United States General Accounting Office

GAO

Report to the Honorable
Daniel K. Akaka and the Honorable
J. Bennett Johnston, U.S. Senate

May 1994

HAWAIIAN HOMELANDS

Hawaii's Efforts to Address Land Use Issues

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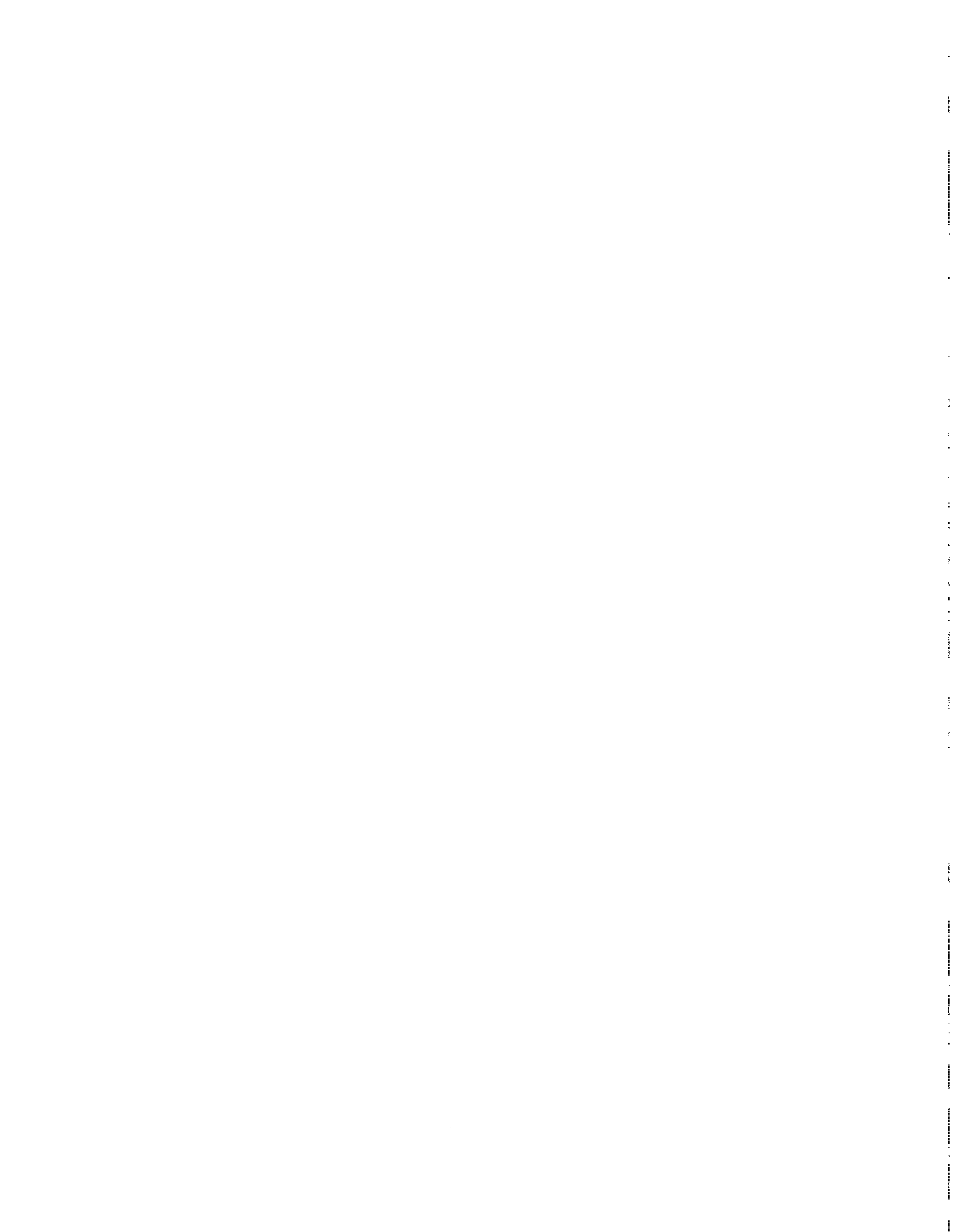


