HAWAII CONSTITUTIONAL CONVENTION STUDIES 1978

Article X: Conservation and Development of Resources

James T. Shon

Article XI: Hawaiian Home Lands

Revised by James T. Shon

Legislative Reference Bureau
State Capitol
Honolulu, Hawaii 96813

Price $2.00
May 1978

Richard F. Kahle, Jr.
Editor

Samuel B. K. Chang
Director

TABLE OF CONTENTS

Page

P A R T T W O

ARTICLE XI:
HAWAIIAN HOME LANDS

Chapter

Article X
CONSERVATION AND DEVELOPMENT OF RESOURCES

RESOURCES; CONSERVATION, DEVELOPMENT AND USE

Section 1. The legislature shall promote the conservation, development and utilization of agricultural resources, and fish, mineral, forest, water, land, game and other natural resources.

NATURAL RESOURCES; MANAGEMENT AND DISPOSITION

Section 2. The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be authorized by law; but land set aside for public use, other than for a reserve for conservation purposes, need not be placed under the jurisdiction of such a board or commission.

The mandatory provisions of this section shall not apply to the natural resources owned by or under the control of a political subdivision or a department or agency thereof.

SEA FISHERIES

Section 3. All fisheries in the sea waters of the State not included in any fish pond or artificial inclosure shall be free to the public, subject to vested rights and the right of the State to regulate the same.

GENERAL LAWS REQUIRED; EXCEPTIONS

Section 4. The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws, except in respect to transfers to or for the use of the State, a political subdivision, or any department or agency thereof.

FARM AND HOME OWNERSHIP

Section 5. The public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law.

Article XI
HAWAIIAN HOME LANDS

HAWAIIAN HOMES COMMISSION ACT

Section 1. Anything in this constitution to the contrary notwithstanding, the Hawaiian Homes Commission Act, 1920, enacted by the Congress, as the same has been or may be amended prior to the admission of the State, is hereby adopted as a law of the State, subject to amendment or repeal by the legislature, provided, that, if and to the extent that the United States shall so require, said law shall be subject to amendment or repeal only with the consent of the United States and in no other manner, provided, further, that, if the United States shall have been provided or shall provide that particular provisions or types of provisions of said Act may be amended in the manner required for ordinary state legislation, such provisions or types of provisions may be so amended. The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms of said Act, and the legislature may, from time to time, make additional sums available for the purposes of said Act by appropriating the same in the manner provided by law.

COMPACT WITH THE UNITED STATES

Section 2. The State and its people do hereby accept, as a compact with the United States, or as conditions or trust provisions imposed by the United States, relating to the management and disposition of the Hawaiian home lands, the requirement that Section 1 hereof be included in this constitution, in whole or in part, it being intended that the Act or Acts of Congress pertaining thereto shall be definitive of the extent and nature of such compact, conditions or trust provisions, as the case may be. The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out.

AMENDMENT AND REPEAL

Section 3. As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of [this] State, as provided in Section 7, subsection (b) of [the Admission Act], subject to amendment or repeal only with the consent of the United States, and in no other manner. Provided, that (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but

the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and 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; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act. [Add 73 Stat 4 and election June 27, 1959]

PART ONE

Article X:
Conservation and Development of Resources

Chapter 1
INTRODUCTION

> They were beautiful.... Their wooded mountains were a joy. Their cool waterfalls, existing in the thousands, were spectacular. Their cliffs, where the restless ocean had eroded away the edges of great mountains, dropped thousands of feet clear into the sea, and birds nested on the vertical stones. Rivers were fruitful. The shores of the islands were white and waves that washed them were crystal-blue.... How beautiful these islands were!
>
> James Michener
> Hawaii, p. 14

In the face of abundance, there is little incentive for prudence. But inevitably, when demand approaches supply, there is a sober reevaluation. Management of that supply, and control of the demand, become crucial. Hawaii is just beginning to face the dangers of a growth rate that may soon overtake the capacity of limited resources. The competition for water, land, open space, minerals, the fruits of the ocean...delivers the ultimatum: manage it wisely or lose it.

The task of management does not enjoy the luxury of conveniently isolated resources, each confined to its own area; each a self-contained "problem". Instead, freshwater falls on Hawaii's mountains, is trapped in dikes, slowly begins to percolate downward into a common water table, or flows along the surface, down through the entire watershed, into the sea. If the terrain is rich and forested, much is absorbed into the land. But if the land is graded and paved with asphalt, it flows with relentless determination, carrying with it valuable soil and polluting waste. If the water table is excessively bled of its treasure, freshwater supplies are threatened. If the mountainous dikes are too often penetrated with highways, they will hold less, and we will drink less. To manage this system is to manage the whole system.

A major concern is the shoreline. It is the sensitive buffer between terrestrial (land based) and marine (ocean based) ecosystems. It is the apple of the tourist's eye, the source of endless recreational opportunities, a place to

be seen from the lanai, the most accessible supply of sand, the scene of tidal waves and floods. Failure to manage the shoreline is a threat to our economy, our life-styles, our ocean, and Hawaii's celebrated beauty. So intimately is the shoreline tied to all facets of island life that many have argued for a "coastal zone" that includes every watershed, every piece of land, every drop of our territorial waters.

Recent examples of resources needing management are precious coral in the Molokai channel, polluted near-shore waters like Kaneohe Bay, dwindling agricultural lands, freshwater resources, geothermal steam on the island of Hawaii, sensitive and pristine conservation lands, and numerous species of marine life that supply both food and recreation.

At the same time, unemployment in the construction industry is unacceptably high. Our population is growing, demanding more houses, more roads, more utilities, more water, more land, more space, and more jobs. Decision makers are caught between accommodating this growth, with all the dangers inherent in an overcrowded future, or attempting to control it, with the inequities and loss of freedom inevitable when controls are first established. At first glance, it might seem that positions are irreconciliably polarized: developers vs. environmentalists, those for progress versus those for obstruction. Yet the real tradeoffs appear to be between the immediate, short-term requirements versus the long-term future of Hawaii. Wise management is not a luxury absurdly thrust upon us by an elite. It is a necessity. If sound planning is absent, so will be the future jobs, the future housing projects, the future energy, the future reasons for living in Hawaii.

The challenge is to select the most appropriate management system. Many would argue that a state constitution is no place for this kind of detail. Others might reply that lacking legislative or administrative initiative, it is as good a place as any. Beyond the nature of any management system are the lingering questions for the 1978 Constitutional Convention. What should be done in Hawaii's Constitution? Would a detailed constitutional approach destroy the needed flexibility to cope with the challenges of growth? Should not the legislature be the proper arena to sort out our management needs?

This study cannot answer those questions. What it does is to present what other states have done at the constitutional level. A primary emphasis is a comparison between Hawaii's Constitution and that of a dozen or so more detailed and comprehensive approaches. Each section of Hawaii's Article X is examined for what it does, what attempts were made in 1968 to change it, comparisons with other state constitutions, and possible alternatives. Those alternatives that represent the most timely issues for Hawaii are more thoroughly explored for their pros and cons, such as a centralized management system, the right to sue for environmental grievances, ownership of resources, and constitutional zoning. Following chapter 4, there is a brief summary of the constitutional alternatives discussed in this study.

As a general introduction to Article X and the Hawaii constitutional issues involved, this study is not intended as a major source of information to support one view or another. It is intended to provide a starting point, a basic orientation to the present situation and the potential alternatives.

Chapter 2
SCOPE OF HAWAII'S CONSTITUTION

Hawaii's Constitution is fairly brief in its treatment of natural resources. Article X is limited to 5 sections:

(1) A general policy statement mandating the legislature to promote the conservation, development, and utilization of natural resources.[1]

(2) Authority to create one or more boards to manage these resources.[2]

(3) Recognition of public fishing rights, subject to certain vested rights.[3]

(4) A provision intended to prevent the alienation of public lands, except in most instances by general law.[4]

(5) A general statement urging the use of public lands for farm and home ownership.[5]

Before beginning a detailed examination of these sections, it may be useful to compare the scope of our constitutional provisions concerning natural resources with what other states have done. This will suggest a framework for evaluation.

Most state constitutions do not devote an entire article to natural resources, although about half do deal with the subject explicitly. Sometimes the authority to manage resources is mentioned in sections that enumerate the powers of the legislature or the executive branch.[6]

Of those state constitutions that include special articles for natural resources, about a dozen contain sections that are significantly more comprehensive than our own. It is from these extensive approaches that we can appreciate what is possible under a constitution, and how Hawaii compares with the other states.

General Scope

Alaska has 18 sections under its Article VIII, natural resources, ranging from statements on common use, the application of the principle of sustained yield in management programs, public domain, leases, sales and grants, mineral rights, water rights, access to navigable waters, and public notice.[7] Although every section is not necessarily a thorough treatment of a particular subject, Alaska's Constitution probably represents one of the most comprehensive examples of natural resources policy at the constitutional level. Louisiana, Missouri, Oklahoma, New York, and Massachusetts also have natural resources provisions significantly more detailed than Hawaii's.[8]

General policy statements often incorporate many constitutional guidelines, covering a wide range of topics. Hawaii's Article X, section 1, states:

> The legislature shall promote the conservation, development and utilization of agricultural resources, and fish, mineral, forest, water, land, game and other natural resources.

By contrast, New York's general policy provision reads as follows:[9]

> The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters, including improvements thereon and any improvements therein, outside the forest reserve counties, and the dedication of properties so acquired or now owned, which because of their natural beauty, wilderness character, or geological, ecological or historic significance, shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historic preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive regular sessions of the legislature.

There are, in the above paragraph, a great number of explicit statements of policy. They represent a more detailed approach than that of Hawaii, but are not necessarily "better" or more effective. They are, however, a stronger constitutional mandate for the management of resources.

Further Comparisons

Water rights are not mentioned explicitly in Hawaii's Constitution. Idaho, by contrast, has a separate article with 8 sections dealing with this topic. It could be argued that Idaho's treatment of water rights is more thorough than most states' treatment of natural resources as a whole! Idaho's provisions concern the following: public ownership and use of water, the right to collect rates, priorities for the use of natural streams, dedication of water rights, the legislature's role in water disputes, the establishment of maximum rates, and the establishment of a state water resource agency that is mandated to create a state water plan.[10]

Wyoming creates a state authority, as well as special geographical divisions for management. Idaho, Montana, New Mexico, South Dakota, and Wyoming all attempt to deal with the ownership and control of this resource. A few constitutions provide guidelines in case of conflicting uses.[11]

The establishment of institutions, with specific guidelines as to their membership and duties, is not uncommon. Hawaii's Constitution gives the legislature power to create "one or more boards or commissions".[12] Arkansas establishes a commission, names it, specifies the number of members and how they will be appointed, details an initial appointment process to ensure staggered terms, limits the terms, prohibits compensation except for expenses, provides for how a member might be removed and how a member can appeal, and details the powers and duties.[13] By contrast, Hawaii leaves these details to the legislature.

The dedication of agricultural, open space, scenic, or other lands for tax purposes is not mentioned in Hawaii's Constitution, the implication being that

the legislature has this power.[14] Several states, such as California and Ohio, have felt the need to guarantee the right of the legislature to dedicate lands and tax them accordingly.[15]

Mineral rights, which in some states are crucial to their economies, are reflected in their constitutions. Alaska has extensive provisions as to the rights of discovery and appropriation, as well as the issuance of permits and leases.[16] Hawaii covers this possibility with a general mandate for legislative utilization, conservation, and development of resources.[17] Mineral deposits on land do not appear significant in Hawaii, except for geothermal resources which have been defined by the legislature as a mineral resource.[18] There may be reason to address the idea of ownership and control of those minerals dissolved in the ocean and on the ocean floor.

A number of states give special attention to specific resources. For example, Mississippi has an entire article devoted to levees, including provisions for a levee system, levee districts, a board of levee commissioners, boundaries of levees, levee taxes, and the property between levees and the Mississippi River.[19]

California's Article XV, entitled harbor frontages, asserts the right of eminent domain, guarantees public access to navigable waters, and prohibits the sale of tidelands.[20] Louisiana goes so far as to claim royalties and revenues from all minerals located beyond the seaward boundary.[21] Others, such as Florida, also claim rights in sensitive shoreline areas.[22] Hawaii's ocean, coral reefs, various bays, and other special resources could be dealt with in similar constitutional detail, although the need for such treatment may be debatable.

A number of constitutions include provisions for other kinds of resources, such as Montana's Article IX, section 4:

> The legislature shall provide for the identification, acquisition, restoration, enhancement, preservation, and administration of scenic, historic, archeologic, scientific, cultural, and recreational areas, sites, records, and objects, and for the use and enjoyment by the people.

Hawaii's Article VIII, section 5, while not as broad, does concern itself with beauty, history, and culture.

Finally, a controversial provision that few constitutions include is the fundamental right to a healthful environment and the subsequent right to sue for that purpose. The Illinois Constitution, Article XI, section 2, declares:

> Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.

In some ways, the inclusion of the right to sue for environmental grievances could be the only opportunity for a private citizen or group of citizens to ensure the implementation of general, constitutional policy statements.

In terms of its general policy statement, water rights, provisions for institutions, dedication of lands, mineral rights, attention to favored resources, cultural resources, or the right to sue, Hawaii has left the details to the legislative branch. Our constitutional provisions are neither as comprehensive nor as specific as that of many others.

Chapter 3
ANALYSIS OF HAWAII'S CONSTITUTIONAL PROVISIONS ON THE CONSERVATION AND DEVELOPMENT OF RESOURCES

PART I. RESOURCES: CONSERVATION, DEVELOPMENT, AND USE

> The legislature shall promote the conservation, development and utilization of agricultural resources, and fish, mineral, forest, water, land, game and other natural resources.

"The legislature shall promote..."

This general policy statement accomplishes several things. Its opening language:

(1) Recognizes state authority;

(2) Explicitly delegates that responsibility to the legislature; and

(3) Implies an active role. The legislature has more than power--it is required to promote the enumerated items.

It should be noted that under this provision state agencies or subdivisions of the state are not included, although the legislature clearly has the authority, if it wishes, to require them to comply with programs or laws designed to implement this policy. It is only the legislature, however, that has the constitutional duty to promote the conservation, development, and utilization of resources. The executive branch and citizenry are excluded from that duty.

Legislative responsibility for general policy is extremely popular in state constitutions. Placing the responsibility in the legislature, without getting involved in which agency should best implement a particular policy, provides greater flexibility.

A broader mandate, such as "[t]he policy of the state shall be...",[1] or even, "[t]he public policy of the state and the duty of each person..."[2] is useful if the people believe that the public policy in question is so important and relevant to every aspect of social, economic, and governmental activity that it

should be universally applied. To the extent that a constitutional provision provides general guidance to the executive branch and the public, the broader statement could encourage the executive branch of government and the general public to be more mindful of their role in the management of natural resources. On the other hand, promoting the conservation, development, and utilization of natural resources is quite general, and carries few concrete duties. Therefore, if section 1 remains general and nonspecific, it may be sufficient coupled with action by the legislature which makes the public and the executive branch responsible.

"Conservation, development and utilization"

This exact phrase is found in at least 2 other state constitutions.[3] In the 1950's, when Hawaii needed a flexible constitutional statement on natural resources, broad terminology was more than adequate. Ambiguity has its advantages, because society's needs change, public policies evolve, and it is often wise to have the constitutional flexibility necessary to adjust. Our present language provides the justification for almost any legislative action, except for the purposeless destruction of a resource. Since "land" is listed as a resource,[4] nearly every "development" or "utilization" of that land is consistent with our constitution.

Difficulty arises, however, when trying to apply notions of conservation, development, and utilization to the same resources, in the same place at the same time, as there is no constitutional guidance.[5] It may be argued that clarification is needed. Generally, guidance is most lacking in the prevention of changes in the environment. In recent years, in the wake of a building boom and increased pressures on our natural resources, there has been a growing need for better management, and clearer policies to guide it. When the notion of conservation includes limits, preservation, and restrictions imposed on the use and development of resources, there is an inevitable tension between management and property rights. Since economic freedom and private ownership are hallmarks of American life, a conscious, explicit policy is often required to limit activity. In many ways, the ability to manage is the ability to impose limits. That which permits action can be general, but that which seeks

to control or restrain must be specific. Without specificity, implementation and enforcement are almost impossible. For these reasons, the meaning of "conservation", the most potentially restrictive concept in section 1, may require clarification. Conservation, as it is used in Hawaii's system of management, will be discussed later.

> "agricultural resources, and fish, mineral, forest, water, land, game and other natural resources."

This language:

(1) Asserts the authority of the state over resources, both public and privately owned. No distinction is made. While this does not establish state ownership, it does tend to limit the powers of private owners to completely control resources;

(2) Includes most natural resources, especially land;

(3) Does not spell out the difference between agricultural resources and those named;

(4) Does not clarify state responsibility in regards to ocean water or the ocean floor.

One might assume that "other natural resources" includes all resources not mentioned. That is one interpretation. Another might be that the omission of the word "all" before the word "other" implies that there may be some resources the state has no authority over. Under either view, it would be up to the courts to decide if a state law concerning an unmentioned natural resource was appropriate.

This phrase also fails to provide any guidelines for the establishment of priorities. Such priorities might clarify the ambiguity discussed regarding conservation, use, and development of resources. It should be noted that at least in the case of water rights, Alaska, California, Idaho, New Mexico, and Wyoming all set constitutional priorities for the use of that resource.[6] Idaho, for instance, gives first priority to residential water consumption over others, then agriculture over manufacturing, although in certain mining districts mining is preferred over agricultural or manufacturing uses.[7]

While a listing of priorities could limit flexibility, such a listing recognizes that the basic conflict between the use of land and the use of water could seriously compromise other constitutional policies. The most obvious example is the promotion of agriculture as opposed to other uses.

Since agriculture is specifically mentioned in Hawaii's Article X, section 1, it could be inferred that this is a kind of priority. Yet there is no concrete guarantee that in the competition over natural resources agriculture stands first. If it is the intent to establish agricultural uses as taking precedence over others, section 1 is insufficient. As the competition for land and water intensifies, no particular use will have a constitutional priority.

Section 1, as mentioned above, does not clearly define terms such as "water" or "mineral". Both mineral rights and water rights have their own set of rules, their own body of case law governing ownership and use. In the management of geothermal steam, which shares characteristics with both water and minerals, classification is of paramount importance. In 1974, the state declared this resource to be a mineral, and thus subject to property rights belonging to the owner of the land surface under which they are located.[8] Whether or not the courts uphold the state's classification, Hawaii's Constitution offers no guidance. For a further discussion of this problem, see chapter 4 of this study.

Once again, it should be noted that many of the problems associated with the broad policies of Article X, section 1, were unforeseen in 1950, when the Constitution was written. The needs of Hawaii then were quite different from the challenges of the 1970's. Caution and flexibility were imperative in the promulgation of a new and untested state constitution. The rapid growth on Oahu during the 1960's and the subsequent environmental movement were unforeseen. Agriculture was still unthreatened. It may be argued that the ambiguity and generality of Hawaii's Constitution has served Hawaii well during the past 27 years. It could also be argued that adjustments are required to meet the need for guidance in the management of resources in the 1970's and 1980's.

1968 Convention Proposals

There were relatively few attempts in 1968 to alter section 1, and none of them were reported out of committee for consideration on the floor of the convention. Those that were proposed, however, do reveal a growing awareness of the pressures on natural resources. Proposals included the following ideas:

(1) The legislature shall further provide for the acquisition of lands and waters.[9]

(2) The lands of the State, now owned or hereafter acquired, constituting conservation districts as now fixed by law, shall be kept forever wild, except as the legislature may otherwise provide.[10]

(3) All rights, title, or interest in or to minerals in, on or under lands owned or purchased in fee shall be reserved to the owner or purchaser.[11]

(4) Deletion of Article VIII, section 5, and incorporation of its language into Article X, section 1.[12]

(5) The abatement of air and water pollution.[13]

(6) The freedom from unnecessary and excessive noise.[14]

(7) The protection of agricultural lands, forest, mountain highlands, shorelines, and water resources.[15]

(8) The legislature may, by law, define open space lands and natural scenic resources and provide for the use thereof solely for recreational and esthetic purposes.[16]

(9) Promotion of the development and use of resources to produce food and fibre for the people of the state.[17]

(10) The establishment of state parks.[18]

Except for the assertion of private ownership of minerals in number 3, most proposals would have expanded the involvement of the state into explicitly stated areas, such as pollution control, establishment of forever wild districts, and the acquisition of lands. These appear to be possible under existing language, and their addition would only emphasize public policy. Number 9 significantly narrows the constitutional mandate by stating a specific purpose,

the production of food and fiber. This might represent a more prominent status for some forms of agriculture, but could limit legislative authority for other purposes. The 1968 Constitutional Convention rejected all proposals because they were deemed possible under existing legislative authority.

PART II. HISTORY, CULTURE, BEAUTY, AND HEALTH

Article VIII, section 5, of Hawaii's Constitution, entitled "public sightliness and good order", reads:

> The State shall have the power to conserve and develop its natural beauty, objects and places of historic or cultural interest, sightliness and physical good order, and for that purpose private property shall be subject to reasonable regulation.

Other states have included history, culture, beauty, recreation, and health in constitutional sections that also deal with natural resources. In general, these have been considered part of the environment and are recognized as legitimate constitutional concerns.

Among those with provisions similar to Hawaii are Alaska, California, Indiana, Massachusetts, Montana, New Mexico, New York, and Virginia. Several provide for the purchase of lands for these purposes. Indiana enumerates various historic sites that are not to be sold or leased, and mandates the "permanent enclosure and preservation of the Tippecanoe Battle Ground". New Mexico states: "The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and general welfare."[19]

The fusion of health, beauty, culture, history, and environment has significant implications. We are no longer operating under a narrow view of public safety, or a general right to a healthful environment, such as clean air and water. Increasingly, humanity creates environment, as well as dwells in it. Places become "resources" because of what people have built or done there.

As the meaning of "environment" takes on greater social implication, and as the increase in population requires greater sensitivity, personal freedoms to utilize property and resources may decrease. This is because certain resources, such as water and air, can carry one person's "pollution" to a neighbor, and pollution is not only defined as what we breathe or drink, but also what we see and hear.

Not only do we have the right to "use" a beach, as in sunbathing, we also have the right to see it from a distance. This "right to see", however, is still in its formative stages. Few projects are totally rejected because they block someone's view, or because they themselves are thought to be unsightly. They are, however, increasingly being forced to modify their designs, to accommodate the growing public demand to view its resources. Waikiki's special design district ordinance seeks to "encourage developments that would improve and complement...visual aspects of the urban environment", and to provide "additional properly distributed open spaces and vistas".[20] A recent application of this ordinance was the insistence of the Honolulu City Council that a new commercial building in Waikiki accommodate the public's desire to view the garden of the Royal Hawaiian Hotel from the street. The new building was a potential threat to the right to see a resource, the Royal Hawaiian.[21] That this "resource" was man-made rather than "natural" speaks for the growing role of cultural and historic considerations. Other proof of the importance of visual appreciation is in Hawaii's law regulating billboards. The courts have supported such statutes, and ruled that they are "a proper community objective, attainable through the use of the police power".[22]

Several states have constitutional protection for the freedom from "excessive and unnecessary noise". In the case of Massachusetts, this is stated in the form of a right:[23]

> The people shall have the right to clean air, and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

Interest is growing both in associating environment with fundamental rights and in regard to noise. The 1968 Constitutional Convention produced 2 proposals concerning noise,[24] using the same "unnecessary and excessive" language as that of Massachusetts. Since the ability to legislate is broad, these proposals were considered unnecessary by the convention.

Because of the increasing interest in historic, cultural, scenic and environmental rights, the convention may want to consider one or more of the following:

(1) Including these concerns in Article I, our Bill of Rights;

(2) Expanding Article VIII, section 5;

(3) Incorporating Article VIII, section 5, into Article X; and

(4) Expanding Article X.

For further discussion, see the Hawaii Constitutional Convention Studies 1978, Article VIII: Public Health and Welfare.

PART III. NATURAL RESOURCES: MANAGEMENT AND DISPOSITION

A controversial aspect of any policy often is who will interpret, coordinate, and implement the policy. It is a question of efficiency, public participation, and the ability to enforce. Our present system is a mixture of county and state involvement. At both levels there are a network of agencies and boards. In part, endorsement or rejection of the existing constitutional language depends on whether or not one is satisfied with the current management of natural resources. It also depends on the kinds of tradeoffs one is willing to make for coordination, efficiency, and accountability.

Management involves the day-to-day administration, paper shuffling, physical maintenance, etc., of natural resources. It includes the amount and reliability of funding for staff and operational expenses, the adequacy of data, the ability to enforce laws, and a set of criteria for the granting of permits.

In a broader sense, management is a function of the total system that regulates the utilization, conservation, and development of natural resources: all decisions, all agencies, and all funding. We cannot understand our current management approach by inspecting a single board or department. Responsibility is shared throughout a complex, decentralized matrix.

Constitutional Issues in Management

Article X, section 2, of Hawaii's Constitution reads:

> The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be authorized by law; but land set aside for public use, other than for a reserve for conservation purposes, need not be placed under the jurisdiction of such a board or commission.
>
> The mandatory provisions of this section shall not apply to the natural resources owned or under the control of a political subdivision or a department thereof.

There is flexibility in the phrase "one or more executive boards or commissions", for it leaves to the legislature the decision of how centralized state management should be. The legislature has the authority to establish a single board or to distribute responsibility among several. There is no guidance as to how much responsibility is to be left to the county governments. The legislature also has a free hand to decide the powers and duties of boards, their membership, and methods of selection. Therefore, in order to initiate a significant change in our management system, a constitutional amendment may not be necessary.

Two major issues emerge when considering management: first, the nature of the management agency, contrasting a single executive with a board, and second, the nature of the entire management system, contrasting the distribution of authority among numerous agencies (including the counties) with a more centralized, coordinated approach.

A Single Executive. The phrase "one or more executive boards or commissions..."[25] received considerable attention in the 1968 Constitutional Convention. It should be noted that the debate was focused on only one decision-making body of our management network, the board of land and natural resources, and one particular function, "powers of disposition", i.e. the authority to sell or lease public land.

There was one attempt on the floor of the convention to eliminate the board and substitute a single executive. In defense of his proposal, Delegate Doi said:[26]

> I am told that the land board representatives from the several land areas in the State of Hawaii do very little in the way of representing their land area for purposes of answering a statewide land program. Rather, the fact that they sit on the board leads up to long delays, increases the cost of running the land department and in fact the recommendation of the director of land and natural resources is almost 100% anyway accepted by the land board.
>
> * * *
>
> Delays, higher cost and the difficulty to place primary source of responsibility on anyone in the department because there are several on the board and as between the board and the director, there's also difficulty in saying exactly who stood for what.

Doi continued, explaining that the present board members were part time and ill-informed, and that in the management of certain lands turned over to agencies the line of command was too long: from the governor, to the director, to the land board, and to the agency. He argued that the land board was not needed.

Delegate Kamaka defended the need for a board: "The unique character of natural resources administration where ill-considered action can lead to permanent damage necessitates the greater protection from pressures of a more diversified representation of community interest which only a board or a commission can provide."[27] Delegate Taira felt that the board diluted the power of the governor, and that this was good.[28] Delegate O'Connor noted that corporations have boards to check their presidents, and the same should be

true of the department of land and natural resources.[29] Some delegates compared the land board with the board of regents or the board of education, insisting that to abolish one was an argument for abolishing all.[30] Another mentioned the fact that board members were not compensated for their duties, and the legislature should reconsider this policy.[31]

There was some attention paid to the powers of the board in regard to the sale and the leasing of land. At the request of one delegate, a legal opinion was prepared and read by President Porteus on the floor:[32]

> In the case of exchanges of public lands, the present law requires that it is subject to legislative disapproval. In the case of sale of residential lots it must be by public auction but the power is in the board. In the case of commercial and other business leases, the power is in the board. In the case of hotel and resort leases the power is in the board. In the case of residential leases, the power is in the board. In the case of permits, the power is in the board. As for contract for development by direct negotiation for various areas the power is in the board.

The importance of these powers was not lost on many of the delegates, and the debates indicate a lack of willingness to place that authority in the hands of one person. There was fear of hasty or arbitrary actions that would result in the permanent loss of valuable resources to the state. The 1968 Constitutional Convention rejected the arguments for "efficiency" in favor of a more democratic institution. The convention agreed with the 1950 committee report:[33]

> To the extent that the laws permit the disposition, destruction or dissolution of these resources such laws are not like laws which, if unjust, are subject to correction at the next meeting of the legislature. Once a piece of land is disposed of it is gone. It might take generations to remedy a destroyed forest or a contaminated water supply. Hence there was a desire by certain of the members of the committee to place fairly rigid restrictions on the administration of these assets.

There is little evidence that the delegates appreciated the full implications of Mr. Doi's amendment. To strike the words "one or more executive boards or commissions" could be interpreted to mean that the distribution of any state responsibility for management would be unconstitutional. The state land use

commission, the departments of transportation, agriculture, health, etc., could be required to relinquish their part in the management system. As a result, the word "resources" might require specific definition. If Article X, section 1, were the standard, then all institutions managing our fish, mineral, forest, water, land, game, and other natural resources might be engaged in unconstitutional activity.

A recent development since the 1968 Constitutional Convention has been the passage of Hawaii's "sunshine" law, mandating open meetings.[34] This new law applies only to boards or commissions. Under its provisions, the public has the right to attend board meetings, and to be notified 72 hours in advance. It must be told the agenda, and given the opportunity to obtain minutes. No such requirements are imposed on departmental meetings.

A board is a group of people who must meet in one room at one time. A department or agency, by contrast, is a hierarchical collection of individuals, each of whom often has a private office. A department generally does not meet or gather in a single room to make decisions. Because of the sunshine law, the potential for highly visible decision making appears greater with a board. A constitutional amendment abolishing boards could diminish this visibility.

Hawaii's Decentralized System. Natural resources management in Hawaii is distributed among many different departments, boards, and levels of government. There has been both criticism and support for a revised management system which has come from all levels of government and from all segments of Hawaii's society. Developers, environmentalists, planners, decision makers--all have spent countless time and energy evaluating our fragmented approach.

The following statement by state planners in 1974 explains some of the disadvantages of our decentralized structure:[35]

> The coastal zone is both one of the most highly regulated and at the same time most poorly regulated areas in the State. The existing agencies in some cases have responsibility without authority and in other cases authority without responsibility. Any development in

> the coastal zone in Hawaii is complicated due to requirements for permits and permissions from a variety of regulatory agencies.
>
> Decisions concerning the use of the coastal zone in Hawaii are made by a variety of State, County, and Federal instrumentalities. The diffusion of power and responsibilities for recreation, conservation, and shoreline management creates major jurisdictional conflicts and competing policies. Coordination is attempted, but in practice is difficult to achieve.

The above frustrations reflected the fact that Hawaii's system is quite complex. Our board of land and natural resources is only one of many managers. We have federal agencies (Army Corps of Engineers, United States Department of Interior, United States Environmental Protection Agency, Council on Environmental Quality, United States Department of Housing and Urban Development, and United States Department of Commerce), state agencies (departments of transportation, land and natural resources, planning and economic development, health, agriculture, and boards of agriculture and land and natural resources), and county agencies (county planning commissions, planning departments, public works departments, city councils, and building departments).

With so many diverse institutions involved, it is little wonder that management is cumbersome, not only to the general public, but to the governmental officials involved. In developing Hawaii's coastal zone program, the state department of planning and economic development listed the following management problems:[36]

(1) Waste and inefficiency associated with the present maze of regulatory authority (e.g., time delays, added costs, duplication of effort).

(2) Uncertainty in the existing decision-making process (e.g., lack of a clearly defined process for acquiring development permits, uncertainty as to how new standards or guidelines will be applied to proposed developments).

(3) Lack of accountability (e.g., "buck passing").

(4) Narrow management focus (e.g., agencies make decisions based on consideration of only a small range of the impacts).

(5) Ad hoc decision making (e.g., extremely general and vague plans and regulations encourage case-by-case decisions which respond primarily to private initiative and which have little relation to any overall strategy for managing resources and/or hazards).

(6) Lack of a full range of resources and hazard management tools (e.g., agencies are often faced with an either-or situation--either condemnation, which is expensive, or police power controls, which may sometimes be confiscatory and sometimes giveaways).

(7) Lack of a coordinated information base to improve coastal resource and hazard management.

State vs. County Control. Further decentralization, or "home rule", is guaranteed by constitutional language:[37]

> The mandatory provisions of this section shall not apply to the natural resources owned by or under control of a political subdivision or a department or agency thereof.

