineering Laboratory (to provide state of the art analysis and expertise related to HTW.)

Other entities that could participate include a special local oversight committee (to provide community participation and cultural sensitivity); the EPA (to assure compliance with federal environmental law); the Hawai'i Department of Health (to assure compliance with applicable State environmental law); an appropriate agency of Maui County (to provide liaison with local government); the Advisory Council on Historic Preservation (to provide administrative services and consultation regarding undertakings affecting Kaho'olawe as a site listed on the National Register of Historic Places); the National Oceanic and Atmospheric Administration (to provide administrative services and consultation with regard to the marine sanctuary proposed for waters including those surrounding Kaho'olawe); any federal agencies with special expertise suitable for use in the restoration effort (such as the Soil Conservation Service); the Protect Kaho'olawe 'Ohana (to provide extensive accumulated experience and knowledge of restoration work already accomplished on Kaho'olawe) and "the public or private entity best suited to perform the [conservation and restoration] activities referred to" in §§1(e)(2)(B) and (F) of Senate bill 3088 (if it should not be one of those entities already named.)

The primary determinations that should be made in the Kaho'olawe Act itself are (1) the lead agency (both overall and for each work category), (2) the path for the appropriation and expenditures, and (3) recommended participants in the environmental restoration phase under the IAG. With those fundamental elements decided, the subsequent negotiation and execution of the IAG, the completion of any necessary further site assessment and remedial activity design, and the undertaking of responsibilities for project administration, contracting and supervision all should follow with no more difficulty than is ordinary in tasks of this type.

Lead agency options (if not DERP) would include any of the various agencies identified as IAG participants. Options for the appropriation path (if not ER,D) would include a special appropriation for any federal agency participating in the IAG, or an appropriation directing a grant (via any participating federal agency or department) to a designated non-federal agency or entity participating in the IAG. Options for participants in the IAG (in addition to those identified above) could include any agency or entity with a potential environmental restoration interest or contribution.

(b) Jurisdiction

Under existing law, Kaho'olawe is federal property subject to Congressional control and disposition. Kaho'olawe also is ceded land taken from the Territory by Executive Order 10436 pursuant to §91 of the Organic Act and therefore subject to the Hawai'i Land Conveyance Act of 1963 if it is determined to be surplus. In that regard, there is an expectation that Kaho'olawe would be conveyed to the State of Hawai'i where it would become a part of the trust created by Admission Act §5(f). However, that expectation is not binding if Congress should choose to provide some special treatment in the Kaho'olawe Act (see §II.C.1., *supra.*) Special treatment would be necessary to accomplish the hybrid environmental restoration plan described above, for example.

Options for jurisdiction can be described as interim and/or ultimate, considering the element of time. Kaho'olawe could be provided an interim jurisdictional status (such as during the environmental restoration phase) pending some ultimate disposition, or it could be immediately disposed of to an ultimate grantee by the Kaho'olawe Act.

Potential designees of interim and/or ultimate jurisdiction include the State of Hawai'i (contemplated by Senate bill 3088 and as ordinary surplus federal-use ceded land); the Department of Defense (the status quo); the National Park Service (contemplated in the Defense Environmental Response Task Force Report to Congress of October, 1991, for certain lands requiring environmental restoration activity); an entity representing a sovereign Native Hawaiian people (contemplated by many of the persons

testifying before the Commission during its public hearings); the Protect Kaho'olawe 'Ohana (contemplated by persons testifying at the Commission's public hearings) or any other entity that may be considered appropriate by the Commission.

A determination of questions regarding jurisdiction will indicate corresponding environmental restoration determinations. For example, the entity receiving jurisdiction during the environmental restoration phase should appropriately have a substantial lead agency role under the IAG.

Existing law requires the completion of environmental restoration *before* any conveyance is granted. However, a DOD task force has held that existing law does not preclude such property transfers within the federal government. An example provided in the Defense Environmental Response Task Force report of October, 1991, suggests that a site such as Kaho'olawe could be placed under the jurisdiction of the National Park Service (NPS) of the Department of the Interior while environmental restoration work proceeds. In such a case, it would be expected that NPS, rather than DERP, would play a principal role in overall project management and administration.

The Commission can consider factors beyond the simple question of primary control of Kaho'olawe. For example, the Kaho'olawe Act could provide for vesting jurisdiction in one entity, but also require consultation with one or more entities. One example of such consultation is that presently required by the National Historic Preservation Act (NHPA) as described in subsection (d), *infra*. NHPA consultation with the Advisory Council on Historic Preservation is required for any undertaking on Kaho'olawe, including environmental restoration.⁶⁴

Using as an example the initial transfer of Kaho'olawe from DOD to the National Park Service for the environmental restoration phase, further consultation could be required between NPS and the State of Hawai'i, the Protect Kaho'olawe 'Ohana and/or the local oversight committee. Dispute resolution provisions in the IAG would provide a procedure for assuring success in the consultation process.

Another factor that merits consideration is sentiment expressed during KICC hearings in favor of Kaho'olawe's ultimate availability for use by a Native Hawaiian sovereign entity. As discussed in subsection (d), *infra*, Kaho'olawe's availability for use by a sovereign entity probably would take the form of a reservation of use under federal title. Recognition of sovereignty requires federal action and is not ordinarily

⁶⁴ An *undertaking* is an event conducted "by the government or with federal funds; the courts ... have indicated that the term is a broadly encompassing one and includes current as well as proposed activities..." 68 ALRF 578, 595 (1984).

accomplished by state action. Only federal land can be reserved by the United States for sovereign use. Thus, if Kaho'olawe is conveyed to a non-federal entity, it will not be available for federal reservation for use by a sovereign Native Hawaiian entity.

Recommendation Options: Environmental Restoration and Jurisdiction

To help illustrate the possibilities regarding KICC recommendations in environmental restoration and jurisdiction matters, the following lists present some of the fundamental determinations. First, below, is a list of the most immediately identifiable potential parties that could or should be involved in these matters. On the following page is a chart showing how some critical determinations would be decided under existing law. The Commission may recommend any alternative appropriate scheme of environmental restoration and jurisdiction.

Potential party abbreviations:

Federal government

1. DOD Department of Defense
2. - DERP Defense Environmental Restoration Program
3. - USN U.S. Navy
4. - NFEC Naval Facilities Engineering Command
5. - EODTC Naval Explosive Ordnance Disposal Technical Center
6. - NCEL Naval Civil Engineering Laboratory
7. - USA U.S. Army
8. - MCX U.S. Army Corps of Engineers Mandatory Center for Expertise
9. - THMA U.S. Army Toxic and Hazardous Materials Agency
10. EPA Environmental Protection Agency
11. DOI Department of the Interior
12. - NPS National Park Service
13. - ACHP Advisory Council on Historic Preservation
14. NOAA National Oceanographic and Atmospheric Administration
15. SCS Soil Conservation Service

State and local government

16. SOH State of Hawaii
17. - DOH Department of Health
18. - DLNR Department of Land and Natural Resources
19. - OHA Office of Hawaiian Affairs
20. - OSP Office of State Planning
21. COM County of Maui

Non-governmental entities

22. PKO Protect Kaho'olawe 'Ohana
23. NHS Native Hawaiian Sovereign
24. LOC Local oversight committee

Additional entities

25. _____
26. _____

Chart of Jurisdiction and Environmental Restoration Elements

Potential Parties:	1.	2.				
	Jurisd. Phase	UXO	Work categories:			
			HTW	Access	Heal	
1. DOD	(a)					Work category Descriptions:
2. - DERP		(f)	(f)			
3. - USN						
4. - NFEC		(d,e?)	(d,e?)	(e?)		UXO: removal of unexploded ordnance
5. - EODTC						
6. - NCEL						
7. - USA						HTW: removal of hazardous/toxic waste
8. - MCX		(d,e?)	(d,e?)	(e?)		
9. - THMA						
10. EPA	(c)	(g)	(g)	(g)		Access: place & maintain fences, signs and paths
11. DOI						
12. - NPS						
13. - ACHP	(c)	(g)	(g)	(g)	(g)	Heal: soil conservation, water resources development & revegetation/reforestation
14. NOAA						
15. SCS					(e)	
16. SOH						
17. - DOH	(c)	(g)	(g)			
18. - DLNR	(b)					
19. - OHA						
20. - OSP						
21. COM						
22. PKO						
23. NHS						
24. LOC						
25. _____						
26. _____						

Kaho'olawe Act Primary Determinations:

[shown on chart above are probable determinations based on existing law
-- ? refers to IRP/FUDS uncertainty]

1. Possible jurisdiction phases:

- (a) Interim (such as during environmental restoration)
- (b) Ultimate jurisdiction/conveyance/reservation
- (c) Consultation requirements

2. IAG Fundamental Elements:

- (d) Overall lead agency
- (e) Lead agency for each work category
- (f) Funding path
- (g) IAG Participant

(c) Liability

Under existing law, the federal government must pay for the removal of hazards to human health and the environment on Kaho'olawe and it remains liable for any failure to accomplish that work. Senate bill 3088 contemplates that the federal government would pay for more extensive environmental restoration work necessary to heal Kaho'olawe after decades of environmental abuse as a weapons range. Also, Executive Order 10436 contemplates that Kaho'olawe would be restored to a condition reasonably safe for human habitation (see §III.A., *infra*.)

Public access to Kaho'olawe will remain quite limited during the restoration phase because of environmental hazards. Ultimately, as contemplated by the Ballena Systems study for example, use restrictions will become an integral part of the restoration effort, determining standards for decontamination, the scope of restoration work and the amount of funding provided for that work. It is likely that restricted use (as contemplated by the restoration plan) would be required as a basis for any conveyance from the federal government. Preservation of archaeological and historic sites may be a basis for further restrictions.

There are several aspects of liability and use restriction that could be specifically addressed by the Kaho'olawe Act, including (a) the requirement of Executive Order 10436 that environmental restoration must be absolute for all of Kaho'olawe; (b) the requirements of CERCLA §120(h) (42 USC §9620(h), and federal property regulations) that environmental restoration work be completed *before* there is any conveyance to a non-federal entity; (c) possible liability limitations (as discussed in §III.A.2., *infra*) such as the exercise of discretionary functions in determining decontamination standards; (d) access and use restrictions based upon safety or other considerations; and (e) ordinary premises liability for injuries not related to UXO or HTW.

Following is a summary of liability and use issues that could be addressed in the Kaho'olawe Act. Resolution of some or all of these issues should be part of the Commission's recommendations to Congress. The Commission's effort to resolve these issues should logically follow the resolution of questions pertaining to jurisdiction and environmental restoration.

Liability and Use Issues

(1) Should UXO and HTW decontamination of Kaho'olawe be absolute and complete as required by Executive Order 10436 (*i.e.*, should the Executive Order's standard of *reasonably safe for human habitation* be applied to the entire Island)?

(a) If decontamination is not to be absolute, should matters such as:

- (i) areas to be decontaminated
- (ii) standards for decontamination and
- (iii) restrictions of access and use

be described in mandatory terms by the Kaho'olawe Act or should such matters be left to the discretion (thus limiting the liability) of the agencies or entities principally charged with the decontamination work? If any such matters are to be mandatory under the Kaho'olawe Act, then those details should be set forth in the Commission's recommendation.

(2) Should the federal government be required to pay for all of the necessary environmental restoration work on Kaho'olawe, now and forever, as provided by CERCLA §120(h) and Executive Order 10436?

(a) If not, then what amounts should be otherwise provided and how?

(3) Should the federal government remain liable for any damages and injuries resulting from unsatisfactory UXO and HTW decontamination?

(a) If not, what entity should indemnify the federal government regarding claims of that nature?

(b) If so, then should there be a specific federal indemnification of any non-federal entity with potential liability?

(4) Should all required UXO and HTW decontamination be completed pursuant to CERCLA §120(h) before any transfer of jurisdiction to a non-federal agency is accomplished?

(5) Ordinary premises liability should be assumed by the entity with primary jurisdiction, and if that entity is a federal or private agency, the Hawai'i recreational use statute could provide a defense from ordinary premises liability: should any such defense under the Hawai'i recreational use statute be limited in the Kaho'olawe Act (for example, should the Kaho'olawe Act specify that archeological, cultural and religious activities are distinct from recreational activities)?

(6) Should there be specific use restrictions in the Kaho'olawe Act for purposes of preserving significant archeological and historic sites?

(d) Related matters

This subsection provides more detailed information regarding some topics that pertain to KICC's recommendations options, including (1) general laws that can affect sovereignty for Native Hawaiians, (2) land banking by the State of Hawai'i, (3) the listing of Kaho'olawe on the National Register of Historic Places, (4) public opinion, (5) 10436, (8) pre-cleanup transfer to the National Park Service as an alternative interim or ultimate recommendation and (9) fence requirements.

(1) Native Hawaiian sovereignty

Recognition of the sovereignty of native people is a matter of exclusive federal concern by virtue of the U.S. Constitution. Native American sovereignty provides the only relevant basis for this analysis. There are substantial differences between the Native American and Native Hawaiian situations, but Indian law is well established in American jurisprudence and so provides the only practical analogy for addressing this topic. The U.S. Supreme Court has consistently recognized that Indian "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980).

Normally a [Native American] group will be treated as a ... "recognized" [sovereign] tribe if (a) Congress or the Executive has created a reservation for the group by treaty, agreement, statute, executive order, or valid administrative action; and (b) the United States has had some continuing political relationship with the group.

F. Cohen, *Handbook of Federal Indian Law* 6 (1982), quoted in *Mashpee Tribe v. Secretary of Interior*, 820 F.2d 480, 484 (1st Cir. 1987)

Article 2, §2, clause 2 of the U.S. Constitution gives the President exclusive power (with the advice and consent of two thirds of the Senate) to make treaties. Many instances of Native American sovereignty have involved a treaty setting forth the respective rights and expectations of the parties.⁶⁵ Article 1, §10, clause 1 of the Constitution provides that no State shall enter into any treaty.

Article 1, §8, clauses 1 and 3 of the Constitution give Congress the power to regulate commerce with Indians.⁶⁶ Article 4, §3, clause 2 of the Constitution gives

⁶⁵ "An Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such rights may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim. When a reservation is established by a treaty ratified by the Senate or a statute, the quality of the rights thereby secured to the occupants of the reservation depends upon the language or purpose of the congressional action. Since Congress, under the Constitution, § 3 of Art. IV, has the power to dispose of the lands of the United States, it may convey to or recognize such rights in the Indians, even a title equal to fee simple, as in its judgment is just." *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103-04, 69 S.Ct. 968, 93 L.Ed. 1231 (1949). (citations omitted)

⁶⁶ In *Matter of Guardianship of DLL & CLL*, 291 N.W.2d 278, 281 (S.D. 1980), the Supreme Court of South Dakota held that the "United States has plenary power under the United States Constitution to govern tribal Indians" under Article I, §8 of the U.S. Constitution, citing *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) (inherent Indian sovereignty and federal preemption serve as

Congress the power to control property belonging to the United States. Most instances of a recognition of Native American sovereignty also involve the reservation of parcels of federal land for exclusive use by the sovereign entity (pursuant to a Congressional Act, treaty and/or Executive Order; usually the United States retains the fee.)

Not only does the Federal Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long-continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States the power and duty of exercising a fostering care and protection of all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired and whether within or outside the limits of a state. The power must exist in the Federal Government because it never has existed anywhere else, the theater of its exercise is within the geographical limits of the United States, it has never been denied, and it alone can enforce its laws on all tribes. Accordingly, plenary authority has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to judicial control.

41 AmJur2d *Indians* §50 (1968), pages 858-59 (footnotes omitted)

Plenary Congressional authority under the U.S. Constitution generally has precluded states from having any role in establishing native sovereignty.⁶⁷ That preemption also can be expected to apply to the recognition of Native Hawaiian sovereignty. Once conveyed to the State or to any non-federal entity, Kaho'olawe could not be reserved by the federal government for use by a sovereign entity.

(2) State land banking

Land banking by the State of Hawai'i has been proposed as one possible alternative for preserving Kaho'olawe for eventual subsequent use, such as use by a sovereign entity. Under existing law, ceded land returned to the State from the federal government is placed in the trust created by §5(f) of the Admission Act. As noted above, only federal land can be reserved by the United States for use by domestic native sovereigns. As State §5(f) land, Kaho'olawe would not be available for federal reservation for such purposes.

barriers to the assertion of state authority in Indian matters), notwithstanding a provision in the state constitution characterized as a conveyance compact with the federal government that was claimed to give the State certain jurisdictional powers.

⁶⁷ Instances of state recognition of Native American entities or rights can be cited. In many such instances, relationships between the affected states and Native American entities were established before the creation of the United States. Some analysts have observed that a special sovereign-like Native Hawaiian entity could be created within the jurisdiction of the State of Hawai'i for example, by an increase of the independence of the Office of Hawaiian Affairs.

Also under State law, the concept of land banking as evolved to date does not yet appear to be a suitable vehicle for preserving Kaho'olawe for a sovereign entity. The 1978 State Constitutional Convention added Article XI, §4 (ratified in the election of November 7, 1978) to the Constitution of the State of Hawai'i:

Section 4. The State shall have the power to acquire interests in real property to control future growth, development and land use within the State. The exercise of such power is deemed to be for a public use and purpose.

Standing Committee Report Number 77 of the 1978 Constitutional Convention explains how land banking was intended to allow an assertion of State ownership interests in shaping regional growth and development before any immediate need for a particular public use was defined in view of the requirement of Article I, §18, providing that private property may be taken only when there is a public use for that property. The report stated that the Constitutional provision does not establish land banking *per se*, but simply enables the State Legislature to proceed in that area.

The Legislature has attempted to proceed in the area of land banking on many occasions, but does not appear to have been successful. In 1983 the Oahu Development Conference published a preliminary and final study on the topic of land banking in Hawai'i. The reports describe eleven bills introduced in the legislature after the 1978 amendment, between 1979 and 1983, although none were adopted. The report envisions a Hawai'i land bank as a trust for acquiring land (by purchase, gift, trade or condemnation) for land management (including renovation and development) and for disposing of land (by lease, sale, trade or otherwise.)

The effort to legislate a government land bank in Hawai'i has been on-going. In recent years there have been numerous bills introduced in the legislature that sought to create a State land bank. In 1989 alone there were sixteen such bills. None of those bills were enacted into law. However, the Legislature has regularly entertained and passed appropriations of funds for land acquisition, sometime with reference to land banking as the purpose.

Thus, while government land banking can be said to exist in Hawai'i as a provision of the State constitution and as a fiscal practice, it has yet to be defined as a statutory concept. As ceded land, the Admission Act would require that Kaho'olawe be placed in the §5(f) trust upon its return to the State. An alternative disposition could be established in the Kaho'olawe Act. However, the vaguely developed concept of State land banking as it presently exists is not likely to provide a satisfactory venue.

(3) The National Historic Preservation Act

The National Historic Preservation Act (NHPA, 16 USC §§470 *et seq.*) and its supporting regulations (36 CFR §§800 *et seq.*) and Executive Order 11593 (1971) seek to preserve historic sites, with the Advisory Council on Historic Preservation providing specialized expertise. Chapter 6E of the Hawai'i Revised Statutes, while framed within the context of governing State historic sites, provides a similar scheme to protect historic resources.

The purpose of NHPA is the preservation of historic and cultural resources (16 USC §470.) In addition to providing grants for such purposes (§§470b-470g) the law requires consideration of the effects of Federal undertakings upon historic sites through a formal consultation process (§470f.) NHPA's National Register of Historic Places now lists the entire Island of Kaho'olawe as a protected site.

A 1981 Memorandum of Agreement pertaining to Kaho'olawe was executed by the Navy in compliance with the consultation requirement of §470f, after the National Register listing was accomplished.⁶⁸ The Navy stipulated with the Advisory Council that certain steps would be taken to preserve Kaho'olawe's important sites. The Agreement includes provisions for necessary changes on request by a signatory.

NHPA would require consultation and probably a new memorandum of agreement for any undertaking on Kaho'olawe, including environmental restoration or a transfer of jurisdiction. The Advisory Council would probably require the presence of an on site archeologist during all restoration activity to assure that significant sites are protected from any adverse impacts.

(4) Public Opinion

Testimony during KICC public hearings and the public opinion analysis sponsored by the State indicate several themes of general public agreement, including: (1) a permanent end of military use of Kaho'olawe; (2) environmental restoration at federal expense; and (3) preservation of Kaho'olawe for cultural and educational activities. Also expressed were opinions favoring limited noncommercial recreational activities (such as hiking, camping and fishing) and favoring a management role for the Protect Kaho'olawe 'Ohana (PKO).

⁶⁸ *Aluli v. Brown*, 437 F.Supp. 602 (D.Haw. 1977), described in §III.B.1.c., *infra*, was one of the first decisions acknowledging a private right of action under the NHPA. Most of the reported cases involving §470f, like *Aluli*, are concerned with compelling a site listing on the National Register, or compliance with the consultation requirement. For a case law analysis of the application and construction of the National Historic Preservation Act, see 68 ALRF 578 (1984).

(5) Problems with the State's position

The State of Hawai'i seeks an immediate and unconditional return of Kaho'olawe. It can be assumed that ending military use is a popular primary objective and that immediate unconditional conveyance to the State could be considered an expeditious means to that end. However, current law and regulations prohibit the conveyance of federal land before decontamination is completed.⁶⁹ The prohibition is based upon considerations of liability and fairness.

National policy has been well-established by Congress in law and through related agency regulations that prevents conveyance of Kaho'olawe to the State before decontamination and environmental restoration. Keeping Kaho'olawe under the control of the United States would avoid conflicts with existing conveyance prohibitions, allowing federal management of the cleanup effort and federal oversight to accompany federal liability.

Existing law, as complemented by Executive Order 10436, generally requires that the United States pay decontamination costs and assume related liability. Those considerations mitigate against an immediate unconditional release of Kaho'olawe from federal control.⁷⁰ Losing control of the land and cleanup work while retaining the obligation to pay cleanup costs and associated liabilities will be difficult for Congress to accept. This is not to suggest that the Commission should recommend an offer by the State to release the United States from an obligation to pay for the cleanup or an offer to indemnify the United States with regard to associated liability. While some government agencies and members of Congress are seeking to avoid those obligations in matters related to unexploded ordnance, many agree that where the federal government makes a contamination problem then the United States should clean it up and bear the associated liability. Substantial resistance to either an offer to release the federal government from cleanup costs or from liability should be expected from those seeking

⁶⁹ As noted on previous occasions, the federal facilities section of CERCLA [*i.e.*, §120, 42 USC §9620] requires completion of environmental restoration before conveyances. Similar provisions are found in Defense Department and general federal property management regulations [*e.g.*, DOD 5154.45 and 41 CFR §101-47.501(3)].

