

ACT 323

H.B. NO. 895

A Bill for an Act Relating to Individual Hawaiian Home Lands Trust Claims.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER
INDIVIDUAL CLAIMS RESOLUTION UNDER THE
HAWAIIAN HOME LANDS TRUST
PART I. PURPOSE AND DEFINITIONS**

§ -1 **Purpose.** The purpose of this chapter is to establish a process under which individual beneficiaries under the Hawaiian home lands trust may resolve claims for actual damages arising out of or resulting from a breach of trust, which occurred between August 21, 1959, and June 30, 1988 and was caused by an act or omission of an employee of the state in the management and disposition of trust resources:

- (1) By establishing a Hawaiian home lands trust individual claims review panel which shall:
 - (A) Receive, review, and evaluate the merits of an individual beneficiary’s claim;
 - (B) Render findings and issue an advisory opinion regarding the merits of each claim filed with the panel, including an estimate of the probable award of actual damages or recommended corrective action that may be implemented to resolve each claim;
 - (C) Prepare and transmit a report to the governor and legislature, at least twenty days prior to the convening of the 1993 legislature in regular session, and a final report, at least twenty days prior to the convening of the 1994 legislature in regular session, on the activities of the panel including a summary of each claim brought before the panel, the panel’s findings and advisory opinion regarding the merits of each claim, and an estimate of the probable compensation or any recommended corrective action for legislation action;
 - (D) Disburse any compensation awarded by the 1993 and 1994 legislatures in regular session or undertake such other action as provided by law which is acceptable to a claimant; and
- (2) By providing an individual beneficiary claimant the right to bring an action to recover actual damages for a breach of trust, in the circuit courts of the State of Hawaii, if the action taken by the 1993 and 1994 legislatures in regular session on each claim brought before the panel is not acceptable to an individual beneficiary claimant.

§ -2 **Definitions.** As used in this chapter, unless the context otherwise requires:

“Act” means the Hawaiian Homes Commission Act of 1920, as amended.

“Actual damages” means direct, monetary out-of-pocket loss, excluding non-economic damages as defined in section 663-8.5 and consequential damages, sustained by the claimant individually rather than the beneficiary class generally, arising out of or resulting from a breach of trust, which occurred between August 21, 1959 and June 30, 1988 and was caused by an act or omission by an employee of the State in the management and disposition of trust resources.

“Beneficiary” means any person eligible to receive benefits of home-steading and related programs from the Hawaiian home lands trust.

“Claimant” means a beneficiary who applies to the panel for a review of a claim for actual damages relating to the trust.

“Commission” means the Hawaiian homes commission.

“Compensation” means an award of actual damages to a claimant.

“Corrective action” means action to be taken by the department to correct a breach of trust, which occurred between August 21, 1959 and June 30, 1988 and was caused by an act or omission by an employee of the State in the management and disposition of trust resources.

“Department” means the department of Hawaiian home lands.

“Employee of the State” means the officers and employees of any state agency and any persons acting in behalf of a state agency in an official capacity.

“Native Hawaiian” means any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian islands previous to 1778.

“Panel” means the Hawaiian home lands trust individual claims review panel.

“Trust” means the Hawaiian home lands trust.

PART II. INDIVIDUAL CLAIMS REVIEW PANEL

§ -3 Establishment of the board of individual claims resolution.

There shall be a Hawaiian home lands trust individual claims review panel to be composed of five members and appointed as follows: the chairperson shall be appointed by the governor and shall be a former federal or state court judge, where possible, or an attorney licensed to practice law in the courts of the State. The governor shall appoint the remaining four members, all of whom shall be from nominations submitted by native Hawaiian organizations as defined in section 673-2. No more than two of the members shall be residents of the same island.

All of these appointments shall be subject to senatorial confirmation. The panel shall be placed within the department of commerce and consumer affairs for administrative purposes.

§ -4 Tenure and compensation of members. The term of office of each member of the panel shall be until December 30, 1995. Any member appointed to fill a vacancy shall be appointed by the governor for the remainder of the term. A vacancy in the panel shall not affect its powers.