Simply stated, it appears the legislature can delegate as much power as it desires to county governments for the management of natural resources. What the county owns and controls is managed by the county.

If greater state, as opposed to county, control is desired, one option would be to eliminate the words: "under control". This would severely limit county authority. Further clarification of the division between county and state authority might result from a constitutional listing of responsibilities. This approach, however, may deny the legislature necessary flexibility in dealing with this area. The degree of detail spelled out in our constitution is really a function of how much flexibility the legislature is to be permitted.

The effect of county authority on all overall management system for the state can be viewed in terms of decentralization. Favoring home rule, it may be argued:

(1) A sharing of responsibility between several state and county agencies may reduce the possibility of hasty and arbitrary action since more people will be involved in decisions.

(2) The county governments, especially those of the neighbor isles, are closer to the problems and people than the state government, and therefore are better able to cope with island-specific problems.

(3) The dramatic differences between Oahu and the lesser populated islands makes the applicability of general state laws less effective since it is difficult to reconcile the needs of an urban Honolulu with a rural Kauai.

(4) Hasty and ill-conceived actions at the state level could do irreparable harm in all counties, whereas a decentralized system protects one county from another.

(5) The belief that "local" government has been successful in responding to the increased demands of a growing population.

Arguments for a more centralized system might include:

(1) Efficiency, accountability, and greater coordination are potentially higher.

(2) The resources belong to all the people of Hawaii, and therefore should be managed by a state authority that represents the interests of all citizens.

(3) For most residents, the state government is just as accessible as the county government. In many cases, state legislative districts are smaller than county council districts.

(4) Federal programs and federal money are best applicable at state level. In some cases, such as the coastal zone management program, state control and coordination is a federal requirement.

(5) The belief that the counties have been less successful in responding to the increased demands of a growing population.

Public Participation. There are advantages to a diffusion of responsibility that lie in the realm of political considerations and the ability of the public to participate. Decentralization offers more opportunities for the public to respond to proposals: (1) because there are more agencies, boards, and departments holding public hearings and meetings; and (2) because the process itself takes longer, proponents and opponents have the necessary time to hold meetings, prepare testimony, and mobilize opinion and action.

Another advantage of a decentralized approach is that more people are involved at the governmental level in major decisions. There are more opportunities to reevaluate, to analyze, to incorporate new information, and to reconsider previous opinions. A single executive with a single department in charge of all natural resources might be more efficient, but might also be more arrogant, and perhaps less visible and conducive to public participation. Decisions could be made so rapidly that the public would be limited to an after-the-fact response. The complex network of boards and agencies we now have may not be the most efficient, but it may be more democratic and lead to slightly more reasoned, deliberative decision making. The simplified, efficient system can be held accountable only if the public has the time and resources to monitor its operations on a day-to-day basis, and can mobilize opinion in time to affect the decision-making process.

Constitutional Alternatives

To summarize possible amendments to this section of Hawaii's Constitution, the constitutional convention may consider:

(1) No change, leaving broad authority at the legislative level and maintaining a complex network of state and county management;

(2) Centralizing all state management into a single executive, eliminating state boards and commissions, as attempted in 1968;

(3) Centralizing all state management into a single board, removing legislative discretion in the distribution of state authority;

(4) Removing all county authority to manage resources by concentrating all responsibility at the state level;

(5) As a variation of any of the above, to spell-out in detail our management system, specifying powers, duties, membership of boards, etc., and thus removing this flexibility from the legislature.

PART IV. SEA FISHERIES

Article X, section 3, declares:

> All fisheries in the sea waters of the State not included in any fish pond or artificial inclosure shall be free to the public, subject to vested rights and the right of the State to regulate the same.

Simply stated, all fish in the sea belong to the public and shall be free except:

(1) Fish in a fishpond or artificial enclosure, which protects aquaculture operations; and

(2) Fish "subject to vested rights and the right of the State to regulate the same".

"Vested rights" can be condemned according to Article XVI, section 13, which reads:

> All vested rights in fisheries in the sea not included in any fish pond or artificial inclosure shall be condemned to the use of the public upon payment of just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the treasury of the State not otherwise appropriated.

These vested rights refer to the konohiki fishing rights established during the Hawaiian monarchy. A "konohiki" was in charge of a large land subdivision, granted to the konohiki by the chief. This subdivision was a wedge-shaped parcel, reaching from the pointed end of a valley in the mountains, down to the sea as it fanned out along the coast. These subdivisions were called ahupuaas. Not only was the konohiki granted the use of the land, but the konohiki was also granted certain rights to use the surface water that flowed over it, and often to the fisheries between the shore and the reef. Konohiki rights are an important part of Hawaii's legal tradition. They are a form of private use, or possibly ownership, and the descendants of the original owners or users, or those who now "own" the land where those rights applied, often claim ownership of the attached resources. Traditional Hawaiian land use, and the sometimes

poorly documented transfer to a western legal system, are frequently matters of contention in court cases. The central issue in most arguments is whether or not Hawaiians did in fact "own" land and resources, thus permitting the absolute transfer of "ownership". A recent court decision declared that "[p]rior to the Great Mahele, all land in Hawaii was public domain land."[38] Another issue is, in the transfer to western legal systems of ownership, whether or not a particular parcel of land in question remained in the public domain or was in fact transferred to private ownership.

Hawaii has a number of laws that regulate existing konohiki fishing rights. These include a definition of the geographical area covered by a konohiki, the rights of tenants living on the konohiki's land, public notices of fish declared "tabu" in a particular area, exclusive rights to "tabu" fish, the right to prohibit all fishing, and provisions for the state's condemnation of konohiki fishing rights, as authorized by Article XVI, section 13.[39]

The state has the right to condemn these rights, but since there was no time limit incorporated into the constitution, there still appear to be existing konohiki fishing areas. According to state officials, there is no regular condemnation program, and records do not appear to be up to date.[40] In fact, the department of land and natural resources treats konohiki fishing areas just like any other until the owner asserts rights.[41] Owners have recently maintained a "low profile", obviating any pressing need for an efficient and updated program of condemnation. It was estimated that there may be from 10 to 20 outstanding konohikis yet to be condemned.[42] For a further discussion of konohiki rights, see Hawaii Constitutional Convention Studies 1978, Article XVI: Schedule.

Perhaps the most significant aspect of Article X, section 3, is that the state asserts public ownership of a natural resource, while still recognizing that private "vested" rights exist.[43] In summarizing the history of court cases dealing with the ownership of fisheries, one author wrote:[44]

> Two principles there appear to be operative in the Court's treatment of the fishery issue: first, a tendency to find for public use of this coastal resource; and second, a willingness to secure

rights to use of the resource on the basis of Hawaiian usage and the history of the Hawaiian property regime (reserved tenants' rights).

Ownership of resources will be further explored in chapter 4.

In considering the management of our fisheries and related resources, the question arises: How much of the ocean is part of the state? The state boundary has been a point of contention from time to time. Hawaii is the only state whose boundaries are not explicitly outlined. The boundaries of the state are the boundaries of the territory, according to the Admission Act; however, neither the Organic Act of 1900, nor the senate resolution providing for annexation in 1898 detailed these boundaries.[45] Thus, the state is left with the interesting problem of determining its boundary on the basis of historical law and practices of the Hawaiian kingdom. The extent of Hawaii's "historic waters" has yet to be delineated.

According to a 1965 decision by the Ninth Circuit Court of Appeals, Island Airlines v. CAB, Hawaii's claim rested on the principle of "acquisitive proscription", which has 3 factors:[46]

(1) The exercise of authority over the area by the state claiming the historic right;

(2) A continuity of this exercise of authority;

(3) The attitude of foreign states.

The Court decided that Hawaii has no binding claim to waters that are beyond the traditional 3-mile territorial sea, but within the channel waters of our island chain. In other words, each island is separated from the others by ocean waters not under the jurisdiction of the state. In the Court's opinion the state could not regulate interisland flights, for they are treated as interstate commerce.[47] Due to this court decision it is not clear whether the state has the authority to regulate the ocean's resources beyond the 3-mile limit. This is especially crucial for management of precious coral beds, fishing, and the mining of manganese nodules on the ocean floor, particularly with the establishment of the new 200-mile limit by the United States in 1977. The

jurisdictional dispute, however, is between the federal government and the State of Hawaii.

There has been some criticism of the Court's ruling, based in part on a number of historic documents. In his second act in 1846, King Kamehameha III stated:[48]

> Section I:
>
> The jurisdiction of the Hawaiian Islands shall extend and be exclusive for the distance of one marine league seaward, surrounding each of the islands of Hawaii, Maui, Kahoolawe, Lanai, Molokai, Oahu, Kauai and Niihau; commencing at low water mark on each of the respective coasts of said islands.
>
> The marine jurisdiction of the Hawaiian Islands shall also be exclusive in all the channels passing between the respective islands, and dividing them; which jurisdiction shall extend from island to island. (Emphasis added)

A privy council resolution of August 29, 1850 included "all navigable straits and passages among the Islands".[49] The 1854 Neutrality Proclamation "includes all the channels passing between and dividing said islands from island to island".[50] The Ninth Circuit Court felt there was a conflict between these documents and the Hawaiian Civil Code of 1859, which expressly repealed the second act of Kamehameha III and several other instances where the inclusion of channel water was either omitted or unclear.[51] A relevant question is, of course, whether or not a particular legal act can diminish the "historic waters".

Hawaii's Constitution could:

(1) Define the state's boundaries.

(2) Assert state authority to manage resources between the channels.

(3) Remain silent on this issue. (As did the 1968 Constitutional Convention, which proposed no changes to this section.)

It should be recognized that regardless of what Hawaii's Constitution says, the potential dispute over ownership and the right to manage resources in our

channel waters may well be decided in the courts or by agreement with the federal government. A major issue may be the right to collect royalties from resources harvested or mined. It should also be recognized, however, that beyond the issue of revenues, state authority may not be synonymous with better management, since the federal government may well have greater expertise and facilities to manage ocean resources. It may have stricter controls, and a higher capability to enforce regulations. For a further discussion of the state's boundaries, see Hawaii Constitutional Convention Studies 1978, Article XIII: State Boundaries, Capital, Flag.

PART V. GENERAL LAWS REQUIRED

Article X, section 4, provides that:

> The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws, except in respect to transfers to or for the use of the State, a political subdivision, or any department or agency thereof.

The intent of this section is clearly expressed in the report of the committee of the whole of the 1950 Constitutional Convention, which stated:[52]

> This section extends the legislative power of the State in relation to lands, but was not intended to place any hampering restriction except to require a general law for its control which the committee believed would prevent possible dissipation through private, or special laws.

A general law is not necessary for a land transaction from one governmental agency to another, but it is necessary in order to sell land to private individuals. Laws permitting the sale of land to private persons must be "general", in that they apply to everyone. Special treatment is prohibited.

Arguments favoring the retention of this type of provision in the constitution stress that it is required to control the disposition of state lands which may otherwise be dissipated by special legislation. It also tends to provide uniformity and equity in selling state lands.

Arguments for the elimination of this provision note that the problem no longer exists, and this is an unnecessary restriction on legislative power.

The 1968 Constitutional Convention generated no proposals to amend this section.

PART VI. FARM AND HOME OWNERSHIP

Article X, section 5, states:

> The public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with proceedings and limitations proscribed by law.

This section, like section 1, is a broad policy statement. It sets a general priority for the use of public lands by encouraging private use and ownership, and ranks private housing and farming as preferable to other, unmentioned uses. One might infer that conservation, recreation, and commercial activity are not to be first priorities in the management of public lands.

In spite of these general guidelines, it must be recognized that this section does not indicate a preference for farming over housing, or vice versa. It does not prohibit uses other than housing or farming. In addition, it does not establish standards for housing or farming, which could be significant in determining whether or not a particular land use does, in fact, qualify as a farm. Finally, when selling lands, it does not give any priority to, or afford any protection to, a particular social or economic group.

Section 5 was included in our 1950 Constitution as an expression of a philosophy that approved of private ownership of public lands, and preferred farm and home ownership to other uses. The committee report stated that "the more families are placed as independent landowners on the public domain, the more stable the economy of the state will be".[53]

The constitutional treatment of homesteading in Hawaii is not confined to this provision. Article XI of Hawaii's Constitution, Hawaiian home lands, is partially a homesteading act, giving preference to native Hawaiians. In addition, the establishment of agricultural parks, low-income housing, and zoning all have homesteading characteristics. The use of public lands for farm and home ownership is part of a broader context of land use policies, both at the state and county levels. The question is not whether public lands should be used for farming and housing, but whether, in the context of housing and farming activity on private lands, it is desirable.

It is also helpful to consider whether or not the present system benefits a particular economic group, such as the higher income segment of the economy. It has been argued that lands distributed through public auction are seldom available to the middle or lower income groups, as prices are frequently bid beyond their financial reach. If this is the case, section 5 could benefit from some guidelines as to how public lands are distributed. Such guidance need not, however, be a constitutional provision, although it could be.

The committee report in Hawaii's 1950 Constitutional Convention does provide some clarification:[54]

> The wording at the end of the sentence "in accordance with procedures and limitations to be established by law" was installed to definitely indicate to the legislature that the mandate contained in the first portion of the sentence did not mean immediate disposition of the resources but that it should be handled in an orderly manner which should not disrupt the over-all economy of the state, or lead to the development of farms that have no prospect of permanent success. For example, the Committee discussed the matter of breaking up large tracts of public lands now being operated by a single corporation which is providing livelihood for many of the citizens of the State. The partial subdivision of such a tract, if improperly made, might destroy the corporation and the jobs created by it without benefit to the homesteaders themselves....

In other words, the "guidance" intended was to protect the economy. Equity in the alienation of public lands and overall land use was not the primary concern. A disorderly alienation of lands could have an adverse impact on employment, and a disruptive effect on the economy as a whole.

It may be necessary to reevaluate Article X, section 5, to consider:

(1) Its impact on general land use policy and the management of natural resources.

(2) The current supply and demand for housing.

(3) The lack of guidance in methods of distribution, and the possibility of favoritism to certain economic groups;

(4) The importance of independent landowners to our economy;

(5) The tradeoffs between public and private uses of lands;

(6) The value of prioritizing uses of public lands;

(7) Whether or not this section is needed at all; and

(8) Because of its general nature, combining it with section 1, which is also a general policy statement.

The 1968 Constitutional Convention made no changes in Article X, section 5.

Chapter 4
ALTERNATIVES

PART I. THE RIGHT TO SUE FOR ENVIRONMENTAL GRIEVANCES

There is a growing effort to establish a direct relationship between constitutional rights and the management of natural resources. Richard J. Tobin, writing in Environmental Affairs, explains:[1]

> In recent years, environmentalists have devoted increasing attention to the legal aspects of environmental degradation. In many cases, they have found that existing statutory legislation is inadequate or improperly enforced by administrative agencies. Concerned with these apparent deficiencies, many have called for a stronger commitment to environmental protection in the form of a constitutional provision guaranteeing citizens a right to a clean, healthful environment.

Some examples of the types of constitutional provisions mentioned would include Illinois: "Each person has the right to a healthful environment";[2] Massachusetts: "The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of the environment";[3] Pennsylvania: "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment";[4] and Rhode Island, where the people "shall be secured in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values...."[5]

A constitutional variation with significant ramifications is the right to sue for environmental grievances. New York's constitutional article on conservation is strengthened by the following legal means of enforcement: "A violation of any of the provisions of this article may be restrained at the suit of the people, or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen."[6] Perhaps the strongest constitutional expression of the right to sue is found in Illinois' Article XI, section 2:

"Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitations and regulation by law."[7] Standing to sue, the right to redress environmental grievances in the courts, is a major constitutional alternative. It could result in an increase in the average citizen's degree of involvement in environmental decisions, and could give meaning to otherwise general and unenforced policy statements. As one legal scholar noted: "Potentially a constitutional statement of such a right could be the basis for an individual's right to go into court and challenge virtually any governmental act--and conceivably any private act--which degrades the environment."[8]

Pros and Cons

There are a number of advantages to the inclusion of a constitutional provision, in contrast to a statute, granting the right to sue:

(1) There is greater authority with a constitutional provision, as opposed to a legislative act. As the well-known legal scholar Joseph Sax has said, "a court enforcing a statutory right (even though it may have the same wording as a constitutional provision) can always be overruled by subsequent legislation".[9]

(2) The judicial process is less amenable than the legislature to political maneuvering, and can even help to overcome undue political and administrative leverage usually applied to the legislature. Again, Sax explains:[10]

> ...an essential format for reasserting participation in the governmental process is in the courtroom...because the court preeminently is a forum where the individual citizen or community group can obtain a hearing on equal terms with the highly organized and experienced interests that have learned so skillfully to manipulate legislative and administrative institutions.

(3) The courts guarantee access. The process is open to the public.

(4) The defendants must confront their accusers, respond to questions, and justify their actions.

(5) If a suit is brought charging that an agency failed to fully evaluate alternatives or to seriously consider environmental impacts, the records of such an agency could play a major role. In this way, the right to sue could encourage a more thorough and accurate system of record keeping.

There are disadvantages to placing the decision-making power in the courts, which could work to the detriment of an effective management system:

(1) The courts are not well-qualified to evaluate environmental data, especially when it contradicts traditional legal concepts.[11] According to one source:[12]

> The courts would have a particularly arduous time assessing allegations that a seemingly innocuous impairment of one ecological system will affect inter-dependent life-sustaining processes. Moreover, since the basis of such allegations approach the fringes of current scientific knowledge, expert opinion will be speculative and possibly contradictory.

(2) An environmental issue may be decided on the basis of a legal technicality, thus avoiding the necessary decision.

(3) There are financial burdens on the citizen who wishes to pursue a legal decision. As Richard Tobin points out: "once in the courtroom the citizen frequently faces protracted litigation and must retain council of sufficient ability to match that of the offending polluter. Coupled with expert witness fees and the financing of necessary legal and technical research, the costs of an environmental lawsuit can be prohibitive."[13]

(4) If the constitutional provision is quite general, the court may be reluctant to overrule administrative actions, and could restrict their review "to whether there has been a manifest abuse of discretion, and the absence of such a finding, will not substitute judicial discretion for administration...."[14] In addition, without specific guidelines, the courts "may only parrot agency expertise, no matter how erroneous or inadequate the conclusions that expertise may have fostered".[15]

(5) The courts could conceivably be overburdened with environmental suits.

Amount of Litigation

There is little evidence that extending the right to sue causes an undue amount of environmental litigation. Since constitutional provisions granting the right to sue are new and rare, some indication of a broad expansion of these rights can be found in state laws which contain similar provisions.

In Hawaii, the Shoreline Protection Act of 1975 established a special management area, and included the following right to appeal: "Any person, including an applicant for a permit, aggrieved by the decision or action of a permit-granting authority, shall have a right to judicial review of any decision or action of the authority."[16] No large number of suits have been initiated under this provision. It may be argued that the lack of litigation made it possible to include a similar provision in the 1977 Coastal Zone Management Act, stating that:[17]

> ...any person or agency may commence a civil action alleging that any agency:
>
> (1) Is not in compliance with one or more of the objectives, policies, and guidelines provided or authorized by this Act; or
>
> (2) Has failed to perform any act or duty required to be performed under this Act; or
>
> (3) In exercising any duty required to be performed under this Act, has not complied with the provisions of this Act....

Hawaii was not acting without the benefit of other states' experience with right to sue clauses. The comments by officials involved might be relevant here. The assistant commissioner, department of environmental affairs in Connecticut wrote, "In the one year plus of experience the statute has not resulted in an undue burden on the Connecticut courts. There has been less than overwhelming usage, and there has been no log jam in the courts."[18] The Florida attorney for the department of pollution control noted, "It is too expensive and time-consuming a process for frivolous suits to be brought."[19] The assistant attorney general of Massachusetts declared, "I can categorically

state that the idea that there would be a flood of cases is a myth that has been exploded."[20] Similar remarks have been made in Minnesota and Michigan, which also have right to sue provisions in their laws.

It should be noted that suits are not brought in a vacuum. Constitutional or statutory provisions must be clear enough to be applied by the court. Therefore, the absence of guidelines or explicit policy would tend to negate the effect of the right to sue. Hawaii's Article X, section 1, for example, while qualifying as a very general policy statement, falls short of providing any real guidance. Apart from urging the legislature to act, section 1 does not contain any citizen rights vis-a-vis the environment. If the 1978 Constitutional Convention intends a stronger commitment to citizen participation and judicial involvement in the management of natural resources, a clear policy statement may be necessary in section 1. Again, the Illinois Constitution provides an example of the right to sue coupled with a policy:[21]

> The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this policy.
>
> Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitations and regulation by law.

PART II. OWNERSHIP OF RESOURCES

Control over a resource is necessary for the management of that resource, and the most recognized form of control is ownership. Questions arise regarding the boundary between private and public (governmental) ownership. Solutions to these questions can be simple when the questions involve a definite boundary between public and private lands but are difficult when the boundary can be changed or involves resources which are not easily defined.

Hawaii is a collection of volcanic islands surrounded by the Pacific Ocean. Land along the shoreline is constantly being eroded by the action of the waves

or extended through newly created lava flow land. Related resources include the tidelands, subject to reclamation. Freshwater, a valuable resource in itself, flows along the surface, frequently serving as an unpredictable boundary between parcels of land. Freshwater may also be trapped beneath the surface, in dikes, on perched water tables, or as part of the basal water table (see groundwater diagram). This freshwater beneath the surface can be tapped, but usually only by affecting larger portions of the groundwater system. A landowner who takes too much groundwater may be denying groundwater to a neighboring landowner. Geothermal energy, drawn from subsurface caverns of hot lava and steam is another resource not usually conforming to the metes and bounds of a particular parcel of land.

The interest of the state is especially critical because of limited land area and resources:

(1) The shoreline and tidelands are sites of a delicate balance between terrestrial (land based) and marine (ocean based) ecosystems and are also important and necessary for tourism industry, residential developments, small boat harbors, commercial shoreline facilities, recreation, and in providing material for concrete.

(2) Freshwater resources are needed for agricultural, residential, and industrial uses. As demand increases, some compromises will have to be made. Allocation and use of freshwater for public and private uses will have to be carefully considered.

(3) As the supply of fossil fuel available to Hawaii diminishes, the development of alternative, feasible sources of energy will play a significant role in Hawaii's future. Geothermal resources, for example, may become a valuable resource, providing energy independence for Hawaii while also stimulating new industries.

In recent years, the courts of this state have rendered legal decisions based, in part, upon policies apparently favoring public ownership of resources. Consideration of the policies announced by the courts may have an impact upon the future use of resources. These recent decisions, however, do not guarantee applicability beyond the factual scope of the particular case nor

foreclose the possibility that the Hawaii Supreme Court will later reverse itself in this area or that a higher court will reverse these decisions.

Hawaiian Land Use

A consideration of case law in Hawaii raises 2 central questions:

(1) Did ancient Hawaiians "own" land and resources in the western sense, thus permitting the absolute transfer of ownership?

(2) In the transition under the Great Mahele to the western legal systems of ownership, did a particular parcel of land (or a particular resource) in question remain in the public domain or was it in fact transferred to a private owner?

Land. In 1977 in State v. Zimring,[22] a case involving the ownership of newly created lava land along the shoreline, the Hawaii Supreme Court held that in this particular case, at least, the shoreline land created by the lava flow belonged to the state and not to the adjoining landowners. The holding of the Court, for the purposes of this discussion, is that all land originally is in the public domain, and transfer to private ownership is possible, but only pursuant to award or grant, operation of common law, or as established by pre-1892 Hawaiian usage. The Court held that there was no government grant of the newly created land.[23] In examining whether the land was transferred to private ownership, the Court also examined whether there was a transfer by common law pursuant to section 1-1, Hawaii Revised Statutes, which reads:

> Common law of the State; exceptions. The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage.

The Court in Zimring held that the common law principle of accretion, the gradual process of newly created land being added to shoreline property due to the action of adjacent rivers or tidal movements, etc. where ownership of the

newly created land then belongs to the adjoining landowner, did not apply.[24] The Court cited the differences between the gradual process of accretion and the sudden, explosive process of a lava eruption and flow found in the case.

The Court also held that there was no basis to claim Hawaiian usage giving the newly created land to the adjoining landowners[25] and traced the history of land ownership in Hawaii, including the Great Mahele of 1848, in which the King retained certain private lands as individual property, and the government, chiefs and konohiki, and the tenants each received one-third of the remaining land. The Great Mahele was a dramatic departure from the traditional system of land ownership where, if a chief or a landholder died, the land did not pass to the chief or landholder's family, but reverted back to the King.[26] The Great Mahele changed this by incorporating the concepts of private ownership. In deciding ownership in lava land, the Court balanced the public interest in the land against the interest of the private landowner in having access to the ocean.

Summary. The 1977 Zimring case is the first Hawaii Supreme Court case in the area relating to ownership of lava flow land. The Court held that all land originally was in the public domain and unless transferred to private owners by deed or patent, by operation of common law, or as set by Hawaiian usage, the land remained in the public domain. The Court found that there was no transfer to private ownership, and the land created by the lava flow thus belonged to the state.

Shoreline Ownership. In Hawaii, at some point on a beach, private property ends and public property begins. Since a number of changing conditions along the shoreline, including the tides, movement of sand, high and low water marks, and the vegetation line, etc., may affect the boundary between public and private property, it is necessary to establish some rule of thumb in deciding the seaward boundary of private property where no statement in the patent or deed can be relied on. Two alternatives are presented. One could use the officially recorded metes and bounds under the land claims or one could use the natural and changing boundary formed by the interaction of the ocean and the shoreline, such as a debris line or the vegetation line.

In the early 1900's, the Hawaii Supreme Court rendered several important decisions in determining the property line, as expressed in the particular document of title or conveyance, of shoreline property. In Territory v. Liliuokalani[27] and in Brown v. Spreckels[28] the Court, based on statements within the respective documents, held that the seaward boundary was the low water mark. In interpreting a document in Territory v. Kerr, the Court held that the term "ma kahakai" (along the edge of the sea) meant that the boundary was the high water mark.[29]

In 1968 in In re Application of Ashford[30] the Court, again interpreting a term used in a document, held that the term "ma ke kai" (along the sea) meant that the boundary of that property was along the upper reach of the wash of the waves, usually evidenced by a vegetation or a debris line. This decision and the cases following it have a great impact in the determination of seaward boundaries of shoreline property with similar word usage in their patents.

The Ashford case was followed in County v. Sotomura[31] where the Court held, in interpreting the Land Court's determination of the seaward boundary as being along the "high water mark", that the high water mark was subject to change due to erosion and that where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka (inland), the presumption is that the wash lies along the vegetation line. The Court cited a public policy favoring the extension to public use and ownership as much of Hawaii's shoreline as is reasonably possible.

In In re Application of Sanborn,[32] the Court held that the term "high water mark" in an earlier court decree meant the vegetation and debris line (which was further inland) rather than the azimuths and distances found in the Land Court decree and that although the azimuths and distances were prima facie evidence of the high water mark, if the vegetation and debris line differed from the azimuths and distances, then the vegetation and debris line prevailed since natural monuments (vegetation line) take precedence over azimuths and distances.[33]

Summary. The Hawaii Supreme Court, in the cases discussed in this section, interpreted terms used in documents (such as patents or land court decrees) to describe the shoreline boundary separating private land from the public beach. In interpreting documents which used such terms as "along the sea", the Court has held that the boundary was the high water mark. The Court, in determining what was the high water mark, held that where there is both a debris line and a vegetation line lying further inland, the vegetation line prevailed as the high water mark and that where there was both a debris and vegetation line and a boundary marked by azimuths and distances, the debris and vegetation line prevailed as a natural monument.

Although the earlier cases favored the private landowners and the later cases favored the state, this does not mean that there has been a shift from or overruling of the earlier cases. The Court in the later cases continued to rely on interpretation of terms in the documents (where available), and the difference in outcome between the earlier and later cases may be explained by the different terms used in the documents before the Court.

Ownership and Control of Water. Earlier court decisions regarding the ownership and control of freshwater, especially surface water, appeared to emphasize the rights of private property owners to divert stream water from one parcel of land to another.

In these cases, the Hawaii Supreme Court sometimes uses the terms "riparian" and "prescriptive" rights. "Riparian rights" refer to rights which a person obtains from ownership of land located next to surface water, whereas "prescriptive rights" refers to rights obtained through the continuous use of water for a period of time where such use is adverse to the owner and where the owner fails to stop such use. In Peck v. Bailey,[34] the Court held that the grantor could convey land, and the grantee would receive water rights which the owners of the particular parcel had enjoyed from time immemorial and a person with a prescriptive right to use water in a ditch for certain purposes and for a certain parcel may divert the water for other uses on other land; provided that no one is injured.

The Court in Wong Leong v. Irwin[35] held that the landowner could transfer water from one ahupuaa (designation for Hawaiian land division) to another as long as the owner did not divert any more water than the owner was entitled to use (to irrigate taro land). Since this was a case involving prescriptive rights, the Court rejected the riparian rights argument that water could not be transferred from one ahupuaa to another. In Lonoaea v. Wailuku Sugar Co.,[36] the Court held that water may be transferred from land entitled to the water to land not entitled; provided that no one is injured. In Hawaiian Commercial and Sugar Co. v. Wailuku Sugar Co.,[37] the Court held that water may be transferred to other land; provided that no one is injured.

These cases on the ownership and control of water recognize the right to transfer a certain amount of water from one land to another. Apparently even if by taking the full share of water, other persons downstream are deprived during time of drought.

In 1973, the Court in McBryde Sugar Co. v. Robinson[38] held that, in the absence of an expressed intent to the contrary by the mahele and subsequent award and royal patent, the King did not transfer his rights to surplus water along with the land. The Court held that the right to water was not intended to be, could not be, and was not transferred to the awardee, and the ownership of water in natural watercourses, streams, and rivers remained in the people (public domain) for their common good. The Court further held that, although the state owned the water, the private landowners had appurtenant rights to use the water.[39] Although the conveyance of the land did not give ownership of the water, it did carry with it the right to use a certain amount of water (calculated by multiplying the number of acres under taro cultivation at the time of the award by the number of gallons needed per acre to grow taro). Although the landowners had a right to use the water, the Court also held that such use was limited to the parcel of land conveyed and could not be diverted to other parcels.[40] This holding represented a major break with the holdings of prior cases allowing transfer of water to other parcels.

The Court in the McBryde case held that the landowners (private and public), as owners of land adjoining a natural watercourse, had riparian rights

under what was then section 577 of the Revised Laws of Hawaii 1925 (now section 7-1, Hawaii Revised Statutes) guaranteeing rights to drinking water and running water.[41] This right is interpreted as being limited in scope of use to domestic purposes, without diminishing other persons' riparian rights or disrupting the natural flow of the stream.

