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**PUBLIC LANDS AS A PUBLIC TRUST**

by

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## PUBLIC LANDS AS A PUBLIC TRUST

Are Hawaii's public lands in the nature of a public trust and if so should their alienation be restricted; should the lands and the proceeds from the sale thereof be preserved as would be the corpus of a private trust; is it proper to expend the proceeds from such sales for daily operating expenses, or should such proceeds be used only for capital improvements?

The Legislative Reference Bureau was requested to consider these questions in the light of practices in Hawaii and elsewhere and to report on the results of its analysis.

A full understanding of the problems inherent in public land administration in Hawaii cannot be achieved without a broad view and analysis of the practices in historical retrospect, and the reasons therefore, of the United States and state governments, in respect to public land administration.<sup>1</sup>

### Administration of United States' Lands

In the period of approximately 1780-1870 the United States gained title to almost 2 billion acres of land, and from about 1800 to 1930 disposed of in the neighborhood of over 1 billion acres.

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<sup>1</sup>For a fuller discussion of federal and mainland state public land policies see Marion Clawson and Burnell Held, The Federal Lands: Their Use and Management (Baltimore: Johns Hopkins Press, 1957); also Charles S. James, Public Land Policies of the United States and the Mainland States (Report No. 5, 1961; Honolulu; University of Hawaii, Legislative Reference Bureau, 1961).

The United States gained title to these public domain lands through cession by the original states, purchase from European powers, conquest of Indians, and international treaties. These lands went through four historical periods; i.e., the eras of acquisition, disposal, reservations, and management, as follows:

Era of Disposal. The era of disposal was geared toward the very pressing needs of the time, that of putting acquired public land into private ownership on the ground that land disposal was a way of meeting the needs of the population and at the same time stimulating much needed continental expansion. This program at first contemplated sales for cash. This was modified by the pre-emption laws of 1841 giving the buyers an opportunity to buy additional adjacent lands at minimum prices. It was again modified in 1862 by the Homestead Acts which permitted alienation to the public of 160 acre tracts of public domain without cost, provided the individuals settled on the land, made certain improvements, and resided thereon for a minimum of five years. This Act alone placed over 300 million acres of public domain in private ownership within a period of about 80 years. There was a definite public policy involved in the philosophy of this Act. It was the belief that the future public interest, economic and otherwise, lay in the settling and expansion of the vast agricultural potential of the West, and it served its purpose well of creating a stable landed and united agricultural population.

One of the most controversial ways of alienating the public domain was the granting of over 90 million acres to about a dozen railroad corporations during the period 1850-1871, as an incentive to expand into the frontier in the interest of furthering the economic development of the West. Although this latter method has been held up as a highly improper example of public domain administration, it must be appraised in the context of the times. It is difficult in retrospect to see what wiser alternative could have been pursued since transcontinental railroads turned out to be one of America's soundest investments, politically and economically.

Era of Reservation. The era of reservation was the result of the realization that the vast land resources of the United States were not inexhaustible. It became apparent that if the public domain was to be used for the general public welfare, rather than purely to serve its assigned place in the national economy through private ownership, some measures were necessary to inhibit the process of disposal. Three principal means were utilized to realize this objective; i.e., development of the national park system, the creation of national forest reserves and the establishment of grazing districts in the western states.

Era of Management. The creation of reservations to preserve the public domain strengthened the idea that public use was a legitimate objective for land policy. Although the change from neglect to management came slowly, the point has

now been reached where the management of the public domain in the interests of the public is one of the larger functions of the federal government. These management functions are now geared toward public objectives such as timber production, recreation, water production, game and wildlife management, national parks, and preservation of scenic areas and those of historical or scientific interest and importance. These objectives serve more than purely narrow goals; they are geared toward giving the nation's expanding population the maximum economic and social return from its lands. In principle, the acceptance of these objectives represents the acceptance of a "trusteeship" of the country's lands for the maximum benefit and return to the maximum number of people.

The era of management was the culmination of many years of experience. Its establishment represents the acceptance of the fact that the public domain is a permanent aspect of government and that the paramount problem is one of determining the best use in the public interest of that domain. This concept has dominated federal land administration policy since 1905, and it is carried to fruition by five agencies-- Bureau of Land Management, Bureau of Indian Affairs, National Park Service, National Forests, and Department of Defense.<sup>2</sup>

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<sup>2</sup>Clawson and Held, op. cit., pp. 15-44.

### Administration of State Lands

The history of state control and administration of the public domain parallels to some degree that of the federal lands. There is little doubt, however, that the early dispositions of state lands in the various states were for the purpose of obtaining revenue. It has not been clearly established how these revenues were used, but most such transactions occurred prior to the development of "perpetual funds" and in all probability were depleted by their use purely as operating expenses. If such were the case, many states never gained anything of capital value out of the funds received in exchange for these lands; and the measurement of the success, if any, of these dispositions must lie solely in the evaluation of the communities in the wilderness created by such alienations.

Today, most states are gradually increasing their land holdings. This has been a slow process starting with tax delinquency foreclosures during the depression in the nineteen thirties, and as a result of the recognition by the states of the growing need, as a concomitant of population growth, for recreational programs. Also, many state lands are put to a variety of uses such as agricultural and grazing leases on a short-term rental or sharecrop agreement basis.

### Administering Public Lands as a Public Trust

It has been an age-old argument that the public lands of a state are its most valuable asset; consequently, aliena-

tion should be controlled though not proscribed. Supporters of this view have maintained that if laws are drafted permitting alienation, they should be geared toward promoting the maximum utilization and return from the land in accordance with the prevailing public needs. Consequently, a law directed toward encouraging individuals to move upon the lands and develop its potential resources under certain conditions would be compatible with this objective. The inclusion of a reversionary clause which permitted the State to recover these lands in the event the desired objectives were not realized or a preservation of corpus clause which required that purchase monies must be applied to public projects, in lieu of general expenditures, would serve to emphasize the public trust nature of such public lands.