⁷⁰ The *Report of the Defense Environmental Response Task Force* (October 1991), page 7, advised Congress that land use restrictions may be "necessary to protect the integrity of the remedial action" and that such restrictions should "be made a part of the transfer document or deed and 'run with the land,' so that later owners cannot extinguish or ignore them."

to confirm federal obligations with regard to UXO; they would fear that either offer would set a bad precedent for similar situations.

(6) CERCLA §120

CERCLA §120 requires a federal covenant with a deed grantee disclosing any prior contamination at federal facilities and guaranteeing pre-conveyance federal cleanup as well as the accomplishment of any later-discovered need for remediation at federal cost.

Characterized as a form of environmental damage that is distinct from hazardous and toxic waste (HTW), unexploded ordnance (UXO) can be considered apart from the CERCLA §120 obligation, but still subject to federal property management regulations.

Congressional conference committee debate surrounding a proposed amendment to the Federal Facilities Compliance Act illustrates that controversy. The UXO debate should result in either EPA or DOD control of munitions decontamination. EPA would be more likely to promulgate rules treating UXO as a form of HTW -- DOD would not.

Taking the position that UXO is not HTW subject to CERCLA §120, the Army Corps of Engineers is reported to have declined certification of cleanup work at the Raritan Arsenal in Edison, New Jersey.⁷¹ The Army Corps of Engineers offered to make its best cleanup effort, and then convey the property by a deed providing that the new owner would assume all subsequent liability, indemnifying the United States from any claims. The State of New Jersey has taken the position that UXO is a hazardous material and so CERCLA should apply to environmental restoration at Raritan Arsenal.

However, Army authorities reflect a somewhat different perspective in a different situation. Water Island, the fourth largest of the U.S. Virgin Islands, was used as a military weapons testing facility until 1952, when it was transferred to the Department of the Interior's Office of Territories. Forty year leases were given by that Office, resulting in the construction of a hotel and some residential housing. Occupants of the island occasionally found unexploded ordnance, but without any major disasters. The lease terms run through the end of 1992.

On March 9, 1989, the Virgin Islands delegate to Congress (Mr. deLugo) introduced the Virgin Islands Reunification Act (H.R. 1345, 101st Congress, 2nd Session) proposing that Water Island be conveyed to the Virgin Islands government. That proposed

⁷¹ See *Defense Cleanup* (weekly newsletter), Vol. 3, No. 15 (July 17, 1992), page 1 article entitled *GAO: No cleanup standards needed* ("Land at the Raritan Arsenal, N.J., contaminated by buried military explosives, does not have to be certified by any federal agency as clean or safe for development ...") The article describes how the General Accounting Office is circulating for comment a draft report supporting the Army's position that it is "not authorized to certify its cleanup work after completion."

legislation failed. Page Stull of Mr. deLugo's staff noted that various contemporary environmental laws apply to the situation, although he was not certain as to exactly why H.R. 1345 failed. Mr. Stull said that a survey of UXO and HTW contamination is being conducted by the Army, and that an archeological study also would be done.

In the case of Water Island, the Army's General Counsel has advised the Army's environmental chief that CERCLA §120 ordinarily "would prevent the United States from transferring Water Island to the Virgin Islands prior to the completion of cleanup." It was further suggested that Congress could be asked to waive the application of CERCLA §120 in special legislation affecting the site. Although the Army would still be expected to clean the site, any waiver of CERCLA §120 could diminish the scope of that duty.

Some recent efforts addressing CERCLA §120 seek to facilitate transfers of real property. However, the limited scope of those efforts supports the general acceptance of the underlying prohibition of transfer before decontamination. One recommendation found in the Defense Environmental Task Force report to Congress in October, 1991, is that provision be made for conveyance of federal sites that have never been affected by contaminants.⁷²

Thomas Baca, Deputy Assistant Secretary of Defense for the Environment, has promulgated guidelines based on negotiations with the EPA and the State of California. Those guidelines seem to reflect the October report's recommendation. In a June 18, 1992, memorandum to the military services, Mr. Baca provided "guidance [that] applies to transfer of uncontaminated property by deed." The memorandum defines a process to be known as an Environmental Baseline Survey for Transfer (EBST), similar to a CERCLA preliminary assessment, to be used to certify that land was never contaminated.

On November 26, 1991, Congressman Leon Panetta introduced H.R. 4016 to provide an amendment to CERCLA §120(h) "to require the Federal Government, before termination of Federal activities on any real property owned by the Government, to identify real property where no hazardous substance was stored, released, or disposed of." More expeditious conveyances of base closure sites where there has been no contamination is the stated purpose of that proposed legislation.

These steps indicate an effort to change the treatment of sites under the CERCLA §120 federal facility provision to expedite conveyances of areas that have never been contaminated. But these measures also indicate limits to variations of that restriction.

⁷² *Report of the Defense Environmental Response Task Force* (October 1991), page 7; "DoD, EPA, and state regulatory agencies should develop a process, including criteria, for determining that an area is not contaminated."

While sites that have never been contaminated may be more expeditiously conveyed to a non-federal entity, these efforts seem to strengthen the underlying prohibition that requires environmental restoration before conveyance.

(7) The Value of Executive Order 10436

Congressional and agency conflicts regarding unexploded ordnance (UXO) cleanup are in a phase of dynamic evolution. Fundamental assumptions as to the hazardous nature of UXO and its place in the existing scheme of environmental restoration are being contested. Several efforts in Congress and federal agencies to resolve those issues involve serious disagreements.

Executive Order 10436 is something of a trump card for Kaho'olawe in that it unequivocally requires environmental restoration so that the Island is reasonably safe for human habitation, assuming a permanent end of military use. Given present general controversies regarding UXO decontamination, Executive Order 10436 provides a safe haven for a special act requiring satisfactory environmental restoration at federal expense and liability.

(8) The NPS Alternative

The Defense Environmental Task Force report notes that inter-governmental transfers of contaminated federal sites are permitted.⁷³ As an alternative, the following recommendations would be more consistent with the general scheme of existing law:

- (1) immediate transfer of jurisdiction from the Defense Department (Secretary of the Navy) to the Interior Department (National Park Service);
- (2) a special appropriation for necessary environmental restoration and management activities;
- (3) thorough environmental restoration work according to the scheme provided in CERCLA §120 for federal facilities on the basis of an interagency agreement (IAG) with the National Park Service (NPS) as the lead agency;
- (4) decontamination of unexploded ordnance (UXO) and hazardous and toxic wastes (HTW) as an interservice pilot project coordinated by the Deputy Assistant Secretary of Defense for the Environment pursuant to the IAG;
- (5) participation in the IAG of all necessary federal and state government agencies plus a specially created local oversight committee;
- (6) consultation with the Protect Kaho'olawe 'Ohana (PKO) and relevant State agencies as part of NPS management;
- (7) continuing regular PKO access and activities on Kaho'olawe as well as limited public access for cultural, educational and recreational activities in safe areas;

⁷³ *Report of the Defense Environmental Response Task Force* (October 1991), page F-3; "DoD thus may be able to transfer real property, or interests therein, on which remedial action has not been taken, to other federal agencies as long as such transfers would not affect the ultimate responsibility to complete remedial action."

(8) annual NPS reports to Congress (with the participation of the local oversight committee and PKO) and biennial Congressional review of the status of Kaho'olawe (including public hearings on Maui.)

These alternative recommendations need not be viewed as determining whether National Park Service jurisdiction should be interim or ultimate. Interim jurisdiction in the National Park Service would not preclude post-cleanup conveyance or transfer of Kaho'olawe to the State of Hawai'i or another appropriate entity.

The Presidio, a former Army base, was destined to become a part of the Golden Gate National Recreation Area pursuant to a federal law enacted in 1972 (P.L. 92-589, §§3(d)-(f), 86 Stat. 1300). §5 of the law requires that NPS establish an advisory commission for consultation on general policy and matters relating to planning, administration and development affecting the recreation area. NPS, as manager of that area, has assured extensive community involvement so that uses reflect local interests. Parts of the Presidio were contaminated with hazardous and toxic waste (although there has not been any explosive ordnance problem there.) Creation of the park took place before the enactment of presently applicable environmental restoration laws; those laws have subsequently required remediation efforts.

Kalaupapa was destined to become a National Historic Park pursuant to a 1980 federal law (P.L. 96-565, 94 Stat. 3321, the same act that also created the Native Hawai'ian Study Commission.) As described by §102(3) of the Act, the park at Kalaupapa would provide that "the preservation and interpretation of the settlement [will] be managed and performed by patients and Native Hawai'ians to the extent practical, and that training opportunities be provided such persons in management and interpretation of the settlement's cultural, historical, educational, and scenic resources." §108 of the Act requires that NPS establish an eleven member park advisory commission, including seven elected members of the patient community, for consultation regarding development and operation of the park, employee training and public visitation policy.

Lead agency administration of environmental restoration on Kaho'olawe, preservation of Kaho'olawe's significance as a sanctuary for Native Hawai'ian cultural and religious purposes and management of appropriate recreational uses under the National Park Service appear to provide a feasible alternative.

(9) Fence requirements

Senate bill 3088, sections 1(e)(2)(D) and (E), require that KICC "[i]dentify fences needed to enclose such areas [as are not safe]." As a minimum requirement there should be high woven wire fences that actually would prevent people from entering an area (as well as frequent warning signs.) The sufficiency of fencing has played a part

in reported ordnance injury cases. See, e.g., *Stewart v. United States*, 186 F.2d 627 (7th Cir. 1951) (United States was liable where injured plaintiffs entered an unguarded magazine area that was enclosed by a six foot woven wire fence with three strands of barbed wire at the top that had a large opening where it was broken down allowing entry); *Kallas v. United States*, 763 F.Supp. 866 (S.D.Miss. 1991) (United States was not liable for injury to a 14 year old boy caused by burning powder that he had removed and combined from several impulse cartridges taken from a National Guard area that was fenced with warning signs and visually checked every four hours).

As observed by authorities cited in §III.A., *infra*, even if the choice of decontamination methods is to some extent discretionary, any resulting immunity from liability would negate only the duty to protect and would not negate the duty to exclude and warn of any existing dangers. The duty to exclude and warn may be somewhat less if the public is always excluded from the entire island until environmental restoration work is completed. In that case, the duty to exclude and warn still would apply to environmental restoration workers on Island. See *United States v. White*, 211 F.2d 79 (9th Cir. 1954), affirming *White v. United States*, 97 F.Supp. 12 (N.D.Ca.S.D. 1951) (the United States was liable for failure to warn an employee of a company contracted to collect scrap metal of the dangers of duds on an unused target range.)

Moving, rather than static, fence lines can be expected, as the progressive cleanup of various sites proceeds according to a priority schedule. At first, several non-contiguous clean sites would require perimeter fencing to keep people inside safe areas. As cleanup progressed, fences would be moved until eventually they would serve to keep people out of unsafe areas.

III. Specific Legal Topics

Preceding sections have described in general terms the formation and purpose of KICC and general considerations regarding subjects that KICC must address in its report to Congress. This sections addresses in greater detail certain specific legal topics pertinent to the Commission's concerns. These topics include liability related matters and matters relating to the decontamination of explosives on Kaho'olawe.

A. Liability

The Commission is required by §1(e)(2)(A) of Senate bill 3088 "to identify any portions of the land of Kahoolawe Island that are suitable for restoration to a condition reasonably safe for human habitation. . ."⁷⁵ The phrase *reasonably safe for human habitation* is taken from the last paragraph of President Eisenhower's February 20, 1953, Executive Order 10436:

When there is no longer a need for the use of the area hereby reserved, or any portion thereof, for naval purposes of the United States, the Department of the Navy shall so notify the Territory of Hawaii, and shall, upon seasonable request of the Territory, render such area, or portion thereof, reasonably safe for human habitation, without cost to the territory.

§1(e)(3) of Senate bill 3088 defines *restoration of a portion of land to a condition reasonably safe for human habitation* as "the removal or rendering harmless to human activity of all hazardous or explosive ordinance located on or within such portion."

This requirement raises questions of *liability*. When the Commission identifies areas that should be rendered reasonably safe (according to the definition provided by Senate bill 3088) there is an apparent presumption that those areas should be sufficiently decontaminated to allow ordinary premises liability law to prevail. That would not be the case in areas with unexploded ordnance.

The Commission also is required by §1(e)(2)(B) of Senate bill 3088 "to identify any additional portions of such land that are suitable for restoration to a condition less than reasonably safe for human habitation. . ."⁷⁶

⁷⁵ §1(e)(2)(A) of Senate bill 3088 also identifies some anticipated uses for such areas: "(i) parks (including educational and recreational purposes); (ii) the study and preservation of archaeological sites and remains; and (iii) the preservation of historic structures, sites and remains."

⁷⁶ §1(e)(2)(B) of Senate Bill 3088 also identifies anticipated uses for these *less than reasonably safe* areas: "(i) soil conservation and plant reforestation purposes; and (ii) removal or destruction of non-native plants and animals."

1. Survey of liability-related theories

Liability ordinarily arises in situations where foreseeable damage or injury is caused by negligence. Negligence can be defined simply as the failure to reasonably satisfy a duty. The phrase *standard of care* is often used to characterize an obligation imposed by a duty. Hawaii case law (and all American common law of negligence) consistently emphasizes that there is a direct relationship between the circumstances involved and the requisite standard of care.⁷⁷

In ordinary tort liability cases, an individual is minimally held to a standard of ordinary care in the conduct of all activities.⁷⁸ What may be characterized as due care under one set of circumstances may constitute negligence under another and different set of circumstances.⁷⁹ Negligence can result from a failure to act as well as from affirmative acts.⁸⁰

The duty to use due care is limited by foreseeable harm. Reasonable foreseeability of harm is a question for the finder of fact.⁸¹ It is not necessary that the exact manner of an accident or injury be foreseeable.⁸² Under Hawai'i law, contributory negligence on the part of a plaintiff will preclude any recovery if that negligence is responsible for more than fifty percent of the injury or damage.⁸³

⁷⁷ See *Pow Kee v. Wilder S.S. Co.*, 9 Haw 57, 59 (1893) ("Negligence is failure to exercise due care under the circumstances. What amounts to negligence under one set of circumstances cannot be proved by showing what amounts to due care under another set of circumstances..."); *Martin v. Wilson*, 23 Haw. 74, 88 (1915) ("Actionable negligence consists in the failure to do what a reasonable and prudent person would ordinarily have done under given circumstances as well as the doing of what such a person would, under the circumstances, not have done."); *DiCenzio v. Izawa*, 68 Haw. 528, 723 P.2d 171, 178 (1986) ("the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence.")

⁷⁸ *Hulsman v. Hemmeter Development Corp.*, 65 Haw. 58, 647 P.2d 713 (1982)

⁷⁹ *Wax v. City and County of Honolulu*, 34 Haw. 256, 258 (1937) ("But negligence is relative. What may be characterized as due care under one set of circumstances may constitute negligence under another and different set of circumstances.")

⁸⁰ *Quality Furniture, Inc. v. Hay*, 61 Haw. 89, 595 P.2d 1066 (1979)

⁸¹ *Bidar v. Amfac, Inc.*, 66 Haw. 547, 669 P.2d 154 (1983)

⁸² *Okada v. State*, 1 Haw.App. 101, 614 P.2d 407 (1980)

⁸³ See §663-31, Hawaii Revised Statutes.

a. Premises liability

An owner or occupier of land has a duty to use reasonable care for the safety of all persons reasonably anticipated to be upon the premises. A failure to satisfy that duty gives rise to what is known as *premises liability*, or the liability of the owner/occupier to an injured party.

Some Hawaii case law addresses premises liability in the specific context of land owned, controlled or affected by the government. A federal court hearing the claim of an injured party would apply the applicable Hawaii premises liability law in a manner generally similar to a State court.

Levy v. Kimball, 50 Haw. 497, 443 P.2d 142 (1968), resulted in a determination of the State's liability. The plaintiff in *Levy* was returning to her hotel room from a picnic. She was walking along a pedestrian easement owned by the State that traversed a seawall. There was no handrail. She fell from the deteriorated seawall. Holding the seawall analogous to a highway, the Supreme Court said that safety would have required, "minimally, some action such as the construction of a handrail on the makai edge of the seawall, or closing of the seawall to pedestrian traffic, or the posting of signs giving notice of its condition." 443 P.2d at 145.

Under the common law, an occupier of land had a duty to exercise reasonable care for the safety of invitees, but only a duty not to wilfully harm nor actively expose to danger licensees upon the premises. The Hawaii Supreme Court has abolished the common law distinction between classes of persons (i.e., invitee, licensee, etc.) with regard to the duty of an occupier of land. See *Farrior v. Payton*, 57 Haw. 620, 562 P.2d 779 (1977); *Pickard v. City and County of Honolulu*, 51 Haw. 134, 452 P.2d 445 (1969). Still, the status of invitee has subsequently been acknowledged as creating a greater duty in certain circumstances.

In *Geremia v. State*, 58 Haw. 502, 573 P.2d 107 (1977), the State was exonerated of liability. In that case, a young visitor to Kauai from Honolulu, had gone to a rock slide with his friends, and drowned in the natural pool when there was a sudden surge of water. Flash flooding had been recognized as a hazard in that popular recreational area. The whole area was on private land, but access had been improved, maintained and advertised by the State. The State was held to be a non-occupier, without control over the premises.

The special rules as to the liability of an occupier of land to trespassers, licensees and invitees are limitations, not extensions, of conventional tort liability. (citation) We have held that in assessing the tort liability of an occupier of land we will no longer allow the common law

distinction between invitees and licensees to be determinative of the scope of the occupier's liability. (citing *Pickard*)

In thus abrogating the distinction between invitees and licensees we have continued to recognize that the control exercised by an occupier over the condition of his land and his opportunity to take precautions against and to warn of known dangers creates a duty of care toward his invitees and licensees. . . . Circumstances may exist in which a non-occupier must take cognizance of dangerous conditions existing on the land of another in discharging a duty of care which he owes to a third person. The existence of such a dangerous condition, although not under the control of the actor, may be the fact which renders negligent an otherwise blameless act. . . . These propositions are but particularizations of the general principle that one who gratuitously acts so as to expose another person to danger must observe ordinary care in so doing, notwithstanding that he would have been wholly free from obligation if he had refrained from acting.

573 P.2d at 111

The *Geremia* reminder that premises liability is in fact an extension of conventional tort liability is instructive with regard to the State's ordinary duty to recognize dangers, and to take due precautions. Further, the Supreme Court said potential liability exists where a non-occupier of the land (in this case referring to the State as a possible invitor by advertising) undertakes to create a false appearance of safety in disregard of a hazard. The fact that the *Geremia* plaintiff was invited to a dangerous area by private advertising avoided the State's liability.

Where the danger is obvious and an alternative to avoid the danger exists, liability may be avoided. *Friedrich v. Department of Transportation*, 60 Haw. 32, 586 P.2d 1037 (1979), involved a Hanalei resident's fall from a familiar pier. The *Friedrich* plaintiff was familiar with the area, and he knew that water puddles collected on the pier. Walking around the pier on smooth-soled sandals, the plaintiff saw a water puddle with a twenty foot wide dry path to one side and a dry path about two to three feet wide along the edge of the pier. Knowing that his sandals would be slippery if wet, he chose to take the narrow path along the edge of the pier, stepped in the puddle, slipped and fell from the pier into shallow water.

It was acknowledged that the pier was deteriorated. It was held the deteriorated condition of the pier was not a substantial factor in causing Friedrich's fall and serious injury. While "[a]n occupier of land has a duty to use reasonable care for the safety of all persons reasonably anticipated to be upon the premises, regardless of the legal status of the individual," (quoting *Pickard*) the plaintiff, realizing the hazard, chose a path most likely to lead to an accident: the duty of care "does not require the elimination of known or obvious hazards which appellant would reasonably be expected to avoid." 586 P.2d at 1040. In *Friedrich*, there also is reference to the *Levy* seawall case:

There the top of a seawall was in use as a public thoroughfare and the defendant State was held to be under a duty to maintain it in a condition safe for travel. . . . We said maintenance of the seawall in a safe condition for travel required at least the installation of a handrail, the posting of warning signs or the closing of the seawall. The risk, although obvious, was not avoidable by a person using the seawall as a thoroughfare, for which purpose it was provided by the State. We need not consider whether the State owed a higher standard of duty to persons using the seawall as a thoroughfare than to persons using the Hanalei pier for recreation. The cases would not be parallel on their facts without the presence of sufficient width of safe walking surface to have permitted the plaintiff in *Levy v. Kimball* to chose between the risky edge of the seawall and safe passage further inland.

586 P.2d at 1039

In *Littleton v. State*, 66 Haw. 55, 656 P.2d 1336 (1982), the plaintiff was injured when struck by a log while gathering seaweed. She had entered the State's waters through a Honolulu city park. "[I]t has also been held that an owner's duty to his invitee extends to such places in or about the premises as his invitees may reasonably be expected to go in the course of the visit. (citations)" 656 P.2d at 1345.

b. Explosives and ultra-hazardous activities

Under the present state of the law, liability in matters regarding explosives and ultra-hazardous activities can be determined more readily than in ordinary situations. *Iokepa v. United States*, 158 F.Supp. 394 (D.Haw. 1958), held the United States was *not* liable regarding the death of a Parker Ranch employee caused by the explosion of a dud shell. It was held that the government had made a reasonable decontamination effort and had given adequate warning of the peril.

From December 1, 1943, until June 30, 1946, 91,000 acres of the Parker Ranch had been used as a military firing range and maneuver area pursuant to a license requiring that the premises be restored to their original condition upon return to the Ranch. Before returning the land, the government decontaminated the area. Upon return of the land, the Ranch signed an acknowledgement that the government had fulfilled its obligation. The decision's description of the ordnance clearance method indicates that the decontamination effort in that case was relatively limited:

Before return of the firing range, on which the fatal explosion occurred, a two and one-half month search was made of the premises by duly authorized agents of the government. This was done by details of men who, at arm's length distance, criss-crossed the range making a visual search for dud shells. It was the opinion of the officer-in-charge that the area had been thoroughly policed for dud shells and was in satisfactory condition for return to the owner. This officer reported, however, that it was quite possible that there were "duds" at the base of cacti plants where it was "practically impossible" to search.

158 F.Supp. at 396

The Ranch manager "was advised of the extent of the search and of the possibility that duds were in cacti beds, but he indicated that he was satisfied with the search conducted." *Ibid.* An Army colonel gave a Parker Ranch employee instructions and materials for detonating duds. Duds were subsequently located and exploded by the Ranch without reporting those events to military authorities. Employees were warned not to handle duds, but to mark them for destruction.

