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From

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WILMER, CUTLER & PICKERING  
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WASHINGTON, D. C. 20006

Mr. Lapham.

The attached memorandum has been revised according to Mr. Carter's instructions. Consequently, the memorandum which I sent to you yesterday, April 17, 1973, should be discarded.

Grant Morris

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April 18, 1973

MEMORANDUM TO: Messrs. Willens, Lapin and Carter

RE: Marianas

This memorandum will review the management and disposition of public lands in the Territory of Hawaii under the Hawaiian Organic Act of 1900, as amended,<sup>1/</sup> and the Hawaiian Homes Commission Act of 1920, as amended.<sup>2/</sup>

An analysis of the compact between the United States and Hawaii with respect to control over the Hawaiian Home Lands follows the discussion of the Acts cited above.

Background

The transfer and ownership of all public lands of the Republic of Hawaii to the United States was accomplished by the Hawaii Organic Act of 1900. Subsequently, Congress passed the Hawaiian Homes Commission Act of 1920 which established a "Hawaiian Homes Commission" (hereinafter referred to as the "Commission") to manage the "available" public lands in the Territory of Hawaii. The Hawaiian

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1/ Formerly 48 U.S.C. §§ 663-677.

2/ Formerly 48 U.S.C. §§ 691-716, now contained in Section Four of the Admissions Act and Article XI of the State Constitution of Hawaii. See pp. 7 and 11, infra.

Homes Commission Act was later incorporated into (i) Section Four of the Admission Act of 1959, Pub. L. 86-3, 73 Stat. 4, providing for Admission of the State of Hawaii into the Union, and (ii) Article XI of the Constitution of the State of Hawaii.<sup>3/</sup>

The Hawaiian Organic Act

The possession, control, and disposition of public property is governed by Sections 91 and 73 of the Hawaiian Organic Act. Section 91 gives the territorial government authority to "manage" public lands subject to any intervention by Congress, the President, or the Governor of Hawaii. Section 73 further authorizes the Territory of Hawaii to sell, exchange and lease the public lands with certain limitations as to area, value, and terms of leases. It provides that all funds arising from the sale, lease or other disposal of public land shall be appropriated to the uses and purposes of the Territory of Hawaii.<sup>3/</sup> (See detailed explanation of Section 73 set out below.)

At least one court has interpreted Sections 73 and 91 of the Act as not merely creating an agency relationship on the part of the Territory of Hawaii to act

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<sup>3/</sup> Since the Hawaiian Homes Commission Act is part of the Hawaiian State Constitution, it is subject to amendment or repeal as prescribed in Article XI, Section 3, of the Constitution.

for the federal government, but rather has construed these provisions as a delegation of legislative power from Congress to the Territory. United States v. Fullard-Leo, 66 F. Supp. 782, 787 (D.C. Hawaii 1944). Accordingly, conveyances made pursuant to this power are not conveyances by the United States executed by the territorial offices acting as agents, but should be considered conveyances by the Territory in its own right pursuant to the Acts of Congress. Id.

Section 73

Section 73(a) (1) provides for a commissioner of the public lands of the Territory of Hawaii and Section 73(a) (2) provides for a land board for public lands.<sup>4/</sup>

The term "public lands" is defined as all lands classified as government or crown land prior to August 15, 1898, or lands acquired by the government since that time.<sup>5/</sup> Under Section 73, some of the major limitations on selling, exchanging, or leasing public lands include the following:

Subsection (d) No lease of land which is capable of being converted into agricultural land can be granted

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<sup>4/</sup> The land board consists of six members who are appointed by the governor for four-year terms. See Sections 73(1) and 80.

<sup>5/</sup> The definition of the term "public land" was followed later in the Homes Commission Act of 1920.

for a period over 65 years.<sup>6/</sup> The land may be withdrawn at any time for homestead or public purposes upon payment of just compensation.

Subsection (f) No person can receive "any certificate of occupation, right of purchase lease, cash freehold agreement, or special homestead agreement" who (or whose husband or wife) has held more than 10 acres of land under any certificate, lease, agreement or patent issued after May 27, 1910, or who already owns more than 80 acres of land, or who is alien and has not declared his intention to become a United States citizen.

Subsection (g) No public land may be sold or leased without the written consent of the commissioner and governor.<sup>7/</sup>

Subsection (h) The land belonging to any violators of the foregoing provisions is forfeited.

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<sup>6/</sup> This period was later shortened to 15 years by an Amendment in 1921.