The Court recognized the prescriptive right to water, acquired through adverse use, but held that since the state owned the water and since there are no prescriptive rights against the state, the private landowner could not obtain any prescriptive rights.[42]

Finally, the Court also held that storm and freshet waters were owned by the state, along the same line of reasoning for finding ownership of streams, etc., overruling an earlier case.[43]

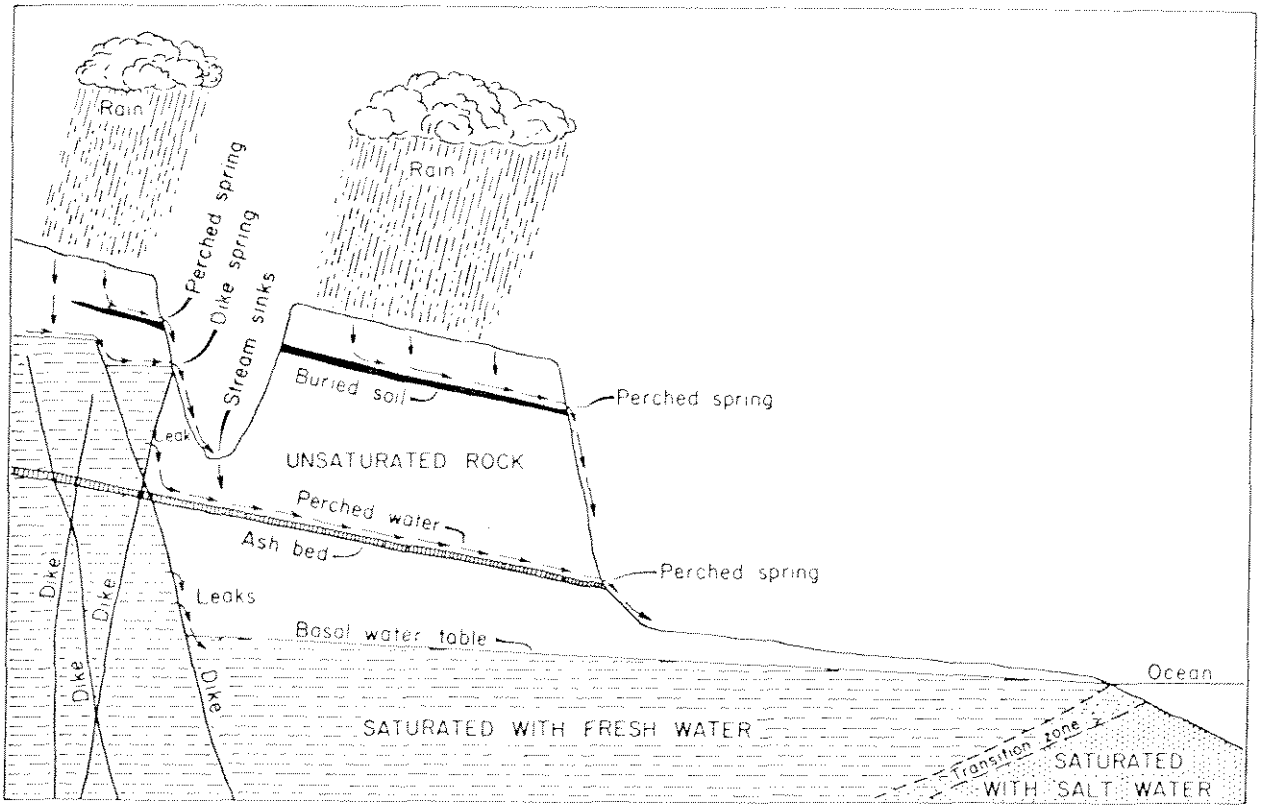
The Hawaii Supreme Court in McBryde Sugar Co. v. Robinson[44] had a rehearing on the case but affirmed its decision. The McBryde case, if upheld, may have a profound effect upon the agricultural industry, which depends heavily upon the private ownership of water and the right to divert water to another parcel. As Mr. Justice Levinson of the Court asserted in the dissenting opinion:[45]

> ...That McBryde I is a totally unforeseeable departure from prior cases of this court on the subject of water rights I have demonstrated elsewhere in this opinion. That the private parties to this action have relied considerably on these cases I have likewise indicated. Moreover, the decision in McBryde I on the questions of the ownership of surplus water and the transferability of privately owned waters affects the substantial and immediate enjoyment of the appellants' rights, not merely matters which are peripheral to those rights.

In Robinson v. Ariyoshi,[46] a federal district court decision, the Court reversed the McBryde case to the extent of declaring void the holdings that the state owned all surface water and that the private landowners cannot divert surface water from one parcel to another. The federal court cited the long history of Hawaii cases which were suddenly reversed by McBryde and held that the decision amounted to the taking of private property (water) without compensation.[47]

Another factor in consideration of freshwater as a resource is the ownership and control of groundwater. The following diagram shows the various types of groundwater (perched, dike, and basal) and the relationship to the groundwater system:

Ground Water



Source: *Gordon A. MacDonald and Agatin T. Abbott, Volcanoes in the Sea, The Geology of Hawaii (Honolulu: The University of Hawaii Press, 1970), p. 247.*

The great groundwater supply was not discovered until 1879. Thus, there are no legal precedents in the area of Hawaiian practices regarding the ownership and control of groundwater. The only case which dealt specifically with this problem of ownership and control of groundwater is City Mill Co., Ltd. v. Honolulu Sewer and Water Commission,[48] decided in 1929, in which the Hawaii Supreme Court held that the owner of the land above an artesian basin is the owner of the artesian basin thereunder and has correlative rights to and reasonable use of the water, subject to the groundwater rights of other landowners owning land over the same basin and to state regulation. The Court rejected the Territory's claim of ownership of all artesian basins as the sovereign.

Summary. The Hawaii Supreme Court, in several decisions, has held that a landowner could transfer water from land entitled to the water to another parcel not entitled to the water, as long as no one was injured. In 1973, the Court in the McBryde case held that the state owned the surface, storm, and freshet waters, unless expressly transferred with the land, but that the private landowners had a right to use the water. The Court in the McBryde case held, however, that the right to use the water did not include any right to divert the water from the original parcel to another parcel of land.

As stated by the federal district court in the Robinson v. Ariyoshi case which reversed the McBryde case as to the state ownership of surface waters and as to prohibiting diversion to other land, the McBryde case appeared to represent a major break with a long line of Hawaii Supreme Court cases. The federal district court held that the McBryde case amounted to a taking of property without compensation.

Until the final decision in the McBryde/Robinson cases is rendered, the Hawaii law on water rights, appears subject to some uncertainty.

Geothermal Resources. The use of geothermal resources to produce energy was unknown in the days of the Hawaiian monarchy. There are no cases on the ownership of geothermal resources in Hawaii and no indication of any practices on the use or ownership of resources in this area which may establish

precedent. Hawaii is basically a volcanic state with several active volcanoes. Heat found deep within the earth when mixed with water produces steam, which can be used to generate electricity, and thus, may prove to be a valuable energy resource.

Hawaii's courts have yet to render a decision on the ownership and control of geothermal resources. Some speculation is therefore necessary to indicate how the courts might decide this question. In the Zimring and McBryde cases,[49] the Court held that lava land and surface water belonged in the public domain, unless specifically granted with the original grant of land.

Since the use of geothermal resources and its value as a property right were unknown in Hawaii until recently, explicit mention of the ownership and use of geothermal resources is omitted from original documents of transfer. Careful definition of geothermal resources either as a mineral or as water may clarify questions of ownership and control since mineral and water rights are treated differently.

In 1974 the legislature in enacting section 182-1 of the Hawaii Revised Statutes declared geothermal resources to be a mineral and attempted to assert state ownership of geothermal resources located underneath privately owned land. Under the common law, where the land was transferred to a person, title to the land carried with it ownership of the minerals underneath the land, except when the grantor (the King, now the State) explicitly reserved mineral rights for the grantor. And conversely, where no reservation of mineral rights was made in a land grant, it would appear that the state under common law does not own mineral rights under the land thus conveyed.

Reservation of mineral rights were made in many grants of land in Hawaii. It appears that there is no difficulty in claiming state ownership as to grants of land made after enactment of section 182-1, Hawaii Revised Statutes. It is unclear, however, whether the courts will give a retroactive effect to section 182-1, Hawaii Revised Statutes, allowing the state to use mineral reservations to claim geothermal resources underneath land transferred prior to the legislative declaration of the resource as a mineral. Since geothermal resources were

unknown when these lands were transferred, there was arguably no intent to reserve the resources as minerals or otherwise. There is a possibility of a legal action being brought to challenge the state's claim of ownership to geothermal resources.[50]

Other states have geothermal resources in the form of geysers. In United States v. Union Oil Co.,[51] the Ninth Circuit Court of Appeals held that the geothermal steam (geyser) was retained by the United States in the reservation of mineral rights. The Union Oil case would not be binding upon Hawaii's courts as to the ownership of Hawaii's geothermal resources.

Summary. The use of geothermal resources to produce steam as a form of energy is new, and there are no Hawaii cases or Hawaiian practices regarding this area. Some speculation is therefore necessary to indicate how Hawaii's courts may decide the ownership of geothermal resources located beneath private property.

The legislature in 1974 defined geothermal resources as a mineral, thereby apparently taking advantage of the reservation of mineral rights to the state. Under the common law, mineral rights are transferred with the land unless explicitly reserved. It is unclear whether the courts will find that the King intended to retain ownership of geothermal resources since they were unknown at the time. The state would have no claim under the common law to geothermal resources as a mineral where no reservation of mineral rights was made in transferring the land.

Examples of Treatment by Other States of Resources. Many states have constitutional assertions of the public's right to own and use resources. These assertions include:[52]

(1) Colorado: The water of every natural stream...is hereby declared to be the property of the public....

(2) Montana: All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state....

(3) New Mexico: The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public....

(4) Washington: The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state....

(5) Wyoming: The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to by the property of the state.

A related concept is the holding of resources in trust for all the people. Virginia's Constitution, for example, declares that the oyster beds are held in trust for the benefit of the people of the state.[53] Similar trust provisions can be found in the constitutions of Alaska, California, Florida, and Massachusetts.[54] As explained earlier, Hawaii recognizes the public right to sea fisheries,[55] and the Hawaii Supreme Court has stated the public trust doctrine, asserting that certain resources are held by the state in trust for the people and can not be lost:[56]

> Land below the high water mark, like flowing water, is a natural resource owned by the state "subject to, but in some sense in trust for, the enjoyment of certain public rights." Bishop v. Mahiko, 35 Haw. 608, 647 (1940). The public trust doctrine, as this theory is commonly known, was adopted by this court in King v. Oahu Railway & Land Co., 11 Haw. 717 (1899). In that case we adopted the reasoning of the United States Supreme Court in Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892), holding that title to land below the high water mark was:
>
> > ...different in character from that which the state holds in lands intended for sale.... It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.... The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. King v. Oahu Railway & Land Co., 11 Haw. at 723-24.

Constitutional Statements on the Ownership of Resources. It may be argued that the ownership and use of resources such as the shoreline, newly created lava land, freshwater, and geothermal resources is not clearly defined and that some constitutional clarification or guidelines are necessary to allocate Hawaii's resources and to plan for the future. In the final analysis, however, it should be noted that a constitutional provision in this area may not be conclusive.

Except for possibly the McBryde case, the more recent cases dealing with land and related resources do not appear to represent a drastic change or upheaval in Hawaii case law, taking away private property rights and sustaining state ownership. To a large extent, the Hawaii Supreme Court has been interpreting the documents of transfer (as in the shoreline cases) or holding that where the document is silent as to the transfer, the lava land (Zimring case) or the surface water (McBryde case) remained in the public domain. The Court has relied on the document in determining ownership of certain resources and would apparently hold that where a transfer of a resource is granted in a document, then the private landowner, and not the State, is the owner. Even ownership of geothermal resources as a mineral would apparently depend on what the document of transfer stated or failed to state. Furthermore, while a constitutional provision could relinquish state property rights, it could not affect or take private property rights without compensation. The federal district court in Robinson v. Ariyoshi[57] reversed the Hawaii Supreme Court's holding in the McBryde case on this very basis. For example, if a constitutional provision asserted state ownership over a vested private property right (e.g., oil) claiming that the oil never left the public domain unless explicitly transferred, the United States Supreme Court may find that there is a vested property right belonging to the private landowners and that there was a taking without just compensation. This constitutional provision would not only be conflicting with other state constitutional provisions prohibiting taking without compensation but also with U.S. constitutional provisions. Thus, even if the state constitution is amended to claim ownership without violation of state constitutional rights, the United States Supreme Court may find a violation under the landowner's U.S. constitutional rights.

PART III. CONSTITUTIONAL ZONING

Conversion of Lands

The greatest danger of an incomplete or inadequate management system is the permanent destruction of valuable resources, and the irreversible conversion of sensitive conservation and agricultural lands to urban development. In the current jargon of bureaucracy, these are called "losing a management option". Examples of such losses might include the filling in of a lake, the pollution of a bay, or the construction of a commercial building in a very remote, scenic area.

In Hawaii the state land use commission classifies land into 4 categories: urban, rural, agricultural, and conservation. In evaluating the effectiveness of this approach, of particular importance is the frequency of converting agricultural or conservation lands to urban. The following table indicates the number of acres in each category, from 1964 to 1977. The total number of acres in the State is approximately 4,111,500:[58]

	Urban	Conservation	Agricultural	Rural
August 1964	117,800	1,862,600	2,124,400	6,700
August 1969	140,163	2,009,086	1,955,875	6,375
March 1974	147,472	1,986,429	1,968,727	8,872
February 1975	148,921	1,976,996	1,976,695	8,887
January 1977	149,197	1,976,695	1,976,393	8,914

Most of Hawaii's land is classified either agricultural or conservation. Not all of this land, however, is suitable for agriculture or urbanization, and thus would not be even considered for conversion. Hawaii's mountain ranges are a major component of its conservation acreage, and even they are found to some extent under agriculture. The only significant change reflected in these figures is an increase in urban land by over 20 per cent.

Perhaps a more meaningful reflection of land use conversion may be found in the number of petitions brought before the land use commission and its willingness to approve changes. The following table shows land use commission decisions on petitions for boundary changes, 1964-1974:[59]

Island	Approved	%	Partial Approval	%	Denial	%
Hawaii	63	60.0%	15	14.3%	27	25.7%
Kauai	25	59.5%	10	23.8%	7	16.7%
Maui	31	67.4$	6	13.0%	9	19.6%
Oahu	34	53.1%	14	21.9%	16	25.0%
TOTAL	153		45		59	

Three-fourths were approved either wholly or in part. Of the 257 petitions acted upon, 250 involved requests for more intensive land uses.[60] Seventy-seven per cent of all requests for change to urban status were approved in whole or in part.[61] This seems to indicate an inclination to convert lands to urban.

If just the conservation lands that were rezoned are considered, the number of acres is relatively small, compared to the total acres in conservation, but the approval rate is high:[62]

County	Petitions Requested	Acres Requested	Petitions Approved	Acres Approved
Hawaii	8	1,163.85[a]	8	1,163.85
Kauai	3	966.25[b]	3	966.25
Maui	4	23,372.33[c]	4	23,372.33
Oahu	19	5,298.94	11	82.19
TOTAL	34	30,801.37	26	25,584.62

Source: Compiled from Land Use Commission files.

a. Includes 317.1 for agricultural uses.

b. Includes 965 acres for agricultural uses.

c. For one petition by the Lanai Co., 18,000 acres of conservation lands were approved for agricultural uses, 2,700 acres were put in the rural district and 1,620 acres were put in the urban district.

A similar situation exists with agricultural lands. From 1962-1974, 80 per cent of the petitions to change from agricultural to urban classifications were

approved.[63] These decisions converted over half of the lands in question, or 34,906[64] acres, 3,190 of which could be classified as "prime".[65]

One might argue that the reluctance of the land use commission to rezone might have held down the number of petitions. Yet there is evidence that investors were willing to gamble on the willingness of the commission to convert agricultural lands, as this case study during that period indicates:[66]

> In 1966, the agricultural district near Wailua included about 427 acres divided into thirty-four individual parcels. This agricultural area was in close proximity to land units that had been previously assigned rural classification by the Commission. By 1971, 293 acres of this agricultural land had been sold at prices averaging about $8,000 per acre, nearly two and one-half times the fair market value of the land in agricultural use. These prices reflected a perception of Commission willingness to redistrict the land. The Commission did redistrict a portion of the land to allow for urban uses. The land redistricted included the most agriculturally productive land. Mounting tax assessments resulting from the Commission action further increased the urban pressures on the remaining agricultural land.

As indicated in chapter 2, Hawaii's Constitution does not clearly define conservation or agriculture, and offers no guidance in setting priorities in the tensions between "conservation, development and utilization" of natural resources. As Hawaii's population grows, it may be assumed that the pressures to urbanize will increase. Although a major percentage of land has not been converted to urban, the state land use commission has tended to approve the petitions that have come before it. One option for the 1978 Constitutional Convention might be to consider a stronger statement of policy regarding the conversion of lands to urbanization. In the current search for ways to cope with population and growth, this certainly may become a major factor.

Permitted Uses

An additional factor in management is the permitted uses within the various districts. The internal management of conservation districts, for example, has been severely criticized. In a resolution passed by the state

senate in 1976, the senate stated: "Regulation 4 [the regulation governing conservation districts] is in need of revision to ensure that conservation district lands will be used for the purposes for which they were intended...."[67] This regulation is currently undergoing revision, but for many years it was the primary guidance for the internal management of those lands.

Regulation 4 is an excellent example of the broad range of policies permitted under Hawaii's Constitution. Permitted uses under this regulation include:[68]

(1) Public, quasi-public, and private recreational facilities and areas;

(2) Cabins, residences, recreational-type trailers, and accessory buildings;

(3) Resort and related residences; hotels and restaurants; guest or resort ranches; country clubs; small boat harbors...and other structures and facilities operated for public agencies or for commercial purposes;

(4) Public and private utility activities;

(5) Governmental uses, including community, public and private service uses;

(6) Military and related service activities;

(7) Airstrips and heliports and related activities;

(8) Logging operations;

(9) Excavation and quarrying;

(10) Diversified agriculture, grazing of livestock, tree farming; and

(11) Temporary variances for any use to last for one year.

Not only was much permitted, much was granted, as 2 analysts of Hawaii's management system commented:[69]

> ...the Land Board has been very permissive in granting use permits within conservation districts for uses that have little to do with the conservation of natural resources. The Board has permitted uses

in conservation districts that include two college campuses, a cemetery, an airport, two major highways, and a variety of tourism-related and commercial activities.

Several conclusions may be drawn from this record:

(1) There is a great flexibility in what may be permitted in a conservation district.

(2) Preservation of sensitive resources does not appear to be a primary objective.

(3) Based on what is potentially allowed, there is little distinction between conservation districts and other zoning classifications.

(4) Regulation 4 provides little real guidance for managing resources.

In defense of such a wide range of permitted activity, it may be argued that conservation districts were not originally intended to be solely for "preservation", that they became a kind of miscellaneous category, and that great flexibility was needed to reconcile all the different kinds of resources and lands that were included. It is not surprising, however, that a consultant for the state's 1969 boundary review "found more confusion and friction throughout the state over the purposes and administration of the Conservation Districts than any other single element in the Land Use Law".[70]

An option for the 1978 Constitutional Convention would be to provide specific guidelines for permitted uses in conservation districts.

Other States

There are several examples of constitutional efforts to discourage excessive rezoning, and to preserve agricultural and conservation lands. Often tax incentives are encouraged or mandated for the dedication of land to a particular restrictive use. Hawaii's legislature has enacted numerous tax incentives, and a constitutional provision would therefore make them difficult to

abolish. Such a constitutional provision could go further than existing laws, as well as elevating tax protection to a higher level of policy.

An example of such policy is found in Massachusetts' Constitution:[71]

> Full power and authority are hereby given and granted to the general court to prescribe, for the purposes of developing and conserving agricultural or horticultural lands, that such lands shall be valued, for the purpose of taxation, according to their agricultural or horticultural uses; provided, however, that no parcel of land which is less than five acres in area or which has not been actively devoted to agricultural or horticultural uses for the two years preceding the tax year shall be valued at less than fair market value under this article.

Not only is there a tax incentive to encourage farming, but an additional clarification is provided: "no parcel of land which is less than five acres", thus establishing some standard for defining a true farm.[72]

Maine's Constitution permits special tax assessments for farms, open space lands, and wildlife sanctuaries.[73] California's provision on open space declares "that assessment practices must be so designed as to permit the continued availability of open space lands for these purposes".[74]

Ohio's Constitution states:[75]

> Laws may be passed to encourage forestry and agriculture, and to that end areas devoted exclusively to forestry may be exempted, in whole or in part, from taxation...laws may be passed to provide that land devoted exclusively to agricultural use be valued for real property tax purposes at the current value such land has for such agricultural use.

New York has gone the farthest in protective measures by, in effect, constitutionally zoning wild forest lands: "The lands of the state, now owned or hereafter acquired, constituting forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."[76] Subsequent language lists the boundaries of

the forest preserve in detail, and elaborate on the right of the state to construct highways and other improvements. Not only does this represent a very clear constitutional "guideline", but also a significant procedural restriction: only a constitutional amendment can alter such a land use policy. The legislative and executive branches of state government are thus limited in their usual authority in these matters.

New York went even further. In permitting the dedication of lands for their "natural beauty, wilderness character, or geological, ecological or historic significance", a state "nature and historic preserve" was established that could not be "taken or otherwise disposed of except by law enacted by two successive regular sessions of the legislature".[77] Massachusetts also imposed constitutional restraints on its legislature with the provision: "Lands and easements taken or acquired for such purposes [clean air, water, etc.] shall not be used for other purposes or likewise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court."[78]

Indirect protection for special lands is provided by both Ohio and South Dakota, which have constitutional provisions dealing with drainage, and the relationship of drainage to agriculture and conservation. South Dakota adds authority to assess such drainage facilities, drains, ditches, levees, etc., in accordance with their benefits.[79]

A related protection for agricultural lands, as noted in chapter 2, is the setting of priorities for the use of water. Idaho and Colorado set these priorities in their constitutions, placing the use of water for agriculture over that of manufacturing.[80] In Hawaii, a comparable treatment might involve agricultural, residential, and tourist uses, since these are the most significant competitors for our water.

Aina Malama

In Hawaii, a more comprehensive and detailed constitutional approach to natural resources management has surfaced in the last few years. One version

of major reform is being called Aina Malama, or preservation of the land. While still in its formative stages, Aina Malama backers proposed a new article to Hawaii's Constitution that would include the following:

(1) The establishment of several new land classifications, ranging from severely restricted uses to well protected agricultural districts;

(2) Provisions detailing the process for nominating lands for Aina Malama classifications, including direct public participation via certified petitions;

(3) Detailed description of permitted uses in each classification, as well as the kinds of data required for nomination petitions;

(4) A requirement that lands nominated be officially approved through a public referendum, with the same process for removal.

(5) The establishment of an Aina Malama Commission entrusted with the guardianship of Aina Malama lands, including the maintenance of a registry of lands.

(6) Detailed description of the powers and duties of the commission, including guidelines for its rules and regulations.

The Aina Malama approach is a serious attempt to increase public participation in the zoning of sensitive and valuable lands. It would reduce the discretionary powers of the land use commission in the rezoning of lands and the department of land and natural resources in the management of conservation lands. Once classified under such a constitutional provision, it would be more difficult to rezone to a more intensive land use, since public referendum would be required. Lands once designated under the Aina Malama process could be assigned to a particular agency for management. The amount of agency discretion would depend on how detailed the constitutional language was in defining permitted uses under its various classifications.

PART IV. SUMMARY

The following is a brief summary of the constitutional alternatives discussed in this book. While fairly comprehensive, it does not represent all possible alternatives.

Summary of Major Alternatives

Section 1:

(1) Abolish section 1.

(2) Make no change.

(3) Expand into a general policy statement, including several statements of policy, applying these to all branches and levels of government, as well as to the general public.

(4) Define conservation, as well as establishment of priorities or guidelines in the conflict between conservation, development, and utilization.

(5) Define agriculture.

(6) Set priorities for the use of water.

(7) Assert state ownership of various resources, such as the shoreline, water, the ocean floor, newly formed lava lands, etc.

(8) Clarify the status of geothermal steam.

(9) Provide policies or guidelines for the conversion of lands to more intensive land uses.

(10) Incorporate Article VIII, section 5 (Public Sightliness and Good Order) into Article X, and include similar, related concerns, such as freedom from excessive and unnecessary noise, etc.

(11) Establish the right of every citizen to a healthful environment, and include the right to sue for that right.

Section 2:

(1) Abolish section 2.

(2) Make no change.

(3) Decentralize all management authority by expanding county authority.

(4) Centralize all state management into a single executive, eliminating state boards and commissions, as attempted in 1968.

(5) Centralize all state management into a single board, removing legislative discretion in the distribution of state authority.

(6) Removal of all county authority to manage resources by concentrating all responsibility at the state level.

(7) As a variation of any of the above, spell out in detail the management system, specifying powers, duties, membership of boards, whether or not officials are full time or part time, etc., thus removing this flexibility from the legislature.

Section 3:

(1) Abolish section 3.

(2) Make no change.

(3) Clarify historic Hawaiian "ownership" of resources.

(4) Define the state's boundaries.

(5) Assert state authority to manage resources between the channels.

Section 4:

(1) Abolish section 4.

(2) Make no change.

Section 5:

(1) Abolish section 5.

(2) Make no change.

(3) Provide guidance in the distribution of public lands to avoid favoring a particular economic group.

(4) Prioritize the uses for public lands.

(5) Integrate the management of public lands with other policies.

(6) Incorporate section 5 into section 1.

Other

(1) Abolish all of Article X.

(2) Provide for special treatment of favored resources, such as precious coral beds, manganese nodules, geothermal steam, etc.

(3) Add a major section, such as the Aina Malama proposal, including detailed provisions for a management institution, definitions, land uses permitted, process for nomination, etc.

(4) Incorporate a citizen's referendum in major land use changes.

FOOTNOTES

Chapter 2

1. *Hawaii Const.* art. X, sec. 1.

2. *Hawaii Const.* art. X, sec. 2.

3. *Hawaii Const.* art. X, sec. 3.

4. *Hawaii Const.* art. X, sec. 4.

5. *Ibid.*

6. It is not unusual to find provisions for natural resources scattered throughout a variety of constitutional articles. *Ohio's* treatment of conservation, for example, is in section 36, under article II devoted to legislative powers and duties.

   In *Michigan's Constitution*, "jurisdiction over all state owned lands useful for forest preserves, game areas and recreational purposes" is found under article X, Property, section 5, State Lands.

   Mississippi prohibits "the permanent obstruction of any of the navigable waters of the state" under article 4, Legislative Department, section 81, Navigable Waters; Obstructions.

   Further, there are a number of provisions dealing with natural resources in amendments at the end of the state constitutions, and listed under miscellaneous.

7. *Alaska Const.* art. VIII (Natural Resources):

   Sec. 1. Statement of policy.
   Sec. 2. General authority.
   Sec. 3. Common use.
   Sec. 4. Sustained yield.
   Sec. 5. Facilities and improvements.
   Sec. 6. State public domain.
   Sec. 7. Special purpose sites.
   Sec. 8. Leases.
   Sec. 9. Sales and grants.
   Sec. 10. Public notice.
   Sec. 11. Mineral rights.
   Sec. 12. Mineral leases and permits.
   Sec. 13. Water rights.
   Sec. 14. Access to navigable waters.
   Sec. 15. No exclusive right of fishery.
   Sec. 16. Protection of rights.
   Sec. 17. Uniform application.
   Sec. 18. Private ways of necessity.

8. *Louisiana Const.* art. IX (Natural Resources):

   Sec. 1. Natural resources & environment, public policy.
   Sec. 2. Natural gas.
   Sec. 3. Alienation of water bottoms.
   Sec. 4. Reservation of mineral rights; prescription.
   Sec. 5. Public notice; public bidding requirements.
   Sec. 6. Tidelands ownership.
   Sec. 7. Wildlife & fisheries commission.
   Sec. 8. Forestry.

   Missouri Const. art. 4 (Executive Department):

   Sec. 40(a) Conservation commission, members, qualifications, terms, how appointed - duties of commission - expenses of members.
   Sec. 40(b) Incumbent members.
   Sec. 41. Acquisition of property - eminent domain.
   Sec. 42. Director of conservation and personnel of commission.
   Sec. 43. Use of revenues and funds of conservation commission.
   Sec. 44. Self-enforceability - enabling clause.
   Sec. 45. Rules and regulations - filing - review.
   Sec. 46. Distribution of rules and regulations.
   Sec. 47. Natural resources, department of - duties.

   Oklahoma Const. art. XXVI (Department of Wildlife Conservation):

   Sec. 1. Creation of department - wildlife conservation commission - membership - appointment - tenure - vacancies - oath and bonds.
   Sec. 2. Game and fish laws not repealed - acquisition of property.
   Sec. 3. Director of wildlife conservation.
   Sec. 4. Disposition of funds.

   New York Const. art. XIV (Conservation):

   Sec. 1. Forest reserve to be forever kept wild.
   Sec. 2. Reservoirs.
   Sec. 3. Forest and wildlife conservation; use or disposition of certain authorized lands.
   Sec. 4. Protection of natural resources; development of agricultural lands.
   Sec. 5. Violations of article; how restrained.

   Massachusetts Const. arts. 51, 88, 97, and 99.

9. *New York Const.* art. X, sec. 1.

10. *Idaho Const.* art. XV (Water Rights):

    Sec. 1. Use of waters, a public use.
    Sec. 2. Right to collect rates - a franchise.
    Sec. 3. Water of natural stream - right to appropriate - State's regulatory power - priorities.
    Sec. 4. Continuing rights to water guaranteed.
    Sec. 5. Priorities and limitations of use.
    Sec. 6. Establishment of maximum rates.
    Sec. 7. State water resource agency.

11. *Wyoming Const.* art. 8 (Irrigation and Water Rights). Ownership is asserted in sec. 1. Sec. 3 deals with priorities); *South Dakota Const.* art. XXI (Miscellaneous. Sec. 6, Drainage districts of agricultural lands; sec. 7, Irrigation districts of agricultural lands); *New Mexico Const.* art. XVI (Irrigation and Water Rights.

State authority is recognized in sec. 1, the right to appropriate in sec. 2, the principle of beneficial use declared in sec. 3); *Montana Const.* art. IX (Environment and Natural Resources), sec. 1-4).

12. *Hawaii Const.* art. X, sec. 2.

13. *Arkansas Const.* amendment no. 35, Game and Fish Commission.

14. The legislature has apparently used this power; see, for example, *Hawaii Rev. Stat.*, sec. 246-12 (dedication of land for tax purposes).

15. *California Const.* art. XXVIII, sec. 2; *Ohio Const.* art. II, sec. 36. See discussion in *Hawaii Constitutional Convention Studies 1978, Article XIV*, which indicates such enumeration in the Constitution may not be necessary.

16. *Alaska Const.* art. VIII, secs. 11 and 12.

17. *Hawaii Const.* art. X, sec. 1.

18. *Hawaii Rev. Stat.*, sec. 182-1.

19. *Mississippi Const.* art. II, secs. 227-239.

20. *California Const.* art. XV, secs. 1-3.

21. *Louisiana Const.* art. IX, sec. 6.

22. *Florida Const.* art. XI, sec. 11.

Chapter 3

1. *New York Const.* art. XIV, sec. 4.

2. *Illinois Const.* art. XI, sec. 1.

3. *Massachusetts Const.* art. 97; *Virginia Const.* art. XI, sec. 1.

4. *Hawaii Const.* art. X, sec. 1.

5. This particular problem has been the focus of the coastal zone management program. The "bottom line" for management is choosing among conflicting uses. A plan which provides no guidance or priorities for this difficult choice is no plan at all.

6. *Alaska Const.* art. VIII, sec. 13; *California Const.* art. XIV, sec. 3; *Idaho Const.* art. XV, sec. 3; *New Mexico Const.* art. XVI, sec. 3; *Wyoming Const.* art 8, sec. 3.

7. *Idaho Const.* art. XV, sec. 3.

8. *Hawaii Rev. Stat.*, sec. 182-1.

9. Hawaii, Constitutional Convention, 1968, *Proposals, Resolutions, Reports and Other Papers*, Proposal No. 65.

10. *Ibid.*

11. *Ibid.*, Proposal No. 61.

12. *Ibid.*, Proposal No. 280.

13. *Ibid.*

14. *Ibid.*

15. *Ibid.*

16. *Ibid.*

17. *Ibid.*

18. *Ibid.*, Proposal No. 146.

19. *Alaska Const.* art. VIII, sec. 7; *California Const.* art. XXVIII, sec. 2; *Indiana Const.* art. 15, sec. 9-10; *Massachusetts Const.* art. 51; *Montana Const.* art. IX, sec. 4; *New Mexico Const.* art. 22, sec. 21; *New York Const.* art. XIV, sec. 4; *Virginia Const.* art. XI, sec. 1.

20. City and County of Honolulu, *Ordinance No. 4573, Waikiki Special Design District*, Section I, Subsections D and L.

21. The Department of Land Utilization's recommendations on this project presented to the Planning and Zoning Committee on May 4, 1977, included the expansion of the opening to the Royal Hawaiian Court from 30 feet to 90 feet. The applicant objected, contending such an opening would disrupt continuity and destroy the interior-court atmosphere. Recommendations also called for numerous beautification adjustments, such as the extension of planter areas and the planting of trees. *Office of Council Services Evaluation of Proposal by Helumoa Land Co. for Items No. D-388 and M-279) Planning and Zoning Committee Agenda of May 4, 1977*, Council Communication No. 136, pp. 1-3.

22. *State v. Diamond Motors*, 50 Haw. 33, 36, 429 P.2d 825 (1967).

23. *Massachusetts Const.* art. 97.

24. Hawaii, Constitutional Convention, 1968, *Proposals, Resolutions, Reports and Other Papers*, Proposals No. 65 and No. 280.

25. *Hawaii Const.* art. X, sec. 2.

26. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, Committee of the Whole Debates, p. 456.

27. *Ibid.*, p. 454.

28. *Ibid.*, p. 462.

29. *Ibid.*

30. *Ibid.*, p. 457.

31. *Ibid.*

32. *Ibid.*, p. 464.

33. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 233.