Each member of the panel shall be compensated at the rate of \$100 per day for each day’s actual attendance to the member’s duties; provided that the compensation shall not exceed a maximum of \$10,000 per year. The members of the panel shall be paid their necessary traveling and subsistence expenses incurred in the discharge of their duties. Such costs will be paid by the department of commerce and consumer affairs.

§ -5 Panel staff; power to contract. (a) Supervisory, administrative, investigatory, hearings, and clerical personnel necessary for the efficient functioning of the panel shall be appointed by the panel and the director for the department of commerce and consumer affairs on a temporary exempt basis. There shall be a special assistant to the chairperson of the Hawaiian homes commission, to be hired by the commission, for the purposes of this chapter.

(b) Upon application by a claimant, the panel, under appropriate circumstances and in accordance with section 103-3, may retain and provide for legal services to assist a claimant in the preparation and presentation of a claim for review by the panel under this chapter.

(c) The panel shall have the power to make and execute contracts and all other instruments necessary or convenient for the exercise of its powers and functions under this chapter.

§ **-6 Rulemaking powers.** The panel shall adopt rules in accordance with chapter 91 within six months after the effective date of this chapter prescribing the procedures to be followed in the filing of claims and in the proceedings for review of claims under this chapter, and such other rules as the panel deems necessary to carry out the purposes of this chapter.

§ **-7 Review by panel required.** (a) Any individual beneficiary under the trust claiming actual damages arising out of or resulting from a breach of trust, which occurred between August 21, 1959 and June 30, 1988 and which was caused by an act or omission of an employee of the State in the management and disposition of trust resources under the trust, shall file a claim therefor for review by the panel no later than August 31, 1993 or shall forever be barred.

§ **-8 Powers and procedures of the panel.** (a) The panel may hold hearings or such other proceedings as it deems necessary, sit and act at such times and places, and take such testimony as the panel deems advisable. The panel shall fix a time and place for hearings or other proceedings on such claim and shall cause notice thereof to be given to the claimant, the department and commission. The panel may, for good cause, allow claims to be consolidated for review.

(b) A majority of all members to which the panel is entitled, which shall include the chairperson, shall constitute a quorum for the panel to meet and review any claim, and the concurrence of a majority of all the members to which the panel is entitled shall be necessary for any findings and advisory opinion issued by the panel to be valid.

(c) Any member of the panel may administer oaths or affirmations to witnesses appearing before the panel. The panel shall have powers of subpoena and compulsion of attendance of witnesses and production of documents and of examination of witnesses as are conferred upon a circuit court. Subpoenas shall be issued under the signature of the chairperson or any person designated by the chairperson. The circuit court of any circuit in which a subpoena is issued or served or in which the attendance or production is required, upon the application of the panel, may enforce the attendance and testimony of any witness and the production of any document so subpoenaed. Subpoena and witness fees and mileage shall be the same as in the circuit courts, and shall be payable from funds appropriated for expenses of administration. Notwithstanding such provisions, the panel shall attempt to secure the voluntary appearance, testimony and cooperation of parties, witnesses and other persons appearing before the panel without coercion.

(d) The panel may appoint a hearings officer or officers, not subject to chapters 76 and 77, to hear any claims and render recommended findings. The hearings officer or officers shall have the same authority as the panel in conducting hearings or proceedings under this chapter. The recommended findings of the hearings officer or officers shall be subject to review and redetermination by the panel.

(e) Upon written acceptance by a claimant or an acceptance as provided in section -17, the panel shall disburse any compensation awarded by the legislature and undertake such other action as may be provided by law.

§ **-9 Panel hearing or review proceedings; fact-finding; evidence.** No persons other than the panel or hearings officer, the claimant, representatives of the concerned state agency, legal counsel, witnesses, and persons called by the panel to assist in its review, shall be present during any hearing or other proceedings conducted by the panel, except with the permission of the chairperson. For every claim filed, the department shall be notified and shall be entitled to be

present during any hearing or other proceeding conducted by the panel. The panel may, in its discretion, conduct an inquiry of a party, witness, or any other person without the presence of any or all parties.

