October 15, 2022

Hawaiian Homes Commission
Department of Hawaiian Home Lands
dhhl.icro@hawaii.gov

RE: WRITTEN TESTIMONY FOR THE OCTOBER 17-18, 2022, HAWAIIAN HOMES COMMISSION MEETING, AGENDA ITEM III.1, REQUEST TO EXTEND GENERAL LEASE NO. 202 TO PRINCE KUHIO PLAZA

Native Hawaiian Legal Corporation urges this commission to deny Prince Kuhio Plaza’s request for an extension of its general lease. The extension is not allowable under Federal and State law. Further, reserving almost 50 acres of valuable trust lands for one commercial user for a total of 105 years under antiquated lease terms would go against this Commission’s duty to manage trust lands for the exclusive benefit of its beneficiaries.

HISTORY

PRINCE KUHIO PLAZA IS LOCATED ON TRUST LANDS

Prince Kuhio Plaza is currently located on approximately 47 acres (inclusive of a parking easement) of Hawaiian home lands trust lands in Hilo. The general lease for the property, General Lease No. 202, was initially issued on October 1, 1977 for a 53 year term continuing to September 30, 2030. The Plaza’s ultimate owner is Brookfield Asset Management, one of the world’s largest investment management companies with over $750 billion in assets under management and with a property management arm that manages 375 million square feet of investment properties globally.

IN 1992 THE PLAZA AND THE COMMISSION AGREED THAT THE PLAZA WOULD NOT BE ELIGIBLE FOR ANOTHER LEASE EXTENSION

On September 30, 1992, the term of the Plaza’s general lease was extended by 12 years through September 30, 2042. The extension mandates that “no further extension of lease term will be considered. This condition shall not be construed to deny the [Plaza] the right to bid or otherwise apply

1 Native Hawaiian Legal Corporation is a 501(c)(3) non-profit law firm that is exclusively dedicated to advancing the rights, customs, and practices that strengthen Native Hawaiian identity and culture. NHLC provides legal counsel, advocacy, information, education, and representation to beneficiaries of the Hawaiian Homes Commission Act to ensure they receive the benefits of the Act to which they are entitled.

Uluru’a Upright, straight, stately, tall and straight as a tree without branches; sharply peaked, as mountains. Fig., righteous, correct
for, and if successful obtain, any new lease[.]”  

No modification or rescission of the prohibition on lease extensions have been publicly identified by the Department of Hawaiian Home Lands (“DHHL”) to date.

**THE PLAZA REQUESTS AN EXTENSION OF THE GENERAL LEASE FOR A TOTAL OF 105 YEARS**

Despite being contractually prohibited by its prior extension from seeking further extensions of the General Lease, the Plaza sought an additional lease extension on September 6, 2022. The lease extension came before the Hawaiian Homes Commission at its September 19-20, 2022 meeting as item “F-5” for information only.

The Plaza’s proposed lease extension is sought under Act 236 (2021), which amended Hawai’i Revised Statutes Chapter 171 to permit commercial and industrial lessees of State lands to seek a 40 year extension of their leases, extending the possible lease term to 105 years total, well beyond industry standard for government leases. Act 236 received substantial opposition from the Native Hawaiian community and the public, including the Office of Hawaiian Affairs, and with the little support coming from developers and current lessees. The Plaza supported Act 236. The Department of Hawaiian Home Lands did not take a position on the passage of Act 236.

The DHHL staff submittal for the lease extension is woefully deficient. The submittal does not include the General Lease documents or the lease extensions. The submittal does not indicate that beneficiary consultation was conducted on the lease extension or on DHHL’s intent to adopt Act 236 for Hawaiian home lands trust lands. The submittal does not explain why the 1992 extension’s prohibition on additional extensions does not apply. The submittal does not indicate that DHHL determined the fair market value of General Lease No. 202 and whether the Plaza will be expected to pay fair market rates for the use of Hawaiian home lands.