34. *Hawaii Rev. Stat.*, ch. 92, part I.

35. Hawaii, Department of Planning and Economic Development, *An Application for Coastal Zone Management Program Development Grants* (Honolulu: May 1974), p. 18.

36. Hawaii, Department of Planning and Economic Development, *Hawaii Coastal Zone Management Program, Second Year Summary Report: 1975-1976* (Honolulu: December 1976), p. 38.

37. *Hawaii Const.* art. X, sec. 2.

38. *State v. Zimring*, 58 Haw. [5522] (1977).

39. See, *Hawaii Rev. Stat.*, secs. 188-4 through 188-14.

40. A discussion with staff members of the department of land and natural resources (DLNR), July 26, 1977. This was confirmed by the bureau of surveys of the department of accounting and general services (DAGS), on the same day. Neither DLNR nor DAGS had updated records. DAGS files were more complete, but would have taken many hours to obtain even the most basic information. DLNR files, a single folder that took some time to locate, contained only scattered references to *konohiki* claims from the late 1940's. There was one letter written in 1964, and one in 1975, which was the last. DLNR staff indicated that the attorney general, which has the power to condemn, does not check with DLNR before taking action.

41. *Ibid.*

42. A discussion with staff members of the department of accounting and general services, July 26, 1977.

43. For a discussion of cases concerning the ownership of fisheries, see, Daniel P. Finn, "Hawaii Caselaw Relating to Coastal Zone Management," *Hawaii Coastal Zone Management Program, Document 6, Vol. 2: Legal Aspects of Hawaii's Coastal Zone Management Program*, June 1976, pp. 17-19.

44. *Ibid.*, p. 17.

45. Robert G. Schmitt and others, "The Hawaiian Archipelago," *Working Paper No. 16, October 1976, Sea Grant College Program*, p. 65.

46. *Ibid.*, p. 65.

47. *Ibid.*, p. 63.

48. *Ibid.*

49. *Ibid.*, p. 64.

50. *Ibid.*

51. *Ibid.*

52. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 336.

53. *Ibid.*, p. 233.

54. *Ibid.*, p. 234.

Chapter 4

1. Richard J. Tobin, "Some Observations on the Use of State Constitutions to Protect the Environment," *Environmental Affairs*, Vol, 3, No. 3, 1974, p. 473.

2. *Illinois Const.* art. XI, sec. 2.

3. *Massachusetts Const.* art. 97.

4. *Pennsylvania Const.* art. I, sec. 27.

5. *Rhode Island Const.* art. I, sec. 17.

6. *New York Const.* art. XIV, sec. 5.

7. *Illinois Const.* art. XI, sec. 2.

8. A.E. Dick Howard, "State Constitutions and the Environment," *Virginia L. Rev.*, Vol. 58, No. 2, February 1972, p. 203.

9. Tobin, quoting from J. L. Sax, *Defending the Environment: A Strategy for Citizen Action* (New York: 1972), p. 237.

10. *Ibid.*, p. 483.

11. *Ibid.*

12. *Ibid.*, p. 484.

13. *Ibid.*

14. *Ibid.*

15. *Ibid.*

16. *Hawaii Rev. Stat.*, sec. 205A-31.

17. 1977 Haw. Sess. Laws, Act 188.

18. Consumer Interest Foundation, *Do Citizen Suits Overburden Our Courts? (A Case Study of the Judicial Impact of State Environmental Legislation)* (Washington, D.C.: 1973), p. 5.

19. *Ibid.*

20. *Ibid.*, p. 6.

21. *Illinois Const.* art. XI, secs. 1 and 2.

22. *State v. Zimring*, 58 Haw. [5522] at 5 (1977).

22. *Ibid.*

23. *Ibid.*, at 10.

24. *Ibid.*, at 15.

25. *Ibid.*, at 13.

26. Jean Hobbs, *Hawaii, A Pageant of the Soil* (Stanford, Calif.: Stanford University Press, 1935), p. 7.

27. 14 Haw. 88 (1902).

28. 14 Haw. 399 (1902).

29. 16 Haw. 363 (1905).

30. 50 Haw. 314, 440 P.2d 76 (1968).

31. 55 Haw. 176, 517 P.2d 57 (1973).

32. 58 Haw. [5522] (1977).

33. *Ibid.*, at 6, 9.

34. 8 Haw. 658 (1867).

35. 10 Haw. 265 (1896).

36. 9 Haw. 651 (1895).

37. 15 Haw. 675 (1904).

38. 54 Haw. 174, 504 P.2d 1330 (1973).

39. *Ibid.*, at 188.

40. *Ibid.*, at 191.

41. *Ibid.*, at 198.

42. *Ibid.*

43. *Ibid.*, at 200.

44. 55 Haw. 260, 517 P.2d 26 (1973).

45. *Ibid.*, at 303.

46. Civil No. 74-32 (D. Haw. 1977).

47. *Ibid.*, at 44.

48. 30 Haw. 912 (1929).

49. 58 Haw. [5522] (1977); 54 Haw. 174, 504 P.2d 1330 (1973).

50. *Honolulu Advertiser*, June 9, 1977, p. A-3.

51. 549 F.2d 1271 (9th Cir. 1977).

52. *Wyoming Const.* art. 8, sec. 1; *New Mexico Const.* art. XVI, sec. 2; *Montana Const.* art. IX, sec. 3; *Colorado Const.* art. XVI, sec. 5; and *Washington Const.* art. XVII, sec. 1.

53. *Virginia Const.* art. XI, sec. 3.

54. *Alaska Const.* art. VIII, sec. 3; *California Const.* art. XIV, sec. 3; *Florida Const.* art. XI, sec. 11; *Massachusetts Const.* art. 97 and art. 51; and *Virginia Const.* art. XI, sec. 3.

55. *Hawaii Const.* art. X, sec. 3.

56. 55 Haw. 176, 517 P.2d 57 (1973); 54 Haw. 174, 504 P.2d 1330 (1973).

57. Civil No. 74-32 (D. Haw. 1977).

58. *State of Hawaii Data Book* (unpublished update draft), Table 92, 1977.

59. Kem Lowrey, "Control and Consequence: The Implementation of Hawaii's Land Use Law," Unpublished Doctoral Dissertation, University of Hawaii, Political Science Department, August 1976, p. 78.

60. *Ibid.*, p. 80.

61. Kem Lowrey and Michael McElroy, "State Land Use Control: Some Lessons from Experience," *State Planning Issues*, Vol. 1, Issue 1, Spring 1976, p. 18.

Regarding the 1974 land use boundary review, Lowrey and McElroy state:

> *The commission approved additions of 1,782 acres to Oahu's urban districts. While the county, holding to its earlier position, did not make recommendations on these petitions, 796 acres approved were in areas designated for little or no growth under the preliminary county general plan revisions.*

Ibid., p. 27. This would seem to indicate the lack of a unified state/county policy.

62. Lowrey, "Control and Consequence...," p. 202.

63. *Ibid.*, p. 172.

LAND USE COMMISSION DECISIONS ON PETITIONS TO CHANGE LAND FROM AGRICULTURAL TO URBAN DISTRICT DESIGNATION, BY COUNTY 1962-1974

County	Number of Petitions	Number Approved Wholly or in Part	Approval Rate
Kauai	28	23	82%
Maui	52	43	83%
Oahu	54	44	81%
Hawaii	111	82	74%

Source: Compiled from Land Use Commission records.

64. *Ibid.*, p. 173.

LAND USE COMMISSION DECISIONS ON PETITIONS TO CHANGE LAND FROM AGRICULTURAL TO URBAN DISTRICT DESIGNATION, BY COUNTY 1962-1975

	Interim Petitions(a)			1969 and 1974 Boundary Reviews(b)	
County	Acres Requested	Acres Approved	% Approved		Total
Oahu	21,022	8,908	42.4	4,931	13,839
Kauai	542	380	70.2	1,967	2,347
Maui	7,423	5,030	67.8	1,951	6,981
Hawaii	13,553	7,430	54.8	4,309	11,739
TOTAL	42,540	21,748	51.1	13,158	34,906

(a) compiled from Land Use Commission records.

(b) provided by the Land Use Commission staff and calculated from data in *Report to the People*, State Land Use Commission, *Second Five Year District Boundaries and Regulations Review*, February, 1975.

65. *Ibid.*, p. 174.

LAND USE COMMISSION DECISIONS ON PETITIONS INVOLVING PRIME AGRICULTURAL LAND BY COUNTY 1962-1974

County	Acres Requested	Acres Approved	% Approved
Oahu	7,108.2	2,127.2	29.9
Kauai	62.9	29.1	46.2
Maui	1,394.5	771.2	55.0
Hawaii	314.3	263.4	83.8
Totals	8,879.9	3,190.9	35.9

Source: Compiled from Land Use Commission records.

66. Lowrey and McElroy, "State Land Use Control...," p. 22.

67. Hawaii, Senate Resolution No. 12: REQUESTING THE DEPARTMENT OF LAND AND NATURAL RESOURCES TO COMPLETE NECESSARY REVISIONS TO ITS REGULATION RELATING TO CONSERVATION DISTRICT LANDS, Regular Session, 1976.

68. Coastal Zone Management Document No. 6, Vol. I, sec. 33, p. 4.

69. Lowrey and McElroy, "State Land Use Control...," p. 26. They add: "Some of the uses permitted in conservation districts are objectionable to the counties because they are growth primers, activities that are likely to provide both a stimulus and a justification for further growth in areas for which the counties have conflicting plans. Some are objectionable simply because they reflect the absence of an overall DLNR strategy for conservation areas, or allow urban uses in violation of the spirit of the Land Use Law." *Ibid.*

70. Lowrey, "Control and Consequence...," p. 201.

71. *Massachusetts Const.* art. 99.

72. Under the current law, it is possible for the counties to permit subdivisions for housing and other nonagricultural uses in the agricultural district. This is partially because state law provides no clear definition of "farming" or "farm".

73. *Maine Const.* art. IX, sec. 8.

74. *California Const.* art. XXVIII, sec. 1.

75. *Ohio Const.* art. II, sec. 36.

76. *New York Const.* art. XIV, sec. 1.

77. *Ibid.*, sec. 4.

78. *Massachusetts Const.* art 97.

79. *South Dakota Const.* art. XXI, sec. 6; *Ohio Const.* art. II, sec. 36.

80. *Colorado Const.* art. XVI, sec. 6; *Idaho Const.* art. XV, sec. 3.

PART TWO

Article XI:
Hawaiian Home Lands

Chapter 1
INTRODUCTION

Article XI involves 2 distinct sets of concerns. First, is the historical background of the use and ownership of land in Hawaii, and its relationship to the Hawaiian People. Related, is the decline in numbers of Hawaiians, and their unfavorable position on the socio-economic ladder. Historical injustice and the obligation to correct it is a continuous theme.

Second, are the measures adopted to deal with the aforementioned situation. Here the focus is on legality, the constitutionality of certain provisions in Hawaii's Constitution, the ability of the state to effect changes in policy, and the need for continued federal approval.

Article XI is a strange provision which does not quite belong in any one category. It touches a number of important issues, such as a symbolic recognition of Hawaiian rights, the contradictory provisions of the Hawaiian Homes Commission Act of 1920, promotion of homesteading, special protection for the sugar industry, low-income housing, admission of Hawaii to the Union, and efforts to "rehabilitate" the Hawaiian People. To be sure, not all of these issues are specifically mentioned in the existing constitutional provisions, but they are part of the laws that implement those provisions. Any change must necessarily be based on some judgment of the current Hawaiian homes program which would require a thorough analysis of state legislation, and reach well beyond purely constitutional considerations.

In 1968, no amendments were made to Article XI. There appeared to be a universal consensus to leave well enough alone. Since then, much has happened within the Hawaiian community. Some have called this a period of revival for Hawaiiana, a Hawaiian Renaissance. Issues such as the military use of Hawaiian lands, the discovery of ancient sites thought to be sacred to the Hawaiians, and the prospect of Native Claims have focused more attention on the purposes and programs outlined by Article XI.

The purpose of this study is to provide a basic orientation to the issues. Detailed guidance for historic and program-related concerns is more appropriately sought from those active in the Hawaiian community. Legal and constitutional questions are best explained by qualified members of the legal profession.

To facilitate this effort, the study may be divided between historical considerations in chapter 2 and constitutional considerations in chapters 3, 4, 5, 6, and 7.

Chapter 2
HISTORICAL CONSIDERATIONS

> There is nothing more characteristic of the Hawaiian than his love for the land; he is essentially of the soil, clinging to ancient traditions and customs that were so important a part of the economic structure of the ancient civilization. And many are the bitter conflicts in the courts of law today in which the old traditional rights are construed in the light of the new system of landholding.[1]

The history of Hawaii is the history of land use. From the days of Kamehameha I when all land belonged to the King, to the arrival of foreigners and their slow but steady influence on land use policies; from the Great Mahele in the 1840's, where western concepts of ownership gained a paramount foothold, to the transfer of lands to foreign entrepreneurs, to 20th century efforts to reserve a small portion of Hawaii's resources for the Hawaiian people...ownership and use of land have been the barometers of social change and justice. They are the primary arena of cultural interaction: the clash between private property and traditional values applied to Hawaii's resources.

Before the Great Mahele, Kamehameha I held all resources in trust for all the people, as Kamehameha III affirmed in 1840:[2]

> Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and the people in common, of whom Kamehameha I was the head, and had the management of landed property.

Not only did private property represent a foreign concept, but the actual use of land by an individual was subject to the king's whim, as Jean Hobbs explained:[3]

> When a chief or a landholder died, his lands reverted, not to his family, but to the King, to be used by him either as a part of his personal holdings or to be given to another chief. The heirs of the deceased were entirely dependent on the will of the king for benefits from the estate accumulated as a result of a lifetime of work on the land.

By the 1830's, Hawaiians were increasingly aware of the western challenge. Some concessions were made, permitting foreigners to occupy "more or less well defined lots in the village".[4] However, the chiefs frequently reminded their guests that they enjoyed a privilege, not a right. As Gaven Dawes noted, "No idea existed in the chiefs' minds that a foreigner's 'right' to a lot or even to his improvements might survive the tenant himself. Foreigners might buy and sell the 'right' of occupancy, and improvements might be transferred, but such transactions required the approval of the chiefs."[5]

Hawaiians were not unmindful that resisting foreign influence would not be easy. David Malo wrote in 1837:[6]

> If a big wave comes in, large fishes will come from the dark Ocean which you never saw before, and when they see the small fishes they will eat them up; such also is the case with large animals, they will prey on the smaller ones. The ships of the white man; have come, and smart people have arrived from the great countries which you have never seen before, they know our people are few in number and living in a small country; they will eat you up....

Malo urged Hawaiians to "hold frequent meetings with all the chiefs"[7] to meet the challenge. There was pressure from the residential foreign community to enact reforms. Foreigners promoted the introduction of western legal documents as improvements to ensure the rights of commoners and foreigners. Dr. Judd wrote in 1838: "There is much agitation on the public mind. The influence of the missionaries, especially those lately arrived, is very decided against the ancient system of government. The 'rights of men', 'oppression',... are much talked of, and a sort of impatience is perceivable that changes are made so slow."[8]

Perhaps a more serious threat was the insistence of European justice for foreigners residing in Hawaii. In 1839, the Sandwich Island Gazette wrote:[9]

> We are informed by a correspondent in Valparaiso, that two French ships of War will be dispatched for these Islands, to demand the most ample satisfaction from the King of Hawaii for the insults and oppressions which have of late been extended to the subjects of France by the government of the Sandwich Islands.

Threatened by foreign takeovers and internal pressures, the King was persuaded to divide the lands of the kingdom and accept the concept of private ownership. The king's motives were noted in the council records, which "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...."[10]

The Great Mahele transferred fee simple ownership, in a western sense, to Hawaiians who were unprepared for the complex and foreign system. Although commoners were entitled to one-third of the land following the Great Mahele, only 28,000 acres actually passed into their hands, because large numbers had failed to file claims with the board of commissioners.[11]

Not only did commoners fail to get their fair share, lands that were claimed quickly passed into the hands of foreigners. As Gaven Dawes wrote: "Once it became possible for part-Hawaiians (and full blooded Hawaiians) to alienate their own lands, they tended to lease or sell cheaply and somewhat imprudently, with the result that land ownership in Honolulu became more an index of rising foreign commercial interest than an expression of native rights of ownership."[12] Theon Wright explained that "...[a]s a people, they always had been notoriously careless about possession of land, as in the swift transfer of lands distributed in the Great Mahele of 1849 from Hawaiians to haole plantation owners. In less than fifteen years after the Mahele, three-fourths of the land distributed to the alii had passed into the hands of haoles."[13]

Concentration of landholdings by the big estates and corporations dominated the land picture. This trend continued well into the 20th century. "The 1930 census showed that Hawaii had 5,955 farm units. Only 633 of these were owned, managed, or leased by haoles, compared with 510 by Hawaiians, 4,191 by Japanese, and 335 by Chinese. The haoles, nevertheless, either through corporations or individuals, controlled 2,579,733 acres, more than sixteen times the acreage controlled by Hawaiians or part-Hawaiians, more than forty-five times Japanese-Americans' holdings, and more than 140 times the amount of land held by Hawaii's Chinese citizens,"[14] notes Fuchs.

When Hawaii became a state, 52 per cent of all private lands were held by 12 private landholders, 32 per cent belonged to the state government, 8 per cent were federally owned, and 2.5 per cent were owned by the Hawaiian Homes Commission for the benefit of the Hawaiian people.[15] In a little over 100 years the Hawaiians' percentage of land "ownership" had gone from 100 per cent to 2-1/2 per cent, a reduction by 97.5 per cent.

The decline in land was paralleled by the decline in numbers of Hawaiians. The pure Hawaiian population in 1853 had been approximately 70,000. This represented a significant decrease from the estimated population at the time of Captain Cooke's arrival, approximately 300,000. By 1920, it was further reduced to 24,000.[16]

Concern for the plight of the Hawaiian people was widely expressed in the early years of the 1900's. Various Hawaiian associations sprang up, hoping to help the less fortunate members of their race and to instill in them a new ethnic consciousness and pride. The Hawaiian Protective Organization and the Hawaiian Civic Club functioned as centers of discussion on the issue of "rehabilitation" of the Hawaiians. No concrete plan for rehabilitation was agreed upon, but there was a general consensus that something needed to be done.

The rehabilitation movement crystallized in the passage of the Hawaiian Homes Commission Act of 1920. An attempt to rehabilitate through opportunities to homestead, the Act has been accused of doing more for the planters than the Hawaiians. One scholar labeled it "major victories for Hawaii's political and economic elite".[17] The 2 outstanding features in regard to land use were the decidedly poor lands made available for Hawaiians, and the special favors granted to the sugar industry.

Lawrence Fuchs related the circumstances under which the Act was drafted:[18]

> Two Kamaaina islanders, one a member of the oligarchy and the other a Hawaiian politician, recall that Merchant Street land lawyers supervised the drafting of the act that specified which lands were to be made available to the Hawaiian Homes Commission. "Good cane lands

> were omitted," the Kamaaina haole remembered years later. "Only rotten lands were left for us," recalled the Hawaiian.... Nearly forty years later, the executive director of the Hawaiian Homes Commission would report that most of the lands set aside for rehabilitation of the native Hawaiians were in extremely remote areas or in various forest-reserve sections unsuitable for actual settlement. Only 2 percent of the lands could "be properly developed at reasonable cost."

The defects were known before its passage. In November, 1920, when the bill was before the U.S. Senate Committee on Territories, a letter from Hawaiian Sugar Planters Association sugar expert, Albert Horner, to Senator Miles Poindexter described the land set aside as "third-grade agricultural lands and second-grade grazing lands". Some of the tracts were so bad, he said, that "not even a goat could subsist on them".[19] Others described lands at Nanakuli, on Western Oahu, as "rough, rocky, and dry".[20] Several years later the Hawaii Sentinel reported that homesteaders were leaving because water was diverted to "sugar lands controlled by American Factors forcing homesteaders to abandon their lands".[21] The territorial land commissioners described Maui homesteading lands as "not in any sense agricultural land...it is totally covered with lava, and unwatered."[22]

Approximately 40,000 of the 185,000 acres set aside for the Hawaiians proved worthless. The rest had been leased to plantations or ranches. Fuchs noted: "At Hooluhua on Molokai, the largest single area for homesteading, comprising more than 5,000 acres and settled by more than 1,000 Hawaiians, was diverted almost entirely to the cultivation of pineapple under contract to large plantations."[23] By 1963, only 10 per cent of the lands set aside for homesteading in 1921 were being farmed by the original homesteaders.

Not only did the planters benefit by the retention of their best agricultural lands, they were able to eliminate a section of the Organic Act that provided for the withdrawal of lease lands when the lease expired if 25 applicants requested the land. They also were unburdened from another provision that had limited the amount of sugar lands any one plantation could lease (1,000 acres).

In terms of the ownership and use of land, the Hawaiian Homes Commission Act did little to reverse the trend that separated the Hawaiian people from their land. It is not surprising that efforts to "rehabilitate" eventually shifted to the construction of low-income housing, since a major reversal of the pattern of land ownership was improbable.

This brief historical review of land ownership illuminates 3 grievances of the Hawaiian community: the cultural subjugation of Hawaiians by the West, the individual and collective success of Westerners in acquiring lands belonging to the Hawaiian people, and the dramatic decline in the Hawaiian population.

To this is added a fourth, which is often confused with the above: the loss of Hawaiian sovereignty and independence that culminated in annexation to the United States. Here the controversy revolves around the political and legal efforts to achieve annexation, and more particularly the role of the American government in the overthrow of the Monarchy. Whereas the land ownership questions have been treated through the Hawaiian homes program, responsibility for the overthrow of the Kingdom has recently been directed at native Hawaiian Claims, or reparations. Reparations would involve some kind of monetary compensation to the Hawaiian people for the loss of their sovereignty. There are at least 2 bases for such demands: first, is the assertion that by accepting Hawaii, the United States accepted responsibility for the plight of the Hawaiians; second, is the charge that the United States unlawfully participated in a conspiracy to overthrow the Monarchy.

Rehabilitation and reparations are not to be confused. One is an ongoing cultural, social, and economic program; the other a singular attempt to redress a specific grievance. The success or failure of one should not affect the other. The rehabilitation program is focused on the needs of the Hawaiian people. The reparation movement appears to be more concerned with their rights to compensation, regardless of need. Since reparations do not appear to directly involve Article XI of Hawaii's Constitution, no further mention of the idea will be made.

THE HAWAIIAN HOMES COMMISSION ACT OF 1920

With the opening of the 10th Territorial Legislature in 1919, Senator John Wise became the first Hawaiian to propose any formal legislative action on the rehabilitation question. Senate Concurrent Resolution 2, introduced by Wise, requested that "suitable portions of the public lands of the Territory of Hawaii" be set aside for use by Hawaiian lessees.[24] This resolution, along with several resolutions requesting certain changes in the public land laws of the Territory, was passed by the legislature and forwarded to Washington, D.C., for congressional consideration. A territorial legislative commission was sent to Washington to press for favorable congressional action on the resolutions.

Senator Wise was one of the 4 legislators included in the delegation sent to Washington. The other commission members felt that the proposed amendments to the public land laws should be given priority in the commission's lobbying efforts, while Wise was most concerned with the rehabilitation resolution. His testimony before the House Committee on Territories at the second session of the 66th Congress in early 1920 successfully focused the committee's attention on Hawaiian rehabilitation rather than on the less emotional issue of public land disposition.

Provisions of the Act

To help achieve the general purpose of the Hawaiian Homes Commission Act, certain basic provisions were considered necessary and made a part of the original Act. The homesteading program was authorized to:

(1) Lease, not sell, land to eligible Hawaiians for 99-year periods at a rental of $1 a year;

(2) Offer financial assistance to individual homesteaders through low-interest loans for agricultural development and home construction; and

(3) Provide agricultural and other experts to aid the homesteaders in developing their farms or ranches.

To administer the provisions for the benefit of the "native Hawaiian", the Act established the "Hawaiian Homes Commission Act".[25] "Native Hawaiian" was defined as "any descendant of not less than one-half part of the blood of the race inhabiting the Hawaiian Islands previous to 1778".[26]

Approximately 200,000 acres of the public lands were designated as "available lands" set aside for agricultural and pastoral use to be leased to native Hawaiians. However, certain areas within these broad tracts were specifically excluded from Hawaiian homesteading. These were: (1) forest reservation lands, (2) all cultivated sugar lands, and (3) all public lands already held under a certificate of occupation, homestead lease, right of purchase lease, or special homestead agreement.[27]

The major source of revenue provided by the Act was 30 per cent of the territorial revenues derived from the leasing of the cultivated sugarcane lands or from water licenses. The program also receives income from the leasing of "available lands" of the commission and from specific legislative appropriations. These revenues were distributed among 4 separate funds: (1) the Hawaiian home-loan fund, (2) the Hawaiian home-development fund, (3) the Hawaiian home-operating fund, and (4) the Hawaiian home-administration account.[28]

Although the above provisions differed from comparable state and national legislation in respect to the limitation of benefits to one ethnic group and governmental retention of the land, the Act was originally intended to provide for the development of traditional rural homesteading. However, the originators of the Hawaiian homes program "did not succeed in securing the resources required for the successful implementation of a homesteading program of the traditional type".[29] Granting the good intentions of the Act's sponsors:[30]

> ...it was virtually impossible in Hawaii in 1920 to launch a successful homesteading program for, among other reasons: (1) arable land of proven quality was specifically excluded from the program; (2) water resources were not developed, nor were sufficient funds provided for water development; (3) access to markets were poor; (4) money for road construction was not provided; and (5) funds made available could, at best, have provided for the settlement of a sharply limited number of people.

Change in Direction of the Hawaiian Homes Program

The original supporters of the Hawaiian Homes Commission Act had intended for native Hawaiians to leave the city slums and "return to the land", there to become subsistent or commercial farmers and ranchers. However, the factors listed above, as well as the growing urban trend of this century, all combined to force the program in directions unanticipated by its sponsors. As early as 1923:[31]

> ...it was found that many Hawaiians living in or close to the city of Honolulu were not desirous of returning to the land as farmers or as ranchers for they had geared their subsistence to an economy in which they earned their living through the performance of services for wages. To many of the city-dwelling native Hawaiians, the production of crops or of livestock as a sole means of earning a living was romantic but uninviting; to others it would have been incompatible. Realizing that the native Hawaiian in the city was just as much in need of rehabilitation as the native Hawaiian elsewhere in the Islands, Congress amended the Hawaiian Homes Commission Act in 1923 to include in the Hawaiian Homes Program the making available of land for residential use. The need for residential land in the Hawaiian Homes Program has grown steadily over the years and is the most pressing need at the present time....

Ever since the 1920's, the demand of eligible Hawaiians for residential houselots has far exceeded their demand for agricultural or pastoral lots. All but 2 homestead projects developed since the inception of the program have been houselot rather than agricultural projects. In 1963, there were only 30 farmers and 55 ranchers out of a total of 1,752 Hawaiians holding leases on Hawaiian home lands.[32] The 1967 report of the department of Hawaiian home lands to the state legislature indicated that the demand for Hawaiian home lands continued to be for houselots, rather than for farms. This trend has continued to the present, re-enforcing the "economic" definition of rehabilitation.

This shift from rural to urban homesteading has not been accompanied by any redefinition of the purpose of the Hawaiian homes program or of the policy to be followed by the program's administrators. "...[N]owhere in the history of the program has there been a comprehensive attempt to develop a philosophy of non-agricultural homesteading, especially the manner in which such

homesteading might contribute to the rehabilitation of the Hawaiian people." (Underlining for emphasis)[33] The dilemma consequently faced by the program's administrators has been described as follows:[34]

> *This change in emphasis from agriculture to urban housing is a striking reorientation in the Hawaiian Homes program, yet all too little effort has been devoted to a systematic consideration of the implications of this change or to a revision of the provisions of the Act to facilitate the new approach. A damaging tension has resulted for the administrators, for they have been forced by the turn of events to move in a direction almost exactly opposite from that envisioned in the Act. Their predicament has inevitably hindered the development of the urban housing program into which the homesteading program has evolved over the years.*

The change in emphasis from agriculture to urban housing was an accomplished fact by the time the Hawaiian Homes Commission Act was adopted as a state law by the Hawaii Constitution. Although the 1950 Constitutional Convention felt it desirable to continue the Hawaiian homes program, they did nothing to resolve the dilemma in policy and philosophy which has confronted the program throughout most of its history. The provisions of Article XI refer to no more specific policy than "the further rehabilitation of the Hawaiian people".

THE CURRENT PROGRAM

A 10-year general plan for Hawaiian home lands was adopted on October 31, 1975. Its goals and objectives read:[35]

(1) Goal: Maximize HOUSING assistance for native Hawaiians.

Objective: Program housing for 2,600 new families.

(2) Goal: Allocate AGRICULTURAL LANDS to native Hawaiians.

Objective: Allocate at least 40,000 additional acres for direct agricultural use by eligible Hawaiians; use all available techniques to maximize productivity of agricultural lands. (Note: the Hawaiian Homes Commission Act sets 20,000 acres as the limit which can be allocated within any 5-year period.)

(3) Goal: Reduce the acreage of LANDS USED FOR INCOME purposes.

Objective: Reduce by at least 20,000 acres the lands presently under general lease and temporary use permit and make these lands available for direct use by native Hawaiians.

(4) Goal: Maximize INCOME through more effective land management.

Objective: Use only a small fraction of Hawaiian home lands to generate sufficient income for operating and administrative expenses.

A recent brochure by the department of Hawaiian homes further explained its mission:[36]

> We now believe that rehabilitation, aina Hoopulapula, or Development, however it is labeled, is our charge.
>
> We believe that the definition of rehabilitation is to maintain and restore human dignity and honor by providing opportunities for one to survive and adapt to enable one to ultimately become self-reliant and self-sufficient.
>
> We believe that we can best contribute to this goal by concentrating on one major need and aspect of rehabilitation - that need being economics. Economics is defined as the satisfaction of material needs. Material needs are those needs important to survival such as food, clothing and shelter.

The current emphasis on the satisfaction of material needs poses several philosophical questions regarding the program. The original program, with its concentration on homesteading, did incorporate the needs of the Hawaiian culture. Hawaiians needed land, not only for economic survival, but for the preservation of a life-style. The intention has shifted from the preservation of an ethnic group's identity, land, and culture to the integration of that group into the predominant western way of life. Except for the target group, the Hawaiian homes program is hardly distinguishable from federal and state attempts to "rehabilitate" other segments of society.

If the Constitutional Convention desires to clarify the direction of the Hawaiian homes program, it could define "rehabilitation", and the relationship of that process to land, culture, economics, and life-style.

Chapter 3
PROVISION FOR THE HAWAIIAN HOMES COMMISSION ACT IN THE HAWAII STATE CONSTITUTION

During the period 1921 to 1959, the Hawaiian Homes Commission Act was administered as a federal law for the Territory of Hawaii. The territorial lands designated for use by the Hawaiian home lands program were federal lands, and all amendments to the Act were made by the U.S. Congress.

The approach of statehood, however, raised the question as to what the status of the Act would be after Hawaii's admission into the Union. Once title to the Hawaiian home lands was transferred from the U.S. government to the State of Hawaii, what would be the relation between Hawaii and the U.S. Congress with respect to the Hawaiian Homes Commission Act? This question was largely resolved by the voters' ratification of the proposed state constitution in 1950 and their approval of the conditions of the Admission Act in 1959.

1950 Constitutional Convention

The Committee on the Hawaiian Homes Commission Act, appointed at the 1950 Constitutional Convention, concluded that the new Hawaii Constitution must include some provision for the Hawaiian Homes Commission Act. In its Standing Committee Report No. 33, the committee explained its view:[1]

> ...The Hawaiian Homes Commission Act, 1920, as amended, is presently part of the basic law of the Territory of Hawaii, on the same basis as the Hawaiian Organic Act. It is an act of Congress, and can only be amended or repealed by Congress. If Hawaii were to remain a Territory, the Hawaiian Homes Commission Act would remain in force. If Hawaii were to become a State without any mention being made of the Hawaiian Homes Commission Act or the Hawaiian Homes Lands in the State Constitution, or in any enabling act passed by Congress, there would be an extremely ambiguous legal situation leading to endless confusion. We could no more adopt a Constitution from which all reference to the Hawaiian Homes Commission Act was excluded, than we could adopt a Constitution from which all reference to the public debt of the Territory of Hawaii was excluded. During some 30 years of operations under this Act, very extensive rights, duties,

> privileges, immunities, powers and disabilities have arisen by way of leases, loans, contracts and various other legal relationships.
>
> ...It is therefore nonsense to propose, as some of the petitions referred to this Committee have proposed, that this Convention exclude from the proposed State Constitution all reference to the Hawaiian Homes Commission Act, 1920, as amended. Something must be said and done about the Hawaiian Homes program in the transition from a Territory to a State.