GAO

United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-252462

May 26, 1994

The Honorable Daniel K. Akaka
The Honorable J. Bennett Johnston
United States Senate

The Congress passed the Hawaiian Homes Commission Act (HHCA) in 1921 to address the severe population decline that native Hawaiians had suffered during the 1800s and early 1900s. Major provisions of this act designated certain public lands as Hawaiian homelands for native Hawaiians and established the Hawaiian Homes Commission (Commission) to administer the lands.

As you are aware, the state of Hawaii is resolving issues concerning withdrawals[1] of Hawaiian homelands, occurring during both the territorial period (1921-59) and the statehood period (1959 to the present), that the state believes were improper. Among other actions, the state has identified specific parcels of withdrawn homelands and, through a consultant, is (1) estimating the value of rent and interest that could have been earned (lost income) from these parcels and (2) appraising the current market value for parcels that continue to be occupied by the U.S. Navy at Lualualei, Oahu, for military purposes. The state plans to present claims on behalf of native Hawaiians for federal compensation for homelands that it believes were improperly withdrawn before Hawaii became a state in 1959.

During Senate hearings in 1992 on the implementation of HHCA, questions arose concerning the Department of the Interior's role in administering homelands during the Hawaiian territorial period. These questions focused on whether the federal government had or has a trust responsibility to native Hawaiians and whether the federal government has an obligation to compensate native Hawaiians for any improper withdrawals of Hawaiian homelands.

In response to your request for information about these matters, we (1) identified federal, state, and court views and opinions on whether the federal government had or has a trust responsibility for native Hawaiians; (2) determined the authority of the territorial governors under the Organic Act, which created the territory of Hawaii, and under HHCA to withdraw certain Hawaiian homelands; and (3) assessed the reasonableness of the

[1]As used in this report, the term "withdrawal" refers to the temporary setting aside of land by a territorial governor's executive order or proclamation, as well as the permanent alienation of land, that is, the transfer of the land's ownership to another party.

approach and methodology used by a consultant to the state to estimate the lost income from and the current market value for specific parcels of land. This report provides the results of our work.

Results in Brief

While the Department of the Interior and the Department of Justice have maintained that the federal government does not and has never had a trust responsibility to native Hawaiians, the state of Hawaii disagrees. Federal courts have concluded that the federal government currently has no trust responsibility to native Hawaiians but have not determined whether such a responsibility existed during Hawaii's territorial period. Hawaiian state courts and the state's Attorney General have concluded that the federal government had a trust responsibility during the territorial period, and the state's Attorney General believes that such a responsibility continues currently.

In our opinion, territorial governors lacked authority to withdraw Hawaiian homelands for nonfederal public purposes through executive orders and proclamations. However, many of these unauthorized withdrawals appear to have (1) benefited native Hawaiians or (2) involved lands that were unsuitable for authorized homeland uses, such as homesteading or leasing, during the territorial period. Territorial governors also lacked authority under HHCA to withdraw homelands for federal purposes through executive orders or other means. However, the President had such authority under the Organic Act. The President could have exercised his authority by delegating it to the territorial governor or by ratifying the governor's action. Because such withdrawals took place over 50 years ago, there is no assurance that all pertinent information relevant to these withdrawals is still available. Therefore, we are unable to express an opinion on the propriety of homeland withdrawals for federal purposes.

We believe that the methodology used by the consultant to estimate the lost income from and the current market value for specific parcels of land was generally reasonable.

Background

HHCA set aside approximately 203,500 acres of public land in the territory of Hawaii to provide homesteads for native Hawaiians. With certain exceptions and limitations provided for in the act, the lands became available for homesteading. HHCA established the Hawaiian Homes Commission and gave it authority for managing the homelands except as

specifically provided for in the act. Under HHCA, the Secretary of the Interior's approval was required for any land transactions by the Commission that altered the composition or boundaries of designated homelands. In 1959, under the Hawaii Admission Act granting statehood to Hawaii, primary responsibility for managing native Hawaiian lands was vested in the state.