**THE DEPARTMENT OF THE INTERIOR NOTIFIES CHAIRMAN AILĀ THAT THE COMMISSION CANNOT EXTEND LEASES PURSUANT TO ACT 236**

The staff submittal for item F-5 did not disclose that the United States Department of the Interior previously sent a letter on **May 11, 2022** directly to Commission Chair William Ailā notifying him that the Commission and DHHL cannot use Act 236 to extend any general lease, which includes the Plaza’s lease, without approval of the Interior and congress. The Interior’s letter to Chair Ailā lays out clearly that “Act 236 can have no effect on the [Hawaiian Homes Commission Act] or the Trust pursuant to 43 C.F.R.§ 48.50, because Act 236 would impact at least one of the criteria listed in 43 C.F.R.§ 48.20 and the administrative procedures outlined in 43 C.F.R. Part 48 have not yet occurred.” Specifically, the Interior disputed the prior conclusion of the office of the Attorney General on the applicability of Act 236 to Hawaiian home lands:

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2 The extension is publicly available through the Bureau of Conveyances as Document no. 92182925.
More fully stated, the AG Opinion ignores the provision in 43 C.F.R. § 48.50, which provides that any “state enactment that impacts any of the criteria in 43 C.F.R. § 48.20 shall have no effect on the provisions of the HHCA or administration of the Trust.” The AG Opinion admits that Act 236 would allow for the extension of the terms of leases on Native Hawaiian home lands in excess of the number of years previously allowed. As such, Act 236 appears to be a “legislative action that directly or indirectly has the effect of...allowing for additional encumbrances to be placed on Hawaiian home lands by officers other than those charged with the administration of the HHCA” as outlined in 43 C.F.R. § 48.20. Therefore, pursuant to 43 C.F.R. § 48.50, Act 236 shall have no effect on the provisions of HHCA or the administration of the Trust because it directly impacts a criterion articulated in 43 C.F.R. § 48.20.

Finally, if the State intends to allow for the extension of lease terms in excess of the previous lease duration limitation in Chapter 171 to have effect on the provisions of the HHCA or administration of the Trust, then the State would have to either amend Act 236 or enact entirely new legislation to specify that the State is seeking to amend the HHCA and submit the materials and information required by 43 C.F.R. § 48.15.6 The Secretary would then undertake her analysis pursuant to 43 C.F.R. §§ 48.20 and 48.25.

THE INTERIOR’S MAY 11, 2022 LETTER WAS NOT DISCLOSED ON THE RECORD AT THE SEPTEMBER 19, 2022 COMMISSION MEETING

The Interior’s conclusion that Act 236 “shall have no effect” on the administration of the Hawaiian home lands trust was not discussed at the September 19, 2022 Commission meeting. In fact, the existence of the Interior’s written letter was hidden from the public.

In response to commissioner questions regarding the Interior’s role in the approval of Act 236, the deputy attorney general appearing at the Commission meeting acknowledged that the Interior has previously taken the position that amendments to HRS Chapter 171 cannot apply to Hawaiian home lands without the Interior’s concurrence and compliance with 43 C.F.R. Part 48.3 Counsel then stated that the Interior may not have “realized” that Act 236 passed,4 implying the Interior has not taken a position on the applicability of Act 236 to the trust. Counsel then directly stated that “there was no action by the Interior” or local “DOI,”5 and that she didn’t “believe that [Interior] ever came back with an actual written anything of the nature[.]”6 While it is unknown whether Counsel was aware of the May 11, 2022 letter, Chair Ailā did not act to correct the inaccurate statements regarding the Interior’s position on Act 236, nor was the Interior’s written letter disclosed to the commissioners at the public portion of the meeting.