Furthermore, at the time the Convention was meeting in 1950, the 81st Congress of the U.S. was considering a statehood enabling bill for Hawaii. This bill contained a requirement that any proposed state constitution for Hawaii must include a provision adopting the Hawaiian Homes Commission Act as a law of the state.[2]

> The Convention, thus, had what it believed to be an implied mandate from the provisions of the bill to include provisions in the Constitution which would assure a protected future for the Hawaiian Homes program. It was the consensus of the convention that any proposed constitution not including such provisions would be unacceptable to Congress.

Article XI of the Hawaii State Constitution

Article XI of the Hawaii Constitution was adopted by the 1950 Constitutional Convention substantially as proposed by the Committee on the Hawaiian Homes Act.[3] It contains 2 sections. The first section adopts the provisions of the Hawaiian Homes Commission Act as a law of the state subject to amendment or repeal in the manner provided by the enabling act. Section 1 of Article XI reads as follows:

> SECTION 1. Anything in this constitution to the contrary notwithstanding, the Hawaiian Homes Commission Act, 1920, enacted by the Congress, as the same has been or may be amended prior to the admission of the State, is hereby adopted as a law of the State, subject to amendment or repeal by the legislature, provided, that, if and to the extent that the United States shall so require, said law shall be subject to amendment or repeal only with the consent of the United States and in no other manner, provided, further, that if the United States shall have been provided or shall provide that particular provisions or types of provisions of said Act may be

> amended in the manner required for ordinary state legislation, such provisions or types of provisions may be so amended. The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms of said Act, and the legislature may, from time to time, make additional sums available for the purposes of said Act by appropriating the same in the manner provided by law.

Section 2 of Article XI, proposed to the Convention, provides that the state and its people agree to enter into a compact with the United States, the conditions of which shall be stipulated by the enabling act, and further that the state and its people agree to faithfully carry out the spirit of the Hawaiian Homes Commission Act. This section reads as follows:

> SECTION 2. The State and its people do hereby accept, as a compact with the United States, or as conditions or trust provisions imposed by the United States, relating to the management and disposition of the Hawaiian home lands, the requirement that Section 1 hereof be included in this constitution in whole or in part, it being intended that the Act or Acts of the Congress pertaining thereto shall be definitive of the extent and nature of such compact, conditions or trust provisions, as the case may be. The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out.

When the necessity for including both of these sections was questioned by one of the convention delegates, Delegate J. Garner Anthony explained the purpose of the 2 sections. The exchange proceeded as follows:[4]

> KELLERMAN: ...Why is it necessary to adopt one section writing into the Constitution the Hawaiian Homes Commission Act as a law and...a second section agreeing with the United States government under compact to write it in as law? It seems to me that we're doing the same thing twice....
>
> ANTHONY: The purpose of the proposal is two-fold. One, the first section will embody the act in the Constitution. Standing alone, if that were just in the Constitution and nothing more, then by a subsequent action of subsequent conventions that section could be repealed. As I understand the draftsman, in order to remove that difficulty they have gone one step further and said, not only shall it be written into the Constitution, but there shall be a compact with the United States. Now, what Delegate Kellerman is concerned about is the necessity of the two sections. I as a lawyer don't

> think that two sections are necessary; the compact would be sufficient. But the purpose in having it in two sections, as I understand it, is, one, to put it in the Constitution, and that is not sufficient because a subsequent convention might change it. So they have added a second section which would require the entry of a compact between the United States and the State providing that it could not be changed without the consent of the Congress.

After adoption of both sections of Article XI by the 1950 Constitutional Convention, the proposed constitution was submitted to a vote of the people. The Constitution, including its Hawaiian homes provision, was ratified by the people at the election held on November 7, 1950.

The Admission Act of 1959

Hawaii's admission into the Union was approved by Congress on March 18, 1959. As expected, section 4 of the Admission Act did require the State of Hawaii to adopt the Hawaiian Homes Commission Act of 1920 as a provision of its constitution. In addition, this section stipulated the conditions of the compact between the United States and Hawaii as follows:[5]

> As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, that (1) sections 202, 213, 219, 220, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and 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; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as

> defined by said Act, shall be used only in carrying out the provisions of said Act.

Section 7, subsection (b), of the Admission Act provided for 3 propositions to be submitted to the people of Hawaii for approval before Hawaii's actual admission as a state. These propositions were: (1) did the people desire statehood; (2) did they accept the boundaries for the State as specified in the Admission Act; and (3) did they consent fully to the terms, conditions, and reservations relating to grants of land and other property?

Section 7 stated that if a majority of voters ratified these 3 propositions, Article XI of the Hawaii Constitution would be deemed to include the provisions of section 4 of the Admission Act. Hawaii's electors approved the 3 propositions at the primary election held on June 27, 1959, and so Article XI of the Constitution was automatically amended to include section 4 of the Admission Act. This section of the Admission Act now appears as section 3 of Article XI in the Hawaii Constitution.

To summarize, section 1 of Article XI adopts the Hawaiian Homes Commission Act, 1920, as a law of the State, subject to amendment or repeal only in the manner provided by Congress. Section 2 accepts as a compact with the United States the requirement that the Hawaiian Homes Commission Act be constitutionally guaranteed, and agrees to the conditions of the compact as these may be prescribed by Act of Congress. Finally, section 3 of Article XI, originally section 4 of the Admission Act, establishes the conditions of the compact by enumerating those sections of the Hawaiian Homes Commission Act which may be amended solely by state legislation or constitutional amendment and those sections which may be amended or repealed only with the consent of Congress.

Chapter 4
CONSTITUTIONALITY OF THE HAWAIIAN HOMES COMMISSION

Several of the 1950 Constitutional Convention delegates expressed grave reservations on the advisability of including the provisions of Article XI in the new state constitution. One of their major reservations concerned the question of the constitutionality of the Hawaiian Homes Commission Act, 1920.

The question of the constitutionality of the Hawaiian Homes Commission Act was given its most thorough consideration by Congress in 1920, at the time the Act was adopted. Several witnesses at the congressional hearings claimed that the proposed Hawaiian Homes Commission Act was discriminatory "class legislation". However, the Attorney General of the Territory and the Solicitor of the Department of Interior held that the enactment of the Hawaiian Homes Commission Act would be a legitimate exercise of the federal government's plenary powers over the Territory of Hawaii. Both the Senate and House Committees on Territories concluded that the Hawaiian Homes Commission Act was constitutional.

A majority of delegates to the 1950 Constitutional Convention agreed with the conclusion of the 1920 House and Senate Committees on Territories. They maintained that the opinions of the attorney general and the solicitor were as valid in 1950 as they had been in 1920. However, the constitutionality of the Hawaiian Homes Commission Act has never been tested in either the federal or state courts. Even though the opinion of those responsible for the original enactment of the Hawaiian Homes Commission Act and of the majority of delegates to the 1950 Constitutional Convention was that the Hawaiian homes program is constitutional, "there is no way that the question of constitutionality of the Act may be finally laid to rest except by a ruling of the Supreme Court of the United States".[1]

Consideration by Congress in 1920

Opposition to the Hawaiian Homes Commission Act. During the hearings held by both the Senate and House Committees on the Territories to consider the proposed Hawaiian Homes Commission Act, several witnesses appeared to testify against the enactment of the bill.[2] One of the most outspoken critics of the measure was A. G. M. Robertson, a former chief justice of the Territory, who was representing the Parker Ranch at the congressional hearings.

Mr. Robertson believed that the Hawaiian Homes Commission Act constituted unfair discrimination against all those not of Hawaiian blood who could not qualify for the Hawaiian homesteading benefits. He felt that the Act violated an "implied" constitutional right:[3]

> Now, there is no direct provision in the Constitution that prohibits Congress from discriminating against persons because of their race, color, or previous condition of servitude, except in relation to the right to vote; but there is an implied right not to be discriminated against because of color of one's skin or the kind of blood in your veins.
>
> * * *
>
> And so I say, Senator, I think it is fundamentally indisputable that Congress has no more right than a state legislature has to classify and discriminate according to a man's race or color under the Constitution. The right to not be so discriminated against is one of those implied limitations that the Supreme Court has so often referred to,....

In response to claims that the Hawaiian Homes Commission Act was constitutional because it was based on a reasonable, rather than a discriminatory, classification of citizens, Robertson stated:[4]

> Undoubtedly, classifications may be, and frequently are, made by law, but in order to be valid they must have a logical relation to the subject of the legislation. A citizen's race or color has no logical or reasonable relation to the matter of homesteading public lands, and a classification which would admit one and exclude another with reference to that subject because of his color ought to be held invalid.

Opinion of the Attorney General of the Territory. The Attorney General of the Territory, Harry Irwin, discounted Robertson's claims that the Hawaiian Homes Commission Act would violate any constitutional right. In his opinion there was nothing in the Constitution which would prohibit Congress from enacting the Hawaiian homes legislation. He testified as follows:[5]

> ...It has been suggested by some and emphatically stated by others, that legislation of this kind may not be constitutionally enacted for the reason... that it would be class legislation, and therefore in violation of the Constitution of the United States. No particular article of the Constitution has been suggested as being prohibitive of this legislation, nor do I know of any such prohibitive provision in the Constitution.
>
> The only provisions of the Constitution of the United States which could, by any construction, affect legislation of this kind are section 2 of Article 4 and section 1 of the fourteenth amendment. These sections are usually grouped in textbooks under the title "Privileges and immunities and class legislation."
>
> [Section 2 of Article 4] Section 2 of Article 4 of the Constitution provides that, "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." This provision, however, has no application to legislation by Congress affecting the Territories.
>
> "The guaranty contained in the Constitution as originally adopted protects only those persons who are citizens of one of the States in the Union. Thus, it does not apply to aliens or to citizens of the United States resident in an organized Territory of the United States." (12 C.J. 1109)
>
> [Section 1 of the Fourteenth Amendment] That portion of section 1 of the fourteenth amendment which is germane reads as follows:
>
> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."
>
> "This section of the Constitution operates only as a protection against State action." (12 C.J. 111)
>
> [Conclusion] After a consideration of the various principles involved, I am of the opinion that nothing in the Constitution of the United States prohibits Congress from enacting the legislation recommended by Senate Concurrent Resolution No. 2.

While discounting the claim that the Hawaiian people had any equity right to the former Crown lands of the Territory, the attorney general proposed the following legal base for enactment of the Hawaiian homes legislation:[6]

> I come now to the proposition which I believe to be one which merits the careful consideration of the Committee and which I believe constitutes a sound and the only basis upon which legislation of this kind can be enacted. The proposition briefly stated, is that the Federal Government in the exercise of its plenary powers over the Territory of Hawaii, should by apt legislation set apart for the exclusive use of members of the Hawaiian race, certain portions of the public domain in Hawaii for the purpose of rehabilitating the race and preventing its ultimate extinction.

This testimony of the attorney general represented the "first time that the concepts embodied in the Act were held to be constitutional by an official of the territorial government".[7]

Opinion of the Solicitor of the Department of Interior. In addition to the attorney general of the Territory, the federal solicitor of the Department of Interior submitted an opinion favoring the constitutionality of the Hawaiian Homes Commission bill. He claimed that the federal government's policy of favoring certain classes of people, such as veterans and Indians, had established numerous precedents for the Hawaiian homes legislation:[8]

> Would an act of Congress setting apart a limited area of the public lands of the Territory of Hawaii for lease to and occupation by native Hawaiians be unconstitutional? It would not. There are numerous congressional precedents for such action. The act of Congress approved February 8, 1887, as amended by the act of February 28, 1891 (26 Stat. 794) authorizes public lands which have been set apart as Indian reservations by order of the President to be surveyed and 80 acres of land therein to be allotted to each Indian located upon the reservation, or where the lands are valuable for grazing to be allotted in areas of 160 acres. Another section of the same act authorizes any Indian entitled to allotment to make settlement upon any public lands of the United States not otherwise appropriated and to have same allotted to them.
>
> Resolution No. 20 passed by the House of Representatives December 10, 1919, and by the Senate February 5, 1920, gives soldiers of the late war a preference right over all other citizens to enter public lands of the United States when same shall be open to disposition. H.R. 1153 proposes to set apart a large area of valuable public lands in Imperial Valley, California, for disposition to soldiers. Many instances might be cited where Congress has conferred special privileges or advantages upon classes of individuals in connection with the disposition or use of public land. Another line of acts of Congress are numerous laws setting apart areas of public lands for water supply or park purposes of cities, counties, and towns.

Although A. G. M. Robertson asserted that the status of the Hawaiians was diametrically opposed to that of the Indians on the mainland and that neither Indian reservations nor veteran's preference rights constituted legitimate precedents for the Hawaiian homes legislation, the Congressional Committees on Territories used the solicitor's opinion to substantiate their conclusion that the Hawaiian Homes Commission Act was constitutional.

Conclusion of the House Committee on Territories. After several hearings on the proposed Hawaiian Homes Commission bill, the House Committee on Territories formally recommended its passage. In Committee Report No. 839, the committee commented on the constitutionality of the recommended legislation as follows:[9]

> In the opinion of your committee there is no constitutional difficulty whatever involved in setting aside and developing lands of the Territory for native Hawaiians only. The privileges and immunity clause of the Constitution, and the due process and equal protection clauses of the 14th amendment thereto, are prohibitions having reference to State action only, but even without this defense the legislation is based upon a reasonable and not an arbitrary classification and is thus not unconstitutional class legislation. Further there are numerous congressional precedents for such legislation in previous enactments granting Indians and soldiers and sailors special privileges in obtaining and using the public lands. Your committee's opinion is further substantiated by the brief of the Attorney General of Hawaii...and the written opinion of the solicitor of the Department of the Interior.

Congress accepted the opinion of its House and Senate Committees on Territories concerning the constitutionality of the Hawaiian Homes Commission Act, and the bill became law on July 9, 1921.

Consideration by the 1950 Constitutional Convention

The 1950 Constitutional Convention's committee on the Hawaiian Homes Act was charged with the responsibility of determining the relationship of the Hawaiian Homes Commission Act to the new Hawaii Constitution and of recommending the provisions to be included in the Constitution. In its Standing

> people; if that act is valid, and as I say we must presume it is until it's declared unconstitutional by the courts, until and unless it is so declared, then the people of this territory have no civil rights to share...in the Hawaiian Homes lands, and therefore this civil rights provision will not apply at all, as I read it.
>
> Now if the act is unconstitutional then somebody ought to take it into court, and do that, and it'll take care of itself automatically. I feel therefore that actually in adopting this Bill of Rights...section, we will not be infringing on the rights of any persons entitled to benefits under the Hawaiian Homes Commission Act.

The 1950 Constitutional Convention delegates eventually adopted a motion to express their feeling that the proposed Bill of Rights section on discrimination was not applicable to the Hawaiian homes provisions. However, the logic of the convention delegates would no longer be applicable if the Hawaiian Homes Commission Act were to be declared in violation of the U.S. Constitution by a court of law.

Chapter 5
LEGALITY OF THE COMPACT WITH THE UNITED STATES

The constitutionality of the Hawaiian Homes Commission Act was not the only major question dealt with by the 1950 Constitutional Convention in regards to Article XI of the proposed constitution. A second major question concerned the legality of the compact between the United States and Hawaii which was provided for in section 2 of the Constitution's Hawaiian home's article. This compact, the conditions of which were to be determined by Act of Congress, was required by the United States as a condition of Hawaii's admission into the Union.

The question concerning the legality of Hawaii's compact with the United States can best be phrased as follows: Is the requirement that Hawaii enter into a compact with the United States to guarantee the continuance of the Hawaiian homes program a violation of the U.S. Constitution's provision that new states shall be admitted upon equal terms with the old? As one researcher has explained:[1]

> ...A compact is generally viewed as a binding agreement between two governments which may only be abrogated or modified by mutual consent of the parties entering into the compact. The question which necessarily arises when the federal government requires the acceptance of a compact by a wholly dependent and subordinate territory as a condition to be met before granting statehood, is how that compact applies after the territory becomes a state. The question may also be phrased as: whether or not the new state has been admitted with the same rights and responsibilities as other states.

Objections to the Compact

There were some delegates to the 1950 Constitutional Convention who believed that the required compact between the State of Hawaii and the United States did indeed violate the principle that new states be admitted upon equal terms with the old. Delegate Ashford explained this view as follows:[2]

> ...I think that the requirement by H.R. 49 of entering into a compact with the United States is absolutely invalid. This is land and this is a subject matter over which the United States, if we were a state, would have no control, and in requiring us to enter into such a compact, they diminish our sovereign powers. They, therefore, infringe upon that well settled interpretation of the provisions of the Constitution that new states shall be admitted upon equal terms with the old. Now, I'll just read you some certain language from the Supreme Court of the United States which in its essence has been repeated often.
>
> > When a new state is admitted into the Union, it is so admitted with all the powers of sovereignty and jurisdiction which pertain 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 submission. (Coyle v. Smith, 221 U.S. 559)

To further support her opposition to the compact, Delegate Ashford argued that: (1) the public lands of the Territory of Hawaii had been held in trust by the United States pending statehood and therefore could not have trust conditions attached when they were returned to the State of Hawaii, and (2) the Indian lands involved in other state compacts with the United States were held on an entirely different basis than the Hawaiian home lands and therefore such compacts were not legitimate precedents for the Hawaiian homes compact. She explained these views as follows:

> ...The Indian lands referred to in the various constitutions of the newly created states and compacts with the United States are an entirely different basis from the Hawaiian Homes Commission lands. When we became a part of the United States, the United States had no public lands here except those specifically designated for defense and so forth. The public lands were ceded to the United States and accepted under the Newlands Resolutions subject to a trust; that trust was recognized when we became an organized Territory. The lands were put under our administration by the Organic Act. They remained our lands in the control of the United States pending the time we were to be admitted as a state.
>
> Now, the Indian lands are upon a different basis entirely. Those were lands not for specific Indians, they were lands set aside either by treaty with the Indians or by an act of Congress out of the public unappropriated lands of the United States--none of which exists in Hawaii or have existed in Hawaii--and always under the

> control of the United States under the terms of the Constitution and under their absolute title. The terms of the Constitution of the United States provide for the regulation of commerce with the Indian tribes. Those lands were set aside from the control of the state, retained in the United States, and subject to the control of the United States; therefore, there was no infringement of the sovereignty of the state. In this case, however, the trustee of our lands, in returning them to us, is attempting to attach to them terms of trust as though it were the full order. That distinguishes these lands from the lands set aside in the various new states for Indian reservations....[3]
>
> * * *
>
> ...the lands granted by the Republic of Hawaii and accepted by the United States, being ceded in trust cannot have trust strings tied to them when they are returned.[4]

The majority of convention delegates, however, were not persuaded by these arguments. Delegate Tavares explained why he felt Congress could legitimately attach strings to the Hawaiian home lands:[5]

> ...I agree with the statement that ordinarily since the lands are trust lands, Congress would not be reasonable in putting a string on it when it gives it back to us. Unfortunately, we, the beneficiaries, have agreed to that change of the Hawaiian Homes Commission Act through our legislature. And in that respect therefore, we have the situation of the beneficiary having consented to the trustee changing the terms of the trust....

Although the Convention, and the people of Hawaii in the statehood election of 1959, did accept the required compact and its terms, the legality of the compact has remained a subject of doubt in some minds. Two commentators on the Hawaii Constitution have commented on the vulnerability of the compact:[6]

> No parallel restrictions upon the self-government of an American State appear to have been imposed by Congress, and in the light of the determination of previous similar, but different restrictions, the provision may be legally vulnerable. (See Coyle v. Smith, 221 U.S. 559 (1911) and Stearns v. Minnesota, 179 U.S. 223 (1900))

Precedent of Coyle v. Smith

The authority most commonly cited by those who have questioned the legality of the Hawaiian homes compact is the landmark case of Coyle v. Smith, 221 U.S. 559 (1911). In this case, a provision of Oklahoma's enabling act requiring that the state capital be located at Guthrie until 1913 was declared void, even though Oklahoma's Constitution contained an ordinance which provided for the irrevocable acceptance of all conditions of the enabling act.

The U.S. Supreme Court, in its decision, stated:[7]

> ...The only question for review by us is whether the provision of the enabling act was a valid limitation upon the power of the state after its admission, which overrides any subsequent state legislation repugnant thereto.
>
> The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly State powers. That one of the original thirteen States could now be shorn of such powers by an act of congress would not be for a moment entertained. The question then comes to this: Can a State be placed upon a plane of inequality with its sister States in the Union if the Congress chooses to impose conditions which so operate at the time of its admission? (Underlining for emphasis)

The above question phrased by the Court was decided in the negative in the Coyle v. Smith case. Critics of Hawaii's compact with the United States governing the Hawaiian Homes Commission Act have felt that the Coyle v. Smith decision is a legitimate precedent indicating that the Hawaiian homes compact is invalid.

However, a careful reading of the Court's decision in Coyle v. Smith indicates that "if Congress does not have the power to impose limitations or conditions upon the admission of a new state other than from its power to admit new states, then an imposition such as found in that case cannot be sustained". But if Congress does have power over the subject matter of the compact, "Congress may impose limitations because the State's power would not then be affected."[8] Thus, the legality of the Hawaiian homes compact appears to rest on

whether the subject matter of the compact is within the conceded powers of Congress or whether the matter is exclusively within the sphere of state power.

Legal Basis for the Compact

The legality of the Hawaiian homes compact can be defended on the grounds that the subject matter of the compact--public lands--is within the conceded powers of Congress. Thus, the sovereign power of the State of Hawaii is not diminished by the conditions of the compact. One researcher has used the following logic to demonstrate the legal basis for the compact:[9]

(1) Coyle v. Smith held that Congress may not impose restrictions or conditions in an enabling act over subjects which it does not have plenary power to regulate, but that Congress may include in an enabling act legislation which derives its force from the power of Congress to regulate public lands:[10]

> [Coyle v. Smith, 221 U.S. 559 (1911), p. 574]
>
> ...It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as 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 that 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, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress. Williamette Bridge Co. v. Hatch, 125 U.S. 1, 9; Pollard's Lessee v. Hagan, supra.

(2) The subject matter of the Hawaiian homes compact is the management and disposition of Hawaiian home lands:

> [Section 4 of the Admission Act, now incorporated as part of Article XI of the Hawaii State Constitution]
>
> As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes

> Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of the State, as provided in section 7, subsection (b) of this Act.... (Underlining for emphasis)

(3) The Newlands Resolution transferred the fee simple title of the public lands of Hawaii from the Republic of Hawaii to the United States, thereby making such public lands the public lands of the United States:[11]

> [The Newlands Resolution, providing for the annexation of Hawaii, 1898]
>
> Whereas the Government of the Republic of Hawaii, having in 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, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining; Therefore
>
> Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, 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 subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.... (First underlining for emphasis only)

(4) The Constitution of the United States by Article IV, section 3, clause 2, vests in Congress the exclusive and plenary power to control and dispose of the public domain:

> [73 Corpus Juris Secundum, Public Lands, section 3, pp. 649-651]
>
> Congress is vested by Article IV section 3 clause 2 of the federal Constitution with the power to control and make all needful rules and regulations with respect to the public domain. Congress has both legislative and proprietary powers with respect to the public domain. It may prescribe rules with respect to the use...and occupancy of the public domain precisely as an individual deals with and controls his land. The power over the public domain intrusted to Congress by the Constitution is exclusive, plenary, and without

limitations. It is for Congress to determine how the trust shall be administered and not for the courts. The courts or executive agencies may not proceed contrary to an act of Congress in this congressional area of national power.... (Underlining for emphasis)

The states have power to control and regulate public lands belonging to them, although, where such state lands have been granted to the states by the federal government, the regulations must be consistent with the terms on which the lands were granted.[12]

[Ibid., section 24, p. 675]

Congress is vested by the Constitution with the power of disposition of public lands. The power is without limitation and 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 by whom, and to whom, the transfer shall be made.... (Underlining for emphasis)[13]

(5) Congress has the power to impose and enforce trust agreements which are contained in the enabling acts of new states:[14]

[Ervien v. U.S., 251 U.S. 41 (1919) in which the U.S. Supreme Court prohibited the State of New Mexico from departing from the trust conditions imposed by the enabling act on lands granted to the State upon its admission to the Union]

The case is not broad in range and does not demand much discussion. There is in the Enabling Act a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose.... To preclude any license of construction or liberties of interference it was declared that the disposition of any of the lands or of the money or anything of value directly or indirectly derived therefrom for any object other than the enumerated ones should "be deemed a breach of trust."

...The phrase, however, means no more in the present case than that the United States, being the grantor of the lands, could impose conditions upon their use, and have the right to exact the performance of the conditions. (Underlining for emphasis)

(6) Congress has the power to enter into compacts:[15]

[Frank P. Grad, "Federal-State Compact: A New Experiment in Cooperative Federalism," 63 Col. L. Rev. 842 (1963).

> The Constitution does not prohibit the federal government from entering into compacts with one or more states, and contractual arrangements between the government and one or more states, much in the nature of compacts have been upheld by the Supreme Court for more than a century, beginning with the Cumberland Road cases....

The logic of the foregoing points appears to uphold the legality of Hawaii's compact with the United States governing the Hawaiian home lands program.

Chapter 6
AMENDMENT OF THE HAWAIIAN HOMES COMMISSION ACT, 1920

By ratifying the state constitution as proposed by the 1950 Constitutional Convention, the people of Hawaii thereby accepted the compact with the United States provided for in section 2 of Article XI. Section 4 of the Admission Act, added to Article XI in 1959, specified the conditions of this compact between Hawaii and the United States. These conditions relate to the method of amending the Hawaiian Homes Commission Act, 1920.

Some important questions concerning the amendment procedure provided for in Article XI are:

(1) Is the entire Hawaiian Homes Commission Act adopted as a provision of the Hawaii Constitution?

(2) How may the Hawaiian Homes Commission Act be amended?

(3) What procedure must be followed to amend or repeal those sections of the Hawaiian Homes Commission Act which require the consent of the United States?

(4) Since 1959, what method has been used to amend the Hawaiian Homes Commission Act?

The following sections will discuss these questions.

Constitutional Status of the Hawaiian Homes Commission Act

Is the entire Hawaiian Homes Commission Act adopted as a provision of the Hawaii Constitution? This question arises because of the conflict in wording between sections 1 and 2 of Article XI of the Hawaii Constitution and section 4 of the Admission Act which was adopted verbatim as an amendment to Article XI:[1]

> ...Article XI, on the one hand, provides that the Hawaiian Homes Commission Act is adopted as a law of the State and subject to amendment or repeal by the State legislature, with the proviso that,

> to the extent the United States would require, the Act shall be subject to amendment or repeal only with the consent of the United States. On the other hand, section 4 of Public Law 86-3 provides that the Act be adopted as a provision of the State Constitution, not as a law of the State as provided in section 7(b) of Public Law 86-3.

The question of whether the Hawaiian Homes Commission Act is adopted as a law of the State or as a provision of the Hawaii Constitution is closely related to the question of how the Act may be amended. If the entire Act is a part of the Constitution, then any changes in the Act may be effected only by constitutional amendment. This would seem to violate the necessary distinction between statutory material and constitutional provisions, and would incorporate a large body of statute into the Constitution.

Fortunately, the attorney general of Hawaii has held that the Act in its entirety was not adopted as part of the Hawaii Constitution upon amendment of Article XI:[2]

> To hold that the Hawaiian Homes Commission Act, in its entirety, is adopted as a provision of our State Constitution would, aside from other serious objections, create a difficult, cumbersome, and time-consuming process for effectuating amendments thereto. It is extremely doubtful that the Congress ever intended that the Hawaiian Homes Commission Act, in its entirety, were to be adopted as a provision of our State Constitution. It seems that the literal language appearing in section 4 of the Admission Act has beclouded the true intent of the Congress. What Congress contemplated appears to be this: that Article XI of our State Constitution shall be deemed amended to include the basic provisions of section 4 of the Admission Act, to wit, the provisions providing that as a compact with the United States, the Constitution of the State of Hawaii shall include a provision under Article XI thereof providing for the continuance of the Hawaiian Homes Commission Act for the rehabilitation of the Hawaiian race as a state law, subject to amendment, whether by constitutional amendment or by state legislative act or repeal, only with the consent of the United States unless otherwise expressly provided therein by Congress.

Although the continuance of the Hawaiian Homes Commission Act is constitutionally guaranteed and the method of the Act's amendment is specified in Article XI of the Hawaii Constitution, not all the statutory provisions of the Hawaiian Homes Commission Act are deemed to be included in the Constitution.

Methods of Amending the Hawaiian Homes Commission Act

How may the Hawaiian Homes Commission Act be amended? This question is largely answered by a careful reading of section 4 of the Admission Act, now section 3 of Article XI. It divides all amendments to the Hawaiian Homes Commission Act into 2 categories: (1) amendments which may be made without the consent of the United States, such as amendments to the administrative sections of the Hawaiian Homes Commission Act and amendments to increase the benefits of lessees; and (2) amendments which require the consent of the United States, such as amendments which impair the funds set up under the Hawaiian Homes Commission Act, change the qualifications of lessees or in any other way diminish the benefits to lessees. As stated by the U.S. Senate in a 1959 report recommending passage of the Hawaii Admission Act:[3]

> ...The Hawaiian Homes Commission Act is a law which set aside certain lands in order to provide for the welfare of native Hawaiians. While the new State will be able to make changes in the administration of the act without the consent of Congress, it will not be authorized, without such consent, to impair by legislation or constitutional amendment the funds set up under it or to disturb in other ways its substantive provisions to the detriment of the intended beneficiaries.

Section 3 of Article XI provides that amendments belonging to the first category above may be made "in the manner required for state legislation". All amendments to the Act since statehood have been accomplished in this manner. Amendments in the first category may also be made "in the constitution". This means that such amendments may be proposed by the Constitutional Convention or by the state legislature in accordance with the constitutional amending procedures provided for in Article XV of the Hawaii Constitution. However, the method for proposing amendments which belong to the category requiring the consent of the United States is not so clearly specified in Article XI.

Amendment of Basic Provisions of the Hawaiian Homes Commission Act

What procedures must be followed to amend or repeal those substantive sections of the Hawaiian Homes Commission Act which require the consent of the United States? This is the major question left unanswered in section 3 of Article XI. The problem has been stated as follows:[4]

> What procedure must be followed to amend or repeal those sections which require the consent of the United States; i.e. can said sections be amended or repealed by State legislative enactment (in the manner required for State legislation) with the consent of the United States or must they be amended or repealed in the manner required for constitutional amendment or repeal (Article XV of the State Constitution), with the consent of the United States, or are both procedures of amendment or repeal with the consent of the United States available under Public Law 86-3, sections 4 and 7 and Article XI of the State Constitution?

In other words, must the substantive provisions of the Hawaiian Homes Commission Act be amended by constitutional amendment with the consent of Congress or by state legislative act with the consent of Congress? Or is either method of amendment acceptable to Congress?

The question of how basic amendments to the Hawaiian Homes Commission Act may be effected arises because of the conflict, mentioned earlier, in the wording between sections 1 and 2 of Article XI on the one hand, and section 4 of the Admission Act on the other. Even though the attorney general has held that the Hawaiian Homes Commission Act in its entirety is not included in the Hawaii Constitution, a question still remains concerning the status of those substantive provisions requiring the consent of Congress to any change. This problem has not yet been officially resolved by the attorney general in any formal ruling:[5]

> ...The memorandum of Vernon Char dated April 4, 1960; VFLC:ru; 343:IX-A stated that the Attorney General was unable to reach a conclusion regarding the procedure to be followed in amending the basic and substantive provisions of the Hawaiian Homes Commission Act due to the apparent conflicting provisions of the Constitution. However, he suggested that the Legislature, if it desired some authoritative ruling on the part of the United States, should amend

the Act by bill and submit such bill to the United States Congress for approval.

The question of the proper amending procedure to be used mainly concerns the acceptability to Congress of amendment proposals made by state legislative act, rather than by constitutional action. It appears safe to assume that the constitutional amending procedure provided for in Article XV of the Hawaii Constitution would prove acceptable to Congress. But whether a constitutional amendment is proposed by the state legislature or by a constitutional convention, in accordance with the provisions of Article XV, any such proposed amendment would require the approval of Congress before becoming effective.