In 1983, the Federal-State Task Force on the Hawaiian Homes Commission Act reported the results of its review of HHCA's administration to the Secretary of the Interior and to the Governor of Hawaii. The task force concluded, among other things, that the control over and use of some homelands had been transferred through executive orders and proclamations by territorial governors and that such transfers were not authorized under HHCA. The task force's report contained 134 recommendations and concluded "that the United States must bear responsibility for its past and/or present misuses of Hawaiian [homelands]. . . ."

In 1992, the state of Hawaii released its Report on Federal Breaches of the Hawaiian Homelands Trust. The state's report concluded that alienations and other uses of homelands for purposes not authorized under HHCA were breaches and identified withdrawals of 43 parcels on 5 of Hawaii's islands, as well as withdrawals of 1,356 acres of federal military land at Lualualei on the island of Oahu, as improper uses of homelands without compensation or land exchanges.

Hawaii has undertaken efforts to address what it believes was the improper use of homelands both during the territorial period (1921-59) and since Hawaii became a state in 1959. In 1991, a state interagency task force was created to review and verify claims by Hawaii's Department of Hawaiian Homelands (DHHL)[2] that specific land parcels are homelands and to appraise these parcels. As directed by the interagency task force, a private real estate consultant and appraisal firm under contract to the state has estimated the market rent and interest (lost income) that could have been earned from specific land parcels, including the 43 parcels that DHHL at that time claimed were improperly set aside during the territorial period.[3] In addition, the consultant is estimating the lost income from and

[2]When DHHL was formed on May 11, 1960, the Hawaiian Homes Commission's functions and authority were transferred to DHHL. With the establishment of DHHL, the Governor of Hawaii appointed seven Commissioners—the executive board designated as the Hawaiian Homes Commission—to head the department.

[3]As of September 1993, 1 of the 43 parcels initially considered to be homelands had been determined not to be homelands, and the status of 3 parcels was still pending verification.

appraising the current market value for lands at Lualualei currently used for federal military purposes.

As of the end of November 1993, estimates of lost income for the 43 parcels had been completed. However, estimates of lost income from and appraisals of current market value for the lands at Lualualei had not been finalized. Thus, our review of such estimates and appraisals for the Lualualei lands was limited to draft documents.

Opinions Differ on the Federal Government's Relationship to Native Hawaiians

No federal court has ever decided whether the U.S. government had a trust responsibility to native Hawaiians during the territorial period. The Hawaii Supreme Court, on the other hand, has held that the federal government did have such a responsibility. However, the Departments of the Interior and of Justice believe that the federal government never had a trust responsibility for native Hawaiians. For the post-territorial period, federal courts and the Hawaii Supreme Court have held that the United States has not had a trust responsibility to native Hawaiians.

The issue of whether the federal government had a trust responsibility for native Hawaiians during the territorial period was directly presented in only one reported case: a suit by the state of Hawaii against the United States in 1988 under the Quiet Title Act (28 U.S.C. 2409a) to obtain title to federally occupied lands at Lualualei. (State of Hawaii v. United States.) However, the court dismissed the suit for failure to comply with the act's 12-year statute of limitations. Furthermore, a federal court decision on this question appears unlikely under any other act because of federal statutes of limitations. For example, a court opportunity to address the trust responsibility issue could be brought under the Tucker Act (28 U.S.C 1346(a)(2), 1491(a)). The Tucker Act provides an opportunity to obtain monetary damages from the United States in certain circumstances, but a court action must be undertaken within 6 years of the party's becoming aware of the wrongful conduct. Thus, a suit brought against the United States on the basis of alleged improper transfers of homelands during the territorial period would appear to be barred by the act's 6-year statute of limitations because such transfers took place over 30 years ago.