THE INTERIOR REITERATES THAT EXTENDING THE PLAZA’S LEASE WOULD VIOLATE FEDERAL LAW

In light of the Commission’s consideration of the Plaza’s extension at the September 19-20, 2022 Commission meeting, the Office of the Solicitor for the Interior wrote to the State Attorney General that “the United States has significant concerns that any actions by the Hawaiian Homes Commission . . . to grant extensions of commercial leases of Hawaiian home lands pursuant to [Act 236] violate Federal law and constitute a breach of trust by the State.” The Interior made clear that any action to approve any

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3http://www.youtube.com/watch?v=Iv78lXkS314 at ~5:20:05.
4~5:21:15.
6~5:24:40.
extensions under Act 236 would create “conflict between the United States and the State” and supplied specific and definitive analysis on why any extension would violate the law:

In compliance with the Admission Act, and as a compact between the State and the United States relating to the management and disposition of the Hawaiian home lands, the State adopted the HHCA, as amended, as a law of the State through Article XII of its Constitution “subject to amendment or repeal only with the consent of the United States, and in no other manner.” The compact “between Hawaii and the United States strictly limits the manner in which Hawaii may manage the homelands and the income they produce.” Price v. Akaka, 928 F.2d 824, 826 (9th Cir. 1990). Paramount among the limitations imposed on the State’s management of the Hawaiian home lands is the prohibition against increasing encumbrances on home lands without congressional approval. Act 236, as the State acknowledges, would have the effect of authorizing DHHL and the Commission to increase encumbrances on Hawaiian home lands. Accordingly, Act 236 must be reviewed by the Secretary and approved by Congress.

The United States understands that in mid-October the Commission intends to consider an application for a 40-year lease extension under Act 236 by a commercial lessee of Hawaiian home lands. The United States believes that it would be imprudent for the Commission to entertain granting any lease extensions under Act 236 relating to the Hawaiian home lands until after the requirements detailed in 43 C.F.R. part 48—including summaries of all consultations conducted with the beneficiaries—are complete, as required by the Admission Act, the HHCA, and the Recovery Act.

Despite the Interior’s follow-up, the Plaza’s extension remains on the agenda for the upcoming Commission meeting on October 17, 2022.

**DHHL LACKS THE AUTHORITY TO EXTEND THE PLAZA’S COMMERCIAL LEASE**

The Commission should refrain from granting the Plaza’s requested extension and instead consider and investigate (1) the Interior’s conclusion that DHHL would violate federal law if it issued lease extensions pursuant to Act 236; (2) enforcement of the Commission’s previous vote prohibiting the Plaza from obtaining an additional lease extension; (3) whether adequate beneficiary input has occurred; and (4) whether a long term extension now, without the ability to re-visit lease terms at a later date, is in the best interest of the trust and its beneficiaries.

The Plaza’s requested extension suffers from many legal deficiencies. Most concerning, though, is that the extension is not a sound land management decision as it shackles this Commission and prevents it from adapting the use of and lease terms for the property as market conditions and the needs of its beneficiaries change between now and 2082.

**ACT 236 DOES NOT APPLY TO HAWAIIAN HOME LANDS**

Federal law prohibits DHHL and the Commission from applying Act 236 to the management of Hawaiian home lands trust lands. 43 C.F.R Part 48 makes clear that for a “legislative action that directly or indirectly has the effect of . . . allowing for additional encumbrances to be placed on Hawaiian home lands other than those charged with the administration of the [Hawaiian Homes Commission Act],” the Chairman of the Commission must submit the act to the Interior for the Secretary of the Interior’s analysis within 120 days of the passage of the act. Part 48 was not followed. There is also no dispute that Act 236 allows for additional encumbrances on home lands, which triggers Interior review of the act prior to it becoming effective for trust lands. The term “encumbrance” includes leases, even in the
context of the Hawaiian home lands trust. Because Act 236 allows for additional lease extensions not currently allowed under the Hawaiian Homes Commission Act, it directly and indirectly allows for additional encumbrances to be placed on trust lands by non-trustees, i.e., the Plaza.