The *lokepa* decision observes the absence of a precedent in Hawai'i on the issue, but assumes that "the government was under a duty to exercise a high degree of care in its attempt to remove or neutralize all unexploded dud shells" although "the duty was not absolute and unqualified." 158 F.Supp. at 397. The decision quotes from the standard described in an unreported opinion from the same court involving the clearing of shells from a firing range on a small island off Oahu: "there was a clear duty on the part of the United States Government agents to do every reasonable and prudent thing to protect the aforesaid fishermen (plaintiffs) who went to Rabbit Island for fishing purposes against said danger from unexploded shells."⁸⁴ *Ibid.*

The *lokepa* court found that "the Government did exercise a high degree of care in removing, or attempting to neutralize, dangerous objects on this vast area before it was returned to its owner, and this is true even though it must be conceded that much ordnance was left on the land, or imbedded in the land, at the time of return. It was, in fact, physically impossible under the circumstances to completely remove all of the potentially dangerous objects." 158 F.Supp. at 398. "[T]he government performed its duty to reasonably clear the range of unexploded shells, and [] it gave ample notice to warn of the possible hidden dangers of unexploded shells in the area." *Ibid.*

The *lokepa* case is cited in *Akiona v. United States*, 732 F.Supp. 1064 (D.Haw. 1990), reversed 938 F.2d 158 (9th Cir. 1991). In *Akiona* the trial court held the government liable for injuries caused when a civilian threw a military hand grenade in a Honolulu parking lot. Identification found on a piece of the grenade indicated that it had been part of one of two shipments delivered to the Army after manufacture in 1966. Military records regarding the subsequent distribution of the grenade had been destroyed according to established policy. The *Akiona* trial court applied the doctrine of *res ipse loquitur* that "relieves the plaintiff[s] from showing any particular acts of negligence

⁸⁴ The quotation (158 F.Supp. at 397) is from an unreported decision in *Kurihara and Others v. United States*, Civil 980-983 (D.Haw. 1952).

and places on the defendant the burden of explaining that the accident did not occur from want of care on [its] part."⁸⁵

The doctrine is applicable "whenever a thing that produced an injury is shown to have been under the control and management of the defendant and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised." *Cozine v. Hawaiian Catamarans Ltd.*, 49 Haw. 77, 82, 412 P.2d 669, 675 (1966). Moreover, the requisite "control and management" need only be established at the time of the negligence, not at the time of the injury. *Guanzon v. Kalamau*, 48 Haw. 330, 402 P.2d 289 (1965); *Jenkins v. Whittaker Corp.*, 785 F.2d 720, cert. denied 479 U.S. 918, 107 S.Ct. 324, 93 L.Ed. 2d 296 (9th Cir. 1986).

In the instant case, there is no question that the grenade which caused plaintiffs' injuries was initially in the possession, control and management of the United States government.

732 F.Supp. at 1066

[I]n a situation such as the one now under consideration, where an extremely dangerous instrumentality is involved, Hawaii courts have imposed a special duty upon defendants. See *Iokepa v. United States*, 158 F.Supp. 394 (D.C.Haw. 1958) (indicating that the government was under a duty to exercise a high degree of care in the removal of unexploded dud shells from a firing range before returning the property to its owner). . .

732 F.Supp. at 1069

The Ninth Circuit Court of Appeals reversed the trial court's judgment of liability, holding it was error to apply the doctrine of *res ipse loquitur* in those circumstances.⁸⁶ However, the appellate decision indicates that the *res ipse loquitur* doctrine could apply in a case where the element of government control of the explosive was more evident.

Even if this grenade had gone to Hawaii, almost twenty years passed between the time when it was clear that the government possessed the grenade and the time when the grenade was used to harm the plaintiffs. During that period, it could have been used or transferred to others, removing it from the control of the government without any negligence. With this much uncertainty, it was error to find that the government had exclusive control over the grenade, and the district court therefore erred in applying *res ipse loquitur*.

938 F.2d at 160

⁸⁵ 732 F.Supp. at 1066, quoting from *Guanzon v. Kalamau*, 48 Haw. 330, 332, 402 P.2d 289, 291 (1965). "The usual purpose of the doctrine of *res ipse loquitur* -- which means, literally, that the thing or the transaction speaks for itself -- is to establish a prima facie case of negligence when proof is not available as to what caused a mishap which ordinarily would not happen in the absence of negligence." 31A AmJur2d *Explosions and Explosives* §193 (1989) p. 543 (footnotes omitted.)

⁸⁶ A petition for *certiorari* (seeking review of the Ninth Circuit's decision in *Akiona*) was filed in the U.S. Supreme Court on January 13, 1992.

The rationale of the Ninth Circuit appellate panel in holding that the doctrine of *res ipse loquitur* should not apply in the *Akiona* case was derived from the factual circumstances showing uncertainty of control and management of the grenade. Similar uncertainty is not likely to arise in a Kaho'olawe unexploded ordnance case.⁸⁷

An understanding of the legal framework for such federal cases requires an appreciation of the Federal Tort Claims Act, 28 USCA §§ 2671-2680, and considerations that relate to it. An analysis of litigation of this type is provided in *Cause of Action Against United States for Injury Caused by Accidental Explosion of Military Ordnance*, 24 COA 711 (1991). The Federal Tort Claims Act (FTCA) provides that the law of the forum State controls federal liability. However, as described in *Dalehite v. U.S.*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), even if the forum state allows a standard of *strict liability without fault*, that standard *cannot* be applied against the United States under the FTCA.

Akiona, the most recent federal explosives decision in this forum, shows how Hawai'i's interpretation of the doctrine of *res ipse loquitur* may be applied in such cases. That doctrine is about as severe as a standard of liability can be without violating the *Dalehite* prohibition of strict liability without fault. It may be expected that in an ordnance explosion case related to Kaho'olawe, the trial court will look favorably upon placing the burden of proof upon the government to show that it was *not negligent* in its efforts to decontaminate and/or to warn of the perils.

The COA article notes that in defending some cases the United States has tried unsuccessfully to limit plaintiffs to ordinary premises liability theories.

Negligence actions for injuries caused by unexploded military ordnance can be brought under either of two general theories. First, the plaintiff can sue for breach of the United States' duty to protect from or warn about the dangers posed by hazardous items of personal property -- military explosive devices. Second, the plaintiff can allege that the presence of unexploded ordnance created a dangerous condition on real estate, for which the United States is liable under standard premises liability principles. . .

Not surprisingly, the United States has tried to prevent plaintiffs from using a defective personal property theory, arguing that only a premises liability theory applies. Plaintiffs faced with this objection have argued with considerable success that unexploded ordnance is not a defect in the land. The argument is that the land where ordnance is located is not defective, but that dangerous devices -- military ordnance -- have been placed on the land.

⁸⁷ In *Jenkins v. Whittaker Corp.*, 785 F.2d 720 (9th Cir. 1986), a Ninth Circuit panel affirmed application of the doctrine of *res ipse loquitur* in a tort claim against the manufacturer of an atomic blast simulator that exploded unexpectedly, resulting in the death of an Army engineer attempting to service it during exercises at Pohakuloa.

See *Parrott v. United States* 181 F.Supp 425 (SD Cal 1960) [California law.] The United States has generally been unable to convince the courts to reject the dangerous personal property theory. (Citations) Indeed, the dangerous personal property theory has been accepted in every case in which the plaintiff has raised it.

24 COA at 711

In the *Parrott* case (cited in the COA text quoted above) the United States was held liable for the injuries of three young boys caused by the explosion of a grenade they found while exploring a former small arms practice range. While there was "a certificate to the effect that the area [had] been de-dudded . . . the Government's military personnel made what the court now finds was an exceedingly negligent and cursory search of the portion of the land here involved prior to issuing their certificate." 181 F.Supp. at 426-27.

The government unsuccessfully asserted as a defense that a "vendor of land is not subject to liability for bodily harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time that the vendee took possession," as provided in the Restatement of Torts §352 (1934), quoted at 181 F.Supp., 426.

The court held that such a defense was not applicable where "there was nothing wrong with the land or with any fixtures thereon. Highly dangerous small chattels were negligently left upon the land . . . the basic situation was one of negligence concerning chattels. The negligence was inherent in a situation rather than incidental to an ownership . . . a tortfeasor should not be relieved from liability for a negligent act solely because the act was committed upon land which he has since conveyed." 181 F.Supp. at 429.⁸⁸ The situation required a standard of care "so great that a slight deviation therefrom will constitute negligence." 181 F.Supp. at 427, quoting *Warner v. Santa Catalina Island Co.*, 282 P.2d 12, 17 (Cal. 1955), and noting that such a standard does not violate the *Dalehite* prohibition of strict liability without fault.

While the *Parrott* decision refused to excuse the government's liability on the real property theory of an intervening conveyance of the land, it did consider the status of the injured boys as trespassers. In many states, a reasonable care standard applies to

⁸⁸ See also *Hernandez v. U. S.*, 313 F.Supp. 349, 357 (N.D.Tex. 1969) (United States was liable for injuries and deaths caused by the explosion of a dud artillery round removed from a former artillery practice range that had been returned to private owners): "Recovery here does not depend upon a dangerous condition of the land or any fixtures thereon. The chattel which caused the injuries was never legally affixed to or a part of the premises."

invitees, while lesser standards apply to licensees and trespassers. Hawai'i has abolished such distinctions,⁸⁹ although the status of invitee may create a greater duty in certain circumstances.⁹⁰

Hawai'i premises liability cases ordinarily require that a plaintiff prove a defendant's breach of a standard of reasonable care. In *Akiona* the trial court applied the doctrine of *res ipse loquitur* to place the burden of proof upon the defendant to show exercise of a special *high degree of care* in its course of dealing with explosives, *i.e.*, a duty "to do every reasonable and prudent thing" to protect against the danger of unexploded ordnance, as quoted from the *Kurihara* case. The appellate court's reversal of *Akiona* on the basis of insufficient evidence of government control of the grenade does not eliminate the doctrine of *res ipse loquitur* and a higher standard of care from future cases where evidence of government control is present. These cases involve dangerous devices (such as unexploded military ordnance) and not defects in land.

The COA article notes that under either theory "the United States owes essentially two different duties with regard to unexploded military ordnance. First, it owes a duty to protect persons from encountering dangerous military devices. Second, it owes a duty to warn persons of any unavoidable dangers posed by unexploded munitions." 24 COA at 721 (citations omitted.) Further, "the duty to protect persons from encountering dangerous military devices requires that the government remove unexploded munitions from designated use areas before permitting civilians to be present in these areas." 24 COA at 722 (citations omitted.) The duty to warn of dangers "applies to all persons who can foreseeably be expected to encounter unexploded munitions, regardless of where the encounter occurs." *Ibid.*

Where a breach of the duty to remove ordnance is alleged, the plaintiff must prove not only that injury was foreseeable, but also that reasonable steps were not taken to remove the ordnance. In evaluating any search for abandoned ordnance, the plaintiff should focus upon the personnel who conducted the search, the technology used to assist the searchers, and the overall care used in making the search . . .

⁸⁹ See §III.A.1.a., above; *Farrior v. Payton*, 57 Haw. 620, 562 P.2d 779 (1977); *Pickard v. City and County*, 51 Haw. 134, 452 P.2d 445 (1969).

⁹⁰ The COA article notes that a landowner's acquiescence to repeated instances of trespass may create for those trespassers a status of implied invitees. In *Geremia v. State*, 58 Haw. 502, 573 P.2d 107 (1977), the court held that the State, even as a non-occupier of the land, could be liable for inviting people to a hazardous place where there was a false appearance of safety. Also, the attractive nuisance theory may affect the legal status of an injured child.

In actions alleging a failure to warn, after proving foreseeability, the plaintiff must also prove the insufficiency of any warnings the government attempted to give.

24 COA at 736 (citations omitted)

c. Applicable standards

Should there be ordnance clearance on Kaho'olawe and then a subsequent injury, the resulting litigation would probably question whether state of the art decontamination efforts were accomplished. The outcome of such a case would be substantially affected by its specific facts and by the requirements established in the terms of any legislation or policy for Kaho'olawe ordnance decontamination. The standards, technology and procedures that constitute the state of the art in ordnance decontamination, applied according to the controlling law and the requisite standard of care as determined by the court, would be influential in determining liability.

Several sources are available for determining standards applicable to unexploded ordnance decontamination efforts. Those include reported cases and other pertinent authorities, established military technology and generally related laws and regulations.

(1) Reported Cases

Reported explosives and ordnance cases reflect a wide range of diverse standards and results. A chronological survey of those cases follows.

1. *Schmidt v. United States*, 179 F.2d 724 (10th Cir. 1950): the United States was not liable for the deaths and injuries of children caused by the explosion of a bazooka shell found by their father while cutting hay on a military reservation, and then brought home by him. The father was employed by a contractor granted permission to enter Fort Riley to cut, bale and remove hay from part of the reservation that had been used as a target range. Applying Kansas law, it was held that the father's intervening negligence precluded government liability. Acknowledging that it may have been negligent of the government to permit entry while unexploded shells were present, the court observed that "[i]f the failure to remove these shells violated no duty the Government owed these children, then they may not recover merely because it was general negligence on the Government's part to fail to remove the shells or because the failure to remove them was a breach of a duty it owed to the workmen under the contract." 179 F.2d at 726.

2. *Denny v. United States*, 185 F.2d 108 (10th Cir. 1950): the United States was not liable on theories of nuisance or negligence for the death of a teenage boy killed while tampering with an artillery shell on a fenced and isolated target range, applying New Mexico law and a standard of due care. "[W]e think the failure of the United

States to warn decedent, a seventeen year old high school boy of above average intelligence, who had actual knowledge of the presence of the range and shells thereon, did not constitute actionable negligence per se. Nor do we think that the mere leaving of the shells upon the range, in the circumstances, can be said to be negligent as a matter of law. . . [T]he trial court has specifically resolved the issue of negligence against the appellant. . ." 185 F.2d at 111 (citations omitted)

3. *Stewart v. United States*, 186 F.2d 627 (7th Cir. 1951): summary judgment for the United States was reversed and remanded, with the government held negligent where the explosion of a smoke grenade caused injuries to minors. A stock of grenades at Fort Sheridan was packed in boxes labelled "Fireworks" stacked in the open in part of an unguarded magazine area enclosed by a six foot woven wire fence with three strands of barbed wire at the top. Warning signs were posted on the road leading to the magazine area. "The military reservation was open to the public, with free access to persons of all ages. There were sentries posted at the several gates in the perimeter fence but members of the public were permitted to come and go in the reservation without escort. The Magazine Area was accessible to the people. The perimeter fence had a large opening where it was broken down at a point near the Magazine Area and no sentry was posted at this opening." 186 F.2d at 628. In 1947 three teenage boys entered through that opening and removed four boxes of grenades. "They shot off many of the grenades and left one case in a vacant lot next to the Baldwin residence in Lake Forest." 186 F.2d at 629. Two boys ages six and eight found the box, picked up a grenade and were injured when it exploded. Strict liability and government negligence in storing the grenades were alleged as grounds for recovery by the plaintiffs. The appellate court was "of the view that the government was negligent in the manner of its storage of the grenades both as a matter of fact and of law." 186 F.2d at 631. The court concluded that Army personnel "were negligent in leaving exposed and unguarded these dangerous explosives readily accessible to youngsters . . ." 186 F.Supp. at 409.⁹¹

4. *Flores v. United States*, 105 F.Supp. 640 (D.N.M. 1952): the United States was not liable for injury resulting from the explosion of a bomb fuse found on private property. From 1941 to 1947 the land had been held by the government as lessee and

⁹¹ A subsequent opinion, *Stewart v. United States*, 199 F.2d 517 (1952), addresses the government's attempt to assert the discretionary function defense (see §III.A.2.b., *infra*) after the appellate court's remand in 1951. The appellate court held in 1952 that the government's assertion of the defense after the prior court mandate was untimely and that the defense would be deemed waived.

used as a bombing range. Before release by the military, an ordnance decontamination effort had been conducted and certified according to established procedure. A scrap metal collector had established a practice of coming onto the private land to gather and remove old bomb casings, although no permission for entry had been given by the land owner. Flores participated in some of those scrap metal excursions. Flores picked up a pipe shaped object marked "nose bomb fuse" and used it as a walking cane, causing it to explode. His was the only known accident involving unexploded ordnance on the former bombing range. Rejecting a doctrine of absolute liability urged by the plaintiff, the court held that the "plaintiff was guilty of contributory negligence to the extent that he could not recover." 105 F.Supp. at 643.

5. *Ford v. United States*, 200 F.2d 272 (10th Cir. 1952): the United States was not liable for a youth's injury from an exploding booby trap on the site of a former military reservation. "After the war the army attempted to clear the area of all live ammunition for the purpose of returning the land to civilian use. . . The trial court held that the army had used reasonable means to clear the area of live ammunition and concluded that the government owed no further duty to a person upon the reservation for his own purposes and benefit, and entered judgment for the United States." 200 F.2d at 273. The judgment was affirmed on appeal. The Army had kept training records showing where specific types of live ammunition had been used. A decontamination effort had been planned and conducted in 1946 that "provided for the use of large numbers of men who were to traverse in close formations the areas of the camp where live ammunition had been used, for the purpose of locating and marking duds remaining in the area. Demolition squads followed and destroyed such duds. The appellant concedes 'that this plan was carefully prepared and one cannot imagine a more complete plan for the thorough decontamination of the area.'" *Ibid*. Each area decontaminated was certified as such by the officer in charge. During the area's use for grazing by lessees in 1948-49, "stockmen and others discovered a substantial number of duds which had not been found during the original search." 200 F.2d at 273-74. Another dedudding effort was made in 1949. Later that year, Ford and his cousin went into the area looking unsuccessfully for two cows. Returning, Ford climbed a tree to get some mistletoe, exploding a booby trap concealed in a crotch of the tree. Public entry into the area was not unusual and "no serious attempt was made to keep them off." 200 F.2d at 274. Under then applicable Oklahoma law, "the owner of premises has no duty to exercise care to make them safe for the use of others who are thereupon without invitation or authority." *Ibid*. Oklahoma premises liability for dangerous

conditions as to licensees then required that the owner know of an unreasonable risk unknown to the licensee. "At the time of the injury, we think there is a total lack of proof that representatives of the United States had knowledge of the dangerous condition which caused the injury. . . . The records did not indicate the training in booby traps extended to the area where the injury occurred and the decontamination operation did not provide for search for them there." 200 F.2d at 275. The United States was held to have exercised due care to make the premises reasonably safe by its decontamination efforts.

6. *United States v. Inmon*, 205 F.2d 681 (5th Cir. 1953): the United States was not liable where a child was injured by a blasting cap found on land formerly used by the military. It was held that the government had used appropriate care by extensively searching the area, fencing it and posting warning signs.

7. *Dalehite v. United S.*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953): claims resulting from a massive explosion of fertilizer used in an effort to increase the food supply in occupied areas after World War II were disallowed on the basis of the discretionary function exception [28 USC §2680(a)] of the Federal Tort Claims Act [FTCA, 28 USC §§1346, 2671-2678 and 2680, that "waived sovereign immunity from suit for specified torts of federal employees." 346 U.S. at 17.] "This is a test case representing some 300 separate personal and property claims in the aggregate amount of two hundred million dollars. Consolidated trial was had in the District Court for the Southern District of Texas on the facts and the crucial question of federal liability generally. This was done under an arrangement that the result would be accepted as to those matters in the other suits." *Ibid.* The fertilizer was produced according to government plans using fertilizer grade ammonium nitrate (FGAN, long used as a component in explosives) in post-war recovery efforts under federal policy. A ship loaded with fertilizer caught fire setting off explosions that leveled much of Texas City. "The negligence charged was that the United States, without definitive investigation of FGAN properties, shipped or permitted shipment to a congested area without warning of the possibility of explosion under certain conditions." 346 U.S. at 23. The trial court found liability in that the "Government had been careless in drafting and adopting the fertilizer export plan . . ." *Ibid.* The court of appeals reversed and the Supreme Court affirmed that even if the trial court was correct there still was no case under the FTCA as it "excepts acts of discretion in the performance of government functions or duty 'whether or not the discretion involved be abused.'" 346 U.S. at 33. "That the

cabinet-level decision to institute the fertilizer export program was a discretionary act is not seriously disputed." 346 U.S. at 37.

8. *United States v. White*, 211 F.2d 79 (9th Cir. 1954), affirming *White v. United States*, 97 F.Supp. 12 (N.D.Ca.S.D. 1951): the United States was liable for failure to warn an employee of a company contracted to collect scrap metal of the dangers of duds on an unused target range. The decision refers to decontamination technology and related expenses. The trial court's decision notes "failure to make the area safe is not excused by reason of the potential cost of such an undertaking." 97 F.Supp. at 13 "[T]he government knew there was a strong possibility that unexploded shells or duds existed on that range and that the presence thereof posed a condition of extreme danger to any person entering thereon." 211 F.2d at 80 A de-dudding operation proposed by the range officer was rejected due to the expense involved. "The strafing range at the time of the accident was grass-covered and visual inspection alone could not detect the presence of hidden duds. Although electrical and other scientific detecting devices were known and available, for reasons of economy, as already said, they were not employed." *Ibid.* The injured employee was not warned of the peril; instead he was told that the range was in a relatively safe condition. Under California law, the United States was obligated to provide a business invitee "a reasonably safe place to perform the contract, among the obligations being the duty to inspect the strafing range for latent or hidden dangers and to remove the same, or to warn White thereof. These duties were to be discharged with a degree of care commensurate with the danger involved." 211 F.2d at 81 (citations omitted) Failure to warn of the dangers on the range "could not rationally be deemed the exercise of a discretionary function." 211 F.2d at 82

9. *Meara v. United States*, 119 F.Supp. 662 (W.D.Ky. 1954): the United States was liable for injuries sustained by a four year old boy caused by the explosion of a mine detonator fuse in the back yard of a Fort Knox apartment assigned to his father (an Army major.) An ammunition dump had once been located about two hundred feet behind the apartment site. The child found the fuse in a dog house about one hundred fifty feet behind the apartment, where it had been placed a day or two earlier by his nine year old brother; he picked it up and it exploded. "[O]ccupants of the apartment had requested Military Authorities to clear up the debris from the area where the detonator fuse was found, but no heed had apparently been given to the request. . . ." 119 F.Supp. at 663. A search of the area after the accident yielded similar parts and objects. Applying Kentucky attractive nuisance and explosives case law, the court concluded that the government was liable for its failure to have cleaned up the area.