In contrast, a federal court's views on a federal trust responsibility to native Hawaiians since Hawaii became a state were expressed in the Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission case. In this case, the federal Court of Appeals for the Ninth Circuit held that the federal government currently has no trust

responsibility for native Hawaiians. Instead, the court stated, the Hawaii Admission Act in 1959 vested primary responsibility for the management of native Hawaiian lands in the state, leaving only a "tangential" role for the federal government. Subsequent court decisions have adhered to this reasoning.

The Supreme Court of Hawaii has held that the federal government had a trust responsibility to native Hawaiians before Hawaii became a state and that the state assumed this responsibility with statehood. While the state's current Attorney General concurs that the federal government had a fiduciary responsibility to native Hawaiians during the territorial period, he also believes that the federal government retains such a responsibility today.

Department of the Interior officials have expressed differing views on the federal government's responsibility to native Hawaiians. In 1979, Interior's Deputy Solicitor said that the federal government had a trust responsibility to native Hawaiians both before and since statehood. However, in 1989, Interior officials said that the Deputy Solicitor's 1979 position on the federal government's responsibility since statehood was in error, in light of the Keaukaha court decision. In 1992 congressional correspondence, the Interior Secretary's designated representative for Hawaiian homelands matters stated Interior's view that the federal government did not serve as a trustee for native Hawaiians before Hawaii became a state. A formal opinion issued by Interior's Solicitor in January 1993 reiterated this view. This opinion, however, was withdrawn by the Solicitor in November 1993 because, according to the Solicitor, the opinion's broad language and premises had created controversy. At the same time, the Solicitor disclaimed any future reliance by Interior on the Deputy Solicitor's 1979 statement about the federal government's trust responsibility to native Hawaiians. According to an Assistant Solicitor, Interior is reviewing land claims at the request of the state of Hawaii.

The Department of Justice concurs with Interior's view that the federal government did not have a trust responsibility to native Hawaiians either before or since Hawaiian statehood. In addition, the U.S. Attorney General has designated a Justice official to be involved with native Hawaiian issues.

Certain Lands Were Withdrawn Without Authority

In our opinion, territorial governors lacked authority under HHCA to withdraw homelands for nonfederal public purposes through executive orders and proclamations. However, 23 of the 37 parcels[4] withdrawn for such purposes appear to have (1) been used to benefit native Hawaiians or (2) been unsuitable for authorized homelands uses, such as homesteading or leasing. (A discussion of the effect of the unauthorized withdrawals is contained in the last section of this letter.) Whether withdrawals of homelands for federal uses, such as the withdrawal of the Lualualei lands currently occupied by the U.S. Navy, were proper is uncertain, and we are unable to express an opinion on this matter.

Withdrawals for Nonfederal Public Purposes Were Unauthorized

In 1898, a congressional joint resolution accepted the republic of Hawaii's transfer of the ownership of all of the republic's public lands. In 1900, the Congress passed the Organic Act, creating the territory of Hawaii. This act, as amended in 1910, provided that the territorial governor would have the authority to set aside lands for forests and other public purposes. The act also gave both the President and the territorial governor authority to set aside public lands received from the republic of Hawaii for use by the United States.

In 1921, the Congress passed HHCA, limiting the governor's authority over certain public lands. HHCA set aside certain public lands to provide homesteads for native Hawaiians (Hawaiian homelands) and authorized the Commission to lease them. Section 206 of the act specifically provided that the powers of the territorial governor with regard to public lands should not extend to Hawaiian homelands. The act also provided that Hawaiian homelands that were not needed for homesteading were to be returned to the control of the commissioner of public lands and could be leased. Furthermore, the act required the public lands commissioner to cancel such leases if the Commission determined that the leased lands were necessary for homesteading.