The Commission is duty bound to follow the law, and its failure to do so constitutes a breach of trust. DHHL, led by the Commission, must discharge the State’s duty to administer the Act. See HRS § 26-17 (“The department shall administer the [Hawaiian Homes Commission Act] as set forth in the Constitution of the State and by law.”); HHCA § 204 (“Upon the passage of this Act, all available lands shall immediately assume the status of Hawaiian home lands and be under the control of the department to be used and disposed of in accordance with the provisions of this Act[].”) (emphasis added). Therefore, the Commission and DHHL cannot act in contravention of the Hawaiian Homes Commission Act and Part 48 and permit lease extensions that are not authorized by the law. This means that, regardless of whether the Commission believes that an extension to the Plaza should be authorized (it should not) or is a sound decision (it is not), it is a decision the Commission cannot make unless and until Federal law is complied with and a similar act is transmitted to the Interior for consideration and approval. The Commission should thoroughly consider and follow the Interior’s official position and action regarding Act 236.

THE EXTENSION IS PROHIBITED BY THIS COMMISSION’S 1992 DECISION

Lease documents for the General Lease prohibits the Plaza from seeking an extension, and prevents the Commission granting an extension. According to the September 30, 1993 extension of General Lease No. 202, “No further extension of lease term” can be granted to the Plaza by the Commission. No amendment to the extension rescinding that lease term appears on record. As trustee, this Commission is duty bound to follow and enforce lease agreements for trust lands and risks legal action by its beneficiaries for failure to do so. See Ching v. Case, 145 Haw. 148, 449 P.3d 1146 (2019) (finding that the State’s failure to enforce a lease provision requiring the Army to clean up after live fire exercise training was a breach of trust enforceable by beneficiaries). The Commission should investigate its prior decision to prohibit future lease extensions and enforce that prohibition if it is still in effect.

BENEFICIARY INPUT ON THIS AGENDA ITEM HAS BEEN DISCOURAGED

The Commission should be concerned that the procedures followed to-date for the extension of the Plaza’s lease silence beneficiary input.

Avoiding the Interior’s approval process for amendments to the Hawaiian Homes Commission Act under Part 48 has the ultimate effect of preventing beneficiary consultation. For example, in proposing an amendment to the Hawaiian Homes Commission Act, the Chairman must provide summaries of all

7 Keliipuleole v. Wilson, 85 Haw. 217, 224, 941 P.2d 300, 307 (1997) (referring to leases, subleases, assignments, and mortgages on Hawaiian homelands as “encumbrances”); Cty. of Hawai’i v. C&J Coupe Family, Ltd. P’ship, 124 Haw. 281, 309 n.28, 242 P.3d 1136, 1164 (2010) (defining encumbrance as “any property right that is not an ownership interest.”); Create 21 Chuo v. Sw. Slopes, 81 Haw. 512, 525, 918 P.2d 1168, 1181 (Ct. App. 1996) (“the [term] is construed broadly to include not merely liens such as mortgages, judgment liens, taxes, or others to which the land may be subjected to sale for their payment, but also attachments, leases, inchoate dower rights, water rights, easements, restrictions on use, or any right in a third party which diminishes the value or limits the use of the land granted.”).

8 Because the submittal for item F-5 is incomplete and does not include copies or summaries of the lease documents for General Lease No. 202, the above is based on readily available documents.
consultations conducted with beneficiaries. The Interior then considers the net benefit of the amendment to beneficiaries, including those on leases, the waitlist, and those who have not yet applied. 43 CFR Part 48.25(b). Beneficiary consultation and input is a critical part of the Interior’s approval process. See 43 C.F.R. Part 48. This means that avoiding that process is avoiding beneficiary input. DHHL and the Commission should welcome participation in the Interior’s approval process; it ensures that beneficiary interests are protected, advanced, and aligned with their actions.

That DHHL took no position on Act 236 when it was before the legislature, despite having the intention of adopting Act 236, had the effect of preventing beneficiary input. By not taking a position, DHHL deprived beneficiaries the opportunity to express whether they agree or disagree with DHHL’s interpretation of Act 236. That DHHL is now taking the position that Act 236 should apply to Hawaiian home lands trust lands strongly implies that DHHL actively avoided beneficiary input on Act 236 to ensure both its passage and approval of the Plaza’s extension request once it came before the Commission; leaving beneficiaries without adequate time, notice, or opportunity to weigh in on a decision impacting their trust lands.