10. *Iokepa v. United States*, 158 F.Supp. 394 (D.Haw. 1958): the United States was not liable regarding the death of a Parker Ranch employee caused by the explosion of a dud shell. It was held that the government had made a reasonable decontamination effort and had given adequate warning of the peril. 91,000 acres of the Parker Ranch used for two and a half years as a military firing range had been decontaminated and the Ranch signed an acknowledgement that the government had fulfilled the restoration obligation of its lease. "Before return of the firing range, on which the fatal explosion occurred, a two and one-half month search was made of the premises by duly authorized agents of the government. This was done by details of men who, at arm's length distance, criss-crossed the range making a visual search for dud shells. It was the opinion of the officer-in-charge that the area had been thoroughly policed for dud shells and was in satisfactory condition for return to the owner. This officer reported, however, that it was quite possible that there were 'duds' at the base of cacti plants where it was 'practically impossible' to search." 158 F.Supp. at 396 The Ranch manager "was advised of the extent of the search and of the possibility that duds were in cacti beds, but he indicated that he was satisfied with the search conducted." *Ibid.* "[T]he government was under a duty to exercise a high degree of care in its attempt to remove or neutralize all unexploded dud shells" although "the duty was not absolute and unqualified." 158 F.Supp. at 397 "[T]he Government did exercise a high degree of care in removing, or attempting to neutralize, dangerous objects on this vast area before it was returned to its owner, and this is true even though it must be conceded that much ordnance was left on the land, or imbedded in the land, at the time of return. It was, in fact, physically impossible under the circumstances to completely remove all of the potentially dangerous objects." 158 F.Supp. at 398 "[T]he government performed its duty to reasonably clear the range of unexploded shells, and [] it gave ample notice to warn of the possible hidden dangers of unexploded shells in the area." *Ibid.*

11. *United States v. Stoppelmann*, 266 F.2d 13 (8th Cir. 1959): affirmed the liability of the United States in a case involving a 12 year old boy injured by the explosion of one of about 70 live blank cartridges he found on the ground and removed to play with after Marine Corps maneuvers. The maneuvers took place in an unfenced area of about 150 acres owned by the United States and bordered on two sides by heavily populated neighborhoods. Approximately 7,000 rounds of 30 caliber blank cartridges had been issued to seventy Marines engaged in two days of mock battle. The trial court found that the government negligently failed both to clean up the area and to exclude the plaintiff from the area. "[W]hile there was evidence that the officers in

charge directed or ordered a cleanup, such cleanup was manifestly not a success . . . [T]he result of the so-called cleanup bespeaks want of care commensurate with the danger involved . . . There were no warning signs excluding children and no admonitions as to the presence of explosives in the area." 266 F.2d at 17

12. *Parrott v. US*, 181 F.Supp. 425 (SD Ca 1960): the United States was liable for the injuries of three young boys caused by the explosion of a grenade they found while exploring a former World War II small arms practice range that had been returned to its private owners in 1947. There was "a certificate to the effect that the area [had] been de-dudded . . . [but] the Government's military personnel made what the court now finds was an exceedingly negligent and cursory search of the portion of the land here involved prior to issuing their certificate." 181 F.Supp. at 426-27 The situation required a standard of care "so great that a slight deviation therefrom will constitute negligence." 181 F.Supp. at 427, quoting *Warren v. Santa Catalina Island Co.*, 282 P.2d 12, 17 (1955), and noting that such a standard does not violate the *Dalehite* prohibition of strict liability without fault. A plain area around the rocky hill where the grenade was found apparently had been decontaminated satisfactorily, but "the attention given by the de-dudding party to the land readily adaptable to potato farming was not given to the [hill], which has little potential for utility." 181 F.Supp at 427 "The same afternoon that the boys were injured, Air Force personnel came a distance of some miles to the area in which the boys found the grenade, and the same day located at least three more which had every appearance of containing a similar explosive. An exhibit in the case is a picture of the finder holding five grenades which were found during that afternoon. It was uncertain in the testimony whether all five were still in condition to be exploded. . . Any prudent searcher coming upon them would have removed them." 181 F.Supp at 429

13. *De Legrand v. United States*, 182 F.Supp. 184 (D.P.R. 1960): the United States was not liable to brothers injured on a naval reservation during maneuvers where an object laying on a road exploded when kicked. It was held that sufficient warnings of the danger of entry and preventative efforts had been provided, and that kicking of the object was reckless. The injured brothers were looking for a cow in an area of their Puerto Rican island, although they had been warned to stay out of the maneuver area by mailed notice, there were warning signs posted around the area, and one of them had been taken into custody by military police a month earlier for entering the area and was released only after having been warned and admonished not to enter the area.

14. *Carey v. United States*, 183 F.Supp. 727 (M.D.N.C. 1960): the United States was liable for failure to warn a workman injured by the explosion of a dud 37 mm projectile he found while installing insulation under the floor of a barracks at Fort Bragg. Such projectiles had been used extensively until 1942. "Although the army made efforts to recover and remove live ammunition from its premises, it was well known to the army officials that this and other types of live ammunition were likely to be found anywhere on the premises. It was customary for the army to have grounds thoroughly investigated and freed from live ammunition before erecting buildings on its premises, but in spite of this it was known to army officials that there was likelihood of the presence of live ammunition to be found or encountered on its premises. These conditions were not known to the plaintiff, Carey, nor did anyone take the pains to advise him of it . . ." 183 F.Supp. at 728

15. *Medlin v. United States*, 244 F. Supp. 403 (WDSC 1965): the United States was liable for resulting injuries where a child burned powder from a flash simulator. Army personnel were held negligent in failing to remove the dangerous materials from a maneuver area on land of the child's family. The parents had executed a permit allowing the Army to cross their land during maneuvers. "It is not disputed that the simulator was the property of the government and was left by the Army personnel when they abandoned the camp." 244 F.Supp. at 406 The soldiers on the maneuvers had received instructions to be particularly careful to remove such devices, and all commanders were instructed to "insure that all areas used by their units are properly policed, that blank ammunition, artillery simulators or other pyrotechnic or explosive devices are not discarded or left behind. . ." *Ibid.*

16. *Hernandez v. U. S.*, 313 F.Supp. 349 (D.C.Tex. 1969): the United States was liable for injuries and deaths caused by the explosion of a dud artillery round found in and then removed from a formerly leased tract of a 23,000 acre World War II artillery practice range that had been returned to private ranch owners after the war. For only about three years thereafter the Army repeatedly gave notice to such ranchers that any duds found on the former range should be flagged for an Army demolition squad and not touched. A 1945 War Department circular stated, "It is the obligation of the War Department in the interest of the United States to restore such areas by locating and removing or neutralizing, so far as practicable, all explosives which remain thereon." 313 F.Supp. at 352

The inspection made by [the Army] to locate and remove the unexploded duds was wholly inadequate, whether its conduct is measured by the degree of care that an ordinarily prudent person similarly situated would have used under the

circumstances, or by the standard of care that a very cautious and prudent person would have exercised.

. . . About 32,605 man hours were devoted to policing the entire 23,000 acre artillery range during the [decontamination] effort. The plan was to spread men out fifteen to twenty feet apart and have them walk the land, tract by tract, in one direction. They were then lined up so as to walk across the tract at right angles to the line of the first trek. German prisoners of war, with enlisted men as supervisors, were used for walkers in the first stages of the inspection and clearance program. For reasons that would be obvious to almost anyone, that plan proved to be unsatisfactory. The prisoners displayed no interest in finding projectiles, and they were replaced by employed civilian laborers after ten days or two weeks. . . [The subject area] was walked only one way, instead of being criss-crossed.

No electronic or scientific metal detector device was used at any time, even though such devices were available and the defendant had knowledge that many projectiles were beneath the surface or were obscured by grass or brush.

349 F.Supp. at 353

"There is no dispute over the inadequacy of signs in the artillery range area warning the public of the danger of handling artillery projectiles which might be found in such area." 313 F.Supp. at 354. "The ragged job of policing the premises where the missile in question was found, and the inadequate warning signs that actually amounted to no warning at all, fell far short" of the duty of the United States." 313 F.Supp. at 359

17. *Duvall v. United States*, 312 F.Supp. 625 (EDNC 1970): the United States was liable for injury caused when a young child ignited a pyrotechnic bomb he and a cousin had removed from a former Navy bombing range in sand dunes of North Carolina's Outer Banks that had been abandoned and decontaminated, but was open to public. The range had been used for training Navy pilots, using only pyrotechnic bomb simulators, from 1943 to 1965. The area was still under government control, but was a popular site for the public to search for Indian relics. People often removed bombs that could be seen decorating lawns in the area. About 1966 the Navy made a mild decontamination effort. Some small warning signs in the area had fallen into disrepair or been removed. "The evidence establishes that the defendant was guilty of negligence which was a proximate cause of the accident and injury." 312 F.Supp. at 634

18. *Jacques v. Montana National Guard*, 649 P.2d 1319 (Mont. 1982): judgment was affirmed against the State of Montana in favor of a plaintiff injured by the explosion of a National Guard projectile. This opinion from a state court negligence action deals largely with evidentiary matters and peculiar questions of state law. However, it was determined by a jury and affirmed on appeal that the National Guard had been negligent in failing to clean up an area used as a howitzer firing range, "and in leaving live ammunition where the public had access to it." 649 P.2d at 1321 The plaintiff was

injured when a shell about 18 inches long exploded as a co-worker was showing it to him at their place of employment. The evidence indicated numerous instances of similar shells having been found in the firing range area.

19. *Kallas v. United States*, 763 F.Supp. 866 (S.D.Miss. 1991): the United States was not liable for injury to a 14 year old boy caused by burning powder that he had removed and combined from several impulse cartridges taken from a fenced National Guard area. The impulse cartridges (small charges, similar in appearance to shotgun shells, used to dislodge bombs from the racks of high speed military aircraft) were held to be neither explosives nor inherently dangerous. On several occasions the injured child and friends had sneaked in through two fences to a shed on airport property leased to the National Guard, where they found and removed impulse cartridges. Storage of the cartridges (in a fenced area, with a display of warning signs, that was visually checked every four hours) had been in compliance with applicable regulations. "In short, the boys intervening, negligent behavior created the unreasonable risk of harm, and it was not the type of behavior that could reasonably have been foreseen by the air national guard personnel." 763 F.Supp at 872

20. *Reber v. United States*, 951 F.2d 961 (9th Cir. 1991): a divided appellate panel affirmed judgment for the United States, defeating plaintiffs' wrongful death claims alleging the undersea explosion of a bomb snared in a fishing net. Dissenting, Judge Noonan agreed with the plaintiffs that only such an event could have caused the fatal injuries and the devastating damage to the vessel shown by the evidence. Two judges found no basis to overturn the District Court's conclusions. The vessel was in an unrestricted area near San Clemente Island (a California island used as a military weapons range for more than 40 years.) Experts disagreed on how the vessel came to be demolished and its two crew members killed. The decision agrees with the District Court that the plaintiffs failed to prove their claims. The opinion describes the doctrine of *res ipse loquitur*, noting that it acts as a form of circumstantial evidence sufficient to avoid a directed verdict or summary judgment, "but it does not create a presumption that a defendant's negligence caused the injury, rather it is only an inference that the fact finder may accept or reject in considering the evidence." 951 F.2d at 964. Three elements of *res ipse loquitur* are described: "(1) an injury-producing event of a kind that ordinarily does not occur in the absence of someone's negligence; (2) the event must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the event must not have been due to any voluntary action or contribution on the part of the plaintiff." *Ibid.*, note 1.

These cases indicate that the United States appears usually to have been absolved of liability where the courts found some basis for excuse (e.g., *Iokepa*, ranch had accepted sufficiency of cleanup and operated on basis of disposing of ordnance itself; *De Legrand*, extensive and personal warnings provided.) United States liability usually resulted in cases where courts viewed the injury itself as evidence of likely negligence (e.g., *Stewart*, negligent storage; *Stoppelmann*, negligent cleanup; *Parrott*, negligent search; *Medlin*, negligent cleanup; *Hernandez*, negligent search and warning; *Duvall*, negligent cleanup and warning.) The inclination of federal courts in Hawai'i to apply the doctrine of *res ipse loquitur* demonstrates acceptance of a view that the injury itself infers negligence.

The evolution of cases of this type, as well as the evolution of premises liability and explosives law in general, combined with likely application of the doctrine of *res ipse loquitur*, all suggest that liability would result from an ordnance related injury in a decontaminated area of Kaho'olawe, absent some legal bar such as those described in part III.A.2, *infra*.

Cases finding government liability for failure to warn (e.g., *White*, workman misinformed as to peril; *Carey*, workman uninformed of peril) usually involve circumstances more egregious than would be expected to arise in any contaminated areas of Kaho'olawe. Liability for injuries in unsafe areas of Kaho'olawe would be less likely, given an assumption that there would be extensive efforts accomplished to give warnings and to restrict entry in such areas.

(2) Military Practices

An Ordnance Clearance Plan published on December 8, 1972, is a report from the Naval Ordnance Systems Command describing information and ideas related to the

clearance of ordnance from Navy sites worldwide.⁹² It names 52 specific areas of ordnance contamination, comprising a total of 757,227 acres.⁹³

Page 1-4 states an assumption regarding standards for unrestricted safe use ("Earth removal and examination to the maximum extent of ordnance penetration will be required for 100% clearance of any area before it can be considered safe and free of ordnance without restriction or conditions.") Page 1-77 proposes that "[t]he following criteria for subsurface clearance depths be adopted as a tentative standard: clear to 6 foot depth areas designated for parks where camping is to be permitted; clear to 12 foot depths areas where residential housing is to be constructed; clear to greater depths (maximum of 42 feet) only those specific areas where deep substructures are to be installed or deep pipelines laid."

A Range Clearance Technology Assessment published in March of 1990 by a similar Navy facility appears to be the latest of several updates of the 1972 material. However, the Naval Explosive Ordnance Disposal Technology Center author preparing the 1990 report described the proposed clearance depth table in that report (§2.2.3, at page 2-3, containing much less restrictive requirements) thus: "The type of clearance required in any specific area is determined primarily by the anticipated end use of the land and the type and depth of contamination . . . Table 1 lists proposed clearance standards for various land uses."

Navy Kaho'olawe Projects Officer, Capt. M.D. Roth, Jr., unequivocally stated (as a result of his discussions with the Navy's ordnance disposal technology experts at Indian Head, Maryland) that such proposed clearance statistics are speculative and should not be relied upon as guidelines. That is consistent with other authoritative military sources of information on the subject. After review of a substantial quantity of decontamination related materials and information provided by Capt. Roth's office, it is evident that modern military practices have not resulted in the creation of any specific

⁹² The report observes, at page 1-17: "It is pertinent to note that a 100 pound bomb buried 10 feet in the ground can be expected to leave a crater 12 feet wide, break building foundations 40 feet away through the earth, wreck a 9-inch brick wall 15 feet from the point of detonation, and requires a minimum personnel distance of 150 feet for any assurance of safety." The same page also describes the hazardous perils of practice bombs, pyrotechnics, propellants and fuzes. It is also noted there that Kaho'olawe has a high dud concentration, estimated to be about 6.5 duds per acre in heavily contaminated areas.

⁹³ Page H-3 of the report indicates that an ordnance clearance camp at Kaho'olawe was considered as part of a proposed plan for developing ordnance clearance methods and expertise.

standards that ultimately could be applied as guidelines for unexploded ordnance decontamination on Kaho'olawe.

(3) Related matters

Notwithstanding the lack of general standards to guide ordnance decontamination on Kaho'olawe, a method for establishing site specific clearance requirements appears to be evolving under federal law. A site specific plan for decontamination based upon federal law requiring reasonable study and application of state of the art methods should satisfy a court's expectations with regard to liability.

A Mandatory Center of Expertise (MCX) was established in the Army Corps of Engineers pursuant to a requirement to clean up unexploded ordnance (UXO) contamination as set forth in SARA (the Superfund Amendment and Reauthorization Act of 1986, Public Law 99-499 [Title II, §211(a)(1)(B), 100 Stat. 1719] affecting the Comprehensive Environmental Response, Compensation and Liability Act of 1980, known as CERCLA or the Superfund Act, 42 USC §§9601 *et seq.*) The UXO obligation is defined (10 USC §2701 *et seq.*) as part of an activity known as the Defense Environmental Restoration Program (DERP) requiring (among several things) "correction of other environmental damage (*such as detection and disposal of unexploded ordnance*) which creates an imminent and substantial endangerment to the public health or welfare or to the environment." See 10 USC §2701(b)(2) (emphasis supplied); *see also* §III.B.1.a., *infra*.

CERCLA (at 42 USC §9620) defines a remedial investigation and feasibility study (RI/FS) required for each included site. It also requires that conveyances of such sites from the United States include a deed covenant stating that "all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken" *before* existing sites may be conveyed by the United States, and a covenant that "any remedial action found to be necessary after the date of such transfer shall be conducted by the United States." See 42 USC §9620(h)(3)

MCX is in the business of deciding how to clean up former sites contaminated with UXO. MCX presently is working on about a dozen projects. CERCLA's RI/FS concept will be the foundation of a standard MCX approach to this problem. An RI/FS first characterizes the site and then determines a basis for remedial action on a site specific basis. MCX presently works on former DOD sites and existing sites under Army jurisdiction. MCX can only work on existing Navy/Air Force sites when invited to do so and at the expense of the service controlling the site. Limited availability of

required ordnance disposal specialists⁹⁴ and limited funding are the principal factors that control the pace of UXO decontamination efforts.

While Congress may make special terms and conditions for Kaho'olawe, even if somehow contrary to the CERCLA/SARA/DERP scheme, it is reasonable to assume that the federal UXO decontamination study method being developed by MCX will eventually be applied on Kaho'olawe in a manner similar to its use elsewhere. Development of a method to establish decontamination plans, procedures and guidelines on a site specific basis appears to be the most compelling solution to the unavailability and impracticality of generally applicable decontamination depth standards.

In view of the federal statutes and regulations requiring and governing unexploded ordnance decontamination efforts, the study method being developed by the MCX apparently represents the state of the art for determining an appropriate site specific UXO decontamination plan that is related to expected uses.

2. Liability-limiting factors

Liability can be limited. This section discusses some of the legal premises for limitations of liability.

After having been rejected in early cases, the doctrine of sovereign immunity eventually was accepted by the United States Supreme Court, limiting the liability of federal and state governments to only those matters specifically allowed by the Constitution or in legislation. In other matters, sovereigns are immune from suit.

Tort claims acts have been passed by Congress and the states specifically identifying how those sovereigns waive their immunity from suit with regard to negligence claims. Those acts prescribe procedural and substantive requirements for asserting government tort liability.

Additional defenses to tort liability can be obtained through theories such as assumption of risk and release. Generally, these defenses would be available where individuals are informed of the hazards and agree to waive their claims (as a prerequisite for entry) prior to entering the area of risk. Negligence on the part of an injured claimant also can serve to limit liability.

Special legislative acts have created general limitations of liability as matters of public policy. An example of such legislation is Chapter 520 of the Hawai'i Revised Statutes, limiting liability where landowners permit recreational use of their land.

⁹⁴ According to Robert Wilcox, MCX manager, there are about 750 Explosives Ordnance Disposal (EOD) technicians alive today, and each UXO decontamination effort requires the presence of a certain number of such EOD specialists.

This section reviews liability limiting factors with regard to possible injuries and resulting claims arising from activities on Kaho'olawe.

a. Sovereign immunity

The doctrine of sovereign immunity stands for the premise that the king cannot be sued in his own court. However, in England it was a regular practice for the King to give consent to be sued and by the 17th century suits against the monarch and government officials had become established as a right. See Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harvard Law Review 1, 9-16 (1977).

While the doctrine of sovereign immunity originated in the English common law and the feudal system, academics have questioned whether sovereign immunity ever existed in actual practice in England. In fact, eighteenth century American colonists refused to accept the doctrine of governmental immunity, and the Constitution's framers apparently rejected the idea as well.

Leary, *Constitutional Law -- Sovereign Immunity -- Under the Commerce Power, Congress Can Revoke State Sovereign Immunity Through Environmental Legislation*, 59 Mississippi Law Journal 771 at 773-74 (1989) (footnotes omitted)

In *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the executor of an estate in South Carolina sued Georgia for Revolutionary War supplies costs, and the state claimed sovereign immunity as a defense. Citing Article III, §2, and other Constitutional provisions for the federal judiciary's jurisdiction over the states, the U.S. Supreme Court held that sovereign immunity was contrary to the Constitution, as sovereignty rested with the people and not with the government.

Reacting to implications of the *Chisolm* decision, Congress proposed and the States ratified the Eleventh Amendment ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State") overruling *Chisolm*.⁹⁵

⁹⁵ Lingering judicial reluctance to accept sovereign immunity has been evident. In *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803), Chief Justice Marshall again rejected the contention that government officials were protected by sovereign immunity. In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), Chief Justice Marshall held that the Eleventh Amendment does not prohibit a state from appearing before the Supreme Court (nor from being sued in federal court by its own citizens nor from federal question jurisdiction, i.e. the interpretation of a matter arising under federal law -- one of the fundamental grounds of the limited jurisdiction of federal courts.)

Following ratification of the Eleventh Amendment, sovereign immunity has become an accepted doctrine of American jurisprudence.⁹⁶ In *Hans v. Louisiana*, 134 U.S. 1 (1890), a Louisiana citizen sued the state on the basis of federal question jurisdiction regarding a repudiated bond obligation. "The Supreme Court ruled that the eleventh amendment constitutionalized a preexisting understanding of sovereign immunity and held that the amendment rendered a state immune from suit by a citizen of that state, even under federal question jurisdiction." Leary, *supra*, at 776. "It is not necessary that we enter upon an examination of the reason or expediency of the rule . . . It is enough for us to declare its existence." *Hans*, 134 U.S. at 21. However, "[t]he Court eventually developed the basis for the consent theory, which eroded sovereign immunity by providing that states could waive their immunity and consent to suit by private parties." Leary, *supra*, at 777.

The Federal Tort Claims Act is an example of limited federal waiver of sovereign immunity, just as its state corollary provides a waiver of the sovereign immunity of the State of Hawai'i in similar circumstances. Given recognition of a doctrine of general prohibition of claims against a sovereign, such waivers of immunity limit opportunities for claims to those specifically allowed by their terms.⁹⁷

b. Tort Claims Acts

The legal framework for negligence claims against the United States is set forth in the Federal Tort Claims Act (FTCA), 28 USCA §§ 2671-2680. (Hawai'i has enacted a similar statute: Chapter 662 of the Hawai'i Revised Statutes is the State Tort Liability Act.) The FTCA provides that forum state law controls federal liability but, as held in *Dalehite v. United S.*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), [§III.A.1.c.(1),

⁹⁶ Acceptance of the doctrine of sovereign immunity was not without objection: "[I]t is a wholesome sight to see 'the Crown' sued and answering for its torts." J. Frankfurter dissenting in *Great Northern Life Insurance v. Reed*, 322 U.S. 47, 54 (1944).

⁹⁷ In *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964), it was held that the states necessarily or constructively consented to suit in certain matters by empowering Congress to regulate commerce under Article I, §8, clause 3 of the U.S. Constitution ("The Congress shall have power to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.") That same rationale subsequently allowed recognition of the abrogation of state sovereign immunity under other Constitutional provisions and through federal legislation.

supra] there can be no strict liability without fault. The FTCA also provides an exemption for what is known as *discretionary functions* of the government.⁹⁸

In most instances, the United States is liable for negligence if a private citizen would be liable under the same facts. There are a number of exceptions to liability, but very few of them appear applicable to the facts of unexploded ordnance actions. There has been some suggestion that the decision to forego certain preventive measures (especially in searching land for unexploded ordnance) might fall under the rule immunizing the government from liability for discretionary decisions. See *White v. United States* 211 F.2d 79 (9th Cir Cal 1954). However, no case has actually so held. In any event, even if the choice of preventive methods is to some extent discretionary, the resulting immunity would negate only the duty to protect. The United States would still be liable for failing to warn of any dangers resulting from its choice of methods. See *White*, above.