Amendments to the Hawaiian Homes Commission Act Since 1959

The question of how basic amendments to the Hawaiian Homes Commission Act may be effected remains unsolved. No amendment has gone to Congress since 1959. In fact, there appears to be no known procedure for congressional approval. The Hawaii state legislature has been quite conservative in its legislation, and there are no congressional committees or administrative offices that regularly monitor amendments to determine the need for congressional action. Therefore, there has been no opportunity to follow the attorney general's suggestion to submit such a proposed amendment to Congress in order to receive some ruling on the question. The basic substantive aspects of the Act have remained unchanged since statehood, and, in fact, since the bill was first enacted by Congress in 1921.

In 1976, the Hawaii state legislature did pass an amendment that ended with the following provision: "This Act shall take effect upon its approval by the Governor of the State of Hawaii, and with the consent of the United States."[6] The department of Hawaiian home lands has found this particular act without merit and has no plans to implement it. No word has come from Congress as to whether or not "silence" is to be considered "consent", and thus this particular act is unlikely to provide an opportunity to clarify procedures.

All amendments to the Hawaiian Homes Commission Act since statehood have been accomplished by simple state legislation. Although the alternative method of constitutional amendment is provided for in Article XI, the state legislature has consistently chosen the simpler method of amendment by legislative act. In light of the desirability to limit a constitution to broad basic principles and exclude detailed items more properly covered by statutes, it appears wise to continue to amend the Hawaiian Homes Commission Act by state legislative act in all possible cases.

Most of the sections of the Hawaiian Homes Commission Act amended since statehood have been among the enumerated sections in Article XI not requiring the approval of the United States. The other sections which have been amended are not listed as "excepted" sections in Article XI, but have been enacted by the state legislature as being provisions which increased the benefits of the lessees. The practice of the legislature in such cases has been to submit the proposed amendment to the attorney general for an opinion as to whether or not such amendment does in fact increase the benefits of lessees and thus not require the consent of the United States.[7]

A few of the major amendments to the Hawaiian Homes Commission Act made by the Hawaii state legislature since 1959 have:

(1) Abolished the Hawaiian Homes Commission as an agency and created the department of Hawaiian home lands to be headed by an executive board to be known as the Hawaiian Homes Commission.[8]

(2) Broadened the purposes for which loans may be made and increased the amounts of loans that can be made.[9]

(3) Provided for a full-time chairperson appointed by the governor and placed all employees under the civil service system with a proviso that gives first preference in job recruitment to qualified persons of Hawaiian extraction.[10]

(4) Provided additional income to the department of Hawaiian home lands from state sugar leases and water licenses; permitted the department to guarantee loans made by private lending institutions to homesteaders for home building; permitted loans to beneficiaries who wish to build, purchase or improve homes on either Hawaiian home lands or on non-

Hawaiian home lands; and directed the state department of education to initiate programs designed primarily to improve educational opportunities for children of homesteaders with funds provided by the department of Hawaiian home lands.[11]

(5) Increased the benefits to lessees by raising the ceiling on certain loans; permitted more flexibility in the uses of the development fund; established 2 new funds (a statewide replacement loan fund and a Hawaiian home general home loan fund; and provided more flexibility in interest rates.[12]

Not all proposed changes in the Hawaiian Homes Commission Act since 1959 have become law. In an attempt to centralize responsibility in the department of Hawaiian home lands and rectify certain problems connected with a plural-headed department, both houses of the legislature in 1963 passed a bill (H.B. 1352) which would have replaced the Hawaiian Homes Commission with a single executive head. However, on the last day of the session the attorney general, in response to a request for an opinion, reaffirmed the view expressed in a 1961 opinion. This earlier opinion stated:[13]

> An amendment to the Hawaiian Homes Commission Act to provide for the elimination of the Hawaiian Homes Commission and to substitute therefor a single executive to manage Hawaiian Home Lands under the Act would violate section 2 of Article X of the Constitution of the State of Hawaii.

Section 2 of Article X of the state constitution reads as follows:

> The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be authorized by law; but land set aside for public use, other than for a reserve for conservation purposes, need not be placed under the jurisdiction of such a board or commission.

The attorney general held that section 2 of Article X would have to be amended if a single executive were to be substituted for the Hawaiian Homes Commission. Therefore, the governor allowed the proposed bill to die without his signature. However, one researcher has made an interesting comment on the applicability of section 2, Article X, to the proposal for a single executive head of the department of Hawaiian home lands:[14]

> The first clause, taken alone, mandates the establishment of a board. However, the closing clause excepts those situations in which the land is set aside for public use (other than for conservation reserves) from the requirement of an executive board. This closing clause makes it possible to place state office buildings under the jurisdiction of the Department of Accounting and General Services and harbor facilities under the Department of Transportation. The question remains as to whether or not this closing clause excepts the Department of Hawaiian Home Lands as well as other agencies from the requirements of an executive board. A close examination of both the letter opinion and the opinion cited above does not disclose whether or not the Attorney General considered the closing clause before rendering his opinion. If such closing clause were considered, then the reasoning why such closing clause did not apply to Hawaiian home lands was not made apparent.

If the interpretation of section 2, Article X, suggested above is not accepted by the attorney general of the state, it appears that any future attempt to establish a single executive head for the department of Hawaiian home lands will require a constitutional amendment to Article X.

Chapter 7
SCOPE OF CONVENTION POWER WITH REGARD TO HAWAIIAN HOME LANDS

The scope of the Constitutional Convention's power with regard to the Hawaiian home lands is extremely broad. It ranges from the ability to propose amendments to statutory provisions of the Hawaiian Homes Commission Act of 1920, to the power to propose changes in the constitutional provisions of Article XI of the Hawaii Constitution. Any proposed change in the Hawaiian Homes Commission Act or in the provisions of Article XI would require approval by the voters of Hawaii in accordance with the provisions of Article XV of the Constitution. Any proposal to impair the basic provisions of the Hawaiian Homes Commission Act or to change the conditions of the compact with the United States would require, in addition to approval by the voters, the consent of the United States Congress.

Amendment or Repeal of the Hawaiian Homes Commission Act

Under the provisions of Article XI, the Constitutional Convention may propose amendments to the administrative provisions of the Hawaiian Homes Commission Act or amendments which would increase the benefits of lessees. Such amendments would require only ratification by the voters of Hawaii in accordance with the provisions of Article XV of the Hawaii Constitution. The Convention may also, if it desires, propose amendments to impair the basic provisions of the Hawaiian Homes Commission Act. Such proposals would require not only the approval of the voters of the state, but also the consent of the United States.

In effect, the Constitutional Convention can conceivably propose any change in the statutory provisions of the Hawaiian Homes Commission Act it desires. The vital question then is one of determining what the appropriate function of the Convention is. Should the Convention involve itself in statutory revision? It is generally agreed that the amendment of statutory provisions is a function of the legislature, not of a Constitutional Convention. The role of a

Constitutional Convention is more appropriately limited to one of determining constitutional, rather than statutory, provisions. "A constitution is no place for legal codes.... It should do no more than set down fundamental and enduring first principles.[1]

Even though Article XI does, in effect, give the Constitutional Convention the power to amend the statutory provisions of the Hawaiian Homes Commission Act, it may be wiser for the Convention to leave such amendment to the state legislature and to limit itself to a review of the constitutional provisions for Hawaiian home lands in Article XI.

Amendment or Repeal of the Provisions of Article XI

If the Constitutional Convention accepts the proposition that all amendments to the Hawaiian Homes Commission Act can best be effected by state legislative action, then the scope of the Convention's action is appropriately limited to possible changes in the provisions of Article XI. The Convention's action is further restricted by the fact that these provisions were required as a condition of Hawaii's admission into the Union and are guaranteed by a binding compact between the United States and Hawaii. It appears that no changes in the basic constitutional provisions can be made without the consent of the United States.

In their simplest terms, the provisions of Article XI do nothing more than agree to a compact with the United States guaranteeing the continuance of the Hawaiian Homes Commission Act as a state law, subject to amendment or repeal only in the manner specified by Congress in the Admission Act. This presents a limited number of alternatives to the Convention. The Convention may propose to:

(1) Maintain the status quo by leaving the provisions of Article XI unchanged;

(2) Amend Article XI to include a statement of general policy to guide the administration of the Hawaiian homes program;

(3) Eliminate all constitutional guarantees for the Hawaiian Homes Commission Act, while allowing the Hawaiian Homes Commission Act to continue as a state law; or

(4) Eliminate the Hawaiian homes program completely.

The first alternative listed requires no action by the Convention. The second alternative requires a determination by the Convention delegates of what the basic objectives of the Hawaiian Homes Commission Act should be. The third and fourth alternatives would be drastic steps with serious legal implications. They could not become effective without the final consent of the United States.

Any choice among the possible courses of action open to the Convention must necessarily be based on some value judgment regarding the Hawaiian homes program.[2] If, in the judgment of the convention delegates, the Hawaiian homes program is serving a useful and worthwhile purpose as presently constituted, the Convention may choose to maintain the status quo. If the delegates feel that a special program for the Hawaiian people is desirable but that the program might be administered more effectively if there were some clear constitutional statement of the policy to be pursued by the program, then the second alternative may be chosen. If the delegates feel that the Hawaiian homes program should continue in existence and yet feel that either (1) it does not merit the special status accorded by a constitutional guarantee, or (2) the Hawaiian Homes Commission Act should be completely within the power of the State to amend or repeal rather than being subject to amendment or repeal only in the manner specified by the U.S. Congress, then the third alternative may be chosen. Finally, if the delegates feel that the Hawaiian homes program is unfairly discriminatory or that it is not serving a useful purpose either for the Hawaiian people or for the state as a whole, then the Convention may choose to propose the repeal of the provisions of Article XI.

FOOTNOTES

Chapter 2

1. Jean Hobbs, *Hawaii, A Pageant of the Soil* (Stanford, Calif.: Stanford University Press, 1935), p. 17.

2. *State v. Zimring*, 58 Haw. [5522] (1977), p. 5.

3. Hobbs, p. 7.

4. Gavin Dawes, "Government and Land in Honolulu to 1850," *Hawaii Historical Review, Selected Readings*, ed. by Richard Greer, Hawaiian Historical Society (Hong Kong: Cathay Press, 1969), p. 249.

5. *Ibid.*, p. 249.

6. Ralph S. Kuykendall, *The Hawaiian Kingdom, Vol. I: 1778-1854 Foundation and Transformation* (Honolulu: University of Hawaii Press, 1968), p. 153.

7. *Ibid.*, p. 153.

8. *Ibid.*, p. 158.

9. *Ibid.*, p. 165.

10. *State v. Zimring*, 58 Haw. [5522] (1977), p. 7.

11. Lawrence H. Fuchs, *Hawaii Pono: A Social History* (New York: Harcourt, Brace & World, Inc., 1961), p. 257.

12. Dawes, p. 253.

13. Theon Wright, *The Disenchanted Isles* (New York: The Dial Press, 1972), p. 35.

14. Fuchs, p. 258.

15. *Ibid.*, p. 426.

16. *Ibid.*, p. 68.

17. Wright, p. 35, quoting Dr. Allan A. Spitz.

18. Fuchs, p. 173.

19. Wright, p. 33.

20. *Ibid.*, p. 34.

21. *Ibid.*

22. *Ibid.*, p. 35.

23. Fuchs, p. 258.

24. Hawaii (Territory), *Journal of the Senate*, 1919, p. 25.

25. Hawaiian Homes Commission Act, 1920, sec. 202, as amended.

26. *Ibid.*, sec. 201.

27. *Ibid.*, sec. 203.

28. *Ibid.*, sec. 213.

29. Tom Dinell *et al.*, *The Hawaiian Homes Program: 1920-1963; A Concluding Report*, University of Hawaii, Legislative Reference Bureau, Report. No. 1 (Honolulu: 1964), p. 16.

30. *Ibid.*

31. *Biennial Report of the Department of the Hawaiian Home Lands, State of Hawaii, to the Legislature of the State of Hawaii, Regular Session, 1967*, p. 6.

32. Dinell, p. 10.

33. Allan A. Spitz, *Land Aspects of the Hawaiian Homes Program*, University of Hawaii, Legislative Reference Bureau, Report. No. 1c (Honolulu: 1964), p. 41.

34. Dinell, p. 17.

35. *A General Plan for Hawaiian Home Lands*, April 1976, p. ii.

36. Hawaii, Department of Hawaiian Home Lands, *Ka Nuohou* (Honolulu: September, 1976), Vol. 2, No. 3.

Chapter 3

1. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 170.

2. Herman S. Doi, *Legal Aspects of the Hawaiian Homes Program*, University of Hawaii, Legislative Reference Bureau, Report No. 1a (Honolulu: 1964), p. 45.

3. See Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, Committee Proposal No. 6, p. 172.

4. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, p. 672.

5. Act of March 18, 1959, 73 Stat. 4; as amended by Act of July 12, 1960, 74 Stat. 422.

Chapter 4

1. Herman S. Doi, *Legal Aspects of the Hawaiian Homes Program*, University of Hawaii, Legislative Reference Bureau, Report No. 1a (Honolulu: 1964), p. 41.

2. See testimony of W. B. Pittman, George M. McClellan and A. G. M. Robertson in U.S., Congress, Senate, Committee on Territories, *Hawaiian Homes Commission Act, 1920, Hearings on H.R. 13500, to Amend Act to Provide Government for Hawaii, As Amended, to Establish Hawaiian Homes Commission, and for Other Purposes*, 66th Cong., 3rd Sess., 1920.

3. U.S., Congress, Senate, Committee on Territories, *Hawaiian Homes Commission Act*, p. 34.

4. Written statement by A. G. M. Robertson, p. 36, submitted to the United States Senate Committee on Territories, on H.R. 13500, 1920.

5. Cited by Doi, pp. 41-43.

6. *Ibid.*, p. 41.

7. *Ibid.*

8. Cited by Doi, p. 43.

9. *Ibid.*, p. 44.

10. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. I, p. 171.

11. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, p. 670.

12. *Ibid.*, p. 35.

Chapter 5

1. Herman S. Doi, *Legal Aspects of the Hawaiian Homes Program*, University of Hawaii, Legislative Reference Bureau, Report No. 1a (Honolulu: 1964), p. 55.

2. Hawaii, Constitutional Convention, 1950, *Proceedings*, Vol. II, p. 670.

3. *Ibid.*, p. 668.

4. *Ibid.*, p. 670.

5. *Ibid.*, p. 669.

6. Paul C. Bartholomew and Robert M. Kamins, "The Hawaii Constitution: A Structure for Good Government," *American Bar Association Journal*, 45(11) (November, 1959), p. 1222.

7. Cited by Doi, pp. 57-58.

8. *Ibid.*, p. 60.

9. The following six points are taken from Doi, p. 65.

10. Cited by Doi, p. 60.

11. *Ibid.*, pp. 61-62.

12. *Ibid.*, p. 62.

13. *Ibid.*, p. 63.

14. *Ibid.*, p. 64.

15. *Ibid.*, p. 65.

Chapter 6

1. Memorandum dated August 26, 1959 from Morio Omori and Phillip Chun, Deputy Attorneys General, cited by Herman S. Doi, *Legal Aspects of the Hawaiian Homes Program*, University of Hawaii, Legislative Reference Bureau, Report No. 1a (Honolulu: 1964), p. 66.

2. Att'y Gen. Ops. No. 61-21 (February 21, 1961).

3. Cited by Doi, p. 67.

4. Memorandum dated August 26, 1959; MO:PTC:mym; 356:6-7494, cited by Doi, p. 68.

5. Doi, p. 68.

6. 1976 Haw. Sess. Laws, Act 23.

7. Doi, p. 70.

8. 1959 Haw. 2d Sp. Sess. Laws, Act 1.

9. 1962 Haw. Sess. Laws, Acts 14 and 18.

10. 1963 Haw. Sess. Laws, Act 207.

11. 1965 Haw. Sess. Laws, Act 4.

12. 1976 Haw. Sess. Laws, Act 72.

13. Att'y Gen. Ops. No. 61-50 (April 25, 1961), p. 2.

14. Doi, p. 6.

Chapter 7

1. W. Brooke Graves (ed.), *Major Problems in State Constitutional Revision* (Chicago: Public Administration Service, 1960), p. 156.

2. Various studies on the Hawaiian Homes program have attempted to evaluate the program in terms of its effectiveness in accomplishing its stated purpose. See *The Hawaiian Homes Program: 1920-1963*, *Land Aspects of the Hawaiian Homes Program*, and *Social Aspects of the Hawaiian Homes Program*, all published by the Legislative Reference Bureau. In addition, no evaluation of the program can be made without a reading of the various reports of the Department of Hawaiian Home Lands submitted to the State Legislature. See, in particular, *A General Plan for Hawaiian Home Lands*, April, 1976.

Appendix

HAWAIIAN HOMES COMMISSION ACT, 1920

(Act of July 9, 1921, c 42, 42 Stat 108)

This Act is now part of the State Constitution and is subject to amendment or repeal as prescribed in Article XI of the Constitution.
Bracketed section headings have been inserted and are not official.

TITLE 1: DEFINITIONS

§1. That this Act may be cited as the "Hawaiian Homes Commission Act, 1920."

§2. That when used in this Act the term "Hawaiian Organic Act" means the Act entitled "An Act to provide a government for the Territory of Hawaii," approved April 30, 1900, as amended.

TITLE 2: HAWAIIAN HOMES COMMISSION

§201. [Definitions.] (a) That when used in this title:

(1) The term "commission" means the Hawaiian Homes Commission;

(2) The term "public land" has the same meaning as defined in paragraph (3) of subdivision (a) of section 73 of the Hawaiian Organic Act;

(3) The term "fund" means the Hawaiian home loan fund;

(4) The term "State" means the State of Hawaii;

(5) The term "Hawaiian home lands" means all lands given the status of Hawaiian home lands under the provisions of section 204 of this title;

(6) The term "tract" means any tract of Hawaiian home lands leased, as authorized by section 207 of this title, or any portion of such tract;

(7) The term "native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778;

(8) The term "irrigated pastoral land" means land not in the description of the agricultural land but which, through irrigation, is capable of carrying more livestock the year through than first-class pastoral land.

(b) Any term defined or described in section 347 or 351 of the Revised Laws of Hawaii of 1915, except a term defined in subdivision (a) of this section, shall, whenever used in this title, have the same meaning as given by such definition or description. [Am Jun. 8, 1954, c 321, §2, 68 Stat 263; am L 1963, c 207, §5(a)]

§202 Department officers, staff, commission, members, compensation. (a) There shall be a department of Hawaiian home lands which shall be headed by an executive board to be known as the Hawaiian homes commission. The members of the commission shall be nominated and appointed in accordance with section 26-34, Hawaii Revised Statutes. The commission shall be composed of eight members, as follows: three shall be residents of the city and county of Honolulu, of whom one shall be a resident of the Third Senatorial District, a second shall be a resident of the Fourth Senatorial District, and a third shall be a resident of either the Fifth, Sixth or Seventh Senatorial District; one shall be a resident of the county of Hawaii; two shall be residents of the county of Maui one of whom shall be a resident from the island of Molokai; one shall be a resident of the county of Kauai; and the eighth member shall be the chairman of the Hawaiian Homes Commission. All members shall have been residents of the State at least three years prior to their appointment and at least four of the members shall be descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian islands previous to 1778. The members of the commission shall serve without pay, but shall receive actual expenses incurred by them in the discharge of their duties as such members. The governor shall appoint the chairman of the commission from among the members thereof.

The commission may delegate to the chairman such duties, powers, and authority or so much thereof, as may be lawful or proper for the performance of the functions vested in the commission. The chairman of the commission shall serve in a full-time capacity. He shall, in such capacity, perform such duties, and exercise such powers and authority, or so much thereof, as may be delegated to him by the commission as herein provided above.

(b) The provisions of section 76-16, Hawaii Revised Statutes, shall apply to the positions of the first deputy and private secretary to the chairman of the commission. The department may hire a staff consisting of qualified aides in finance and funding, planning and development, legal matters, agriculture and ranching, and other individuals on a contractual basis not subject to chapters 76, 77, and 78, Hawaii Revised Statutes, when the services to be performed will assist in carrying out the purposes of the Act. These positions may be funded through appropriations for capital improvement program projects and by the administration account, development or operating funds. No contract shall be for a period longer than two years, and no individual hired under contract shall be employed beyond a maximum of six years. All other positions in the department shall be subject to the provisions of chapters 76 and 77, Hawaii Revised Statutes, and employees having tenure, according to the employment practices of the department, immediately prior to June 20, 1963 and occupying positions in accordance with the state's position classifications and compensation plans shall be given permanent appointment status under chapter 76 without a reduction in pay or the loss of seniority, prior service credit, vacation or sick leave earned heretofore. An employee with tenure who does not occupy a position under chapters 76 and 77 shall be appointed to the position after it has been classified and assigned to an appropriate salary range by the director of personnel services and such employee shall not suffer a reduction in pay or loss of seniority and other credits earned heretofore.

All vacancies and new positions which are covered by the provisions of chapters 76 and 77, Hawaii Revised Statutes, shall be filled in accordance with the provisions of section 76-23 and 76-31, Hawaii Revised Statutes, provided that the provisions of these sections shall be applicable first to qualified persons of Hawaiian extraction. [Am Jul. 26, 1935, c 420, §1, 49 Stat 504; May 31, 1944, c 216, §1, 58 Stat 260; Jul. 1, 1952, c 618, 66 Stat 515; am L 1963, c 207, §1; am imp L 1965, c 223, §§5, 8; am L 1977, c 174, §1]

§203. [Certain public lands designated "available lands."] All public lands of the description and acreage, as follows, excluding (a) all lands within any forest reservation, (b) all cultivated sugar-cane lands, and (c) all public lands held under a certificate of occupation, homestead lease, right of purchase lease, or special homestead agreement, are hereby designated, and hereinafter referred to, as "available lands":

(1) On the island of Hawaii: Kamaoa-Puueo (eleven thousand acres, more or less), in the district of Kau; Puukapu (twelve thousand acres, more or less), Kawaihae 1 (ten thousand acres, more or less), and Pauahi (seven hundred and fifty acres, more or less), in the district of South Kohala; Kamoku-Kapulena (five thousand acres, more or less), Waimanu (two hundred acres, more or less), Nienie (seven thousand three hundred and fifty acres, more or less), in the district of Hamakua; fifty-three thousand acres to be selected by the department from the lands of Humuula Mauka, in the district of North Hilo; Panaewa, Waiakea (two thousand acres, more or less), Waiakea-kai, or Keaukaha (two thousand acres, more or less), and two thousand acres of agricultural lands to be selected by the department from the lands of Piihonua, in the district of South Hilo; and two thousand acres to be selected by the department from the lands of Kaohe-Makuu, in the district of Puna; land at Keaukaha, Hawaii, more particularly described as follows:

PARCEL 1

Now set aside as Keaukaha Beach Park by Executive Order Numbered 421, and being a portion of the Government land at Waiakea, South Hilo, Hawaii.

Beginning at the southeast corner of this parcel of land, on the north side of Kalanianaole Road, the coordinates of said point of beginning referred to Government survey triangulation station "Halai" being five thousand six hundred and eighty-one and twelve one-hundredths feet north and seventeen thousand nine hundred and thirty-three and fifteen one-hundredths feet east, as shown on Government Survey Registered Map Numbered 2704, and running by true azimuths.

1. Sixty-one degrees fifty-eight minutes one thousand three hundred and fifty-one and seventy-three one-hundredths feet along the north side of Kalanianaole Road (fifty feet wide);

2. One hundred and fifty-one degrees fifty-eight minutes eight hundred and forty feet along United States military reservation for river and harbor improvements (Executive Order Numbered 176);

Thence along the seashore at high-water mark, the direct azimuths and distances between points at seashore being:

3. Two hundred and eighty-two degrees no minutes four hundred and sixty-eight and fifty one-hundredths feet;

4. Three hundred and thirteen degrees twenty minutes four hundred and forty-one feet;

5. Two hundred and sixty degrees twenty minutes one hundred and forty feet;

6. Two hundred and forty-two degrees twenty minutes two hundred and fifty feet;

7. One hundred and eighty-eight degrees forty minutes sixty feet;

8. Two hundred and seventy-two degrees twenty minutes one hundred and seventy feet;

9. Two hundred and five degrees no minutes sixty feet;

10. One hundred and ten degrees twenty minutes two hundred and twenty feet;

11. Ninety degrees fifty minutes eighty feet;

12. One hundred and sixty-two degrees no minutes one hundred and seventy feet;

13. Two hundred and fifty degrees thirty minutes four hundred and thirty feet;

14. Three hundred and thirty-one degrees fifty-eight minutes three hundred and eighty feet along parcel II of Government land to the point of beginning and containing an area of eleven and twenty one-hundredths acres, more or less.

PARCEL II

Being a portion of the Government land of Waiakea, South Hilo, Hawaii, and located on the north side of Kalanianaole Road and adjoining parcel I, hereinbefore described.

Beginning at the south corner of this parcel of land, on the north side of Kalanianaole Road, the coordinates of said point of beginning referred to Government survey triangulation station "Halai," being five thousand six hundred and eighty-one and twelve one-hundredths feet north and seven thousand nine hundred and thirty-three and fifteen one-hundredths feet east and running by true azimuths:

1. One hundred and fifty-one degrees fifty-six minutes three hundred and eighty feet along the east boundary of parcel I;

2. Two hundred and twenty-nine degrees forty-five minutes thirty seconds one hundred and ninety-one and one one-hundredths feet;

3. One hundred and ninety-eight degrees no minutes two hundred and thirty feet to a one-and-one-half inch pipe set in concrete;

4. Three hundred and seven degrees thirty-eight minutes five hundred and sixty-two and twenty-one one-hundredths feet to a one-and-one-half inch pipe set in concrete;

5. Twenty-eight degrees no minutes one hundred and twenty-one and thirty-seven one-hundredths feet to the north side of Kalanianaole Road;

6. Sixty-one degrees fifty-eight minutes four hundred and eighty-three and twenty-two one-hundredths feet along the north side of Kalanianaole Road to the point of beginning and containing an area of five and twenty-six one-hundredths acres, more or less.

(2) On the island of Maui:* Kahikinui (twenty-five thousand acres, more or less) in the district of Kahikinui, and the public lands (six thousand acres, more or less) in the district of Kula;

(3) On the island of Molokai: Palaau (eleven thousand four hundred acres, more or less), Kapaakea (two thousand acres, more or less), Kalamaula (six thousand acres, more or less), Hoolehua (three thousand five hundred acres, more or less), Kamiloloa I and II (three thousand six hundred acres, more or less), and Makakupaia (two thousand two hundred acres, more or less) and Kalaupapa (five thousand acres, more or less);

(4) On the island of Oahu: Nanakuli (three thousand acres, more or less), and Lualualei (two thousand acres, more or less), in the District of Waianae; and Waimanalo (four thousand acres, more or less), in the District of Koolaupoko, *excepting therefrom the military reservation* and the beach lands; and those certain portions of the lands of Auwaiolimu, Kewalo, and Kalawahine described by metes and bounds as follows, to-wit:

(I) Portion of the Government land at Auwaiolimu, Punchbowl Hill, Honolulu, Oahu, described as follows:

Beginning at a pipe at the southeast corner of this tract of land, on the boundary between the lands of Kewalo and Auwaiolimu, the coordinates of said point of beginning referred to Government Survey triangulation station "Punchbowl," being one thousand one hundred and thirty-five and nine-tenths feet north and two thousand five hundred and fifty-seven and eight-tenths feet east as shown on Government Survey Registered Map Numbered 2692, and running by true azimuths:

1. One hundred and sixty-three degrees thirty-one minutes two hundred and thirty-eight and eight-tenths feet along the east side of Punchbowl-Makiki Road;

2. Ninety-four degrees eight minutes one hundred and twenty-four and nine-tenths feet across Tantalus Drive and along the east side of Puuowaina Drive;

3. One hundred and thirty-one degrees thirteen minutes two hundred and thirty-two and five-tenths feet along a twenty-five foot roadway;

4. One hundred and thirty-nine degrees fifty-five minutes twenty and five-tenths feet along same;

5. One hundred and sixty-eight degrees seventeen minutes two hundred and fifty-seven and eight-tenths feet along Government land (old quarry lot);

6. One hundred and fifty-six degrees thirty minutes three hundred and thirty-three feet along same to a pipe;

7. Thence following the old Auwaiolimu stone wall along L.C. Award Numbered 3145, to Laenui, grant 5147 (lot 8 to C.W. Booth), L.C. Award Numbered 1375, to Kapule, and L.C. Award Numbered 1355, to Kekuanoni, the direct azimuth and distance being two hundred and forty-nine degrees forty-one minutes one thousand three hundred and three and five-tenths feet;

8. Three hundred and twenty-one degrees, twelve minutes, six hundred and ninety-three feet along *the remainder of the land of Auwaiolimu*;

9. Fifty-one degrees, twelve minutes, one thousand and four hundred feet along the land of Kewalo to the point of beginning, containing an area of twenty-seven acres, excepting and reserving therefrom Tantalus Drive and Auwaiolimu Street crossing this land.

(II) Portion of the land of Kewalo, Punchbowl Hill, Honolulu, Oahu, being part of the lands set aside for the use of the Hawaii Experiment Station of *the United States Department of Agriculture by proclamation of the Acting* Governor of Hawaii, dated June 10, 1901, and described as follows:

Beginning at the northeast corner of this lot, at a place called "Puu Ea" on the boundary between the lands of Kewalo and Auwaiolimu, the coordinates of said point of beginning referred to Government survey triangulation station "Punchbowl," being three thousand two hundred and fifty-five and six-tenths feet north and five thousand two hundred and forty-four and seven-tenths feet east, as shown on Government Survey Registered Map Numbered 2692 of the State of Hawaii, and running by true azimuths:

1. Three hundred and fifty-four degrees thirty minutes nine hundred and thirty feet along the remainder of the land of Kewalo, to the middle of the stream which divides the lands of Kewalo and Kalawahine;

2. Thence down the middle of said stream along the land of Kalawahine, the direct azimuth and distance being forty-nine degrees sixteen minutes one thousand five hundred and twelve and five-tenths feet;

3. One hundred and forty-one degrees twelve minutes eight hundred and sixty feet along the remainder of the land of Kewalo;

4. Two hundred and thirty-one degrees twelve minutes five hundred and fifty-two and six-tenths feet along the land of Auwaiolimu to "PUU IOLE";

5. Thence still along the said land of Auwaiolimu following the top of the ridge to the point of beginning, the direct azimuth and distance being two hundred and thirty-two degrees twenty-six minutes one thousand four hundred and seventy feet and containing an area of thirty acres; excepting and reserving therefrom Tantalus Drive crossing this land;

[(III) Repealed. Act of Jul. 9, 1952, c 614, §1, 66 Stat 511]

(IV) Portion of the Hawaii Experiment Station under the control of the United States Department of Agriculture, situated on the northeast side of Auwaiolimu Street.

KEWALO-UKA, HONOLULU, OAHU

Being a portion of the land of Kewalo-uka conveyed by the Territory of Hawaii to the United States of America by proclamations of the Acting Governor of Hawaii, Henry S. Cooper, dated June 10, 1901, and August 16, 1901, and a portion of the United States Navy Hospital reservation described in Presidential Executive Order Numbered 1181, dated March 25, 1910.

*See second to last paragraph of this section as added by Act of June 3, 1948, c 384, referring to available lands at Wailuku, Maui.