Neither the DHHL staff submittal for the September 19-20, 2022 Commission meeting nor commission decision-making at the meeting addressed the Interior’s written rejection of DHHL’s application of Act 236 to trust lands, nor did it address the prohibition on additional extensions for the Plaza. The lack of open discussion on these critical issues limited the opportunity for beneficiary input and resulted in the lack of necessary information for the beneficiaries (and this Commission) to fully vet the Plaza’s extension request.

To ensure that the best interests of all beneficiaries are accounted for, the Commission should reject the Plaza’s extension from 2042 to 2082 until (1) Act 236, or a similar law, is approved by the Interior pursuant to 43 C.F.R. Part 48; (2) substantial beneficiary consultation occurs on the adoption of Act 236 or a similar law; and (3) a full and open discussion on the legal issues surrounding the Plaza’s extension occurs at a Commission meeting with a full opportunity for beneficiary consultation.°

°THE COMMISSION SHOULD THOROUGHLY CONSIDER WHETHER AN ADDITIONAL EXTENSION AT THIS TIME CONSTITUTES BEST PRACTICES CONSISTENT WITH INDUSTRY STANDARDS

Whether implementing Act 236 for Hawaiian home lands, and specifically for General Lease No. 202, is a sound land management decision is premature as it is not a legally available choice. An illegal act by a trustee cannot be considered a prudent action benefiting the trust, no matter the intent. However, even if Act 236 ultimately receives approval from the Federal Government for implementation, the Commission should fully consider whether extending General Lease No. 202 for a total term of 105 years is sound from a land management perspective.

Shockingly, the staff submittal for the extension does not provide any indication that DHHL determined the fair market value for the General Lease, by appraisal or otherwise, or that the Plaza will be paying that value. It would not be in the best interests of beneficiaries to grant a lease extension that will give

°The Commission should invite opportunities to consult with beneficiaries on both the implementation of Act 236 and the Plaza’s requested extension, particularly since DHHL took no formal, public position on Act 236 or its applicability to Hawaiian home lands when Native Hawaiians and Native Hawaiian organizations, including the Office of Hawaiian Affairs, resoundingly opposed Act 236’s passage in 2021.
one wealthy corporation exclusive use of the limited, developable home lands for the next sixty years without even knowing if the trust is getting a fair value for the use of its lands.

Ultimately, the requested extension does not empower this and future commissions to make the best choices for the trust and its beneficiaries in the years to come. The Commission will be bound, for the next **sixty years**, to the lease terms previously negotiated and set in 1973 and which were amended in 1993. The Commission will be shackled and prevented from changing terms as the market, industry best practices, law, surrounding area, and needs of the beneficiaries change with the times. If the extension is denied and the lease expires in 2042 as mandated by the 1993 lease amendment, then future ‘ōiwi leaders appointed to the Commission would be free to make that decision after consulting with beneficiaries. This Commission would be empowering the 2042 Commission to determine if the highest and best use of approximately 50 acres of infrastructure-ready home lands (a typically cost-prohibitive dream come true) would be by issuing waitlisters leases to provide generational stability for their ‘ohana for years to come, or by generating income from a mall or other commercial operation secured through market competition and competitive bidding for the lease. Next-generation kanaka commissioners could implement new provisions requiring the lessee sublet commercial spaces, create employment opportunities, and provide other benefits to beneficiary-owned businesses and the surrounding homestead community in Pana‘ewa and beyond; things it cannot do with a long-term extension under Act 236. The proposed extension severely limits this Commission from doing what is pono for its beneficiaries.