24 COA at 729 (most citations omitted)

In *United States v. White*, 211 F.2d 79 (9th Cir. 1954), affirming *White v. United States*, 97 F.Supp. 12 (N.D.Ca.S.D. 1951) [§III.A.1.c.(1) case 8, *supra*] an off-duty soldier helping gather scrap metal from a former firing range tossed an unexploded projectile that then slipped from a civilian employee's hands and exploded. "[T]he government knew there was a strong possibility that unexploded shells or duds existed on that range and that the presence thereof posed a condition of extreme danger to any person entering thereon." 211 F.2d at 80. White, the injured employee, was not warned of the peril; instead he was told that the range was in a relatively safe condition. Under California law, the United States was obligated to provide White (as a business invitee) "a reasonably safe place to perform the contract, among the obligations being the duty to inspect the strafing range for latent or hidden dangers and to remove the same, or to warn White thereof." 211 F.2d at 81. The government raised as a defense the FTCA discretionary function exclusion (*i.e.*, that the decision not to decontaminate the area on the basis of expense was a discretionary function of the government.)

Citing *Dalehite*, the *White* appellate panel held that even if the decision not to undertake the removal of hidden dangers constituted a discretionary function, the failure to warn of the dangers on the range "could not rationally be deemed the exercise of a discretionary function." 211 F.2d at 82. That failure was compounded by inaccurate

⁹⁸ Under 28 USC §2680(a), the government is not liable for "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." A similar exception is provided in Hawaii's State Tort Liability Act, HRS §662-15(1).

advice to White that the range was safe. COA thus concludes that even if the choice of preventive methods is to some extent discretionary, any resulting immunity negates only the duty to protect and does not negate the duty to warn of existing dangers.

The discretionary function also is discussed in *Lakeland R-3 School District v. U. S.*, 546 F.Supp. 1039 (W.D.Mo. 1982), holding the United States liable for damages to a school caused by an Army engineers' training exercise involving demolition of a bridge about 1½ miles distant from the building.

The court's search for the answer to the "discretionary function question" -- that is, a determination of whether the Army's acts here involved such a function -- begins with the seminal case of *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). The inquiry necessary to determine if the exception applies focuses on whether the particular act of a government agent is one involving the formulation of government policy or whether the act in question occurred while implementing at an operational level a policy which had already been set.

The *Lakeland* court, while noting that discretionary function cases in the lower courts since *Dalehite* do not present a particularly coherent body of case law, found that the Army had established and published demolition safety policies used in planning the exercise. "This court concludes that the acts performed by the United States Army in demolishing State Bridge No. 5 were performed at the operational level and thus this court has jurisdiction under the Federal Tort Claims Act to adjudicate plaintiff's claim against defendant United States." 546 F.Supp. at 1043.

The FTCA discretionary function defense is discussed in *United States v. Gaubert*, 59 U.S.L.W. 4244, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991), affirming dismissal of an action by the chairman of a savings and loan for his losses resulting from an allegedly negligent federal receivership. The opinion notes that discretionary functions involve an element of judgment or choice, citing *Dalehite*. That element is not satisfied if a statute, regulation or policy requires a course of action leaving the employee no options. The presence of an element of judgment alone is not by itself determinative, since the exception is intended "to prevent 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." 59 U.S.L.W. at 4246, quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 813 (1988). Citing several precedents, the opinion notes how the discretionary function exception was applied in the *Dalehite* case to claims resulting from a massive explosion of fertilizer used in an effort to increase the food supply in occupied areas after World War II.

Under the applicable precedents, therefore, if a regulation mandates particular conduct, and the employee obeys the direction, the Government will

be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. (citing *Dalehite*) If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.

Ibid.

When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion . . . The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by the statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

59 U.S.L.W. 4247

The *Gaubert* decision expands the discretionary function exception to shield government employees acting to fulfill a governmental policy, as expressed or implied by statute, regulation, or agency guidelines that allow the exercise of discretion.⁹⁹ Thus, if Congress passed legislation requiring the decontamination of unexploded ordnance on Kaho'olawe, then in any resulting tort litigation that legislation would be examined to determine whether it allowed an exercise of discretion in fulfilling the public policy expressed therein.

Senate bill 3088 in describing KICC's duties indicates that Congress may establish a policy requiring that certain areas of Kaho'olawe be made safe and habitable, and that the remaining areas may be left less safe due to unexploded ordnance contamination. It is certain that individuals must be competently protected from and warned of any unsafe areas. If Congress requires that *all* unexploded ordnance be removed in some areas, then there will be no discretionary function exception allowing the government's agents to leave any hazards at all in those areas.

Kaho'olawe cleanup legislation could be drafted to allow government agents some discretion in determining the degree of decontamination to be accomplished. The RI/FS

⁹⁹ In *Nakahira v. State*, 71 Haw. 581, 799 P.2d 959 (1990), the Hawai'i Supreme Court held that while the discretionary function exception could apply to the creation of a policy allowing non-aviator National Guard members to "run-up" a helicopter during maintenance, that defense would not protect the State from liability for negligence in safely accomplishing the ends of that policy. In a recent unreported decision, *Kirn v. Percival*, No. 14634 (Haw. August 23, 1991), the Hawai'i Supreme Court adopted *Gaubert's* analysis of the discretionary function exception in finding the State not liable for electing not to place a traffic control device at an intersection.

study method being developed by the MCX would appear to require the exercise of discretion in setting UXO decontamination standards according to site studies and expected uses. In that event, the federal government could be shielded from some liability by the discretionary function exception of the Federal Tort Claims Act.

The FTCA [28 USC §2401(b)] requires that a formal notice of claim must be filed with the United States within two years after the accident. Settlement of FTCA claims involving the Navy is governed by Justice Department regulations. 32 CFR §750.307 Suit can be filed only during the six months after the government denies the claim. 28 USC §2675(a)¹⁰⁰ The plaintiff cannot sue for an amount greater than that demanded in the notice unless there is new evidence. 28 USC §2675(b) A jury trial is not permitted in FTCA litigation. 28 USC §2402; *Carlson v. Green*, 446 U.S. 14, 64 L.Ed.2d 15, 100 S.Ct. 1468 (1980).

The FTCA also provides that forum state law controls most substantive legal matters. See 28 USC §1346(b); *Richards v. United States*, 369 U.S. 1, 7 L.Ed.2d 492, 825 S.Ct. 585 (1962) (tort liability of the United States in an action under the FTCA is governed by the law of the state where the tortious conduct took place). Such matters can include the government's duty of care,¹⁰¹ application of the doctrine of *res ipse loquitur*,¹⁰² contributory negligence,¹⁰³ assumption of risk,¹⁰⁴ release¹⁰⁵ and

¹⁰⁰ The claim can be treated as rejected if the government fails to respond within six months.

¹⁰¹ See *Jones v. United States*, 693 F.2d 1299 (9th Cir. 1982).

¹⁰² See *White v. United States*, 193 F.2d 505 (9th Cir. 1951).

¹⁰³ See *Leigh v. United States*, 586 F.2d 121 (9th Cir. 1978).

¹⁰⁴ See *Jones v. United States*, 241 F.2d 26 (4th Cir. 1957).

¹⁰⁵ See *Air Transport Associates, Inc. v. United States*, 221 F.2d 467 (9th Cir. 1955).

indemnification questions in some cases.¹⁰⁶ Any claim arising from UXO related injury or damage on Kaho'olawe may be affected by Hawai'i cases interpreting those theories.

c. Assumption of risk, comparative negligence and release

In the *White* case, *supra*, it also was urged by the government as a defense that the scrap contractor had assumed the risk of explosions by entering the range. The court disagreed, saying that unexploded ordnance was not an ordinary danger in scrap collecting and that *White* did not assume any risk of unknown dangers.

As described in *Burrows v. Hawaiian Trust Company*, 49 Haw. 351, 417 P.2d 816, 821 (1966) (reversing judgment for the defendant in an assault case where an assumption of risk jury instruction was placed in question) the assumption of risk defense "is an offshoot of the common law rule that '*volenti non fit injuria*' -- to one who consents no wrong is done. Restatement (Second), Torts, § 496A, Comment *b*." The *Burrows* case recognizes that there can be a limited assumption of risk, citing Prosser, *Torts* (2d Ed.) §18 at 84. The decision also notes the close similarity between the defense of assumption of risk and the defense of contributory negligence.

In *Bulatao v. Kauai Motors, Ltd.*, *supra*, 49 Haw. 1, 15, 406 P.2d 887, we noted this overlap of the defenses of assumption of risk and contributory negligence and stated: "There being no distinguishing feature whereby the defense of assumption of risk has a different application in the present case from the defense of contributory negligence, we join the growing number of courts which decline to permit reliance on both of these defenses where one would serve."

417 P.2d at 822 (citations omitted)

The essential element of that apparent requirement to elect between assumption of risk and contributory negligence seems to be that it applies in cases *where the defenses cannot be distinguished*. Appellate cases in Hawai'i since the 1966 *Burrows* decision have addressed both defenses together. See, e.g., *Rodrigues v. State*, 52 Haw. 156, 52

¹⁰⁶ A contract of indemnity "is generally defined as an obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit." 41 AmJur2d *Indemnity* §1 (1968) page 687. In the context of Kaho'olawe, questions of indemnity would be most likely to arise in circumstances such as where an employer or contractor might indemnify the government regarding potential claims of injured employees or subcontractors. Where there is an actual contract for indemnification, federal law will govern the right of the United States to recover indemnity. See *U.S. v. Seckinger*, 397 U.S. 203, 25 L.Ed.2d 224, 90 S.Ct. 880 (1970). Where indemnity is not by contract, the law of the forum state controls. See *U.S. v. Arizona*, 216 F.2d 248 (9th Cir. 1954) (noncontractual indemnity sought by United States); *U.S. v. Yellow Cab*, 340 U.S. 543, 95 L.Ed. 523, 71 S.Ct. 399 (1951) (noncontractual indemnity sought from the United States.) Subtle questions regarding indemnity, and distinctions between State and federal law affecting those questions, exceed the scope of this memorandum.

Haw. 283, 472 P.2d 509 (1970) (a case involving damage to a house from a flooding highway culvert, affirming negligence despite alleged contributory negligence and assumption of risk -- both such defenses being discussed in the same paragraph with no reference to their exclusivity or any election requirement); *Geldert v. State*, 3 Haw.App. 259, 649 P.2d 1165, 1171 (1982) (discussing both defenses and citing *Bulato*, stating "[w]e need not decide whether assumption of risk equals contributory negligence and thus cannot be applied in a comparative negligence case to bar recovery.")

The context of the analogy between assumption of risk and contributory negligence has been changed since the time of the *Burrows* decision. Under the former common law doctrine, any contributory negligence of the plaintiff served as a bar to recovery. Act 227 of the 1969 State Legislature abolished that doctrine, replacing it with the comparative negligence system contained in HRS §663-31, effective for claims accruing after July 14, 1969. The existing statutory law of comparative negligence results only in a decrease of the plaintiff's recovery in proportion to the plaintiff's contributory negligence, if the level of the plaintiff's contributory negligence is not greater than that of the defendants.

Thomas v Pang, 72 Haw. 191, 811 P.2d 821, 824 (1991), notes that "widespread abolition of contributory negligence as a total bar to recovery by an injured party raised the question whether the [Fireman's] Rule [barring recovery in tort by a fireman injured in the course of duty] premised on assumption of risk remained viable." The *Thomas* decision adopts the Fireman's Rule for Hawai'i on public policy grounds, without indicating a position on the comparative negligence/assumption of risk question.

57A AmJur2d *Negligence* §804 *et seq.* (1989) contrasts assumption of risk with contributory negligence by describing the former as subjective venturousness and the latter as carelessness. Where a risk is known and accepted, the assumption of risk defense may apply. Those elements need not be present to establish contributory negligence, and where the distinction between the two defenses can be made the *Burrows* and *Bulato* cases still would seem to stand for the premise that it should be made. However, unlike the state of the law at the time of *Burrows* and *Bulato*, a contributory negligence defense will not necessarily deprive a plaintiff of any recovery.

As stated by §496A of the Restatement (Second) of Torts, "A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm." The voluntary assumption of risk may be by express agreement or implied. §§496B and 496C An implied assumption of risk requires knowledge of the existence of the risk and an appreciation of its unreasonable

character. §496D Where a defendant's tortious conduct leaves the plaintiff no reasonable alternative course of conduct to avert harm or to exercise or protect a right or privilege that the defendant has no right to take from him, the necessary element of voluntary assumption is absent. §496E

For Kaho'olawe, a limitation of liability probably would be stated in a written release from claims by persons entering the island. Pre-litigation releases, as opposed to releases obtained by settlement of claims, are not widely discussed in Hawai'i case law. Such a release, if properly worded, may accomplish a waiver of claims. Waiver is a relinquishment of a right. *Anderson v. Anderson*, 59 Haw. 575, 585 P.2d 938, 945 (1978); *State Savings & Loan v. Kauaian Development Company*, 50 Haw. 540, 445 P.2d 109, 121 (1968). "Waiver can take place only by the intention of the party and such intention must be clearly made to appear." *Anderson, supra*, citing *Robinson v. McWayne*, 35 Haw. 689, 719 (1940). While in some jurisdictions waiver can be inferred or implied, the element of intent appears to be required in Hawaii. A person fully informed of the risks of entering Kaho'olawe and voluntarily relinquishing such claims in a written release prior to entry could be said to have waived such claims. An absence of disclosure or sufficient warning could serve to negate the waiver.

d. Special legislation

Legislatures may act to limit liability by law. As an example, HRS Chapter 520 limits the liability of non-government landowners permitting free recreational use of their land. "The purpose of this chapter is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." HRS §520-1. The law was enacted as Act 186 of the 1969 Legislature.

§520-2(1) defines *land* broadly, but excludes from the definition "lands owned by the government." §520-2(2) defines *owner* as "the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises."¹⁰⁷ However, *Proud v. United States*, 723 F.2d 705 (9th Cir. 1985), held that exclusion of government lands by the definition in §520-2(1) could not be applied to a premises liability claim arising in Haleakala National Park because, under the Federal Tort Claims Act, 28 USC §2674, the

¹⁰⁷ It is not certain whether an occupier in control of land owned by the State could be excluded from the limitation of liability, in part because no Hawaii appellate decision has interpreted the statute. *But see Diloraiti v. Noel Lee Haas*, 80 HLR 141 (Haw. U.S. Dist. Civ. No. 73-3989 1975) (a utility company with an easement in gross along a public highway was not liable for a recreational injury thereon, citing HRS Chapter 520, where a sport parachutist was injured upon striking utility lines.)

United States is liable only "to the same extent as a private individual under like circumstances." As a private individual would escape liability under HRS Chapter 520, so did the United States as held by the Ninth Circuit panel in *Proud* ("the United States' liability under the FTCA is that of a private individual, regardless of what a state intends that liability to be." 723 F.2d at 707) See also *Stout v. United States*, 696 F.Supp. 538 (D.Haw. 1987) (granting government's motion for summary judgment on claim for injuries to boy climbing a tree on a military base, notwithstanding limited public access and wilfulness arguments.)

In *Collard v. U.S.*, 691 F.Supp. 256 (D.Haw. 1988), Judge Kay denied the government's motion for summary judgment. Relying on *Proud*, the government sought immunity from liability under Chapter 520 after a military dependent died when struck by a previously sighted log while swimming in the ocean off a beach at Kaneohe Marine Corps Air Station. The *Collard* decision points out that while the statute absolves the landowner of any duty, the Marine Corps may have voluntarily assumed a duty by placing lifeguards at the beach or by inviting users to the area, and §520-5 does not limit liability for wilful failure to guard against a dangerous condition. The court decided that there was a question of fact on an issue of wilfulness.

Palmer v. U.S., 945 F.2d 1134 (9th Cir. 1991), affirming 742 F.Supp. 1068 (D.Haw. 1990), allowed summary judgment against the claim of a party injured at an Army swimming pool and refers to *Collard* saying "[t]he authority underlying that holding is, however, questionable at best." 945 F.2d at 1137 The Appellate Court says the *Collard* case does not "persuade us that the Hawaii Legislature intended an exception to be made to [Chapter 520] when a landowner gratuitously undertakes to make safer land upon which the public may recreate without charge." *Ibid*.

Pursuant to §520-3, "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes." §520-4(3) provides that a landowner allowing any person to use land for recreational purposes without charge does not "assume responsibility for or incur liability for any injury to person or property ..." §520-5 provides exceptions from the limitation of liability where there is a charge for entry, and for houseguests and "for wilful or malicious failure to guard or warn against a dangerous condition, use, or structure which the owner knowingly creates or perpetuates and for wilful or malicious

failure to guard or warn against a dangerous activity which the owner knowingly pursues or perpetuates."¹⁰⁸

State ownership of Kaho'olawe would render the liability limiting provisions of Chapter 520 inapplicable to the State pursuant to the government land exception of §520-2(1). Federal possession of Kaho'olawe might result in the applicability of Chapter 520 to claims against the United States for ordinary injuries resulting from permitted recreational activity, but would probably not be applicable for ordnance related injuries caused by any failure to guard or warn against the dangers of unexploded ordnance.

3. Reasonably safe for human habitation

A self-evident provision, lacking ambiguity, generally requires no external information to help understand its meaning. When there is intrinsic ambiguity in the provisions of a written document, courts look to extrinsic sources of information to understand the intent of the persons using the terms in question.¹⁰⁹

The meaning of the phrase *reasonably safe for human habitation* is not self-evident since diverse areas of law can be implied by the words.¹¹⁰ The dissimilarity of

¹⁰⁸ In *Viess v. Sea Enterprises Corp.*, 634 F.Supp. 226 (D. Haw. 1986), Judge Pence granted a defendant's motion for summary judgment based on HRS Chapter 520 in a case brought by an injured ocean swimmer. The hotel owner of land where the plaintiff had accessed the beach was held not liable because the injury was not on land, and if it had been on land then the limitation of Chapter 520 would have applied. The decision discusses the case in the context of the exclusions regarding a charge for entry and wilful or malicious acts.

¹⁰⁹ See, e.g., *U.S. for Use and Benefit of Union Building Materials v. Haas & Haynie Corporation*, 577 F.2d 568 (9th Cir. 1978) (extrinsic evidence is properly admitted to help ascertain the intended meaning of ambiguous writings); *Fuji v. Osborne*, 67 Haw. 322, 687 P.2d 1333 (1984) (construing legal documents is a matter of law, but where such a document is ambiguous then resort can be had to facts and materials that may be helpful in interpreting the document); *Airgo, Inc. v. Horizon Cargo Transport, Inc.*, 66 Haw. 590, 670 P.2d 1277 (1983) (a contract is ambiguous in the context of determining whether extrinsic evidence will be admissible to interpret the contract when terms of the contract are reasonably susceptible to more than one meaning); *Graham v. Washington University*, 58 Haw. 370, 569 P.2d 896 (1977) (extrinsic evidence may be considered to determine the true intent of the parties if there is any doubt or controversy as to the meaning of language in a contract.)

¹¹⁰ E.g., the phrase *reasonably safe* is a term that could be ordinarily associated with premises liability duties, such as in *Pickard v. City and County of Honolulu*, 51 Haw. 134, 452 P.2d 445 (1969), and *Friedrich v. Department of Transportation*, 60 Haw. 32, 586 P.2d 1037 (1979) (an occupier of land has a duty to use reasonable care for the safety of all persons reasonably anticipated to be on the premises.) However the term *habitation* is more readily associated with residential situations, such as the warranty of habitability implied in landlord-tenant relations according to cases such as *Lemle v.*

those areas of law gives rise to ambiguity in the meaning of the phrase. Therefore, extrinsic evidence is helpful and necessary to understand the intent of the persons using that phrase in Executive Order 10436.

Archival documents help provide an understanding of the evolution of the text of Executive Order 10436. Documents from the State Archives include the content of a file labelled "Kaho'olawe -- Inez Ashdown" stored under the topic of Public Lands in archival material of Governor Oren E. Long; a document found in a 1952 correspondence file in archival material of the Attorney General's office; and documents found in a file labelled "Special Use Committee" in archival material of the Board of Commissioners of Agriculture and Forestry. Additionally, documents both similar to those from the State Archives and additional unique documents were obtained from a State Attorney General's office archival working file regarding Executive Order 10436. Following is a review of some of those documents in chronological order, with a discussion of their most pertinent content.

On August 3, 1951, Territorial Governor Oren E. Long replied to a letter from Inez McPhee Ashdown. At that time, Kaho'olawe had been used by the military since 1941 under a sublease from the lessees of the State. See §II.A.2. above for the history of Kaho'olawe's title, use and possession. Attached to Gov. Long's letter are several documents, including Attorney General Walter D. Ackerman's letter to Gov. Long summarizing Kaho'olawe's title history and likely future uses; Commissioner of Public Lands Frank G. Serrao's analysis of Kaho'olawe's history and likely future; and a November 20, 1932, summary of Kaho'olawe's history by E.H. Bryan, Jr.

Attorney General Ackerman's July 31, 1951, comments include this observation: "[a]ssuming the respective heirs or executors of the original lessees [McPhee and Baldwin] had the right to terminate the sublease, the United States Navy would never permit that to happen. They would immediately take steps to condemn the leasehold held under said Lease No. 2341." In the next paragraph, the Attorney General continues, "[t]he United States Navy has indicated to the Territory that it requires the Island for its purposes. It has issued what is tantamount to a threat to acquire the Island through an Executive Order of the President of the United States if such an order is not issued by the Governor of Hawaii." He later concludes, "the United States

Breeden, 51 Haw. 426, 462 P.2d 470 (1969) (the doctrine of the implied warranty of habitability requires that premises be free from defects and unsafe conditions) and the related statutory requirements of HRS §521-42 (landlord's obligations to supply and maintain fit premises include duty to keep premises safe and habitable.)

Navy is determined to acquire the Island, and the chances are great that if the problem is ever brought to a head the Territory will lose the Island and have nothing to lease."

Mr. Serrao also noted that "[t]he Navy has requested, on numerous occasions, that this Island be transferred by Executive Order to the sole jurisdiction of the United States of America." He later observed, "[a]lthough the Naval and Military authorities would like to acquire title to the Island of Kahoolawe, it is my personal belief that this Island should be placed under the jurisdiction of the Board of Agriculture and Forestry and dedicated as a public park in the interest of the people at large." He enclosed a copy of a July 20, 1948, report from the Board of Commissioners of Agriculture and Forestry noting that the U.S. government's then-existing lease allowed "unrestricted naval military use for an indefinite term not to exceed six months after the termination of unlimited emergency or in no event beyond June 30, 1954, when the main lease [from the Territory to McPhee and Baldwin] terminates."