<sup>7/</sup> An 80-acre land limitation was later provided by an Amendment in 1921.

Subsection (i). The persons entitled to purchase or lease the forfeited land is determined by drawing a lot after public notice is provided.

Subsection (j). The commissioner may give to any citizen of the United States, who has improved and resided on any parcel of public land for 10 years, a preference right to purchase such parcel and adjoining land for a home.

Subsection (l). The sale of land for other than homestead purposes and the exchange of land exceeding 40 acres or \$15,000 in value is prohibited.<sup>8/</sup> The leases made by the commissioner must be approved by two-thirds of the board of public lands.<sup>9/</sup> Leases for the mining of minerals are excluded. Resident lots may not exceed three acres.

Subsection (m). Twenty-five or more persons who qualify as homesteaders may apply to the commissioner for the opening of agricultural lands for settlement.

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8/ This figure was decreased to \$5,000 by an Amendment in 1921.

9/ In an 1921 Amendment, approval by two-thirds of the board was later changed to situations dealing with agricultural lands exceeding 40 acres or pastoral or waste lands exceeding 200 acres.

Subsection (n). The commissioner is required to survey <sup>10/</sup> and open agricultural and pastoral lands for homestead entry. The homestead may not exceed 80 acres of agricultural lands and 250 acres of first-class or 500 acres of second-class pastoral lands. In the case of a homestead which includes pastoral lands only, not more than 500 acres of first-class or 1,000 acres of second-class pastoral lands may be allotted.

Subsection (q). The commissioner has the power to manage all lands in the possession, use, and control of the Territory. The governor is authorized to make all orders setting aside land for public purposes. Lands leased by the Hawaii aeronautics commission may not exceed 55 years.

Subsection (r). Any person holding an unpatented homestead under a special homestead agreement is entitled to a reamortization of the indebtedness. The homesteads under the control of the Hawaiian Homes Commission are excluded.

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<sup>10/</sup> An Amendment in 1921 requires the commissioner to make the survey annually.

The Hawaiian Homes Commission Act

As previously stated, the Hawaiian Homes Commission Act received Congressional approval in 1920 and established a Hawaiian Homes Commission to manage the "available" public lands in the Territory of Hawaii. Since this was an Act by Congress, the Hawaiian Homes Commission Act was part of the United States Code at Title 48, Sections 691-716. When the Territory of Hawaii became a State in 1959, the Hawaiian Homes Commission Act was incorporated into Section Four of the Admission Act of Hawaii and Article XI of the State Constitution of Hawaii.

The Commission consists of five members appointed by the governor, <sup>11/</sup> who are required to make a biennial report on the home lands to the legislature. <sup>12/</sup> Section 222. The Commission is given control of all "available lands", Section 204, to sell or lease as it see fits. Section 204.

The most extensive provision of the Homes Commission Act concerns the description of certain public lands designated

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<sup>11/</sup> As originally enacted, the Commission consisted of seven members. Section 202(a).

Two major requirements imposed on the members of the Commission include: a three-year residency requirement and a requirement that three members be descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian Islands prior to 1778. Section 202(a).

<sup>12/</sup> As originally enacted, the Commission was required to present an annual report. Section 222.



as "available lands". Section 203 provides for a precise description of the location of the available lands on each of the Hawaiian Islands and specifically excludes:

"(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..." (emphasis added)

The Commission is authorized to lease tracts of Hawaiian homelands to native Hawaiians,<sup>13/</sup> subject to the following acreage limits per each lessee.<sup>14/</sup>

"(1) Not less than one nor more than [40] acres of agricultural lands; or (2) not less than one nor more than [500] acres of first-class pastoral lands; or (3) not less than [250] nor more than [1,000] acres of second-class pastoral lands; or (4) not more than one acre of any class of land to be used as a residence lot..." Section 207(a).

The title to the leased lands remains in the United States.<sup>13/</sup>  
The Commission is given the power to grant leases not exceeding 20 years to public utility companies or corporation as easements for railroads, telephone lines, etc., Section 207(c) (1), or leases to churches, hospitals, public schools, theaters, garages, stores, etc. Section 207(c) (1) (A) and (B).  
In addition, the Commission may grant, with the approval

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<sup>13/</sup> 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." Section 201(a) (7).

<sup>14/</sup> As originally enacted, the title to the leased lands remained in the State. Section 207(b).

of the governor, licenses to the United States for terms not to exceed five years, for reservations, roads, and water storage and distribution facilities. Section 207(c)(2).