Abstaining from granting the extension at this time does not unfairly prejudice the Plaza and its multi-billion dollar parent company. They have a lease for 20 more years. They have known since 1992 that they are prohibited from seeking an additional extension. They can still reapply for a new lease later, and the Commission can consider that request in light of the then-needs of its beneficiaries. They are not owed anything more at the expense of beneficiaries.

**GRANTING THE EXTENSION COULD SUBJECT THE COMMISSION TO LEGAL ACTION**

The Commission should be aware that State law permits beneficiaries and Native Hawaiian organizations to sue over its decisions to issue general leases.\(^\text{10}\) This means that the Commission and DHHL could be liable for its decision to extend General Lease No. 202 in violation of federal law, and for its failure to enforce its prior prohibition on new extensions for the general lease. The Commission should consider whether moving forward on this issue for the benefit of the Plaza at the risk of costly litigation is best for its beneficiaries, especially when there is no good reason why granting an extension twenty years prior to the expiration of the General Lease is necessary.

\[^{10}\text{Even though such suits are allowable without a waiver of sovereign immunity, under Hawaii Revised Statutes Chapter 673, the State waives sovereign immunity for suits of this nature, and beneficiaries are allowed to sue the State, including DHHL and the Commission, for breach of trust. Chapter 673 also allows attorney’s fees to successful plaintiffs who sue DHHL and Commission for breach of trust. Because litigation is possible, DHHL and the Commission must preserve and maintain all records, documents, and recordings related to this matter.}\]
Mahalo for your consideration,

David Kauila Kopper, esq.
For the Native Hawaiian Legal Corporation

Attachments:
May 11, 2022 Letter from the Department of the Interior
October 13, 2022 Letter from the Department of the Interior Office of the Solicitor
ATTACHMENT 1
Dear Chairman Ailā:

Subject: Act 236, 2021 Hawai’i Session Laws

Thank you for your letter dated February 16, 2022, regarding the above referenced matter. The Department has reviewed your letter and the opinion of the State of Hawai‘i Attorney General (“AG Opinion”) that Act 236, Session Laws of Hawai‘i 2021 (“Act 236”), does not require the consent of the United States because it does not seek to amend the Hawaiian Homes Commission Act (“HHCA”) and does not affect Hawaiian home lands such that United States consent is required. For the reasons articulated below, the Department believes that Act 236 would have a direct effect of allowing for additional encumbrances to be placed on Hawaiian home lands which would trigger the need for Secretarial review and Congressional approval. As such, pursuant to 43 C.F.R. § 48.50, because Act 236 would implicate one of the factors outlined in 43 C.F.R. § 48.20, Act 236 can have no effect on the HHCA until all administrative procedures and responsibilities outlined in 43 C.F.R. Part 48 occur.

This letter is not intended to serve as the Secretary’s formal review of Act 236 pursuant to 43 C.F.R. § 48.20. Rather, this letter serves as notice that Act 236 can have no effect on the HHCA or the Trust pursuant to 43 C.F.R. § 48.50, because Act 236 would impact at least one of the criteria listed in 43 C.F.R. § 48.20 and the administrative procedures outlined in 43 C.F.R. Part 48 have not yet occurred. Our initial review of Act 236 suggests that it would allow for the additional encumbrance of Native Hawaiian home lands. Specifically, if applied to Hawaiian home lands, Act 236 would allow for the extension of lease terms in excess of the previous lease duration limitation as previously provided for in Chapter 171 of the Hawai‘i Revised Statutes. These potential lease extensions would constitute an additional encumbrance on Hawaiian home lands as articulated by 43 C.F.R. § 48.20. As such, unless and until the administrative procedures and responsibilities outline in 43 C.F.R. Part 48 are performed by you, the Secretary, and as necessary Congress, Act 236 cannot have any effect on the provisions of the HHCA or the administration of the Trust pursuant to 43 C.F.R. § 48.50.