The July 1948 report describes several efforts by the Navy to obtain Kaho'olawe,¹¹¹ noting particularly that Gov. Stainback had been unwilling to make such a transfer. Subsequently there were conferences between the Navy and the Territory to work out a permit for Navy use of all of Kaho'olawe. The minimum requirements of the Navy were identified, and the final item on the list stated "[t]he [U.S.] government would not be required to restore Kahoolawe to its condition prior to the date of permit or to any previous date thereto." The report notes that in subsequent conferences with the Navy, the Attorney General's office and the Land Commissioner's office, the Board of Commissioners of Agriculture and Forestry pointed out that "[t]he territory could not undertake the responsibility of reaccepting the island after the government had finished

¹¹¹ A July 6, 1948, letter from Assistant Attorney General Rhoda V. Lewis to Board of Commissioners of Agriculture and Forestry President Colin G. Lennox refers to an inquiry made by a Navy real estate officer seeking a reply to a proposed revocable permit to the Navy for Kaho'olawe. It observes the Board's preference to leave matters in the status quo (with the Navy in possession as a sublessee) unless the Navy changed its position and agreed to use only restricted areas for bombing. "[T]he matter has not reached a stage where it presents merely a legal problem as to how best to carry out the arrangements agreed upon." Attached to the letter is a page of typewritten notes entitled "Re Kahoolawe" providing a chronology including reference to the May 10, 1941, sublease to the Army that included a printed restoration clause, but also had added a paragraph number 13 eliminating that requirement; a September 5, 1944, conference where permission was given for bombing ("nothing [was] said about restoration") and annual rent was set at \$238; a second supplemental agreement on October 18, 1944, that "does not change the situation"; and noting that the sublease was transferred to the Navy on November 1, 1945.

using it without the restoration of the island through removal of duds. The territory had no facilities for doing this type of work."

After several months of intentional inaction by the Territory, the Navy requested a specific response to their proposed permit. The 1948 report includes a proposed draft response stating in part that Navy "custodianship of this island would not be acceptable unless the Navy or other military agency using the island for a target area would be willing to assume the responsibility of removing, to the best of their ability, all duds at the termination of the use of the island for target purposes."

A letter dated November 15, 1948, from Gov. Stainback replies to an October 25, 1948, letter from Rear Admiral Charles H. McMorris, 14th Naval District Commandant.¹¹² The Governor states his preference to maintain the status quo, noting that "[r]ehabilitation of Kahoolawe for pasturage is the ultimate aim of the Territory." Gov. Stainback writes, "Your letter states that the Navy Department cannot assume the obligation to remove unexploded duds. This position is taken, as I understand it, because of paragraph 13 of the sublease, it being the Navy Department's view that under the sublease, it now has the use of Kahoolawe without obligation of restoration, and cannot give up the favorable position it now holds without adequate compensation." The Governor notes that such a sublease was approved by the Territory's Commissioner of Public Lands only because concerns during actual hostilities outweighed concerns that might otherwise have prevailed (presumably requiring restoration.) It is noted that "expiration of the general lease in 1954 will change the legal situation" and the Governor writes that he would prefer to await that situation.

On August 19, 1952, Rear Admiral S. S. Murray, then 14th Naval District Commandant, wrote Gov. Long asking that his administration transfer Kaho'olawe to the Navy, and referring to earlier Navy efforts to obtain that end. He wrote, "Presidential

¹¹² Rear Admiral McMorris's October 25th letter refers to his receipt of a September 20, 1948, letter of the Acting Commissioner of Public Lands proposing cancellation of Kaho'olawe Ranch's General Lease 2341 and the issuance of a revocable permit to the United States "obligating the United States to remove unexploded duds which might accumulate during the life of the permit. . . [W]ithout adequate consideration for such an undertaking, the United States could not legally assume a presently non-existent obligation to restore the premises." Admiral McMorris observes that the Navy could continue as sublessee "deferring the question of its future occupancy until the expiration of its terms as a sublessee" or the Governor could "issue an executive order, in favor of the United States, abandoning the right of the Territory to use and possess the Island" (the Admiral expressed his preference for the latter option, noting "this procedure would remove any legal duty on the part of the Territory to insure the eventual accomplishment of restoration. . .")

Proclamation No. 2974, dated April 30, 1952, which terminated the National Emergency, brings the Navy's present tenure to an end October 30, 1952, under the terms of the existing sublease, and makes immediate action to continue the occupancy and use of the Island as a target area imperative." The admiral suggested as alternatives an executive order of the Governor, a 99 year lease or a Presidential executive order.

Commenting on the request to the Governor, Board of Agriculture and Forestry President Colin G. Lennox wrote on August 21, 1952, "I would like to recommend that we still attempt to meet the objectives which we were trying to accomplish in 1948. The Attorney General's Office informs me that the Territory could not enter into a 99 year lease, however, it may be within the powers of a Presidential Executive Order to place certain conditions and responsibilities on the military department if they are assigned the custody of the island. . . [¶] It is suggested that when the military declares the island surplus to their needs that a thorough job of de-dudding be done before reverting to the Territory, State or Interior Department."

A September 5, 1952, document by Colin Lennox entitled *Land Use Possibilities for Kahoolawe* summarizes the island's physical characteristics, its (modern) historic use and its present and potential economic uses. The report anticipated grazing as the most likely such use, but conditioned even that upon the uncertainty of water supply. On September 8, 1952, Mr. Lennox wrote a letter to Gov. Long sending him a copy of the September 5th paper by Mr. Lennox and reporting on the meeting of a Special Land Committee appointed by the Governor on September 2, 1952, addressing Kaho'olawe and lands of Lalamilo. Mr. Lennox states in his letter, "[t]he Committee favored a Presidential Executive Order which would transfer the care and custody of Kahoolawe to the Department of Defense with certain conservation stipulations to be incorporated into the Executive Order. These stipulations were discussed with the Attorney General and he, Mr. Frank Hustace, will prepare the proposed Executive Order for your review."

On September 12, 1952, Gov. Long replied to the letter from Rear Admiral Murray. Gov. Long tells the Admiral how the matter was referred to the Special Land Committee for review. "The Special Land Committee has recommended the preparation of a Presidential Executive Order which would transfer the care and custody of Kahoolawe to the Department of Defense, with certain conservation stipulations. [¶] Mr. Frank Hustace of the Attorney General's office is preparing the proposed Executive Order for my review. As soon as this is completed, we will discuss the problem with you to determine whether the proposed order meets your needs. [¶] Mr. Irwin Silverman, Chief Counsel, Office of Territories, Department of Interior, has been kept informed on these

developments, and he has indicated that after agreement is reached here, he will be able to expedite the final order in Washington."

An undated page from the Special Land Committee file entitled "Suggested Basic Provisions For Presidential Executive Order Transferring Kahoolawe to Department of Defense" notes that it was prepared pursuant to a September 2, 1952, memorandum from Gov. Long and recommends items "for including in the executive order which he has suggested that the Attorney General's Office draft." It states, in part, "[t]hat prior to release of care and custody of the island the Department of Defense shall exercise all reasonable efforts to remove all unexploded ammunition or shells from the island."

On September 18, 1952, Territorial Surveyor Francis Kanahele sent Commissioner of Public Lands Norman D. Godbold a description of the Island of Kaho'olawe, pursuant to Mr. Godbold's September 16, 1952, request. Mr. Kanahele wrote, "Your attention is called to the fact that before the Island of Kahoolawe can be set aside by Executive Order under the control of the Department of Defense, Governor's Executive Order 308 and Presidential Executive Order 1827 should be cancelled." Those orders set aside about 23 acres of Kaho'olawe as a lighthouse reservation.

On September 19, 1952, Commissioner of Public Lands Godbold wrote Territorial Attorney General Michiro Watanabe providing the description and eight maps of Kaho'olawe, also suggesting that it would be appropriate to cancel the lighthouse reservation.

September 23, 1952, Deputy Attorney General Frank W. Hustace, Jr., forwarded the first draft of a proposed executive order to Mr. Lennox and Mr. Godbold, asking for their comments and criticisms in response by telephone. On September 24, 1952, Mr. Hustace wrote Gov. Long a letter transmitting the proposed executive order placing Kaho'olawe under the Department of Defense. He states that the proposed order conforms with the recommendations of the Special Land Committee, including "that upon termination of the military use the Island should be rendered *safe for human habitation*. This will require the removal of all unexploded ammunition or shells from the Island. Paragraph 5 of our draft pertains to this required 'de-dudding.' The language used, we must admit, is of a general nature, but considering the present state of world tension

we feel that perhaps the exact use to which the Island will be put should not be spelled out in detail."¹¹³ (Emphasis supplied)

This September 24, 1952, letter is the earliest available evidence of the specific use and intended meaning of the phrase *safe for human habitation*. The phrase is described by the author as intended to require *de-dudding* (that is, the "removal of all unexploded ammunition or shells from the Island.")

Mr. Hustace's initial draft of the executive order (entitled "Executive Order Placing Kahoolawe Island, Territory of Hawaii, Under the Department of Defense") includes a *whereas* provision stating "it is deemed desirable and in the public interest" that "measures be taken upon the cessation of Federal use to make said Island fit for habitation by the peoples of the Territory of Hawaii." The final provision of the order states "[u]pon cessation of the need for which said Island is hereby set aside to the Department of Defense, said Department shall render the Island *reasonably safe for resumption of habitation* by the peoples of the Territory of Hawaii." (Emphasis supplied)

Two later executive order draft revisions (both are entitled "Executive Order Placing Kahoolawe Island, Territory of Hawaii, Under the Jurisdiction of the Secretary of the Navy") are found: one is enclosed with an October 15, 1952, letter from Interior Department counsel Irwin Silverman to Gov. Long and one is an enclosure with an October 22, 1952, letter from Gov. Long to the Interior Department.

In Mr. Hustace's initial draft order, the words in question were phrased "render the Island reasonably safe for resumption of habitation by the peoples of the Territory of Hawaii." In both later executive order drafts the *whereas* phrase is stated "that the Island be restored to a condition reasonably safe for human habitation at the termination of such use." In Executive Order 10436, the similar *whereas* phrase states "that the area within such reservation be restored to a condition reasonably safe for human habitation when it is no longer needed for naval purposes."

On October 2, 1952, Gov. Long wrote a letter to Mr. Silverman (Chief Counsel of the Interior Department's Office of Territories) providing a copy of the proposed executive order, a copy of a background memorandum prepared by Mr. Hustace (*i.e.*, the September 24, 1952, letter to Gov. Long from Mr. Hustace described above) and a copy of a letter and memorandum from the Special Land Committee. The letter states, "[i]t

¹¹³ Mr. Hustace's letter also noted that removal of the lighthouse reservation had been recommended by Mr. Godbold, and stated "[w]e have not contacted the Navy during the process of drafting our proposed order." On the attached executive order draft is a handwritten notation "Lennox & Godbold OK form 9/24/52."

is important that Kahoolawe be returned to the Territory when the defense needs no longer make it urgent for them to retain it. It is also important that a long range program of soil conservation be maintained and that the land [be] returned to the territory so that it would be fit for habitation."

On October 8, 1952, Mr. Silverman replied to Gov. Long with comments on the proposed executive order. He states that he discussed the draft "in general terms with a representative of the Navy Department, since the Navy will be asked for comments on any such order which we submit to Budget. I gather that the Navy will probably have some serious objection to the provision that upon termination of military use the island shall be made reasonable (*sic*) safe for human habitation. This objection would be on the ground of cost, since the island has been used for a bombing target for some years and undoubtedly many unexploded bombs are lodged in the ground. In view of the report submitted to you by the 'Special Land Committee', enclosed with your letter, which clearly states that it is believed that the use of the island will be limited for hundreds of years to come to grazing or to the development of feral animals in a game reserve, I do not understand the purpose of requiring the military to make the island safe for human habitation."

Gov. Long replied to Mr. Silverman in a letter dated October 14, 1952. He states, "[t]he representatives of the Navy Land Office here have examined the proposed Executive Order dealing with the transfer of Kahoolawe Island and they are agreeable to the provisos safeguarding the use of the island in the future. We indicated to them that if objections were made to those provisions, we would strenuously object to the transfer of Kahoolawe to the Department of Defense." He also said that the Special Land Committee preferred an Executive Order as it "would carry more weight and the Department of Defense would more likely conform to the stipulations contained in such an order." However, he proposed to issue an executive order of the governor "agreed to by the local representatives of the Navy" if that would be preferable. "In any event, adequate stipulations must be made in order to see that the land returns to the Territory and is made available for future use by the people of the Territory."

On October 15, 1952, Mr. Silverman wrote Gov. Long a letter to supplement his October 8th comments regarding the proposed executive order.¹¹⁴ "In view of the fact that it is the Navy Department rather than the Department of Defense which has been

¹¹⁴ It is likely that Mr. Silverman sent his October 15th letter before he received Gov. Long's October 14th letter.

using the Island and wishes to continue using it, the order should place the Island under the jurisdiction of the Secretary of the Navy. As the order was submitted by you, it imposed an absolute obligation on the Defense Department to make the Island reasonably safe for human habitation when the Naval need has ceased. The Navy people do not want to assume this obligation without qualification, because they anticipate the cost of de-dudding would be substantial and it may be the Territory's plans for subsequent use will be such as to make de-dudding unnecessary. They are prepared to undertake the job if the Territory requests it, however, and suggested that to convey this thought there should be inserted between the words 'the Department' and 'shall render the Island reasonably safe for resumption of habitation' the words 'shall cooperate with the Territory to.' I suggested that this phrase might carry the connotation that the work of de-dudding would be entirely or at least partially at the Territory's expense, and that that would not be desirable, and the Navy representative agreed to clarify this point by the addition of an express provision that the work was to be at no cost to the Territory, since the Navy did not intend that the Territory should pay for it or contrivute (*sic*) to the cost." Attached to Mr. Silverman's letter was a revised executive order draft. In his letter, Mr. Silverman states, "I enclose a copy of the order as I propose to send it to Budget. There are incorporated not only the Navy suggestions but also some stylistic changes made here. If you have no objection to the changes, please let me know promptly and I will send it on; if you do not find the changes acceptable, please let me have your comments."

Gov. Long wrote a letter dated October 22, 1952, to James P. Davis, Director of the Interior Department's Office of Territories, to the attention of Mr. Silverman. It states that after careful study of the revised draft executive order, he has several comments. "Your letter indicates that the Navy is willing to 'de-dud' the Island upon request being made of it by the Territory following termination of Naval use. If this be so, I feel the third line of your paragraph 4 should be redrafted to read 'of the Navy, shall, upon reasonable request being made by the Territory following notice given it of the cessation of such use, render the Island.'" He next stated, "The present need to which the Navy is placing the whole of the Island is naval and aircraft bombardment. It is conceivable that that need might cease, to be followed by only a small portion of the Island being used by the Navy in more peaceful pursuits. Under such a circumstance, I feel your draft of paragraph 4 will effectively postpone the return of the balance of the Island to civilian economy by reason of no duty being placed on the Navy to remove the unexploded missiles located thereon. As the draft now reads, de-

dudding will not be accomplished until the whole island is ready to be returned. My draft, on the other hand, requires de-dudding upon cessation of the present need, i.e., use as a bombing range. This will permit piecemeal restoration to the Territory." Gov. Long's comments conclude, "I am not at all happy in the capacity of trust which I bear the Territory, to sanction the taking of such a large part of its public lands, especially so when the use to which Kahoolawe will be put is entirely uneconomic. I fully appreciate, of course, that national interests must prevail over local interests even to the extent of destroying valuable assets. I do feel, however, that we must do everything in our power to guard those assets. I would be remiss in my duties if I did not make an effort to get the Navy to understand this need of conservation. Only by our resistance to orders entirely favorable to the Navy will the Territory receive that to which it is entitled." Gov. Long sent along a proposed redraft of the order.

Paragraph 5 of Mr. Hustace's September 24th initial draft of the executive order states:

5. Upon cessation of the need for which said Island is hereby set aside to the Department of Defense, said Department shall render the Island reasonably safe for resumption of habitation by the peoples of the Territory of Hawaii.

Paragraph 4 of the draft executive order attached to Mr. Silverman's October 15th letter states:

4. When there shall no longer be a need for the use of the Island for naval purposes of the United States, the Department of the Navy shall cooperate with the Territory to render the Island reasonably safe for human habitation, Provided, that this undertaking shall be without cost to the Territory.

Paragraph 4 of the draft executive order sent along with Gov. Long's October 24th letter states:

4. When there shall no longer be a need for the use of the whole or any portion of the Island for naval purposes of the United States, the Department of the Navy, shall, upon seasonable request being made by the Territory following notice given it of the cessation of such use, render the Island reasonably safe for human habitation, Provided, that this undertaking shall be without cost to the Territory.

Paragraph 4 of Executive Order 10436, as signed by President Eisenhower on February 20, 1953, states:

4. When there is no longer a need for the use of the area hereby reserved, or any portion thereof, for naval purposes of the United States, the Department of the Navy, shall so notify the Territory of Hawaii, and shall, upon seasonable request of the Territory, render such area, or such portion thereof, reasonably safe for human habitation, without cost to the Territory.

An October 24, 1952, letter from Gov. Long to Mr. Silverman refers to the materials sent to Mr. Davis. It expresses the hope of favorable consideration by the

Navy and states, "I recently had an informal discussion with a number of Naval Officers including Rear Admiral S. S. Murray, Commandant, 14th Naval District, about the use of Kahoolawe. They recognize the entire reasonableness of the Territorial government in urging that the agreement for the continued use of this Island be on a basis that will protect the interests of the Territory."

Mr. Hustace wrote a memorandum to Gov. Long on October 31, 1952, regarding a proposed revocable permit for the Navy's use of Kaho'olawe "pending the issuance of a proposed Executive Order by the President."¹¹⁵ Mr. Hustace "anticipated that the Navy will not be very happy with its terms. . . [¶] None of the conditions contained in the permit vary in the slightest from those set forth in your letter of October 22, 1952 to the Hon. James P. Davis of the Interior Dept., for incorporation in the proposed Executive Order to be issued by the President. To be consistent, it is felt that we should adhere to them here. [¶] The most serious objection the local Navy officials probably will have over the substance of the permit will be the requirement for 'deduinding' at the conclusion of Navy use. However, Mr. Silverman in his letter to you of October 15, 1952 indicated that the Washington Navy officials were willing to undertake such task at the request of the Territory."¹¹⁶

A handwritten note of Mr. Hustace dated December 11, 1952, states: "Commander Shannon (Navy legal officer) telephoned this date re Kahoolawe Island ExO [executive order] to advise that processing has been completed through Bureau of the Budget. Difficulty encountered however when Coast Guard found ¶ 5 of order cancelled prior ExO to them. Navy therefore requests our permission to exclude from proposed order the portion set aside to Coast Guard. Shannon [h]as been advised that coast guard is still using area for navigation light. [¶] I advised that Territory would have no objection to proposed exclusion."

On December 24, 1952, Mr. Davis wrote Gov. Long. His letter states that the draft order submitted by Gov. Long had been reviewed by the Bureau of the Budget. Mr. Davis notes that the lighthouse reservation was retained according to the Coast

¹¹⁵ On October 30, 1952, Mr. Hustace sent the proposed revocable permit with a letter to Commissioner of Public Lands Godbold, noting its "terms and conditions are identical to that contained in the Territory's latest draft of a proposed executive order forwarded earlier this week to the Department of the Interior."

¹¹⁶ Revocable Permit 800 to the Secretary of the Navy (executed November 7, 1952) included the language described by Mr. Hustace, and provided that the Permit, issued in contemplation of an Executive Order, would terminate upon such an order.

Guard's wishes. He further states "we have retained the provision making the Navy responsible at its expense for making the area under its jurisdiction, or portions thereof, reasonably safe for human habitation when the naval need for the use of that area or any portion of it ceases." He also concludes, "we think we have protected the Territory's interest in the public domain represented by Kahoolawe."

On January 15, 1953, Frank G. Serrao, as Acting Governor, wrote Mr. Davis as follows: "Thank you very much for your letter of December 24, 1952, advising us of the status of the pending executive order involving Kahoolawe Island. Based upon what you have stated in your letter, it would appear that the Territory's interests are well protected."

These documents indicate that the parties agreed upon a need to protect the Territory's interests. The requirement to render an area *reasonably safe for human habitation*, as used in Executive Order 10436, was intended to mean that the area would be de-dudged, or that unexploded ordnance would be removed, so that people could resume the use of that part of Kaho'olawe in the same manner as it was available for use before it was taken as a federal military weapons range.

§1(e)(3) of Senate bill 3088 defines *restoration of a portion of land to a condition reasonably safe for human habitation* as "the removal or rendering harmless to human activity of all hazardous or explosive ordinance located on or within such portion." That definition is perfectly consistent with the intent of those Territorial and federal officials responsible for negotiating the pertinent terms of Executive Order 10436, as shown by the available evidence.

Obtaining a condition that could be characterized as reasonably safe for human habitation by the removal or rendering harmless to human activity of all hazardous or explosive ordinance located on or within such portion would be consistent with the observation in *Cause of Action Against United States for Injury Caused by Accidental Explosion of Military Ordnance*, 24 COA 711 (1991) at 722 (citations omitted) that "the duty to protect persons from encountering dangerous military devices requires that the government remove unexploded munitions from designated use areas before permitting civilians to be present in these areas."

4. Not reasonably safe for human habitation

The removal or rendering harmless to human activity of all hazardous or explosive ordinance, as defined by the terms of Senate bill 3088, would *not* be accomplished in any areas contemplated to be left in a condition *not reasonably safe for human*

habitation. In those areas, hazards of injury and damage from unexploded ordnance would be expected to exist.

As shown by the previous discussion of liability theories (see §III.A.1., above) it would be necessary to make a reasonable effort to exclude the public from areas *not reasonably safe for human habitation*, and to provide sufficient and adequate public warnings of the hazards found within such areas.

The COA article cited above notes that "the United States owes essentially two different duties with regard to unexploded military ordnance. First, it owes a duty to protect persons from encountering dangerous military devices. Second, it owes a duty to warn persons of any unavoidable dangers posed by unexploded munitions." 24 COA at 721 (citations omitted.)

While liability limiting steps, including written releases and statutory exceptions to liability, could be available to decrease exposure to claims premised upon injuries or damages in such areas, it is unlikely that sensible public policy or jurisprudence would permit laxity in the provision of steps to exclude the public from and to warn the public of areas on Kaho'olawe that may be allowed to remain in a *not reasonably safe for human habitation* classification.

It is in view of such considerations that Senate bill 3088, when requiring the Commission to "identify portions of land suitable for restoration to a condition less than reasonably safe for human habitation, including lands suitable for (i) soil conservation and plant reforestation purposes; and (ii) removal or destruction of non-native plants and animals" also required the Commission to "identify fences needed to enclose such areas" and to "estimate the cost of placing and maintaining the fences."