The actual and practical application of this approach may be seen in the administration of the federal lands. The early history of the federal public domain was that one objective of its disposal was to raise revenue for the new nation. Most of the money that was obtained went into the general treasury in the same way as revenue from tariffs or from other sources. However, a major change within the federal government in the use of revenues from the sale of public domain lands came with the Reclamation Act of 1902. This program provided that its objective or irrigation development was to be financed out of revenues received from the sale of public domain lands in the western states to which

the Act was applicable. This was the first large scale earmarking of funds from a resource for the development of a resource; and from the time the Act was passed until the present, 95 per cent of the revenues from the sale of public lands has gone into this fund.<sup>3</sup> It is an example of the application of the concept that public lands are a public trust and that consequently the revenues from the sale of lands should be utilized for capital improvements, in lieu of operating expenses, thus preventing the depletion of the corpus.

#### Hawaii Public Lands Generally

In Hawaii title to all government and crown lands was conveyed to the United States by the Act of Annexation in 1898, but reverted to the State of Hawaii upon its attainment of Statehood in 1959. Agencies of the state government have continued to manage most of the public lands throughout this entire period to the present.

Public land amounts to about 42 per cent and private land to 58 per cent of all lands in the islands. Of the government-owned land approximately 1,250 thousand acres are state and approximately 10 thousand acres are county lands; 170 thousand acres belong to the Department of Hawaiian Home

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<sup>3</sup>Ibid., pp. 234-241.

Lands, and 320 thousand acres are federal lands.<sup>4</sup> Much of the State's public land is poor; more than 800 thousand acres are forest and water reserve zones, and most of the rest is leased for agricultural purposes, mainly for grazing.

In Hawaii as elsewhere the need and the demand for most of the diverse services of public lands have multiplied in response to large increases in population, income, and related developments. Therefore, there is a need to re-examine existing arrangements and possible alternatives to facilitate use, development, and protection of state lands. The common quest is for effective and equitable ways of organizing to administer the public domain for diverse changing uses in response to public needs. The authorities are in general agreement that government agencies hold the public domain subject to a variety of interests, claims, and rights of private persons, and that the government is, in the broad sense, a "trustee". Such "trustee" is obligated to hold and manage the public lands for the benefit of the State.<sup>5</sup>

#### Public Trust Concept--Hawaii Lands

The view that the public domain lands held by a state are a "public trust", and as such they should be guarded and

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<sup>4</sup>Perry F. Philipp, "Hawaii's Problems and Many Assets," Land, The Yearbook of Agriculture, 1958 (Washington: Government Printing Office, 1958), p. 446; Bank of Hawaii, Department of Business Research, "Hawaii: Planning for Island Growth," 1961 Annual Economic Report (Honolulu: 1961), p. 6.

<sup>5</sup>Fred A. Clarenbach et al., "Arrangements for Our Public Lands," Land, The Yearbook of Agriculture, 1958 (Washington: Government Printing Office, 1958), p. 551.

administered carefully with the objective in mind of the greatest benefit for the greatest number of the present and future citizens of the State applies in Hawaii, as will be seen from the discussion of the Admissions Act which follows.

The Admissions Act, P. L. 86-3, 86th Congress, Section 5(f), states in effect that Hawaii state lands together with the proceeds from the sale or other disposition of any such lands, and the income therefrom shall be held by the State as a "public trust" for the support of the public schools and other public educational institutions; for the betterment of the conditions of native Hawaiians as defined in the Hawaiian Homes Commission Act 1920, as amended; for the development of farm and home ownership on as widespread a basis as possible; for the making of public improvements and for the provision of land for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the Constitution and laws of the State may provide, and their use for any other object shall constitute a breach of trust.

The public trust concept applicable to Hawaii state lands may be reasonably compared to a charitable trust, e.g. the Bishop Estate Trust, wherein the obligation is imposed upon the trustee to manage the corpus of the trust and make the net benefits therefrom available to the Cestui Que Trust (beneficiary). Although the corpus may be invested, or sold and the proceeds reinvested, every precaution must be employed

by the trustee in the administration of the trust to preserve the value of the corpus so as not to impair the net returns inuring to the Cestui Que Trust, and to those who have an interest in the corpus and its benefits, in perpetuity. And this trust concept requires on the part of the State, acting as trustee, proper conservation, development and utilization of the public lands (corpus), and that they be held or used, or the proceeds therefrom if alienation were deemed desirable in the interests of the public (Cestui Que Trust), for development of the public schools and other public projects, for the benefit and improvement in conditions of the native Hawaiians, and the development of or stimulus to farm and home ownership wherever required, and the making of public improvements.

It appears from the wording in the Admissions Act that it was not intended to permit the State to utilize the proceeds from the sale of lands for the broad general operating expenses of the government, but rather to encourage, wherever possible, their exchange into other capital assets for the benefit of the public to replace the lands alienated. This does not seem to preclude, however, the use of proceeds from land sales, and the income from such lands, for general operating expenses as long as these expenditures are in furtherance of and a concomitant to those specific public purposes as outlined in the Admissions Act, and such use serves to implement only those particular improvement programs.

Such an approach sets the pattern for a continued and ascendant capital improvements program for the State, financed from the proceeds and income from public lands, in those areas specifically enumerated in the aforesaid Act, and facilitates protecting the public against depletion of its capital assets.

This report was typed by Mrs. Ellen Onaga of the legislative reference bureau.