The AG Opinion suggests that because Act 236 amends Chapter 171 of the Hawai‘i Revised Statutes (“Chapter 171”) to allow extension of certain leases of public lands within the State of
Hawai‘i (“State”) generally, the inclusion of Hawaiian home lands is incidental and therefore not covered by the requirements of the Hawai‘i Admission Act, the HHCA, the HHLRA, or 43 C.F.R. Part 48. The AG Opinion does acknowledge that Act 236 “allows [the Department of Hawaiian Home Lands] to extend the terms of its leases of Hawaiian Home Lands that it has issued under HRS chapter 171.”

Notwithstanding this acknowledgement, however, the AG Opinion goes on to suggest that the change authorized by Act 236 can occur without the review of the Secretary or approval of Congress. The AG Opinion relied on the Department’s analysis of Act 173, Session Laws of Hawai‘i 2014, concerning leases of certain DHHL property for this conclusion. The AG Opinion unfortunately overlooked a key part of our analysis of Act 173:

Consistent with the limitations in the Admission Act, the HHCA, the HHLRA, and other Federal laws, any state enactment (including amendments to chapter 171 or other chapters it references, such as chapter 102) that meets any of the criteria expressed at 43 C.F.R. § 48.20, or otherwise impacts the provisions of the HHCA, has no effect on the management of the Trust unless approved by the Secretary or Congress.

More fully stated, the AG Opinion ignores the provision in 43 C.F.R. § 48.50, which provides that any “state enactment that impacts any of the criteria in 43 C.F.R. § 48.20 shall have no effect on the provisions of the HHCA or administration of the Trust.” The AG Opinion admits that Act 236 would allow for the extension of the terms of leases on Native Hawaiian home lands in excess of the number of years previously allowed. As such, Act 236 appears to be a “legislative action that directly or indirectly has the effect of . . . [a]llowing for additional encumbrances to be placed on Hawaiian home lands by officers other than those charged with the administration of the HHCA” as outlined in 43 C.F.R. § 48.20. Therefore, pursuant to 43 C.F.R. § 48.50, Act 236 shall have no effect on the provisions of HHCA or the administration of the Trust because it directly impacts a criterion articulated in 43 C.F.R. § 48.20.

Finally, if the State intends to allow for the extension of lease terms in excess of the previous lease duration limitation in Chapter 171 to have effect on the provisions of the HHCA or administration of the Trust, then the State would have to either amend Act 236 or enact entirely new legislation to specify that the State is seeking to amend the HHCA and submit the materials and information required by 43 C.F.R. § 48.15. The Secretary would then undertake her analysis pursuant to 43 C.F.R. §§ 48.20 and 48.25.

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3 Similarly, these requirements and procedures would apply to any other amendments to HRS Chapter 171 that the State intends to have effect on the provisions of the HHCA or administration of the Trust, i.e., Act 215, 2017 Hawai‘i Session Laws.
Again, thank you for your letter and the AG opinion. Please let us know if you have any questions.

Sincerely,

Joan M. Mooney  
Principal Deputy Assistant Secretary  
Exercising the Delegated Authority of the Assistant Secretary - Policy, Management and Budget

Cc: Congressman Kai Kahele, U.S. House of Representatives
ATTACHMENT 2
October 13, 2022

The Honorable Holly T. Shikada
Attorney General, State of Hawai‘i
425 Queen Street
Honolulu, Hawai‘i 96813

Re: Act 236, 2021 Hawai‘i Session Laws

Dear Attorney General Shikada:

I am writing to give notice that the United States has significant concerns that any actions by the Hawaiian Homes Commission (Commission) to grant extensions of commercial leases of Hawaiian home lands pursuant to Hawai‘i Act 236 (2021 Hawai‘i Session Laws) violate Federal law and constitute a breach of trust by the State.