5. Implications of liability as to use

"Removal or rendering harmless to human activity of all hazardous or explosive ordnance" as contemplated by §1(e)(3) of Senate bill 3088 for those areas to be restored to a condition reasonably safe for human habitation will be extremely difficult for most of the Island of Kaho'olawe.

Senate bill 3088 seems to have anticipated a simpler situation with regard to decontamination efforts on Kaho'olawe. The complete decontamination of substantial areas of land on Kaho'olawe for park, recreational and archaeological purposes is not likely to be feasible in the foreseeable future.

Existing law (discussed in §III.A.1.c.(3), *supra*, and §III.B.1 *infra*) appears to provide a scheme for formal site specific studies to establish less-than-complete decontamination standards for planned *limited* uses of Kaho'olawe.

Fences and warning signs would have to be placed and maintained to warn and exclude persons from areas not yet attaining the degree of decontamination and safety determined to be necessary for planned limited uses of each such area. Some form of access control also would be appropriate for areas where limited uses are permitted.

In addition to reporting on the specific study required by §1(e) of Senate bill 3088, §1(f)(2) of that bill allows the Commission's report to Congress to include "such comments and recommendations as the Commission considers appropriate." The Commission may wish to recommend limited decontamination of specific areas, defined according to planned permitted uses, and scheduled so that designated areas become progressively more available for less restricted use. Such a recommendation, while technically outside of the specific expectations of Senate bill 3088, would be consistent with the present state of UXO decontamination technology and also would be consistent with the present state of federal law and regulations governing UXO decontamination.

In such a recommendation, very few areas would satisfy the definition of reasonably safe for human habitation found in Senate bill 3088 §1(e)(3), and many of those areas remaining in a status technically defined as less than reasonably safe for human habitation would be designated for planned uses exceeding those limited uses contemplated by Senate bill 3088 §1(e)(2)(B). However, limited park, recreational and archaeological uses of designated areas subject to less-than-complete decontamination according to standards established by a special study conducted according to federal laws and regulations would be an appropriate recommendation in view of the realities of technology and the laws affecting Kaho'olawe.

These requirements and their associated liability implications pose questions affected by use. Physical removal of explosive hazards will require time. The Commission's job of identifying the total amount of land to be decontaminated requires the formulation of a policy defining planned uses and time priorities. The Commission may wish to establish an area by area priority list and timeline for the accomplishment of UXO decontamination efforts, recommending a schedule for accomplishing those ends after several successive phases of decontamination activity. The special study approach can be expected to determine ordnance decontamination standards that will provide a basis for declaring that an area has attained the requisite degree of safety for planned intermediate and ultimate uses.

With regard to areas considered unsafe for any uses, the Commission should describe methods for adequate warnings and total exclusion by means of fencing as contemplated in Senate bill §1(e)(2)(E). With regard to areas considered safe for limited

uses the Commission should propose adequate warnings and methods for limiting liability, such as written release and waiver forms and supervision by trained personnel.

B. Removal of ordnance

Potential harm from unexploded ordnance (UXO) includes obvious as well as not so obvious risks. The removal or prevention of ordnance related hazards is required by existing federal laws and regulations. More specific provisions for Kaho'olawe could be enacted by Congress.

An obvious UXO hazard is an unexpected explosion. Not so obvious is the peril of harm involving toxic and dangerous materials that are constituent parts of military ordnance and propellants. For example, it is reported that thousands of waterfowl have died after ingesting tiny bits of phosphorous in a 2,500 acre area at Eagle River Flats, Alaska, used by Fort Richardson for artillery training. See Rinehart, *Army links phosphorus, bird deaths*; *Anchorage Daily News* (February 22, 1991) page C-1. Also, the February, 1992, report of an epidemiological study of the population living near Camp Edwards, Massachusetts, by Dr. David Ozonoff, a professor at the Boston University School of Public Health, suggests that disposal by burning of an artillery propellant (2,4-DNT, a probable human carcinogen) increased the incidence of lung and breast cancer. See also, Shulman, *The Threat at Home, Confronting the Toxic Legacy of the U.S. Military* (1992).

Worst among the toxic residues commonly associated with ordnance are 2,4 DNT and 2,6 DNT (both are class B carcinogens.) Also of concern is 2,4,6-trinitrotoluene, a parent product for composition B explosives (TNT and RDX). TNT photodecays to 2,4,6-trinitrotoluene. These toxic residues do not migrate easily (a point emphasized by the Army Corps of Engineers in their draft UXO manual) although the RDX explosive can wash out of soil readily. As sediment washes from Kaho'olawe to the sea it could contain chemical residue affecting shell fish and near shore areas. There is similarly a potential for ground water contamination.

These ordnance-related chemical hazards are known within military laboratories. ACE-WEST (the Army Corps of Engineers Waterways Experimental Station) is a research group of the U.S. Army Toxic and Hazardous Materials Agency (USATHAMA) that has cognizance of this type of contamination. Also, on a smaller scale, the Naval Civil Engineering Lab in California is studying relevant water and soil residue treatment. Both military laboratory projects are proceeding in conjunction with the EPA.

The EPA is attempting to restrict the military's common practice of open burning or detonating ordnance in the field. The EPA's effort is premised upon RCRA law and

rules requiring permits for the disposal of explosive materials. USATHAMA is helping the Army comply with RCRA by dealing with the EPA requirement for RCRA open burning/open detonation permits at Army sites.

Some military sources, particularly the Army Corps of Engineers, seek to emphasize a legal distinction between environmental restoration efforts involving explosive ordnance under DERP and environmental restoration work involving hazardous and toxic waste (HTW) under CERCLA. The Defense Department's proposed amendments to the Federal Facilities Compliance Act would strongly establish a special delegation to DOD of primary legal authority for ordnance decontamination work.

In view of the substantial probability of hazardous and toxic chemical residue from ordnance on Kaho'olawe, and considering the possibility of separating UXO from HTW, there is a compelling interest in assuring that environmental restoration work on Kaho'olawe ultimately includes the decontamination of ordnance-related chemical residue that could adversely affect human health or the environment. While there is no present study that evaluates the presence of such HTW on Kaho'olawe in specific quantities or locations, it can be reasonably assumed that there is a proportionate and proximate relationship between the presence of UXO and the likely presence of HTW.

Separation of Kaho'olawe's UXO and HTW contamination by implication of law or by scientific oversight could leave parts of the island in a condition unfit for human habitation. KICC should consider the need to reduce the potential for lingering contamination and on-going pollution of Kaho'olawe's soil, ground water and shore and the surrounding sea.

The following subsections review certain legal obligations to remove ordnance from Kaho'olawe. Those obligations are considered in the context of existing authority (including federal laws and regulations, Executive Order 10436 and a Hawaii U.S. District Court consent decree) and alternatives to existing authority (*i.e.*, the creation of new authority.)

1. Existing authority

The most direct legal authority on the subject of unexploded ordnance is the Defense Environmental Restoration Program (DERP) created by the Superfund Amendment and Reauthorization Act of 1986 and administered by the Department of Defense. UXO is primarily treated as an explosive hazard under DERP while the broader subject of toxic hazards is the primary concern of the Superfund law generally administered by the Environmental Protection Agency (EPA).

Also affecting the subject of UXO contamination, but not as directly, is the Resource Conservation and Recovery Act (RCRA) addressing hazardous waste problems. Under RCRA, UXO constituents may be considered a hazardous waste both because of toxicity and because of explosive potential.

Finally, UXO removal on Kaho'olawe is impacted by Executive Order 10436 ("When there is no longer a need for the use of the area hereby reserved, or any portion thereof, for naval purposes of the United States, the Department of the Navy shall so notify the Territory of Hawaii, and shall, upon seasonable request of the Territory, render such area, or portion thereof, reasonably safe for human habitation, without cost to the territory") and the terms of the Consent Decree entered on December 1, 1980, in the case of *Aluli v. Brown* (No. 76-0380, U.S. District Court for the District of Hawai'i.)

a. Federal law

Explosives are considered hazardous wastes *per se* under the Resource Conservation and Recovery Act (RCRA,¹¹⁷ 90 Stat. 2796, 42 USC §§6901 *et seq.*) See, e.g., 40 CFR §264.17(b) dealing with the treatment, storage or disposal of explosive wastes and 40 CFR §261.23 defining the hazardous waste characteristic of reactivity (including the capability of detonation or explosive reaction.)

As discussed in §III.A.c.(3), *supra*, cleaning up UXO contamination is a specific goal of the Defense Environmental Restoration Program described in the Superfund Amendment and Reauthorization Act of 1986 [known as SARA, Public Law 99-499, Title II, §211(a)(1)(B), 100 Stat. 1719] affecting the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (known as CERCLA or the Superfund Act, 42 USC §§9601 *et seq.*) Existing federal law and regulations preclude conveyance of federal property where hazards still are present.¹¹⁸

¹¹⁷ RCRA is intended to regulate "the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment." 42 USC §6902(4).

¹¹⁸ Under CERCLA, 42 USC §9620(h)(3), deeds from the United States must include a covenant stating that "all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken" *before* sites may be conveyed by the United States, and also a covenant stating that "any remedial action found to be necessary after the date of such transfer shall be conducted by the United States." Also, 41 CFR chapter 101, Federal Property Management Regulations, Subchapter H, Utilization and Disposal, part 101-47, Utilization and Disposal of Real Property, includes a subpart entitled Abandonment, Destruction, or Donation to Public Bodies, that provides in §101-47.500(a): "This subpart prescribes the policies and methods governing the abandonment, destruction, or donation to the public

The statutory UXO decontamination goal (the second of three DERP goals)¹¹⁹ provides for "correction of other environmental damage (such as detection and disposal of unexploded ordnance) which creates an imminent and substantial endangerment to the public health or welfare or to the environment." 10 USC §2701(b)(2)

The U.S. Army Corps of Engineers (USACE), the Defense Department entity with responsibility for unexploded ordnance decontamination activity at formerly used Defense sites, is preparing materials explaining its understanding of the legal distinction between ordinary CERCLA toxics and explosive ordnance hazards. USACE views explosive ordnance as including unexploded bombs, missiles and ammunition (UXO), bulk military chemicals (explosives, propellants, etc.), component parts (boosters, motors, fuzes, etc.) and contaminated soils (containing primary and secondary explosives, propellants, pyrotechnics, and chemical agents.)

USACE generally distinguishes explosive ordnance (EXO) hazards from ordinary hazardous and toxic wastes (HTW) on the basis of their environmental mobility, pathways for exposure, chemical specificity, impacts of contamination and the agency with response authority. Hazardous and toxic wastes are considered highly mobile through many environmental pathways (e.g., ground water, surface water, air currents and food chains) with substantial risks of exposure in chemically specific toxic concentrations. The imminent and substantial hazard of EXO (explosion) is not mobile but instead requires on-site contact and it is not based upon specific chemical concentrations.

Obviously, Congress did not consider EXO to be a subset of HTW. Nevertheless, many regulators think of EXO as a characteristic waste. The goals of DERP are set forth in separate paragraphs and, as such, should be considered separate forms of contamination that Congress has directed DOD to clean-up. The USEPA [Environmental Protection Agency] has no regulatory authority over EXO contaminated sites. Section 300.120(c) of the

bodies by Federal agencies or real property located within the States of the Union, the District of Columbia [etc.]" -- §101-47.501-1(b) defines "Public body" as "any State of the United States [etc.]" -- §101-47.501-3 provides: "No property which is dangerous to public health or safety shall be abandoned, destroyed, or donated to public bodies pursuant to this subpart without first rendering such property innocuous or providing adequate safeguards therefor." Within the Department of Defense, DOD regulation 5154.45 provides that DOD real property dangerously contaminated with unexploded ordnance "should not be released from DOD custody until the most stringent efforts have been made to assure appropriate protection of the public."

¹¹⁹ The three statutory DERP goals include (1) removal and disposal of hazardous and toxic waste, (2) removal of ordnance and explosive waste, and (3) demolition and removal of old buildings and debris.

final National Contingency Plan states "DOD will be the removal response authority with respect to incidents involving DOD military weapons and munitions or weapons and munitions under the jurisdiction, custody or control of DOD." Section 300.130(c) declares that the DOD has special expertise regarding contamination involving munitions waste. For CERCLA responses, there are public involvement requirements. USEPA is informed so they will be aware of what is occurring, but they do not have approval/disapproval or regulatory authority.

Draft USACE *Explosive Ordnance Engineering* manual, page 5

It is likely that Environmental Protection Agency (EPA) officials would not completely agree with the USACE interpretation of EPA authority. See note 130, *infra*, regarding the Federal Facilities Compliance Act legislation now being debated in Congress, and its impact upon these questions. There are several premises supportive of the requirement for EPA regulatory participation in ordnance decontamination, but the fine points of those premises need not be argued or resolved by this memorandum. It is sufficient to note that EPA participation in environmental restoration is required by most federal statutes on the subject, including DERP. See, e.g., 10 USC §2701(a)(3), requiring DERP consultation with EPA.

Environmental restoration appears to be the fastest growing part of the Department of Defense (DOD) budget.¹²⁰ The Bush Administration's proposed budget would spend \$2 billion in fiscal 1993 on domestic Defense Department cleanup. Most of those funds would be spent on DERP's Installation Restoration Program (IRP). The majority of those remedial activities address problems caused by ordinary CERCLA toxics, not ordnance contamination. DERP estimates that long term (*i.e.*, during the next 20 years) cleanup costs will be about \$25 billion in 1991 dollars, although the Congressional General Accounting Office notes that figure may be too low as the estimate includes only the cleanup of known existing sites at existing standards.

Federal laws controlling the realignment and closure of military bases (the Defense Authorization Amendments and Base Closure and Realignment Act of October 24, 1988, Public Law 100-526, 102 Stat 2623, as amended by the Act of November 5, 1990, Public Law 101-510, 104 Stat. 182, and other acts, and generally codified at 10 USC §§2687 *et seq.*) establish a separate Department of Defense Base Closure Account that serves as the exclusive source of funds for environmental restoration projects at such sites. Funds in the Base Closure Account are separate and distinct from funds in DERP's

¹²⁰ Much of this information comes from DERP's *Annual Report to Congress for Fiscal Year 1991* (February 1992); see also *Touching Bases*, a newsletter of The National Toxics Campaign Fund's Military Toxics Project (Vol. 2, No. 1, March 1992).

Defense Environmental Restoration Account (DERA). Both funds derive from what is referred to as the Environmental Restoration, Defense [ER,D] appropriation and restoration activities under both are similar in practice.¹²¹ Like IRP projects, base closure cleanup efforts are conducted under the management of the service controlling the facility.

Congress is providing \$220 million during FY 1992 through the DoD BRAC 88 Account for environmental restoration at bases scheduled for closure. DoD is applying the same restoration methodologies and protocols used at other IRP sites to cleanup efforts at installations scheduled for closure or realignment.

DERP 1991 *Annual Report*, page 3

The Secretary of Defense is required to plan and accomplish necessary environmental restoration activities at each base closure and realignment site. Those remedial activities are the subject of a report of a Defense Environmental Response Task Force. The October, 1991, report notes the CERCLA prohibition against transfer of contaminated property, 42 USC §9620(h)(3), but observes that the prohibition does not restrict transfers of contaminated property between federal agencies, provided that DOD retains responsibility for decontamination.

The Defense Environmental Response Task Force report suggests that Congress may wish to consider amending the law to authorize agreements whereby DOD indemnifies grantees of former DOD property. The report repeatedly describes how necessary use limitations for safety purposes can be made part of a conveyance document. Similar restrictions are recommended for property with significant ecological, scenic, historic or recreational value. CERCLA and RCRA as well as state laws generally control remedial activities for base closures, and the report suggests a need for EPA rules that harmonize some inconsistent requirements of those laws.¹²²

¹²¹ Base realignment and closure (BRAC) activities are the subject of a special commission established to work with the Secretary of Defense in identifying for the President those military installations suitable for elimination or reorganization. Congress may, by joint resolution, exempt specific sites from the BRAC process. For these purposes, several property management functions ordinarily accomplished by the Administrator of General Services have been delegated to the Secretary of Defense, including an obligation to consult with state and local officials regarding any plans for use of BRAC surplus property.

¹²² The report (note 4 at page 3, etc.) acknowledges the EPA's published Policy for Federal Facilities (54 *Fed. Reg.* 10520-25, March 13, 1989) that contemplates resolution of CERCLA-RCRA conflicts through the vehicle of the inter-agency agreement (giving greater priority to the CERCLA scheme.) For *non-federal* sites, EPA generally defers CERCLA NPL listing of RCRA sites based upon a theory of maximizing Superfund

Under ordinary Superfund law (CERCLA) a preliminary assessment and site investigation are conducted by the EPA to determine whether a site warrants consideration for Superfund action. The next CERCLA-required step is a Remedial Investigation and Feasibility Study (RI/FS) [see 42 USC §9620(e)(1)] that must be commenced within six months after a site has been identified for Superfund listing. The RI/FS characterizes a hazardous site and then determines a basis for remedial action. The RI/FS is completed upon the issuance of a Record of Decision (ROD) providing public notice of the cleanup methods to be used at the site.

An RI/FS is followed by the design and execution of remedial action. An interagency agreement (IAG), including as parties all necessary state and federal agencies, must be executed within 180 days after completion of the RI/FS study for a site listed on the Superfund National Priorities List (NPL) [see 42 USC §9620(e)(2) and 42 CFR §300].¹²³ The IAG defines a detailed management plan for the remediation effort.

The end of CERCLA activity is formalized in a declaration that no further response action is planned (NFRAP.) The primary criteria for the NFRAP decision is that the site does not pose a significant threat to public health or the environment. A chart following this section depicts the broad outline of the CERCLA/SARA/DERP statutory scheme affecting ordnance cleanup.

Similar study methods and procedures are being developed by the Mandatory Center of Expertise of the U.S. Army Corps of Engineers to establish plans, procedures and guidelines for site specific UXO decontamination efforts at formerly used Defense Department sites (known as FUDS) and at IRP sites under Army control.

IRP sites remaining under Navy control rely upon the Navy Facilities Engineering Command (NAVFACENGCOM) for similar support services. The Pacific Engineering Field Division (PACDIV) is the NAVFACENGCOM arm responsible for DERP activities at Navy

resources (*i.e.*, RCRA compelled cleanups do not tap into the Superfund.) Because the various federal agencies usually pay for CERCLA cleanup actions from their own respective budgets, rather than by payment from the Superfund, that theory does not apply at federal sites, according to the EPA's reasoning and policy. Therefore, separation of CERCLA and RCRA remediation efforts at federal sites is deemed inappropriate and such efforts are "addressed comprehensively under CERCLA pursuant to an enforceable [IAG]." 54 *Fed. Reg.* 10523.

¹²³ A site's position on EPA's National Priorities List is determined by its score on the EPA Hazard Ranking System, using data from the preliminary assessment and site investigation.

and Marine Corps facilities in Hawaii and the Pacific. In May, 1992, PACDIV contracted for a preliminary assessment of Kaho'olawe; however, that assessment addresses only ordinary CERCLA toxics and does not address ordnance.

An inter-service DOD Explosive Safety Board (DESB) reviews plans for UXO decontamination. DESB, created by 10 USC §172, consists of several dozen explosives experts under a Chairman (presently Navy Captain David Wallace.) A team of technical explosives experts reviews DOD ordnance decontamination plans, such as those from MCX, to assure they are safe and feasible. Decontamination plans are reviewed according to DESB analysis of the best available technology. If the plan would leave the site harmless for the purposes of its intended use, then it would receive DESB approval.¹²⁴

As discussed previously, the initial importance of these existing ordnance cleanup laws pertains to liability considerations and the absence of generally useful standards for UXO decontamination. DERP provides an existing federal statutory goal (the detection and removal of unexploded ordnance) that appears to serve as the basis for a method to establish site specific clearance requirements and standards as an evolution of well-established federal law.

DERP fiscal requirements are identified on a site-by-site basis leading to a cumulative request for appropriations. The interagency agreement (IAG) provides a detailed management plan for site cleanup and also serves to provide a basis for estimating specific and cumulative funding requirements under CERCLA. The DERP 1991 *Annual Report*, at page 5, describes how DOD seeks to gain the credibility and management advantages of early mutual planning.

DOD involves EPA and the states in the IRP process from early assessment and characterization through final cleanup of the site...

The Department seeks a cooperative and collaborative ongoing effort with all parties to avoid discovering problems late in the process that could result in costly delays. The early establishment of good working relationships also resolves potentially duplicative and possibly conflicting regulatory requirements governing cleanup, such as those that occur between CERCLA and RCRA. To fully realize these benefits, we are routinely entering into IAGs during the RI/FS phase. These [pre-NPL listing] IAGs, or Federal Facilities Agreements (FFAs), are amended as IRP work progresses and become the IAG required under SARA.

¹²⁴ 32 CFR Part 186 regulates DESB functions. 32 CFR §186.6(i) requires that DESB "Review and approve plans for leasing, transferring, or disposing of DOD real property where ammunition and explosives contamination exist or is suspected to exist."

DOD has developed a Defense Priority Model (DPM) that uses data from the RI/FS to evaluate (a) site hazards, (b) pathways for extended contamination and (c) potential human and environmental damage. The results of that analysis allow higher priorities to be assigned for "sites that represent the greatest potential public health and environmental hazards... [1] Prior to receiving DERP funding for [remedial] efforts, virtually all IRP sites are now scored using DPM." DERP 1991 *Annual Report*, page 3.

To date, funding has been adequate to support all executable cleanups. This situation will change as many sites now under study become ready for remediation simultaneously. In a constrained funding situation, DPM will provide an excellent means for identifying sites to receive funding first.

Ibid.

DERP reports that it is acting to decontaminate hazardous sites whether they are Superfund NPL sites or not.¹²⁵ DERP's annual report states that 89 DOD installations are included in EPA's Superfund National Priorities List. Most of the DOD Superfund NPL installations, such as Pearl Harbor, have been listed due to chemical and other toxic hazards rather than UXO hazards.

DoD has continued to make progress during FY 1991 in investigating all sites or facilities on DoD installations potentially contaminated with hazardous substances and cleaning up those sites that pose a threat to human health and the environment, regardless of whether they are on the NPL. A total of 17,660 sites on 1,877 military installations are currently included in the IRP. Of the total number of sites, 3,738 are sites associated with facilities listed on the NPL. Facilities not listed on the NPL have a total of 13,922 sites in various stages of the IRP.

DERP 1991 *Annual Report*, page A-8¹²⁶

The Department of Defense and the State of Hawai'i have taken an initial step toward the preparation of interagency agreements for remedial activity at a number of known DOD hazardous materials sites in Hawai'i. On September 10, 1991, a *Department of Defense and State Memorandum of Agreement* (DSMOA) was executed by Thomas E. Baca, Deputy Assistant Secretary of Defense (Environment) and Dr. John Lewin, Director of the Hawai'i Department of Health. The 1991 DSMOA contemplates providing the

¹²⁵ CERCLA's 42 USC §9620(a)(4) provides that state laws shall apply to cleanup activities for non-NPL sites.