Beginning at the west corner of this parcel of land, on the Auwaiolimu-Kewalo-uka boundary and on the northeast side of Auwaiolimu Street, the coordinates of said point of beginning referred to Government survey triangulation station "Punchbowl," being one thousand two hundred and thirty and fifty-eight one-hundredths feet north and two thousand six hundred and seventy-five and six one-hundredths feet east as shown on Government Survey Registered Map Numbered 2985 and running by azimuths measured clockwise from true south:

1. Two hundred and thirty-one degrees twelve minutes one thousand two hundred and forty-eight and twenty-six one-hundredths feet along the land of Auwaiolimu;

2. Three hundred and twenty-one degrees twelve minutes eight hundred and sixty feet along Hawaiian home land as described in Presidential Executive Order Numbered 5561;

3. Thence down along the middle of stream in all its turns and windings along the land of Kalawahine to the north corner of Roosevelt High School lot, the direct azimuth and distance being thirty-three degrees forty-eight minutes forty seconds one thousand one hundred and twelve and twenty one-hundredths feet;

Thence still down along the middle of stream for the next seven courses along the Roosevelt High School premises, the direct azimuth and distances between points in middle of said stream being:

4. Twenty-three degrees forty minutes twenty-eight and ninety one-hundredths feet;

5. Eight degrees no minutes one hundred and fifteen feet;

6. Three hundred and thirty-seven degrees fifty minutes forty-eight feet;

7. Two degrees thirty minutes sixty feet;

8. Forty-nine degrees forty minutes fifty-two feet;

9. Forty-six degrees six minutes ninety and seventy one-hundredths feet;

10. Ninety-two degrees forty-three minutes ninety-five and sixty one-hundredths feet; thence

11. Eighty-three degrees thirty-eight minutes seventy-one and sixty-three one-hundredths feet along state land to the northeast side of Auwaiolimu Street;

12. Thence on a curve to the left with a radius of one thousand one hundred and seventy-six and twenty-eight one-hundredths feet along the northeast side of Auwaiolimu Street along land described in Presidential Executive Order Numbered 1181, dated March 25, 1910, the direct azimuth and distance being one hundred and seventy-two degrees twenty-nine minutes thirty-five seconds one hundred and sixty-four and thirty-nine one-hundredths feet;

13. Thence continuing on a curve to the left with a radius of one thousand one hundred and seventy-six and twenty-eight one-hundredths feet along the northeast side of Auwaiolimu Street, the direct azimuth and distance being one hundred and sixty degrees fifty minutes forty-eight seconds three hundred and twelve and seventy-five one-hundredths feet;

14. Two hundred and twenty-four degrees fifty-three minutes six hundred and seventy and sixty-five one-hundredths feet along the Quarry Reservation (State of Hawaii, owner);

15. One hundred and ten degrees six minutes two hundred and thirty-nine and twenty one-hundredths feet along same;

16. Ninety-two degrees five minutes two hundred and two and twenty one-hundredths feet along same;

17. Fifty-three degrees twenty minutes three hundred and forty and thirty-four one-hundredths feet along same;

18. One hundred and forty-two degrees thirty minutes four hundred and twenty-four and sixty-eight one-hundredths feet along the northeast side of Auwaiolimu Street to the point of beginning and containing an area of twenty-seven and ninety one-hundredths acres; excepting and reserving therefrom that certain area included in Tantalus Drive, crossing this land.

(V) Portion of Kewalo-uka Quarry Reservation. Situate on the northeast side of Auwaiolimu Street.

KEWALO-UKA, HONOLULU, OAHU

Being land reserved by the State of Hawaii within the Hawaii Experiment Station under the control of the United States Department of Agriculture, as described in proclamations of the Acting Governor of Hawaii, Henry E. Cooper, dated June 10, 1901.

Beginning at the northwest corner of this parcel of land and on the northeast side of Auwaiolimu Street, the coordinates of said point of beginning referred to Government survey triangulation station "Punchbowl," being eight hundred and ninety-three and sixty-six one-hundredths feet north and two thousand nine hundred and thirty-three and fifty-nine one-hundredths feet east as shown on Government Survey Registered Map Numbered 2985 and running by azimuths measured clockwise from true south:

1. Two hundred and thirty-three degrees twenty minutes three hundred and forty and thirty-four one-hundredths feet along the Hawaii Experiment Station under the control of the United States Department of Agriculture;

2. Two hundred and seventy-two degrees five minutes two hundred and two and twenty one-hundredths feet along same;

3. Two hundred and ninety degrees six minutes two hundred and thirty-nine and twenty one-hundredths feet along same;

4. Forty-four degrees fifty-three minutes six hundred and seventy and sixty-five one-hundredths feet along same to the northeast side of Auwaiolimu Street;

5. Thence on a curve to the left with a radius of one thousand one hundred and seventy-six and twenty-eight one-hundredths feet along the northeast side of Auwaiolimu Street, the direct azimuth and distance being one hundred and forty-seven degrees fifty-one minutes thirteen seconds two hundred and nineteen and fifty one-hundredths feet;

6. One hundred and forty-two degrees thirty minutes one hundred and thirty-four and fifty-five one-hundredths feet along the northeast side of Auwaiolimu Street;

7. Two hundred and thirty-two degrees thirty minutes twenty feet along same;

8. One hundred and forty-two degrees thirty minutes seventy-one and fifty-seven one-hundredths feet along same to the point of beginning and containing an area of four and six hundred and forty-six one-thousandths acres.

(VI) Being a portion of government land of Auwaiolimu, situated on the northeast side of Hawaiian home land of Auwaiolimu and adjacent to the land of Kewalo-uka at Pauoa Valley, Honolulu, Oahu, State of Hawaii. Beginning at a pipe in concrete at the south corner of this parcel of land, being also the east corner of Hawaiian home land, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Punchbowl," being two thousand twelve and seventy-five one-hundredths feet south and three thousand six hundred forty-seven and eighty-seven one-hundredths feet east, and thence running by azimuths measured clockwise from true south:

1. One hundred and forty-one degrees twelve minutes six hundred and ninety-three feet along Hawaiian home land;

2. Thence along middle of stone wall along L.C.Aw. 1356 to Kekuanoni, Grant 5147, Apana 1 to C.W.Booth, L.C.Aw. 1351 to Kamakainau, L.C.Aw. 1602 to Kahawai, Grant 4197 to Keauloa, L.C.Aw. 5235 to Kaapuiki and Grant 2587 to Haalelea;

3. Two hundred and ninety-five degrees thirty minutes three hundred and twenty feet along the remainder of government land of Auwaiolimu;

4. Twenty-four degrees sixteen minutes thirty seconds one thousand five hundred seventy-nine and thirty-six one-hundredths feet along the remainder of government land of Auwaiolimu;

5. Thence along middle of ridge along the land of Kewalo-uka to a point called "Puu Iole" (pipe in concrete monument), the direct azimuth and distance being fifty-six degrees no minutes eight hundred and thirty feet;

6. Fifty-two degrees twelve minutes five hundred fifty-two and sixty one-hundredths feet along the land of Kewalo-uka to the point of beginning and containing an area of thirty-three and eighty-eight one-hundredths acres, more or less.

(VII) Being portions of government lands of Kewalo-uka and Kalawahine situated on the east side of Tantalus Drive at Pauoa Valley, Honolulu, Oahu, State of Hawaii. Beginning at the west corner of this parcel of land, the true azimuth and distance to a point called "Puu Ea" (pipe in concrete monument) being one hundred and seventy-four degrees thirty minutes four hundred one and ninety-nine one-hundredths feet, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Punchbowl" being two thousand eight hundred fifty-five and ten one-hundredths feet north and five thousand two hundred eighty-two and twenty-five one-hundredths feet east and thence running by azimuths measured clockwise from true south:

1. Two hundred and forty-eight degrees nineteen minutes forty seconds eight hundred fifty and fifty-four one-hundredths feet along the land of Kewalo-uka;

2. Sixteen degrees thirty minutes five hundred feet along the land of Kewalo-uka, along the land of Kalawahine;

3. Twenty-five degrees no minutes five hundred feet along the land of Kalawahine;

4. Thirty-five degrees no minutes three hundred and twenty feet along the land of Kalawahine;

5. Fifty degrees forty-six minutes ninety-six and seventy one-hundredths feet along Makiki Forest Ridge lots;

6. Seventy-three degrees twenty minutes two hundred fifty-five and ninety one-hundredths feet along Makiki Forest Ridge lots;

7. Eighty-six degrees thirty-two minutes one hundred sixty-three and forty one-hundredths feet along Makiki Forest Ridge lots;

8. Thence along the south side of Tantalus Drive on a curve to the right with a radius of two hundred and seventy feet, the direct azimuth and distance being two hundred and twenty-one degrees twelve minutes nineteen seconds ninety-eight and thirty-six one-hundredths feet;

9. Two hundred and thirty-one degrees forty-two minutes one hundred ninety-three and thirty-five one-hundredths feet along the south side of Tantalus Drive;

10. Still along Tantalus Drive on a curve to the left with a radius of one hundred eighty and seventy-eight one-hundredths feet, the direct azimuth and distance being one hundred and eighty-one degrees forty-five minutes fifty-five seconds two hundred seventy-six and seventy-two one-hundredths feet;

11. Two hundred and forty-two degrees fifteen minutes sixty-two and thirty-two one-hundredths feet along the land of Kewalo-uka;

12. One hundred and seventy-four degrees thirty minutes five hundred twenty-eight and one one-hundredths feet along the land of Kewalo-uka to the point of beginning and containing an area of five hundred and seventy-four thousand seven hundred and thirty square feet or thirteen and one hundred ninety-four one-thousandths acres.

(5) On the island of Kauai:* Upper land of Waimea, above the cultivated sugar cane lands, in the district of Waimea (fifteen thousand acres, more or less); and Moloaa (two thousand five hundred acres, more or less), and Anahola and Kamalomalo (five thousand acres, more or less).

Wailuku, Maui: That parcel of government land, situate in the District of Wailuku, Island and County of Maui, comprising twelve and four hundred and fifty-five one-thousandths acres of the ILI OF KOU and being a portion of the land covered by General Lease Numbered 2286 to Wailuku Sugar Company, Limited, notwithstanding the fact that said parcel is cultivated sugar cane land, subject, however, to the terms of said lease.

Cultivated Sugar Cane Lands: That parcel of Anahola, Island of Kauai, comprising four hundred and one and four hundred and twenty-three one-thousandths acres, hereinafter described and being portion of the land covered by general lease numbered 2724 to the Lihue Plantation Company, Limited, notwithstanding the fact that said parcel is cultivated sugar cane land, subject however, to the terms of said lease, said parcel being more particularly described as follows:

Being a portion of land described in general lease numbered 2724 to the Lihue Plantation Company situate in the district of Anahola, Kauai, State of Hawaii, beginning at the northwest corner of this parcel of land, the coordinates of which referred to government trianguiation station south base are three thousand and forty-nine and sixty-two one-hundredths feet south, one thousand nine hundred and thirty-two and twenty-five one-hundredths feet west, and running thence by azimuths measured clockwise from true south two hundred and eighty-four degrees thirty minutes two hundred and fifty feet, thence on the arc of circular curve to the left, with a radius of eight hundred and ninety feet and a central angle of thirty-five degrees fifteen minutes, the direct azimuth and distance being two hundred and sixty-six degrees fifty-two minutes thirty seconds five hundred and thirty-eight and ninety-six one-hundredths feet, thence two hundred and forty-nine degrees fifteen minutes one thousand eight hundred and nine and twenty-five one-hundredths feet, thence two hundred and twenty-four degrees fifteen minutes three thousand fifty-six feet, thence one hundred and thirty-four degrees fifteen minutes two hundred and seven feet, to the seashore at Anahola Bay, thence along the seashore around Kahala Point, the direct azimuth and distance being two hundred and thirty-seven degrees six minutes seven seconds one thousand and sixty and fourteen one-hundredths feet, thence along the seashore, the direct azimuth and distance being three hundred and thirty-two degrees no minutes one thousand eight hundred and twenty-seven feet, thence along the seashore, the direct azimuth and distance being three hundred and fifty-five degrees no minutes one thousand eight hundred and twenty-seven feet, thence eighty-seven degrees twenty minutes seven hundred and forty feet, thence fifty-nine degrees no minutes two thousand seven hundred and fifteen feet, thence sixty-nine degrees fifteen minutes one thousand eight hundred and eighty-seven and thirty-six one-hundredths feet, thence on the arc of a circular curve to the right with a radius of three thousand and twelve feet, and a central angle of thirty-five degrees fifteen minutes the direct azimuth and distance being eighty-six degrees fifty-two minutes thirty seconds one thousand eight hundred and twenty-three and ninety-eight one-hundredths feet, thence one hundred and four degrees thirty minutes two hundred and fifty feet, thence one hundred and ninety-four degrees thirty minutes one thousand and thirty-one feet, thence on the arc of a circular curve to the left with a radius of six hundred and seven and ninety-five one-hundredths feet and a central angle of fifty-three degrees three minutes thirty seconds the direct azimuth and distance being seventy-seven degrees fifty-eight minutes fifteen seconds five hundred and forty-three and nine one-hundredths feet to the government road, thence two hundred and thirty-one degrees twenty-six minutes thirty seconds one hundred and thirteen and sixty-one one-hundredths feet along the government road, thence along the government road on the arc of a circular curve to the left with a radius of four hundred and seventy-seven feet and a central angle of forty-four degrees twenty-six minutes thirty seconds, the direct azimuth and distance being two hundred and nine degrees thirteen minutes fifteen seconds three hundred and sixty and seventy-eight one-hundredths feet, thence one hundred and eighty-seven degrees no minutes one hundred and sixty-nine and fifty-four one-hundredths feet along the government road, thence on the arc of a circular curve to the left with a radius of three hundred and fifty-one and eight one-hundredths feet and a central angle of eighty-two degrees thirty minutes the direct azimuth and distance being three hundred and twenty-five degrees forty-five minutes four hundred and sixty-two and ninety-seven one-hundredths feet, thence one hundred and ninety-four degrees thirty minutes five hundred and seventy-nine feet, thence one hundred and four degrees thirty minutes three hundred feet, thence one hundred and ninety-four degrees thirty minutes two hundred feet, thence two hundred eighty-four degrees thirty minutes three hundred feet, thence one hundred and ninety-four degrees thirty minutes two hundred and fifty-two feet to the point of beginning containing an area of four hundred and one and four hundred and twenty-three one-thousandths acres more or less. [Am May 16, 1934, c 290, §1, 48 Stat 777; Aug. 29, 1935, c 810, §1, 49 Stat 966; Jul. 10, 1937, c 482, 50 Stat 497; Nov. 26, 1941, c 544, §1, 55 Stat 782; May 31, 1944, c 216, §2, 58 Stat 260; Jun. 3, 1948, cc 384, 397, 62 Stat 295, 303; Jul. 9, 1952, c 614, §§1, 2, 66 Stat 511; am L 1963, c 207, §§2, 5]

§204. Control by department of "available lands"; return to board of land and natural resources, when. 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 title, except that:

(1) In case any available land is under lease by the Territory of Hawaii, by virtue of section 73 of the Hawaiian Organic Act, at the time of the passage of this Act, such land shall not assume the status of Hawaiian home lands until the lease expires or the board of land and natural resources withdraws the lands from the operation of the lease. If the land is covered by a lease containing a withdrawal clause, as provided in subdivision (d) of section 73 of the Hawaiian Organic Act, the board of land and natural resources shall withdraw such lands from the operation of the lease whenever the department, with the approval of the Secretary of the Interior, gives notice to it that the department is of the opinion that the lands are required by it for the purposes of this title; and such withdrawal shall be held to be for a public purpose within the meaning of that term as used in subdivision (d) of section 73 of the Hawaiian Organic Act;

(2) Any available land, including lands selected by the department out of a larger area, as provided by this Act, as may not be immediately needed for the purposes of this Act, may be returned to the board of land and natural resources and may be leased by it as provided in chapter 171, Hawaii Revised Statutes, or may be retained for management by the department.

Any lease by the board of land and natural resources of Hawaiian home lands hereafter entered into shall contain a withdrawal clause, and the lands so leased shall be withdrawn by the board of land and natural resources, for the purpose of this Act, upon the department giving at its option, not less than one nor more than five years' notice of such withdrawal; provided, that the minimum withdrawal-notice period shall be specifically stated in such lease.

In the management of any retained available lands not required for leasing under section 207(a), the department may dispose of such lands to the public, including native Hawaiians, on the same terms, conditions, restrictions and uses applicable to the disposition of public lands as provided in chapter 171; provided, that the department may not sell or dispose of such lands in fee simple except as authorized under section 205 of this Act.

(3) The department shall not lease, use, nor dispose of more than twenty thousand (20,000) acres of the area of Hawaiian home lands, for settlement by native Hawaiians, in any calendar five-year period.

(4) The department may, with the approval of the governor and the Secretary of the Interior, in order to consolidate its holdings or to better effectuate the purposes of this Act, exchange the title to available lands for land, publicly owned, of an equal value. All land so acquired by the department shall assume the status of available lands as though the same were originally designated as such under section 203 hereof, and all lands so conveyed by the department shall assume the status of the land for which it was exchanged. The limitations imposed by section 73 (l) of the Hawaiian Organic Act and the land laws of Hawaii as to the area and value of land that may be conveyed by way of exchange shall not apply to exchanges made pursuant hereto. No such exchange shall be made without the approval of two-thirds of the members of the board of land and natural resources. [Am Mar. 27, 1928, c 142, §1, 45 Stat 246; Jul. 10, 1937, c 482, 50 Stat 503; Feb. 20, 1954, c 10, §1, 68 Stat 16; Jun. 18, 1954, c 319, §1, 68 Stat 262; am L 1963, c 207, §§2, 5(b); am L 1965, c 271, §1; am L 1976, c 24, §1]

§205. [Sale or lease, limitations on.] Available lands shall be sold or leased only (1) in the manner and for the purposes set out in this title, or (2) as may be necessary to complete any valid agreement of sale or lease in effect at the time of the passage of this Act; except that such limitations shall not apply to the unselected portions of lands from which the department has made a selection and given notice thereof, or failed so to select and give notice within the time limit, as provided in paragraph (3) of section 204 of this title.*

§206. [Other officers not to control Hawaiian home lands; exception.] The powers and duties of the governor and the board of land and natural

*See last paragraph of this section as added by Act of June 3, 1948, c 397, 62 Stat. 303.

*The reference was to paragraph (3) of section 204 as originally enacted, which fixed a period of eight years after the first meeting of the commission [department]. The first meeting was held September 20, 1921. [Am L 1963, c 207, §2]

resources, in respect to lands of the State, shall not extend to lands having the status of Hawaiian home lands, except as specifically provided in this title. [Am L 1963, c 207, §5(a) (b)]

§207. [Leases to Hawaiians, licenses.] (a) The department is authorized to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands within the following acreage limits per each lessee: (1) not less than one nor more than forty acres of agricultural lands; or (2) not less than one hundred nor more than five hundred acres of first-class pastoral lands; or (3) not less than two hundred and fifty nor more than one thousand acres of second-class pastoral lands; or (4) not less than forty nor more than one hundred acres of irrigated pastoral lands; (5) not more than one acre of any class of land to be used as a residence lot: provided, however, that, in the case of any existing lease of a farm lot in the Kalanianaole Settlement on Molokai, a residence lot may exceed one acre but shall not exceed four acres in area, the location of such area to be selected by the lessee concerned: provided further, that a lease granted to any lessee may include two detached farm lots located on the same island and within a reasonable distance of each other, one of which, to be designated by the department, shall be occupied by the lessee as his home, the gross acreage of both lots not to exceed the maximum acreage of an agricultural or pastoral lot, as the case may be, as provided in this section.*

(b) The title to lands so leased shall remain in the [State]. Applications for tracts shall be made to and granted by the department, under such regulations, not in conflict with any provisions of this title, as the department may prescribe. The department shall, whenever tracts are available, enter into such a lease with any applicant who, in the opinion of the department, is qualified to perform the conditions of such lease.

(c) (1) The department is authorized to grant licenses for terms of not to exceed twenty-one years in each case, to public utility companies or corporations as easements for railroads, telephone lines, electric power and light lines, gas mains, and the like. The department is also authorized to grant licenses for lots within a district in which lands are leased under the provisions of this section, to–

(A) churches, hospitals, public schools, post offices, and other improvements for public purposes;

(B) theaters, garages, service stations, markets, stores, and other mercantile establishments (all of which shall be owned by lessees of the department or by organizations formed and controlled by said lessees).

(2) The department is also authorized, with the approval of the governor, to grant licenses to the United States for terms not to exceed five years, for reservations, roads, and other rights-of-way, water storage and distribution facilities, and practice target ranges: provided, that any such license may be extended from time to time by the department, with the approval of the governor, for additional terms of three years: provided further, that any such license shall not restrict the areas required by the department in carrying on its duties, nor interfere in any way with the department's operation on maintenance activities. [Am Feb. 3, 1923, c 56, §1, 42 Stat 1222; May 16, 1934, c 290, §2, 48 Stat 779; Jul. 10, 1937, c 482, 50 Stat 504; May 31, 1944, c 216, §§3, 4, 58 Stat 264; Jun. 14, 1948, c 464, §§1, 2, 62 Stat 390; Jun. 18, 1954, c 321, §1, 68 Stat 263; Aug 23, 1958, Pub L 85-733, 72 Stat 822; am L 1963, c 207, §2]

§208. Conditions of leases. Each lease made under the authority granted the department by the provisions of section 207 of this title, and the tract in respect to which the lease is made, shall be deemed subject to the following conditions, whether or not stipulated in the lease:

(1) The original lessee shall be a native Hawaiian, not less than twenty-one years of age. In case two lessees either original or in succession marry, they shall choose the lease to be retained, and the remaining lease shall be transferred or cancelled in accordance with the provisions of succeeding sections.

(2) The lessee shall pay a rental of one dollar a year for the tract and the lease shall be for a term of ninety-nine years.

(3) The lessee shall occupy and commence to use or cultivate the tract as his home or farm within one year after the lease is made. The lessee of agricultural lands shall plant and maintain not less than five, ten, fifteen and twenty trees per acre of land leased and the lessee of pastoral lands shall plant and maintain not less than two, three, four, and five trees per acre of land leased during the first, second, third and fourth years, respectively, after the date of lease. Such trees shall be of types approved by the department and at locations specified by the department's agent. Such planting and maintenance shall be by or under the immediate control and direction of the lessee. Such trees shall be furnished by the department free of charge.

(4) The lessee shall thereafter, for at least such part of each year as the department shall by regulation prescribe, so occupy and use or cultivate the tract on his own behalf.

(5) The lessee shall not in any manner transfer to, or mortgage, pledge, or otherwise hold for the benefit of, any other person or group of persons or organizations of any kind, except a native Hawaiian or Hawaiians, and then only upon the approval of the department, or agree so to transfer, mortgage, pledge, or otherwise hold, his interest in the tract. Such interest shall not, except in pursuance of such a transfer, mortgage, or pledge to or holding for or agreement with a native Hawaiian or Hawaiians approved of by the department, or for any indebtedness due the department or for taxes, or for any other indebtedness the payment of which has been assured by the department, including loans from governmental agencies where such loans have been approved by the department, be subject to attachment, levy, or sale upon court process. The lessee shall not sublet his interest in the tract or improvements thereon.

(6) The lessee shall pay all taxes assessed upon the tract and improvements thereon. The department may in its discretion pay such taxes and have a lien therefor as provided by section 216 of this act.

(7) The lessee shall perform such other conditions, not in conflict with any provision of this title, as the department may stipulate in the lease: provided, however, that an original lessee shall be exempt from all taxes for the first seven years from date of lease.

(8) The department may assure the repayment of loans made by governmental agencies or by private lending institutions, defined as banks, building or savings and loan associations, trustees, guardians, trust companies, insurance companies, fiduciaries, and all other persons or organizations having moneys to invest, to lessees when such loans have been approved by the department, up to the limits prescribed in section 215; provided that the lessee has no indebtedness due the department and the department shall not make any loans to the lessee while such assured loans are outstanding; provided further that upon receipt of notice of default in the payment of such assured loans, the department may, upon failure of the lessee to cure the default within 60 days, cancel the lease and thereupon use its best efforts to redispose of the tract to a qualified and responsible native Hawaiian or Hawaiians as a new lessee who will assume the obligation of the outstanding debt thereby assured, and make payments to the governmental agency or the private lending institution from available funds either for the monthly payments as they become due and payable or for the amount of the debt. In no event shall the aggregate amount assured by the department exceed $8,000,-000. [Am Jul. 10, 1937, c 482, 50 Stat 504; Nov. 26, 1941, c 544, §2, 55 Stat 783; Aug. 21, 1958, Pub L 85-710, 72 Stat 706; am L 1963, c 207, §2; am L 1967, c 146, §§1, 2; am L 1973, c 66, §1; am L 1974, c 175, §1]

§209. [Successors to lessees.] (1) Upon the death of the lessee, his interest in the tract or tracts and the improvements thereon, including growing crops (either on the tract or in any collective contract or program to which the lessee is a party by virtue of his interest in the tract or tracts), shall vest in the relatives of the decedent as provided in this paragraph. From the following relatives of the lessee, husband and wife, children, widows or widowers of the children, grandchildren, brothers and sisters, widows or widowers of the brothers and sisters, or nieces and nephews,–the lessee shall designate the person or persons to whom he directs his interest in the tract or tracts to vest upon his death. Such person or persons must be qualified to be a lessee of Hawaiian home lands: provided, that Hawaiian blood requirements shall not apply to the descendants of those who are not native Hawaiians but who were entitled to the leased lands under the provisions of section 3 of the Act of May 16, 1934 (48 Stat. 777, 779), as amended: provided, further, that such person or persons need not be twenty-one years of age. Such designation must be in writing, must be specified at the time of execution of such lease with a right in such lessee in similar manner to change such beneficiary at any time and shall be filed with the department and approved by the department in order to be effective to vest such interests in the successor or successors so named.

In the absence of such a designation as approved by the department, the department shall select from the relatives of the lessee in order named above as limited by the foregoing paragraph one or more persons who are qualified to be lessees of Hawaiian home lands, except as hereinabove provided, as the successor or successors of the lessee's interest in the tract or tracts, and upon the death of the lessee, his interest shall vest in the person or persons so selected. The department may select such a successor or successors after the death of the lessee, and the rights to the use and occupancy of the tract or tracts may be made effective as of the date of the death of such lessee.

*The text of subsection (a) as amended by L 1976, c 23, to be effective with the consent of the United States, reads: (a) The department is authorized to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands within the following acreage limits per each lessee: (1) not less than one nor more than forty acres of agriculture lands; or (2) not less than one hundred nor more than five hundred acres of first-class pastoral lands; or (3) not less than two hundred and fifty nor more than one thousand acres of second-class pastoral lands; or (4) not less than forty nor more than one hundred acres of irrigated pastoral lands; (5) not more than one acre of any class of land to be used as a residence lot; provided, however, that, in the case of any existing lease of a farm lot in the Kalanianaole Settlement on Molokai, a residence lot may exceed one acre but shall not exceed four acres in area, the location of such area to be selected by the department; provided further, that a lease granted to any lessee may include two detached farm lots located on the same island and within a reasonable distance of each other, one of which, to be designated by the department, shall be occupied by the lessee as his home, the gross acreage of both lots not to exceed the maximum acreage of an agricultural or pastoral lot, as the case may be, as provided in this section; provided further, that the department may designate the location of the homesite on residence lots less than 10,000 square feet.

In the case of the death of a lessee leaving no such relative qualified to be a lessee of Hawaiian home lands, the land subject to the lease shall resume its status as unleased Hawaiian home lands and the department is authorized to lease such land to a native Hawaiian or Hawaiians as provided in this Act.

Upon the death of a lessee leaving no such relative qualified to be a lessee of Hawaiian home lands, or the cancellation of a lease by the department, or the surrender of a lease by the lessee, the department shall appraise the value of all such improvements and growing crops and shall pay to the legal representative of the deceased lessee, or to the previous lessee, as the case may be, the value thereof, less any indebtedness to the department, or for taxes, or for any other indebtedness the payment of which has been assured by the department, from the deceased lessee or the previous lessee. Such payments shall be made out of the loan fund and shall be considered an advance therefrom reimbursable out of payments made by the successor or successors to the tract involved.

Such appraisal shall be made by three appraisers, one of which shall be named by the department, one by the previous lessee or the legal representative of the deceased lessee, as the case may be, and the third shall be selected by the two appraisers hereinbefore mentioned.

(2) After the cancellation of a lease by the department in accordance with the provisions of sections 210 and 216 of this title, or the surrender of a lease by a lessee, the department is authorized to transfer the lease or to issue a new lease to any qualified Hawaiian regardless of whether or not he is related in any way by blood or marriage to the previous lessee.

(3) Should any successor or successors to a tract be a minor or minors, the department may appoint a guardian therefor, subject to the approval of the court of proper jurisdiction. Such guardian shall be authorized to represent the successor or successors in all matters pertaining to the leasehold: provided, that said guardian shall, in so representing such successor or successors, comply with the provisions of this title and the stipulations and provisions contained in the lease, except that said guardian may not be a native Hawaiian as defined in section 201 of this title. [Am Jul. 10, 1937, c 482, 50 Stat 504; Nov. 26, 1941, c 544, §3, 55 Stat 783; Jul. 9, 1952, c 614, §4, 66 Stat 514; am L 1963, c 207, §2]

§210. [Cancellation of leases.] Whenever the department has reason to believe that any condition enumerated in section 208, or any provision of section 209, of this title has been violated, the department shall give due notice and afford opportunity for a hearing to the lessee of the tract in respect to which the alleged violation relates or to the successor of the lessee's interest therein, as the case demands. If upon such hearing the department finds that the lessee or his successor has violated any condition in respect to the leasing of such tract, the department may declare his interest in the tract and all improvements thereon to be forfeited and the lease in respect thereto canceled, and shall thereupon order the tract to be vacated within a reasonable time. The right to the use and occupancy of the Hawaiian home lands contained in such tract shall thereupon revest in the department and the department may take possession of the tract and the improvements thereon. [Am L 1963, c 207, §2]

§211. [Community pastures.] The department shall, when practicable, provide from the Hawaiian home lands a community pasture adjacent to each district in which agricultural lands are leased, as authorized by the provisions of section 207 of this title. [Am L 1963, c 207, §2]

§212. [Lands returned to control of board of land and natural resources.] The department may return any Hawaiian home lands not leased as authorized by the provisions of section 207 of this title to the control of the board of land and natural resources. Any Hawaiian home lands so returned shall, until the department gives notice as hereinafter in this section provided, resume and maintain the status of public lands in accordance with the provisions of the [Hawaii Revised Statutes], except that any such lands may be disposed of under a general lease only. Each such lease, whether or not stipulated therein, shall be deemed subject to the right and duty of the board of land and natural resources to terminate the lease and return the lands to the department whenever the department, with the approval of the Secretary of the Interior, gives notice to the board that the department is of the opinion that the lands are required by it for leasing as authorized by the provisions of section 207 of this title or for a community pasture. [Am L 1963, c 207, §§2, 5(b)]

§213. Hawaiian home-loan fund; Hawaiian home-development fund; Hawaiian home-operating fund; administration account; Hawaiian home-farm loan fund; Hawaiian home-commercial loan fund; Hawaiian home-repair loan fund; Anahola-Kekaha loan fund; Hawaiian loan guarantee fund; Papakolea home-replacement loan fund; Keaukaha-Waiakea home-replacement loan fund; Keaukaha-Waiakea home-construction fund; the statewide replacement loan fund; and the Hawaiian home general home loan fund. (a) There are hereby established in the treasury of the State eleven revolving funds to be known as the Hawaiian home-loan fund, the Hawaiian home-operating fund, the Hawaiian home-farm loan fund, the Hawaiian home-commercial loan fund, the Hawaiian home-repair loan fund, the Anahola-Kekaha loan fund, the Papakolea home-replacement loan fund, the Keaukaha-Waiakea home-replacement loan fund, the Keaukaha-Waiakea home-construction fund, statewide replacement loan fund, and the Hawaiian home general home loan fund, and three special funds to be known as the Hawaiian home-development fund, the Hawaiian home-administration account, and the Hawaiian loan guarantee fund.

(b) Hawaiian home-loan fund. Thirty per cent of the state receipts derived from the leasing of cultivated sugar-cane lands under any other provisions of law or from water licenses, shall be deposited into the Hawaiian home-loan fund until the aggregate amount of the fund (including in such amount the principal of all outstanding loans and advances, and all transfers which have been made from this fund to other funds for which this fund has not been or need not be reimbursed) shall equal $5,000,000. In addition to these moneys, there shall be covered into the loan fund the installments of principal paid by lessees upon loans made to them as provided in section 215(2), or as payments representing reimbursements on account of advances made pursuant to section 209(1), but not including interest on such loans or advances. The moneys in the fund shall be available only for loans to lessees as provided for in this Act, and for the payments provided for in section 209(1), and shall not be expended for any other purpose whatsoever, except as provided in subsections (c) and (d) of this section.

Thirty per cent of the state receipts derived from the leasing of cultivated sugar-cane lands under any other provisions of law or from water licenses, over and above the present ceiling in the Hawaiian home-loan fund of $5,000,000, which additional amount is hereinafter called "Additional Receipts", shall be deposited into a special revolving account within the Hawaiian home-loan fund until the aggregate amount of the Additional Receipts so deposited (including the principal and advances made from the Additional Receipts but not from moneys borrowed under (6) hereinbelow, and all transfers which have been made from the Additional Receipts to other funds for which this fund has not been or need not be reimbursed) shall equal $5,000,000. In addition to these moneys there shall be covered into the special revolving account of the loan fund, moneys borrowed under (6) hereinafter, installments of principal and interest paid by borrowers upon loans from the special revolving account, whether from the Additional Receipts or such borrowed moneys. To the extent as stated hereinafter, the Additional Receipts shall be repaid to the general fund of the State upon proper action by the legislature directing repayment.