All proceedings shall be informal. Except as otherwise provided in this chapter, chapters 91 and 92 shall not apply. For the purpose of this chapter, the panel shall prepare a record of each claim. The record shall include:

- (1) All correspondence, pleadings, motions, rulings;
- (2) Evidence received or considered, including oral or written testimony, exhibits, and a statement of any matters officially noticed;
- (3) Offers of proof and rulings thereon;
- (4) Proposed findings and exceptions;
- (5) Staff memoranda submitted to members of the panel in connection with their review of the claim;
- (6) Recommended or proposed findings of the hearings officer who presided at the hearing;
- (7) The panel findings and advisory opinion.

No matters outside the record shall be considered by the panel in reviewing and evaluating a claim.

The panel may require a stenographic record of all or part of its proceedings for the use of the panel, but such record shall not be made available to the parties. The panel may receive any oral or documentary evidence, or any matter that, in the opinion of the panel, may contribute to its function under this chapter, whether or not such statement, document, information or matter would be admissible in a court of law. Questioning of parties, and witnesses may be conducted by the panel, and the panel may, in its discretion, permit any party, or any counsel for a party to question other parties, witnesses, or other persons appearing before the panel. Discovery by the parties shall not be allowed.

§ -10 Findings and advisory opinion. (a) The panel shall prepare findings and an advisory opinion concerning the probable merits of a claim, probable award of compensation or recommended corrective action by the State.

(b) The findings and advisory opinion shall be signed by all members of the panel; provided that any member of the panel may file a written concurring or dissenting advisory opinion.

(c) The advisory opinion of the panel rendered on each claim shall be incorporated in the reports required by section -14 for submission prior to the closing of the 1993 and 1994 legislatures.

§ -11 Subsequent litigation; excluded evidence. No statement made in the course of any hearing or review proceedings of the panel shall be admissible in evidence either as an admission, to impeach the credibility of a witness, or for any other purpose in any legal proceeding. No opinion, conclusion, finding, or recommendation of the panel on the issue of liability or on the issue of compensation or corrective action shall be admitted into evidence in any legal proceeding, nor shall any party to the panel hearing, or the counsel or other representative of such party, refer to or comment thereon in any opening statement, any argument, or at any other time, to any court or jury.

§ -12 Immunity of panel members from liability. No member of the panel shall be liable in damages for libel, slander, or other defamation of character of any party to a panel proceeding for any action taken or any opinion conclusion, finding, or recommendation made by a panel member while acting within the member's capacity as a member of the panel under this chapter.

§ -13 **Legal adviser.** The panel, in accordance with section 103-3, shall obtain its own legal counsel to provide legal services necessary to implement the purposes of this chapter.

§ -14 **Annual report.** The panel shall prepare a report to be transmitted to the governor and to the legislature, at least twenty days prior to the convening of the 1993 legislature in regular session, and a final report to be transmitted to the governor and to the legislature, at least twenty days prior to the convening of the 1994 legislature in regular session, which summarizes its activities in furtherance of this chapter, and shall include a summary of each claim brought before the panel, the panel's findings and advisory opinion regarding the merits of each claim, and an estimate of the probable compensation or recommended corrective action by the State, for action by the 1993 and 1994 legislatures in regular session.

§ -15 **Limitations upon award of compensation or corrective action.** No claim shall be made under this chapter for which a remedy was or is provided elsewhere under the laws of this State, which is or was the subject of pending or prior litigation, or which is predicated, in whole or in part, on an act or omission which occurred prior to August 21, 1959.

PART III. JUDICIAL RELIEF FOR RETROACTIVE CLAIMS BY INDIVIDUAL NATIVE HAWAIIANS

§ -16 **Waiver of immunity.** (a) The State waives its immunity from liability for actual damages suffered by an individual beneficiary arising out of or resulting from a breach of trust or fiduciary duty, which occurred between August 21, 1959 to June 30, 1988 and was caused by an act or omission of an employee of the State in the management and the disposition of trust resources.

(b) This waiver shall not apply to the following:

- (1) Any claim for which a remedy was or is provided elsewhere in or under the laws of the State;
- (2) Any claim which was or is the subject of prior or pending litigation;
- (3) Any claim predicated, in whole or in part, upon any act or omission which occurred prior to August 21, 1959.