¹²⁶ By the end of fiscal year 1991, preliminary assessments had been completed at 17,286 of the 17,660 identified IRP sites. Site investigations had been accomplished for 10,500 of those sites; RI/FS studies were completed at 1,493 sites. 4,072 of the sites were identified as requiring remedial activity and 698 sites had remedial activity underway. 6,736 sites had been placed in the NFRAP (closeout) category. 87 formerly used Defense sites (FUDS) have been funded for action that involves the detection and removal of ordnance and explosive waste from former target ranges or impact areas.

State of Hawai'i with certain DOD/DERP funds "to expedite the cleanup of hazardous waste sites on Department of Defense installations within the State of Hawaii and ensure compliance with the applicable State law and regulations of the State..."¹²⁷

The DSMOA contemplates further site specific remediation agreements relating to twenty-six identified installations (including Schofield Barracks, Pearl Harbor, Pohakuloa and others, but not including Kaho'olawe) and provides for the inclusion of additional sites by future agreement.¹²⁸ The DSMOA refers to the parties' acceptance of the DOD priority evaluation system (DPM, *supra*) intended to assure a "national worst first cleanup." Kaho'olawe could eventually become subject to the DSMOA and a specific interagency agreement (IAG) for remediation in the ordinary course of events.

At the Environmental Protection Agency (EPA) Region 9 office in San Francisco, Kaho'olawe has been identified as site ID # HI6170090074 in the CERCLIS database used by EPA to track existing and potential Superfund activities. EPA Region 9 recorded what is identified as a DS1 (initial discovery) CERCLIS entry for Kaho'olawe based upon their receipt of a letter¹²⁹ from the manager of the Hawai'i Department of Health Office of Hazard Evaluation and Emergency Response.

The State DOH letter formally requests that Kaho'olawe be listed in CERCLIS based on ordnance uses that have "potentially released mercury, lead and highly nitrated

¹²⁷ The DSMOA is based upon a model document negotiated in 1989 by the Association of State and Territorial Solid Waste Management Officials, the National Association of Attorneys General, the National Governors' Association and the Department of Defense. It provides that the State may receive up to one percent of the entire cost of all DOD installation cleanup activity in Hawai'i that is funded through DERP for State costs resulting from review and services related to the cleanup activity. The DSMOA includes all sites, whether identified as EPA NPL sites or not.

¹²⁸ §A.1 of the Hawai'i DSMOA provides that it applies to installations "owned by the Federal government on the effective date of the Agreement including installations with sites on the National Priorities List (NPL) and installations with sites not on the NPL." A June 29, 1992, DOD notice (57 FR 28835) describes an amended DSMOA form that includes new provisions in §A.1 making such agreements also applicable to "installations identified on the Base Realignment and Closure (BRAC) I list (Pub. L. 100-526, dated October 24, 1988) and Base Realignment and Closure (BRAC) II list (Pub. L. 101-510, dated November 5, 1990)" for DERP remedial actions as well as Formerly Used Defense Sites (FUDS) where an Inventory Project Review (IPR) has determined the site to be a FUDS eligible for DERP funding. The new agreement form excludes "activities funded from sources other than ER,D appropriation except as specified above." The DSMOA as signed by the State would appear to potentially include Kaho'olawe, while under the more recent DSMOA form any special non-ER,D appropriation for Kaho'olawe would place it outside of the agreement.

¹²⁹ The letter is dated both March 9, 1991, and March 9, 1992.

aromatics into the island's soil and sediment" and requests that EPA conduct a preliminary assessment. The State DOH contact identified in the letter (Bryce Hataoka) reports that EPA will not be proceeding at this time with regard to Kaho'olawe, but has identified the Island as a federal facility subject to the preliminary assessment being conducted by the Navy. Eventually, these efforts, in the ordinary course of events, would lead to an interagency agreement between the State, EPA and DOD to clean up Kaho'olawe. However, given the present course of the preliminary assessment, the cleanup effort would not include ordnance decontamination.

Execution of the DOD-State DSMOA in September of 1991, registration of Kaho'olawe in CERCLIS and completion of a preliminary assessment are necessary starting points for the decontamination of Kaho'olawe under existing federal law. At present, the process would need some external influence to provide for ordnance decontamination in addition to the toxic evaluation already underway. Under the existing scheme of federal law and regulations,¹³⁰ Kaho'olawe would stand in line with a multitude of other sites requiring remedial activity and the decontamination of Kaho'olawe would be addressed according to a priority determined on a national worst first basis.

Larry Hourcle, former counsel for the DERP main office in Arlington, explained that under a standard worst first evaluation Kaho'olawe would receive a low priority. Because UXO detection technology is not advanced, as he described it, the present

¹³⁰ Proposed amendments to the Federal Facilities Compliance Act (FFCA, also known as the Mitchell-Eckhardt Bill, HR 2194 and S 596) may provide special treatment for munitions sites under DOD control. FFCA legislation was originally introduced "to make the waiver of sovereign immunity contained in [RCRA] clear and unambiguous with regard to the imposition of civil and administrative fines and penalties. This legislation requires Federal facilities to comply with all Federal, State, interstate, and local solid and hazardous waste management and disposal requirements, both substantive and procedural, in the same manner, and to the same extent, as any person is subject to such requirements." Report 102-67 of the Senate Committee on Environment and Public Works (May 30, 1991) page 1. The Senate has approved an amendment proposed by DOD providing "The Secretary of Defense shall have the responsibility for carrying out any requirement ... with respect to regulations promulgated relating to the safe development, handling, use, transportation, and disposal of military munitions. The Secretary shall, with the concurrence of the [Environmental Protection Agency] Administrator, promulgate such regulations as may be necessary to carry out the purpose of this subsection." February 4, 1992, the matter was referred to a House/Senate conference committee. Some organizations fear that the proposed amendment placing munitions-related environmental regulatory authority in the DOD would eliminate presently available state and federal regulations affecting UXO and munitions storage sites.

approach for complete decontamination is essentially the equivalent of stripmining. Mr. Hourcle said technological research and development is needed to seek better methods of locating UXO. He suggested that it may be wise to recommend that Kaho'olawe receive a special appropriation rather than recommending that Kaho'olawe receive a legislative mandate for a high priority. He fears that if the setting of priorities becomes a political matter, then DERP's job will be more difficult to deal with on a scientific basis. He suggested it may be wise to recommend the use of Kaho'olawe as a pilot center for developing UXO decontamination methods.

On the following page is a chart the summarizes the existing scheme of federal law affecting ordnance removal.

***The Existing Federal
Statutory Scheme for
Ordnance Cleanup***

Department of Defense

DERP

Defense Environmental
Restoration Program

10 USC §2701(b):

- removal and disposal of
hazardous & toxic waste (HTW);
- detection and disposal of
unexploded ordnance (UXO)
- demolition and removal of
old buildings and debris

IRP

Installation
Restoration
Program

FUDS

Former
Defense
Sites

CERCLA (Superfund)

Comprehensive Environmental
Response, Compensation and
Liability Act of 1980

EPA

(Toxics)

SARA

Superfund Amendment and
Reauthorization Act of 1986

Actions under CERCLA:

PA	Preliminary Assessment
SI	Site Investigation
HRS	Hazard Ranking System
NPL	National Priorities List (sites with HRS \geq 28.5)
RI/FS	Remedial Investigation/ Feasibility Study (for NPL sites)
ROD	Record of Decision
IAG	Interagency Agreement
RD	Remedial Design
RA	Remedial Action
NFRAP	No further response action is planned

DOD Actions under DERP:

DSMOA	Defense/State Memorandum of Agreement (for NPL and other sites -- state agency technical support)
CA	Cooperative Agreement (allows reimbursements for state agency costs under DSMOA)
FFA	Federal Facilities Agreement (pre-ROD agreement, during RI/FS phase, as amended it becomes IAG)
DPM	Defense Priority Model (sets priority for IRP projects; similar to HRS, but uses RI/FS data)
IAG	Interagency Agreement (detailed management plan for cleanup at a specific site)
BRAC	Base realignment and closure (cleanup funds come from a separate account but cleanup process is similar to IRP)

USACE/MCX -- The U.S. Army Corps of Engineers Mandatory Center
of Expertise was established to manage ordnance decontamination at
formerly used Defense Department sites (FUDS) and Army IRP projects

NAVFACENGCOM -- Navy Facilities Engineering Command provides
management for all Navy and Marine Corps IRP projects

2. Executive order

President Eisenhower's Executive Order 10436 determined in 1953 that upon timely request the Navy would render Kaho'olawe reasonably safe for human habitation. That provision of the Executive Order was the result of extensive negotiation between federal and Territorial officials. See §III.A.3., *supra*. Pursuant to §5(c) of the Admission Act, the limitations of EO 10436 are incorporated into the law regulating the federal government's control of Kaho'olawe. See §II.C.1., *supra*.

EO 10436 could be viewed as a contract that is in essence akin to the fundamental premise of a contemporary interagency agreement for remedial activity. That essential and fundamental premise is an agreement that remedial activity is needed and that it will be accomplished.

This limitation specifically negotiated as part of the taking of Kaho'olawe for federal use in 1953 at a time when a high level of UXO contamination was already well-established and applied to federal control of Kaho'olawe by §5(c) of the Admission Act suggests that the decontamination of Kaho'olawe should merit special consideration.

Special consideration for the decontamination of Kaho'olawe could take several forms, such as a specific appropriation by Congress and Kaho'olawe's use as a pilot site for DERP UXO decontamination efforts. Treated fairly as the historic equivalent of an early interagency agreement for remediation, EO 10436 presages the need for expeditious activity in such matters.

Although Kaho'olawe would obtain a low priority according to the national worst first scheme that considers all sites only on the merits of their environmental perils, Kaho'olawe may obtain a special place according to the archival evidence of a decontamination agreement negotiated early in the 1950's, the incorporation of that agreement by reference in the Admission Act, and Kaho'olawe's unique suitability as a site appropriate for developing DERP skills in UXO decontamination technology.¹³¹

3. Consent Decree

Stipulations between the Navy and plaintiffs now represented by the Protect Kaho'olawe 'Ohana (PKO) resulted in the December 1, 1980, entry of a Consent Decree in the case of *Aluli v. Brown* (No. 76-0380, U.S. District Court for the District of Hawai'i.) That federal court consent decree affirms the fact that Kaho'olawe's extensive

¹³¹ The December 8, 1972, *Ordnance Clearance Plan* published by the Naval Ordnance Systems Command, at page H-3, suggests that an ordnance clearance camp at Kaho'olawe was considered twenty years ago as part of a proposed plan for developing ordnance clearance methods and expertise.

archeological sites should be protected from harm and provides for progressive cleanup of other areas and general environmental work on Kaho'olawe for preservation and restoration purposes.

The litigation regarding Kaho'olawe began on October 13, 1976, with the filing of a Complaint for Injunctive Relief and Declaratory Relief seeking to end the Navy's bombing of Kaho'olawe and seeking to compel compliance with certain laws intended to protect and preserve Kaho'olawe's environment and its extensive historic, religious, cultural and archaeological resources.

In the course of the litigation, a plaintiffs' motion for partial summary judgment was granted with regard to count one (environmental impact statement requirements) and count nine (historic preservation claims.) See *Aluli v. Brown*, 437 F.Supp. 602 (D.Haw. 1977). On appeal, the Ninth Circuit held that the defendants were not required to file *annual* environmental impact statements. See *Aluli v. Brown*, 602 F.2d 876 (9th Cir. 1979). The parties then entered into negotiations to attempt to resolve the remaining issues and the Consent Decree was entered. The Consent Decree includes the following specific statements of its intent and purpose:

The goal of the Defendants' land management plan for Kaho'olawe is to eliminate erosion and implement a reforestation program. [§I.A.1.]

The [soil conservation program] will be reevaluated for its adequacy by the parties, at least annually, and adjusted and/or modified accordingly, including appropriate adjustments in man-days committed per year, to insure optimum effectiveness in restoring and preserving the island's natural environment. [§I.A.2.]

Compatible with Defendants' obligation pursuant to Executive Order 10436 to restore the Island of Kaho'olawe to a condition reasonably safe for human habitation when it is no longer needed for naval purposes, Defendants agree to remove surface ordnance from approximately ten thousand (10,000) acres of the surface of Kaho'olawe which are deemed by Plaintiffs to be of significance in restoring the religious, cultural, historic and environmental values of Kaho'olawe. [§I.D.]

Military operations will be planned and conducted in a manner that minimizes the accidental delivery of ordnance in the waters surrounding Kaho'olawe. [§II.A.]

Defendants will minimize the use of live ordnance at Kaho'olawe from all sources, including foreign users, by substituting "puff" or similar non-high explosive ordnance to the maximum extent practicable. Defendants anticipate that by the late 1980's almost all ordnance used by ships firing on Kaho'olawe will be inert. [§III.A.]

All military users of Kaho'olawe will submit to Commander, Fleet Training Force, and to Commander Third Fleet for approval Standard Operating Procedures (SOP) for Kaho'olawe. SOP's must include measures to prevent adverse impact to archaeological sites on Kaho'olawe which appear to the Defendants to be eligible for nomination or are placed on the National Register of Historic Places. [§III.E.1.]

Indiscriminate fire on targets of opportunity shall not be permitted. [§III.E.2.]

Commencing with the areas cleared pursuant to section I.D of this Decree, to the maximum extent possible, the Island of Kaho'olawe shall be used for religious, cultural, scientific and educational purposes. [§III.F.1.]

Furthermore, Defendants' use of Kealaikahiki or the areas cleared in accordance with section I.D always shall be consistent with the archaeological significance of these areas and in accordance with the Navy's management plan for Kaho'olawe archaeological sites placed on the National Register of Historic Places. [§III.F.2.]

Following a nomination or determination of eligibility of archaeological sites by the Keeper of the National Register, the Defendants will submit a comprehensive management plan to the Advisory Council on Historic Preservation, in accordance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), which details protective measures for all archaeological sites covered by the Keeper's determination.¹³² [§IV.D.]

Defendants immediately shall authorize and implement a program to stabilize eroding human burial sites on the Island of Kaho'olawe. [§IV.F.]

In Developing their soil conservation plans as discussed in section I.A., *supra*, Defendants also shall take steps to protect from erosion those archaeological sites which are considered to be eligible for listing in the National Register. [§IV.G.]

The Navy shall set aside no less than ten consecutive days per month for all non-training purposes including religious, cultural, scientific and environmental purposes. [§V.A.]

Both the Consent Decree and a 1981 Memorandum of Agreement between the Navy and the U.S. Advisory Council on Historic Preservation seek to prevent deterioration and damage to sites of historic, cultural and archaeological significance found on Kaho'olawe. §V of the Agreement refers to the Consent Decree as a basis for its scope. Under the Agreement, the Navy was obliged to develop a cultural resource management plan. The Agreement also requires periodic review and refinement of the

¹³² The entire Island of Kaho'olawe was eventually placed on the National Register of Historic Places.

plan in consultation with the Hawaii State Historic Preservation Officer (§V.H.) Consultations among the parties are required to resolve objections (§VII.)

Although the stated intent and purposes of the Consent Decree and Agreement were specific and explicit in providing for the protection and preservation of valuable historic, religious, cultural and archaeological sites, there were continuing instances of damage to such sites. Therefore, PKO and others continued in their efforts to protect Kaho'olawe by additional public education and political means.¹³³

The Consent Decree reserves to the plaintiffs a right "to bring about termination of the use of live and inert ordnance on Kaho'olawe." (Consent Decree, introduction at page 1.) Also, in §VI.G., the District Court retains jurisdiction "for the purpose of enabling either party to this Decree to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the enforcement of compliance with the terms of this Consent Decree." The Memorandum of Agreement contains a provision, §X., allowing a party to "request the consulting parties to consider an amendment or addendum to the Agreement."

The seminal opinion defining consent decrees for subsequent enforcement purposes appears to be *United States v. Armour & Co.*, 402 U.S. 673, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971). Often quoted therefrom is the following:

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive

¹³³ A May 26, 1988, letter from PKO to Admiral David Jeremiah, Commander of the Pacific Fleet, described instances including: fresh shells observed outside the target area in 1981; evidence of strafing at the Pu'u Moiwi adz complex and shrine in 1982; bullet holes found in 1984 at a coastal shrine and Hawaiian halau being built at Hakioawa; several incidents of ordnance falling outside of target zones and damage to archaeological sites since 1986; shells falling into the ocean during RIMPAC exercises in 1986; the unexplained disappearance of a prominent navigational landmark known as Kuhu Ke'e I Kahiki (shown as Black Rock on nautical charts); and the dropping of dud cluster bombs on eight archaeological sites in July of 1987. A Navy *Investigation to inquire into the circumstances connected with the off-target delivery of aviation ordnance by CVW-2 aircraft at Kahoolawe Island on or about 22 July 1987* describes how four A-6E aircraft from the U.S.S. *Ranger* dropped a total of 16 MK-20 Rockeye cluster bombs based on the pilots' selection of "an unauthorized target" after relying on "target folders [that] contained outdated information..." "The fact that more serious consequences did not result from this incident is fortuitous and not a result of sound strike planning" (quoting from the February 17, 1988, endorsement of Chief of Staff of the Third Fleet Commander.) In November, 1987, a 500 pound bomb, 5 ship to shore projectiles and a flare marker were found in two Pu'u Moiwi complexes; in May, 1988, a sweep team found nine 105 millimeter artillery shell impact points in a site at the Pu'u Moiwi complex, one causing damage to an archaeological feature; and in May, 1987, a large bomb was sighted in the ocean between Ku'uku'i Point and Papkanui Point.

their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving the cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.

402 U.S. at 681-682 (original emphasis, footnote omitted)

"To be sure, consent decrees bear some of the earmarks of judgments entered after litigation. At the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts. (citations, including *Armour*).¹ *Local Number 93, Intern. Ass'n. of Firefighters, AFLCIO C.L.C. v. City of Cleve*, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986).

Quoting *Armour*, 402 U.S. at 681-82, for the premise that the "scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it," the Supreme Court in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984), refused to allow an injunction that exceeded the scope of matters contemplated in a consent decree and that was not justified as a proper modification by a change in circumstances.

"Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree. Such reliance does not in any way depart from the 'four corners' rule of *Armour*."

United States v. ITT Continental Baking Co., 420 U.S. 223, 238, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975) (footnote omitted)

See also *S.E.C. v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984) (noting that a consent decree, as a judgment, has *res judicata* effect); *Collins v. Thompson*, 679 F.2d 1668, 170 (9th Cir. 1982) (observing that contract principles apply to questions of interpretation of consent decrees, including their formation).

Thus, the Consent Decree, like the Executive Order, can be viewed most appropriately as a contract requiring environmental restoration efforts on Kaho'olawe.

c. Alternatives

As described previously, the mixture of existing authorities pertaining to ordnance removal has areas of general harmony mixed with some areas of specific incongruity. In

this circumstance, the most practical approach would be a special act of Congress dealing with Kaho'olawe.

The statutory UXO decontamination goal of DERP provides for the detection and disposal of unexploded ordnance that creates an imminent and substantial endangerment to the public health or welfare or to the environment. See 10 USC §2701(b)(2).

Protection of human health and environmental restoration also are required by Federal Property Management Regulations and general environmental restoration laws such as CERCLA and RCRA. CERCLA's 42 USC §9620(h)(3) generally contemplates that conveyances from the United States include a covenant providing that all remedial action necessary to protect human health and the environment will be taken before a site may be conveyed and that any remedial action necessary after the date of conveyance shall be conducted by the United States.

Existing law requires either that Kaho'olawe be rendered safe or else that civilian use of the island be prohibited. Existing legal documents specifically contemplate Kaho'olawe's eventual non-military use and appear to compel the removal of hazards and environmental restoration.

Executive Order 10436, as an agreement negotiated by the Territorial government and the federal government, explicitly requires that Kaho'olawe be rendered safe. Incorporated by reference in Admission Act §5(c), that stipulation provides an immediate answer to the question of whether Kaho'olawe should be decontaminated. It is an answer that was determined by extensive deliberations completed forty years ago. The Executive Order is best interpreted as a contract.

More recently, further stipulations between the Navy and Protect Kaho'olawe Ohana resulted in a federal court consent decree affirming the fact that Kaho'olawe's extensive archeological sites must be protected from harm and that there would be a progressive cleanup of non-target areas and environmental restoration. The Consent Decree also is legally similar to a contract.

Assuming Congress decides to enact a special law addressing Kaho'olawe, that act should determine and resolve any potential controversy regarding the question of whether management of environmental restoration and the removal of explosive ordnance hazards should be undertaken using the procedures defined by CERCLA/SARA and DERP.

Notwithstanding certain efforts to separate UXO explosive hazards from hazardous and toxic waste in the general scheme of site cleanup, it would seem most appropriate to include all of the UXO-related contamination and hazards (explosive and toxic) on Kaho'olawe within the context of CERCLA and RCRA for decontamination purposes. As

a complete and discrete ecological entity, the Island of Kaho'olawe should be thoroughly decontaminated of all hazards -- structural, toxic and explosive -- under one integrated and comprehensive plan.

In the same context, the Congressional act regarding Kaho'olawe should establish a specific basis for any recommended transfer of the land from the jurisdiction of the Secretary of the Navy.

If Kaho'olawe is to be used as a pilot project site for unexploded ordnance decontamination and the removal of related toxic hazards, then provision for such use must be expressed in the special law, as well as provision for an appropriation to an appropriate account or entity in order to accomplish the cleanup. The Kaho'olawe Act should designate the entity with management responsibility for the cleanup effort and set a specific schedule for accomplishing the work.

While use of one of the existing schemes of decontamination (*i.e.*, IRP, FUDS and BRAC) would necessarily route the cleanup of Kaho'olawe into a specific set of appropriation, management and procedural requirements, it may be most sensible to create a hybrid scheme that accommodates the diverse mixture of interests potentially involved. A hybrid partnership of agencies and organizations could best focus all existing technology and resources upon such an effort.

Finally, a special Kaho'olawe Act should resolve matters of liability. It would be most appropriate to maintain the intent of 42 USC §9620(h)(3) and Executive Order 10436 by providing that full responsibility for the decontamination of Kaho'olawe rests upon the federal government.

Recognition of a federal duty to clean up Kaho'olawe will raise the question of a requirement for land use restrictions necessary for safety purposes prior to the accomplishment of complete decontamination as well as the related question of whether there should be an ultimate requirement for complete decontamination -- as a fiscal and ecological consideration. Further, Land use restrictions also may be imposed to protect Kaho'olawe's significant cultural, archaeological and historic sites. Those questions also must be addressed by the Kaho'olawe Act.

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