Act 236 amends chapter 171, Hawai‘i Revised Statutes (Chapter 171), to authorize the Board of Land and Natural Resources to extend the terms of certain leases of public lands for up to 40 years. The Hawaiian Homes Commission Act (HHCA) allows the Department of Hawaiian Home Lands (DHHL) to lease Hawaiian home lands not required for homesteading to members of the general public “on the same terms, conditions, restrictions, and uses applicable to the disposition of public lands in chapter 171[,]” Your office opined that because Act 236 amends Chapter 171 to allow extension of certain leases of public lands within the State generally, including Hawaiian home lands, such home lands are exempt from the requirements of the Hawai‘i Admission Act, the HHCA, and the Hawaiian Home Lands Recovery Act (Recovery Act), or 43 C.F.R. Part 48.1

The State concluded that Act 236 does not require Secretarial review or Congressional approval based, in part, upon its reading of the 2018 analysis by the Department of the Interior of Act 173 (2014 Hawai‘i Session Laws).2 Act 173 proposed to amend HHCA § 204(a)(2) by adding an additional proviso to permit DHHL to enter into certain leases of improvements on Hawaiian home lands not required for homestead leasing under section 207(a) of the HHCA.3 The Department concluded that Act 173 required Congressional approval and in discussing its reasoning stated that:

The Department agrees that if the State were to amend chapter 171, maintaining the same procedure for public lands as for the home lands, it could do so,

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3 2018 Decision Letter at 1.
provided such amendment to chapter 171, as determined by Secretarial review, does not conflict with the HHCA and section 4 of the Admission Act.\(^4\)

This highlighted language above makes clear that any proposed amendment must not conflict with the HHCA and section 4 of the Admission Act. The State’s analysis of Act 236 does not consider the requirements of those governing statutes.\(^5\)

In compliance with the Admission Act, and as a compact between the State and the United States relating to the management and disposition of the Hawaiian home lands, the State adopted the HHCA, as amended, as a law of the State through Article XII of its Constitution “subject to amendment or repeal only with the consent of the United States, and in no other manner.” The compact “between Hawaii and the United States strictly limits the manner in which Hawaii may manage the homelands and the income they produce.” Price v. Akaka, 928 F.2d 824, 826 (9th Cir. 1990). Paramount among the limitations imposed on the State’s management of the Hawaiian home lands is the prohibition against increasing encumbrances on home lands without congressional approval.\(^6\) Act 236, as the State acknowledges, would have the effect of authorizing DHHL and the Commission to increase encumbrances on Hawaiian home lands. Accordingly, Act 236 must be reviewed by the Secretary and approved by Congress.

The United States understands that in mid-October the Commission intends to consider an application for a 40-year lease extension under Act 236 by a commercial lessee of Hawaiian home lands.\(^7\) The United States believes that it would be imprudent for the Commission to entertain granting any lease extensions under Act 236 relating to the Hawaiian home lands until after the requirements detailed in 43 C.F.R. part 48—including summaries of all consultations conducted with the beneficiaries—are complete, as required by the Admission Act, the HHCA, and the Recovery Act.

I respectfully request your prompt attention to this matter to avoid unnecessary conflict between the United States and the State, which for more than 60 years have worked cooperatively and collaboratively to ensure that our respective responsibilities under the HHCA are faithfully executed.

Sincerely,

Robert T. Anderson
Solicitor

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\(^4\) 2018 Decision Letter at 15, n. 23 (emphasis added).

\(^5\) As was noted in the Department’s May 11, 2022, letter to Chairman Ailā, our Act 173 analysis was unequivocal that “any state enactment (including amendments to chapter 171 or other chapters it references, such as chapter 102) that meets any of the [criteria expressed at 43 C.F.R. § 48.20], or otherwise impacts the provisions of the HHCA, has no effect on the management of the Trust unless approved by the Secretary or Congress.” See letter to William J. Ailā, Chairperson, Hawaiian Homes Commission from Joan M. Mooney, Principal Deputy Assistant Secretary Exercising the Delegated Authority of the Assistant Secretary - Policy, Management and Budget (May 11, 2022).

\(^6\) Section 4 of the Admission Act provides in part: “[A]nd the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States[.]” An increase in encumbrances is not “administration.”

\(^7\) Monthly meeting of the Commission, September 19, 2022, discussing October 17 and 18 hearing agenda.