Eighty-five per cent of the annual Additional Receipts, hereinafter called the "Additional Receipts - Development Fund Portion", is to be transferred to the Hawaiian home-development fund, to be used in accordance with the amended provisions of subsection (c) of this section.

Fifteen per cent of the annual Additional Receipts, hereinafter called the "Additional Receipts - Loan Fund Portion," shall be retained in the special revolving fund and be used for and in connection with the repair or maintenance or purchase or erection or improvement of dwellings on either Hawaiian home lands or non-Hawaiian home lands, whether owned or leased. In furtherance of the purposes herein, the department may do any one or more of the following, with moneys from the Additional Receipts - Loan Fund Portion and any borrowed moneys under (6) hereinbelow:

(1) The department may extend the benefits of the special revolving account only to native Hawaiians as defined in the Act;

(2) The department may loan, or guarantee the repayment of or otherwise underwrite any authorized loan, up to a maximum of $35,000; provided, that where, upon the death of a lessee living on Hawaiian home lands who leaves no relatives qualified to be a lessee on Hawaiian home lands, or the cancellation of a lease by the department, or the surrender of a lease by the lessee, the department shall be authorized to make payment and to permit assumption of loan in excess of $35,000 under and in accordance with the provisos of section 215(1), subject, as stated, to the provisions of section 215(3);

(3) Where the dwelling is on Hawaiian home lands, anything in the Act to the contrary notwithstanding, either the department, other governmental agencies, or private lending institutions may make loans, and the loans made in connection with the repair or maintenance or purchase or erection or improvement of dwellings shall be subject to, all applicable provisions of the Act, including but not limited to the provisions of sections 207, 208, 209, 210, 215, 216, and 217, and to such legislative amendments of the Act herein or hereafter enacted, provided such amendments do not change the qualifications of lessees or constitute a reduction or impairment of the Hawaiian home-loan fund, Hawaiian home-operating fund or Hawaiian home-development fund or otherwise require the consent of the United States. Loans made to lessees by governmental agencies or private lending institutions shall be approved by the department, and the department may assure the payment of such loans, provided that the department shall reserve the following rights, among others: the right of succession to the lessee's interest and assumption of the contract of loan; right to require that written notice be given to the department immediately upon default or delinquency of the lessee; and any other rights necessary to protect the monetary and other interests of the department;

(4) Where the dwelling is on non-Hawaiian home lands, anything in the Act to the contrary notwithstanding, either the department, other governmental agencies, or private lending institutions may make loans, and in connection with such loans, the department shall be governed by, and the loans made in connection with the repair or maintenance or purchase or erection or improvement of dwellings shall be subject to, such terms and conditions as the department may, by rules and regulations not inconsistent with the provisions of this legislative amendment to such Act, promulgate; provided, the department shall require any loan made or guaranteed or otherwise underwritten to be secured adequately and suitably by a first or second mortgage or other securities;

(5) The department shall establish interest rate or rates at two and one-half per cent a year or higher, in connection with authorized loans on Hawaiian home lands or non-Hawaiian home lands;

(6) The department may borrow and deposit into the special revolving account for the purposes of repairing or maintaining or purchasing or erecting or improving dwellings on Hawaiian home lands and non-Hawaiian home lands and related purposes as provided for in the second paragraph of (8) hereinafter, from governmental agencies or private lending institutions and if necessary in connection therewith, to pledge, secure, or otherwise guarantee the repayment of moneys borrowed with all or a portion of the estimated sums of Additional Receipts for the next ensuing ten years from the date of borrowing, less any portion thereof previously encumbered for similar purposes;

(7) The department may purchase or otherwise acquire, or agree so to do, before or after default, any notes and mortgages or other securities covering loans made by other governmental agencies or by private lending institutions to native Hawaiians or guarantee the repayment of or otherwise underwrite the loans and accept the assignment of any notes and mortgages or other securities in connection therewith;

(8) The department may exercise the functions and reserved rights of a lender of money or mortgagee of residential property in all direct loans made by the department with funds from the Additional Receipts - Loan Fund Portion or with funds borrowed under (6) hereinabove (but not with funds from the original $5,000,000, unless such exercise is authorized by the Act), or in all loans made by other governmental agencies or by private lending institutions to native Hawaiians. The functions and reserved rights shall include but not be limited to, the purchasing, repurchasing, servicing, selling, foreclosing, buying upon foreclosure, guaranteeing the repayment, or otherwise underwriting, of any loan, protecting of security interest, and after foreclosure, the repairing, renovating, or modernization and sale of the property covered by the loan and mortgage, to achieve the purposes of this program while protecting the monetary and other interests of the department.

The Additional Receipts - Loan Fund Portion, less any amounts thereof utilized to pay the difference in interest rates, discounts, premiums, necessary loan processing expenses, and other expenses authorized in this legislative amendment, are subject to repayment to the general fund upon appropriate legislative action or actions directing whole or partial repayment.

(c) Hawaiian home-development fund. Twenty-five per cent of the *amount of* moneys covered into the Hawaiian *home-loan fund annually shall be* transferred into the Hawaiian home-development fund. The moneys in such development fund shall be available, with the prior written approval of the governor, for off-site improvements and development; for improvements, additions and repairs to all assets as structures and buildings owned by the department excluding, however, such structures or improvements that the department shall be required to acquire under section 209 of this Act; for engineering and architectural planning to maintain and develop properties; for purchase of equipment of every kind and nature as the department shall deem necessary or proper for its use; for nonrevenue producing improvements to fulfill the intent of the Act not permitted in the various loan funds, the administration account or the operating fund.

With respect to the Additional Receipts - Development Fund Portion, fifteen per cent thereof shall be used, with the prior written approval of the governor, for off-site improvements and development; for improvements, additions and repairs to all assets as structures and buildings owned by the department excluding, however, such structures or improvements that the department shall be required to acquire under section 209 of this Act; for engineering and architectural planning to maintain and develop properties; for purchase of equipment of every kind and nature as the department shall deem necessary or proper for its use; for nonrevenue producing improvements to fulfill the intent of the Act not permitted in the various loan funds, the administration account or the operating fund, and the remaining eighty-five per cent shall be segregated into a special account which may be drawn upon from time to time by the department of education, with prior written approval of the governor, for such educational projects as shall be developed and directed by the department of education after consultation with the University of Hawaii and the department of Hawaiian home lands; provided that such projects shall be directed primarily to the educational improvement of the children of the lessees, the funds to be used primarily at the preschool and elementary grade levels.

Only so much of the Additional Receipts - Development Fund Portion not encumbered at the time of appropriate legislative action directing repayment, shall be repaid to the general fund of the State.

(d) Hawaiian home-operating fund. All moneys received by the department *from any other source, except moneys received from the Hawaiian home-*administration account, shall be deposited in a revolving fund to be known as the Hawaiian home-operating fund. The moneys in such fund shall be available (1) for construction and reconstruction of revenue-producing improvements, including acquisition therefor of real property and interests therein, such as water rights or other interests; (2) for payment into the treasury of the State of such amounts as are necessary to meet the following charges for state bonds issued for such revenue-producing improvements, to wit, the interest on such bonds, and the principal of such serial bonds maturing the following year; (3) for operation and maintenance of such improvements, heretofore or hereafter constructed from such funds or other funds; and (4) for the purchase of water or other utilities, *goods, commodities, supplies, or equipment and for services, to be resold, rented,* or furnished on a charge basis to occupants of Hawaiian home lands. The moneys in the fund may be supplemented by other funds available for, or appropriated by the legislature for, the same purposes. In addition to such moneys, the fund, with the approval of the governor, may be supplemented by transfers made on a loan basis from the home-loan fund. The amounts of all such transfers shall be repaid into the home-loan fund in not exceeding ten annual installments, and the aggregate amount of such transfers outstanding at any one time shall not exceed $500,000. No projects or activities shall be undertaken hereunder except as authorized by sections 220 and 221 or the other provisions of this Act.

(e) Match moneys. The department is authorized and empowered to use *moneys in the development and operating funds, with the prior written approval* of the governor, to match federal, state, or county funds available for the same purposes and to that end is authorized to enter into such undertaking, agree to such conditions, transfer funds therein available for such expenditure, and do and perform such other acts and things, as may be necessary or required, as a condition to securing match funds for such projects or works.

(f) Hawaiian home-administration account. The entire receipts derived from any leasing of the available lands defined in section 204 shall be deposited into the Hawaiian home-administration account. The moneys in such account shall be expended by the department for salaries and all other administrative expenses of the department, not including structures and other permanent improvements, subject, however, to the following conditions and requirements:

(1) The department shall, at such time as the governor may prescribe, but not later than November 15, preceding each regular session of the legislature, submit to the state director of finance its budget estimates of expenditures for the next ensuing (fiscal period) in the manner and form and as required by state law of state departments and establishments.

(2) The department's budget, if it meets with the approval of the governor, shall be included in the governor's budget report and shall be transmitted to the legislature for its approval.

(3) Upon approval by the legislature of the department's budget estimate of expenditures for the ensuing (fiscal period) the amount thereof shall be available to the department for the (fiscal period) and shall be expendable by the department for the expenses hereinabove provided, or, if no action on the budget is taken by the legislature prior to adjournment, the amount submitted to the legislature, but not in excess of $200,000, shall be available for such expenditures; any amount of money in said account in excess of the amount approved by the legislature for the (fiscal period) or so made available shall be transferred to the Hawaiian home-development fund, such transfer to be made immediately after the amount of moneys deposited in the administration account shall equal the amount approved by the legislature or so made available.

(4) The money in the administration account shall be expended by the department in accordance with state laws, rules, and regulations and practices.

(g) Hawaiian home-farm loan fund. The department shall create a fund of $500,000 out of moneys heretofore appropriated to it by the legislature to beknown as the "farm loan fund". The moneys in this fund shall be used to make loans to lessees of agricultural tracts leased under the provisions of section 207 of this Act. Such loans shall be subject to restrictions imposed by sections 214 and 215 of this Act.

(h) Hawaiian home-commercial loan fund. The department is authorized to create a fund out of which loans may be made to those holding licenses issued under section 207 of this Act. The loans shall be for theaters, garages, service stations, markets, stores, and other mercantile establishments and these shall all *be owned by lessees or by organizations formed and controlled by the lessees.* The loans shall be subject to the restrictions imposed by sections 214 and 215 of this Act.

(i) Hawaiian home-repair loan fund. The department shall create a fund of $500,000 out of moneys heretofore appropriated to it by the legislature to be known as the Hawaiian home-repair loan fund. The moneys in this fund shall be used to make loans in amounts not in excess of $10,000 to lessees for repairs to their existing homes and for additions to such homes. Such loans shall be subject to restrictions imposed by sections 214 and 215 of this Act.

(j) Anahola-Kekaha fund. The department shall create a fund of $121,500 out of moneys heretofore appropriated to it by the legislature to be known as the Anahola-Kekaha fund. The moneys in this fund shall be used to make loans to lessees who are residents of Anahola and Kekaha on the island of Kauai to construct homes upon their residence lots. Such loans shall be subject to the restrictions imposed by sections 214 and 215 of this Act.

(k) The Hawaiian loan guarantee fund. The department is authorized to create a fund to support, if necessary, its guarantee of repayment of loans made by governmental agencies or by private lending institutions to those holding leases or licenses issued under section 207 of this Act. The loan guarantees shall be subject to the restrictions imposed by sections 208, 214, and 215 of this Act. The department's guarantee of repayment shall be adequate security for a loan under any state law prescribing the nature, amount, or form of security or requiring security upon which loans may be made.

(l) Papakolea home-replacement loan fund. The department shall create a fund of $200,000 out of moneys heretofore appropriated to it by the legislature to be known as the Papakolea home-replacement loan fund. The moneys in this fund shall be used to make loans to lessees who are residents of Papakolea on the island of Oahu to construct replacement homes upon their residence lots. Such loans shall be subject to the restrictions imposed by sections 214 and 215 of this Act.

(m) Keaukaha-Waiakea home-replacement loan fund. The department is authorized to create a fund to be known as the Keaukaha-Waiakea home-replacement loan fund. The moneys in this fund shall be used to make loans to lessees who are residents of Keaukaha-Waiakea on the island of Hawaii to construct replacement homes upon their residence lots. Such loans shall be subject to the restrictions imposed by sections 214 and 215 of this Act.

(n) Keaukaha-Waiakea home-construction fund. The department is authorized to create a fund to be known as the Keaukaha-Waiakea home-construction fund. The moneys in this fund shall be used to make loans to lessees to construct homes upon their vacant residence lots. Such loans shall be subject to the restrictions imposed by sections 214 and 215 of this Act.

(o) Statewide replacement loan fund. The department shall create a fund of $5,250,000 out of moneys heretofore appropriated to it by the legislature to be known as the Statewide replacement loan fund. The moneys in this fund shall be used to make loans to lessees to construct replacement homes upon their residence lots. Such loans shall be subject to the restrictions imposed by sections 214 and 215 of this Act.

(p) Hawaiian home general home loan fund. The department shall create a fund to be known as the Hawaiian home general home loan fund. Funds appropriated by the legislature for the construction of homes but not otherwise set aside for a particular fund shall be deposited to this fund. The moneys in this fund shall be used to make loans to lessees for the purposes set forth by the legislature in the enactment appropriating said funds. Such loans shall be subject to the restrictions imposed by sections 214 and 215 of this Act. [Am Feb. 3, 1923, c 56, §2, 42 Stat 1222; Mar. 7, 1928, c 142, §2, 45 Stat 246; Nov. 26, 1941, c 544, §4, 55 Stat 784; Jun. 14, 1948, c 464, §3, 62 Stat 390; Jul. 9, 1952, c 615, §§1, 2, 66 Stat 514; Aug. 21, 1958, Pub L 85-708, 72 Stat 705; am L 1959 1st, c 13, §2; am L 1961, c 183, §2; am L 1963, c 114, §5 and c 207, §§2, 5(a); am L 1965, c 4, §§1, 2; am L 1967, c 146, §3; L 1969, c 114, §1 and c 259, §1; am L 1972, c 76, §1; am L 1973, c 130, §1 and c 220, §1; am L 1974, c 170, §1, c 172, §1, c 174, §1, c 175, §§2, 3 and c 176, §2; am L 1976, c 72, §1]

§214. Loans, purposes of. The department is hereby authorized to make loans from revolving funds to the lessee of any tract, the successor to his interest therein or any agricultural cooperative association all of whose members are lessees. Such loans may be made for the following purposes:

(1) The repair or maintenance or purchase or erection of dwellings on any tract and the undertaking of other permanent improvements thereon;

(2) The purchase of livestock and farm equipment;

(3) Otherwise assisting in the development of tracts and of farm and ranch operations;

(4) The cost of breaking up, planting and cultivating land and harvesting crops, the purchase of seeds, fertilizers, feeds, insecticides, medicines and chemicals for disease and pest control for animals and crops, and related supplies required for farm and ranch operations, the erection of fences and other permanent improvements for farm or ranch purposes and the expense of marketing; and

(5) To assist lessees in the operation or erection of theaters, garages, service stations, markets, stores, and other mercantile establishments, all of which shall be owned by lessees of the department or by organizations formed and controlled by said lessees. [Am L 1962, c 14, §3; am L 1963, c 207, §2; am L 1969, c 259, §2; am L 1972, c 76, §2]

§215. Conditions of loans. Except as otherwise provided in section 213(i), each contract of loan with the lessee or any successor or successors to his interest in the tract or with any agricultural or mercantile cooperative association composed entirely of lessees shall be held subject to the following conditions whether or not stipulated in the contract loan:

(1) At any one time, the outstanding amount of loans made to any lessee, or successor or successors in interest, for the repair, maintenance, purchase, and erection of a dwelling and related permanent improvements shall not exceed $35,000, for the development and operation of a farm or a ranch shall not exceed $35,000, except that when loans are made to an agricultural cooperative association for the purposes stated in paragraph (4) of section 214, the loan limit shall be determined by the department on the basis of the proposed operations and the available security of the association, and for the development and operation of a mercantile establishment shall not exceed the loan limit determined by the department on the basis of the proposed operations and the available security of the lessee or of the organization formed and controlled by lessees; provided, that where, upon the death of a lessee leaving no relative qualified to be a lessee of Hawaiian home lands, or the cancellation of a lease by the department, or the surrender of a lease by the lessee, the department shall make the payment provided for by section 209(1), the amount of any such payment made to the legal representative of the deceased lessee, or to the previous lessee, as the case may be, shall be considered as part or all, as the case may be, of any such loan to the successor or successors, without limitation as to the above maximum amounts; provided, further, that in case of the death of a lessee, or cancellation of a lease by the department, or the surrender of a lease by the lessee, the successor or successors to the tract shall assume any outstanding loan or loans thereon, if any, without limitation as to the above maximum amounts but subject to paragraph (3) of this section.

(2) The loans shall be repaid in periodic installments, such installments to be monthly, quarterly, semi-annual, or annual as may be determined by the department in each case. The term of any loan shall not exceed thirty years. Payments of any sum in addition to the required installments, or payment of the entire amount of the loan, may be made at any time within the term of the loan. All unpaid balances of principal shall bear interest at the rate of two and one-half per cent a year for loans made directly from the Hawaiian home-loan fund, or at the rate of two and one-half per cent or higher as established by law for other loans, payable periodically or upon demand by the department, as the department may determine. The payment of any installment due shall be postponed in whole or in part by the department for such reasons as it deems good and sufficient and until such later date as it deems advisable. Such postponed payments shall continue to bear interest on the unpaid principal at the rate established for the loan.

(3) In the case of the death of a lessee the department shall, in any case, permit the successor or successors to the tract to assume the contract of loan subject to paragraph (1) of this section. In case of the cancellation of a lease by the department or the surrender of a lease by the lessee, the department may, at its option declare all installments upon the loan immediately due and payable, or permit the successor or successors to the tract to assume the contract of loan subject to paragraph (1) of this section. The department may, in such cases where the successor or successors to the tract assume the contract of loan, waive the payment, wholly or in part, of interest already due and delinquent upon said loan, or postpone the payment of any installment thereon, wholly or in part, until such later date as it deems advisable. Such postponed payments shall, however, continue to bear interest on the unpaid principal at the rate established for the loan. Further, the department may, if it deems it advisable and for the best interests of the lessees, write off and cancel, wholly or in part, the contract of loan of the deceased lessee, or previous lessee, as the case may be, where such loans are delinquent and deemed uncollectible. Such write-off and cancellation shall be made only after an appraisal of all improvements and growing crops on the tract involved, such appraisal to be made in the manner and as provided for by section 209(1). In every case, the amount of such appraisal, or any part thereof, shall be considered as part or all, as the case may be, of any loan to such successor or successors, subject to paragraph (1) of this section.

(4) No part of the moneys loaned shall be devoted to any purpose other than those for which the loan is made.

(5) The borrower or the successor to his interest shall comply with such other conditions, not in conflict with any provision of this title, as the department may stipulate in the contract of loan.

(6) The borrower or the successor to his interest shall comply with the conditions enumerated in section 208, and with the provisions of section 209 of this title in respect to the lease of any tract.

(7) Whenever the department shall determine that a borrower is delinquent in the payment of any indebtedness to the department, it may require such borrower to execute an assignment to it, not to exceed, however, the amount of the total indebtedness of such borrower, including the indebtedness to others the payment of which has been assured by the department of all moneys due or to become due to such borrower by reason of any agreement or contract, collective or otherwise, to which the borrower is a party. Failure to execute such an assignment when requested by the department shall be sufficient ground for

cancellation of the borrower's lease or interest therein. [Am Feb. 3, 1923, c 56, §3, 42 Stat 1222; Jul. 10, 1937, c 482, 50 Stat 505; Nov. 26, 1941, c 544, §5, 55 Stat 785; Jun. 14, 1948, c 464, §§4, 5, 62 Stat 392; Jul. 9, 1952, c 615, §§3, 4, 66 Stat 514; am L 1962, c 14, §4 and c 18, §2; am L 1963, c 207, §§2, 3; am L 1968, c 29, §2; am L 1972, c 76, §3; am L 1974, c 173, §1; am L 1976, c 72, §2]

§216. Insurance by borrowers; acceleration of loans; lien and enforcement thereof. The department may require the borrower to insure, in such amount as the department may prescribe, any livestock, machinery, equipment, dwellings and permanent improvements purchased or constructed out of any moneys loaned by the department; or, in lieu thereof, the department may directly take out such insurance and add the cost thereof to the amount of principal payable under the loan. Whenever the department has reason to believe that the borrower has violated any condition enumerated in paragraphs (2), (4), (5) or (6) of section 215 of this title, the department shall give due notice and afford opportunity for a hearing to the borrower or the successor or successors to his interest, as the case demands. If upon such hearing the department finds that the borrower has violated the condition, the department may declare all principal and interest of the loan immediately due and payable notwithstanding any provision in the contract of loan to the contrary. The department shall have a first lien upon the borrower's or lessee's interest in any lease, growing crops, either on his tract or in any collective contract or program, livestock, machinery and equipment purchased with moneys loaned by the department, and in any dwellings or other permanent improvements on any leasehold tract, to the amount of all principal and interest due and unpaid and of all taxes and insurance and improvements paid by the department, and of all indebtedness of the borrower, the payment of which has been assured by the department, including loans from governmental agencies where such loans have been approved by the department. Such lien shall have priority over any other obligation for which the property subject to the lien may be security.

The department may, at such times as it deems advisable, enforce any such lien by declaring the borrower's interest in the property subject to the lien to be forfeited, any lease held by the borrower cancelled, and shall thereupon order such leasehold premises vacated and the property subject to the lien surrendered within a reasonable time. The right to the use and occupancy of the Hawaiian home lands contained in such lease shall thereupon revest in the department, and the department may take possession of the premises covered therein and the improvements and growing crops thereon; provided that the department shall pay to the borrower any difference which may be due him after the appraisal provided for in paragraph (1) of section 209 of this title has been made. [Am Jul. 10, 1937, c 482, 50 Stat 506; Jun. 14, 1948, c 464, §6, 62 Stat 393; am L 1962, c 14, §5; am L 1963, c 207, §2; am L 1967, c 146, §4]

§217. [Ejectment, when: loan to new lessee for improvements.] In case the lessee or borrower or the successor to his interest in the tract, as the case may be, fails to comply with any order issued by the department under the provisions of section 210 or 216 of this title, the department may (1) bring action of ejectment or other appropriate proceedings, or (2) invoke the aid of the circuit court of the State for the judicial circuit in which the tract designated in the department's order is situated. Such court may thereupon order the lessee or his successor to comply with the order of the department. Any failure to obey the order of the court may be punished by it as contempt thereof. Any tract forfeited under the provisions of section 210 or 216 of this title may be again leased by the department as authorized by the provisions of section 207 of this title, except that the value, in the opinion of the department, of all improvements made in respect to such tract by the original lessee or any successor to his interest therein shall constitute a loan by the department to the new lessee. Such loan shall be subject to the provisions of this section and sections 215, except paragraph (1), and 216 to the same extent as loans made by the department from the Hawaiian loan fund. [Am L 1963, c 207, §§2, 5(a)]

§218. [Lessees ineligible under "farm loan act".] [Repealed L 1967, c 146, §5]

§219. [Agricultural experts.] The department is authorized to employ agricultural experts at such compensation and in such number as it deems necessary. The annual expenditures for such compensation shall not exceed $6,000. It shall be the duty of such agricultural experts to instruct and advise the lessee of any tract or the successor to the lessee's interest therein as to the best methods of diversified farming and stock raising and such other matters as will tend successfully to accomplish the purposes of this title. [Am L 1963, c 207, §2]

§219.1. General assistance. The department is authorized to carry on any activities it deems necessary to assist the lessees in obtaining maximum utilization of the leased lands, including taking any steps necessary to develop these lands for their highest and best use commensurate with the purposes for which the land is being leased as provided for in section 207, and assisting the lessees in all phases of farming and ranching operations and the marketing of their agricultural produce and livestock. [L 1962, c 14, §6; am imp L 1963, c 207, §2]

§220. [Development projects; appropriations by legislature: bonds issued by legislature.] The department is authorized directly to undertake and carry on general water and other development projects in respect to Hawaiian home lands and to undertake other activities having to do with the economic and social welfare of the homesteaders, including the authority to derive revenue from the sale, to others than homesteaders, of water and other products of such projects or activities, or from the enjoyment thereof by others than homesteaders, where such sale of products or enjoyment of projects or activities by others does not interfere with the proper performance of the duties of the department; provided, however, that roads through or over Hawaiian home lands, other than federal-aid highways and roads, shall be maintained by the county or city and county in which said particular road or roads to be maintained are located. The legislature is authorized to appropriate out of the treasury of the State such sums as it deems necessary to augment the Hawaiian home-loan fund, the Hawaiian home-development fund, the Hawaiian home-operating fund, and the Hawaiian home-administration account, and to provide the department with funds sufficient to execute and carry on such projects and activities. The legislature is further authorized to issue bonds to the extent required to yield the amount of any sums so appropriated for the payment of which, if issued for revenue-producing improvements, the department shall provide, as set forth in section 213(d).

To enable the construction of irrigation projects which will service Hawaiian home lands, either exclusively or in conjunction with other lands served by such projects, the department is authorized, with the approval of the governor, to grant to the [board of land and natural resources], or to any other agency of the government of the State or the United States undertaking the construction and operation of such irrigation projects, licenses for rights-of-way for pipelines, tunnels, ditches, flumes, and other water conveying facilities, reservoirs and other storage facilities, and for the development and use of water appurtenant to Hawaiian home lands; to exchange available lands for public lands, as provided in section 204 (4) of this title, for sites for reservoirs and subsurface water development wells and shafts; to request any such irrigation agency to organize irrigation projects for Hawaiian home lands and to transfer irrigation facilities constructed by the department to any such irrigation agency; to agree to pay the tolls and assessments made against community pastures for irrigation water supplied to such pastures; and to agree to pay the costs of construction of projects constructed for Hawaiian home lands at the request of the department, in the event the assessments paid by the homesteaders upon lands are not sufficient to pay such costs: Provided, that licenses for rights-of-way for the purposes and in the manner specified in this section may be granted for a term of years longer than is required for amortization of the costs of the project or projects requiring use of such rights-of-way only if authority for such longer grant is approved by an act of the legislature of the State. Such payments shall be made from, and be a charge against the Hawaiian home-operating fund. [Am Jul. 10, 1937, c 482, 50 Stat 507; Nov. 26, 1941, c 544, §6, 55 Stat 786; Jun. 14, 1948, c 464, §7, 62 Stat 393; Aug. 1, 1956, c 855, §1, 70 Stat 915; am L 1963, c 207, §§2, 5(a)]

§221. [Water.] (a) When used in this section:

(1) The term "water license" means any license issued by the board of land and natural resources granting to any person the right to the use of government-owned water; and

(2) The term "surplus water" means so much of any government-owned water covered by a water license or so much of any privately owned water as is in excess of the quantity required for the use of the licensee or owner, respectively.

(b) All water licenses issued after the passage of this Act shall be deemed subject to the condition, whether or not stipulated in the license, that the licensee shall, upon the demand of the department, grant to it the right to use, free of all charge, any water which the department deems necessary adequately to supply the livestock or the domestic needs of individuals upon any tract.

(c) In order adequately to supply livestock or the domestic needs of individuals upon any tract, the department is authorized (1) to use, free of all charge, government-owned water not covered by any water license or covered by a water license issued after the passage of this Act or covered by a water license issued previous to the passage of this Act but containing a reservation of such water for the benefit of the public, and (2) to contract with any person for the right to use or to acquire, under eminent domain proceedings similar, as near as may be, to the proceedings provided in respect to land by sections 667 to 678, inclusive, of the Revised Laws of Hawaii 1915 [HRS §§101-10 to 101-34] the right to use any privately owned surplus water or any government-owned surplus water covered by a water license issued previous to the passage of this Act, but not containing a reservation of such water for the benefit of the public. Any such requirement shall be held to be for a public use and purpose. The department may institute the eminent domain proceedings in its own name.

(d) The department is authorized, for the additional purpose of adequately irrigating any tract, to use, free of all charge, government-owned surplus water tributary to the Waimea river upon the island of Kauai, not covered by a water license or covered by a water license issued after July 9, 1921. Any water license issued after that date and covering any such government-owned water shall be deemed subject to the condition, whether or not stipulated therein, that the licensee shall, upon the demand of the department, grant to it the right to use,

free of all charge, any of the surplus water tributary to the Waimea river upon the island of Kauai, which is covered by the license and which the department deems necessary for the additional purpose of adequately irrigating any tract.

Any funds which may be appropriated by Congress as a grant-in-aid for the construction of an irrigation and water utilization system on the island of Molokai designed to serve Hawaiian home lands, and which are not required to be reimbursed to the federal government, shall be deemed to be payment in advance by the department and lessees of the department of charges to be made to them for the construction of such system and shall be credited against such charges when made.

(e) All rights conferred on the department by this section to use, contract for, acquire the use of water shall be deemed to include the right to use, contract for, or acquire the use of any ditch or pipeline constructed for the distribution and control of such water and necessary to such use by the department. [Am Aug. 1, 1956, c 855, §§2, 3, 70 Stat 915; am L 1963, c 207, §§2, 5(b)]

§222 Administration. (a) The department shall adopt rules and regulations and policies in accordance with the provisions of chapter 91, Hawaii Revised Statutes. The department may make such expenditures as are necessary for the efficient execution of the functions vested in the department [by] this Act. All expenditures of the department, as herein provided out of the Hawaiian home-administration account, the Hawaiian home-development fund, or the Hawaiian home-operating fund, and all monies necessary for loans made by the department, in accordance with the provisions of this Act, from the Hawaiian home-loan fund, shall be allowed and paid upon the presentation of itemized vouchers therefor, approved by the chairman of the commission. The department shall make an annual report to the legislature of the State upon the first day of each regular session thereof and such special reports as the legislature may from time to time require. The chairman and members of the commission shall give bond as required by law. The sureties upon the bond and the conditions thereof shall be approved annually by the governor.

(b) When land originally leased by the department is, in turn, subleased by the department's lessee or sublessee, the department shall submit, within ten days of the convening of any regular session, a written report to the legislature which shall cover the sublease transactions occurring in the calendar year prior to the regular session and shall contain the names of the persons involved in the transaction, the size of the area under lease, the purpose of the lease, the land classification of the area under lease, the tax map key number, the lease rental, the reason for approval of the sublease by the department, and the estimated net economic result accruing to the department, lessee and sublessee. [Am Nov. 26, 1941, c 544, §7, 55 Stat 787; Jun. 14, 1948, c 464, §8, 62 Stat 394; am L 1963, c 207, §4; am L 1972, c 173, §1; am L 1977, c 174, §2]

§223. [Right of amendment, etc.] The Congress of the United States reserves the right to alter, amend, or repeal the provisions of this title.

§224. Sanitation and reclamation expert. The Secretary of the Interior shall designate from his Department someone experienced in sanitation, rehabilitation, and reclamation work to reside in the State and cooperate with the department in carrying out its duties. The salary of such official so designated by the Secretary of the Interior shall be paid by the department while he is carrying on his duties in the State. [Add Jul. 26, 1935, c 420, §2, 49 Stat 505; am imp L 1963, c 207, §5(a); am L 1976, c 120, §1]

§225. [Investment of funds; disposition.] The department shall have the power and authority to invest and reinvest any of the moneys in any of its funds, not otherwise immediately needed for the purposes of the funds, in such bonds and securities as authorized by state law for the investment of state sinking fund moneys. Any interest or other earnings arising out of such investment shall be credited to and deposited in the Hawaiian home-operating fund and shall be considered a deposit therein from the other sources mentioned in section 213(d). [Add Nov. 26, 1941, c 544, §8, 55 Stat 787; Jun. 14, 1948, c 464, §9, 62 Stat 394; am L 1963, c 207, §5(a); am L 1965, c 30, §1]

TITLE 3: AMENDMENTS TO HAWAIIAN ORGANIC ACT.

[See the Organic Act.]

TITLE 4: MISCELLANEOUS PROVISIONS.

§401. All Acts or parts of Acts, either of the Congress of the United States or of the State of Hawaii, to the extent that they are inconsistent with the provisions of this Act, are hereby repealed.

§402. If any provision of this Act, or the application of such provision to certain circumstances, is held unconstitutional, the remainder of the Act and the application of such provision to circumstances other than those as to which it is held unconstitutional shall not be held invalidated thereby.