§ -17 **Right to sue, individual claims.** (a) An aggrieved individual claimant shall have the right to bring an action, in accordance with this part, in the circuit courts of the State for recovery of actual damages suffered by the claimant arising out of or resulting from a breach of trust which occurred between August 21, 1959 to June 30, 1988; provided that no action shall be filed until after October 1, 1994.

(b) "Aggrieved individual claimant", as used in this section, means an individual claimant whose claim was reviewed by the panel under this chapter and who has filed, no later than October 1, 1994, a written notice with the panel that the claimant does not accept the action taken by the 1993 or 1994 legislatures in regular session upon such claim. Any claimant who fails to file a written notice rejecting the action of the legislature upon the claim shall be deemed to have accepted the action taken by the legislature.

§ -18 **Scope of relief.** In an action under this part the court may award actual damages to a successful claimant.

ACT 323

§ -19 **Limitation on actions.** Every claim cognizable under this part shall forever be barred unless the action is commenced by September 30, 1996.

§ -20 **No implied liability or award.** In no case shall any liability be implied against the State, and no award shall be made against the State on any claim brought under this chapter except upon such legal evidence as would establish liability against an individual or corporation.

§ -21 **Attorney's fees and costs.** In any action brought under this chapter, the court may, as it deems just, award to a prevailing claimant and enter as part of its order or judgment, a reasonable sum for costs and expenses incurred, including reasonable attorney's fees."

SECTION 2. Section 103-3, Hawaii Revised Statutes, is amended to read as follows:

"§103-3 Employment of attorneys. No department of the State, other than the attorney general, shall make any expenditure of public funds for the employment or retention by contract or otherwise of any attorney for the purpose of representing the State or such department in any litigation, rendering legal counsel to the department, or drafting legal documents for the department; provided that the foregoing provision shall not apply:

- (1) To the housing finance and development corporation or the public utilities commission;
- (2) To any court or judicial or legislative officer of the State;
- (3) To the legislative reference bureau;
- (4) To such compilation commission as may be constituted from time to time;
- (5) To the real estate commission in any action involving the real estate recovery fund, the contractors license board in any action involving the contractors recovery fund, and the trustees in any action involving the travel agency recovery fund;
- (6) To the Hawaii criminal justice commission;
- (7) To grand jury counsel;
- (8) To the office of Hawaiian affairs;
- (9) To the department of commerce and consumer affairs; provided that its attorney shall be responsible for the prosecution of consumer complaints;
- (10) To the employees retirement system; [or]
- (11) To the Hawaiian Home Lands Trust Individual Claims Review Panel; or
- [(11)] (12) In the event the attorney general, for reasons deemed by the attorney general good and sufficient, declines representation or counsel, or approves a department's expenditures; provided that the governor thereupon waives the provision of this section.

For the purpose of this section the term "department of the State" means any department, board, commission, agency, bureau, or officer of the State.

Every attorney employed by any department on a full-time basis, except an attorney employed by the Hawaii criminal justice commission or as a grand jury counsel, [or] the department of commerce and consumer affairs in prosecution of consumer complaints, or the Hawaiian Home Lands Trust Individual Claims Review Panel, shall become a deputy attorney general."

SECTION 3. There is appropriated out of the general revenues of the State of Hawaii the sum of \$464,184, or so much thereof as may be necessary for fiscal year 1991-1992, and the sum of \$702,094, or so much thereof as may be necessary for fiscal year 1992-1993 for the administration of this Act.

The sum appropriated shall be expended by the department of commerce and consumer affairs for the purposes of this Act.

SECTION 4. There is appropriated out of the general revenues of the State of Hawaii the sum of \$55,000, or so much thereof as may be necessary for fiscal year 1991-1992, and the sum of \$55,000, or so much thereof as may be necessary for fiscal year 1992-1993, to hire a special assistant to the chairperson of the Hawaiian home commission.

The sum appropriated shall be expended by the department of Hawaiian home lands to hire a special assistant for the purposes of this Act.

SECTION 5. The provisions of this Act are not severable and if any provision of this Act, or application thereof to any person or circumstance is held to conflict with any federal or state law, rules or regulations, this Act in its entirety shall be invalidated.

SECTION 6. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 7. This Act shall take effect upon approval; provided that sections 3 and 4 shall take effect on July 1, 1991.

(Approved July 2, 1991.)