The Commission does not have the power, however, to control any "available" lands under lease by the Territory (by virtue of Section 73 of the Hawaiian Organic Act) unless the lease expires or contains a withdrawal clause.<sup>15/</sup> If the lease expires or contains a withdrawal clause, the Commissioner of Public Lands may withdraw designated lands from the operation of the lease whenever the Commission requests, provided that the request is approved by the Secretary of the Interior. The withdrawal is restricted to "public purposes". Id. (See Section 73(d) of the Hawaiian Organic Act).<sup>16/</sup> Moreover, leases of Hawaiian homelands entered into after July 9, 1921, must contain a minimum withdrawal-notice period.<sup>17/</sup> Section 204(2). The Commission is without authority to lease more than 20,000 acres of Hawaiian homelands in any five-year period. Section 204(3).

Section 208 provides that leases granted by the Commission are subject to the following major conditions:

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<sup>15/</sup> Section 665 of the Hawaiian Organic Act states that a withdrawal clause should be included in all leases.

<sup>16/</sup> See p. 4 supra.

<sup>17/</sup> The Commission must give not less than one nor more than five years' notice of such withdrawal. Section 204(2).

(1) The lessee shall be a native Hawaiian, not less than 21 years old.

(2) The lessee shall pay a \$1.00 a year rental fee and the lease shall have a term of 99 years.

(3) The lessee shall occupy and begin to cultivate the tract as his home or farm within one year after the lease is made.

(4) The lessee, for part of each year, shall occupy and cultivate the land in his own behalf.

(5) The lessee may transfer the tract only to native Hawaiians subject to the approval of the Commission.

(6) The lessee must pay all taxes.

(7) The original lessee is exempt from all taxes for the first five years.

According to Section 209, the successors to a deceased lessee must be qualified to be a lessee of Hawaiian homelands. An exception to the Hawaiian blood requirements is allowed for descendants of non-native Hawaiians who were entitled to the leased land under the provisions of Section 3 of the Act as amended.<sup>18/</sup> Under Section 210, the Commission

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<sup>18/</sup> Section 3 of the Act (formerly 48 U.S.C. § 704a) states: "[P]ersons, whether or not native Hawaiians . . . who are on May 16, 1934, residing on the lands of Aowaiolima, Kewalo, and Kalawahine on the Island of Oahu placed under control of the Hawaiian Homes Commission . . . shall be given first opportunity to lease such lands on which they reside."

has the power to take all lands away from a lessee violating Sections 208 or 209 after a hearing has been afforded.

Section 213(a)-(f) established in the Treasury of the Territory two revolving funds, the Hawaiian home-loan fund and the Hawaiian home-operating fund, and two special funds, the Hawaiian home-development fund and the Hawaiian home-administration account. Under Section 204, the Commission has the power to make loans from the fund to the lessee for: (1) the erection and permanent improvement of dwellings; (2) the purchase of livestock and farm equipment; and (3) assisting in the development of tracts.<sup>19/</sup>

The lessee may not borrow loans over \$5,000 and his successor in interest may not borrow loans over \$3,000.<sup>20/</sup> Section 215. The Commission may require insurance on the lessee's investments from the moneys loaned. Section 215.

The Compact Between Hawaii and the United States

Section Four of the Admissions Act contains a provision stating that there is a compact between Hawaii and the United States dealing with the Hawaiian Homelands.

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<sup>19/</sup> Agriculture expenses were added in a 1962 Amendment.

<sup>20/</sup> Through a series of Amendments, the lessee may now borrow \$25,000, and his successors in interest may borrow \$20,000. Moreover, the lessee may borrow an unlimited amount with respect to agriculture expenses noted in the above footnote. 1972 Amendment.

The compact says:

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 said State . . . subject to amendment or repeal only with the consent of the United States . . . . (emphasis added)

Section Four deals strictly with a procedure for amending the compact, subject to the approval of the United States. Significantly, amendments to increase the benefits to the lessees of Hawaiian home lands are allowed, but amendments to the Hawaiian home-land fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund are prohibited. This section is identical to Article XI, Section 3, of the State Constitution of Hawaii.

The term compact also appears in Article XI, Section 2, of the Constitution. But the exact nature of the compact is not clearly defined. Instead, as stated in this section, subsequent acts by Congress are needed to provide definition and substance to the actual nature and breath of the compact. To date, however, Congress has been silent in this area.