We believe that section 206 of the Commission Act makes clear that the authority of the territorial governor under the Organic Act to set aside lands for public purposes does not apply to Hawaiian homelands. In two cases—one federal and one state—courts had reached the same conclusion. Our view is also consistent with the federal-state task force's

[4]The state initially identified 43 parcels of homelands that it believed were improperly withdrawn by territorial governors' executive orders and proclamations. These 43 parcels include 37 parcels that were withdrawn for nonfederal public purposes, 2 parcels that were withdrawn for federal purposes, 1 parcel that the state subsequently determined not to be homelands, and 3 parcels whose status as homelands has yet to be verified.

1983 report on HHCA and the state of Hawaii's 1992 report on federal breaches of the homelands trust. We therefore conclude that the 37 executive orders and proclamations that we reviewed, through which territorial governors withdrew Hawaiian homelands for nonfederal public purposes, were unauthorized.

Propriety of Withdrawals for Federal Uses Is Uncertain

The territorial governor's executive orders withdrawing the Lualualei lands for federal use and two additional executive orders withdrawing homelands for a federal airport present a different case. While we would agree that HHCA did not contain authority for the territorial governor to make such withdrawals, the President had authority under section 91 of the Organic Act to withdraw lands for the use and purposes of the United States. A key issue, therefore, is whether the President ever delegated this authority to the territorial governor or ratified the governor's actions. Our review of documents and records available to us in Hawaii did not disclose any evidence of such delegation or of presidential ratification of Lualualei transfers.[5] However, because over 50 years have passed since these withdrawals took place, we cannot be certain that all pertinent information relevant to these withdrawals is still available.[6] Consequently, we can only conclude that the propriety of these withdrawals of homelands for federal use is uncertain, and we are therefore unable to express an opinion on this matter.

Methods for Estimating Lost Income and Market Value Appear Reasonable

The consultant's study of lost income and current market value for specific parcels of land was commissioned by the state to assist Hawaii's interagency task force in estimating and recommending the amounts to be paid as compensation to DHHL by federal and state governments for any improper uses of homelands. Among other things, the consultant estimated compensation and current exchange value for 43 parcels of land identified by the task force.[7] The consultant defined compensation as the amount of rental income that a parcel of land could have earned had the

[5]With respect to the two territorial governor executive orders withdrawing homelands for a federal airport at Morse field, we found that one of the orders was specifically superseded by a presidential executive order effecting the same transfer 6 months later. The other order withdrew a strip of land adjacent to the air field for the air field's use.

[6]A search for pertinent evidence of such presidential actions, we believe, would involve a time-consuming examination of executive branch archival files. Moreover, because so much time has elapsed since the withdrawals took place, even an exhaustive search of the available files would not provide a conclusive result, since relevant documents may have been lost or destroyed.

[7]At the time the consultant's work was undertaken, the task force was verifying the status of the 43 parcels as homelands. Since that time, at least one of the parcels has been determined not to be homelands.

parcel not been withdrawn (lost income). Lost income was calculated as the amount of forgone rent, plus interest, for the period of time the parcel was withdrawn. The consultant defined exchange value as the current market value for the parcel.

The consultant's appraisal methodology incorporated the following assumptions:

- The parcels being appraised would have been used for the highest and best use had they not been withdrawn. The appraisal also assumed that the parcels were vacant and ready for development and that the highest and best use had to be physically possible, legally permitted, financially feasible, and maximally productive.
- In estimating lost income and interest, the properties were assumed to be vacant, available, and developed for their highest and best use. Interest was calculated using a range of four interest rates—statutory interest rate, market interest rate, prime rate, and residential mortgage rate.
- The current market value calculations were based on the unencumbered fee simple interest of the property, assuming that it was vacant and available for development to the highest and best use. However, for certain lands at Lualualei, the consultant was instructed to consider existing infrastructure improvements that had been added by the U.S. Navy when determining the highest and best use of the land. Two methods of calculation were used to estimate current market value—sales comparison and modified subdivision development.

The consultant's estimate of lost income from the 43 parcels of land included in the study's scope amounted to over $8.9 million, which is the September 1993 value of forgone rent during the territorial period and of interest assuming market interest rates. For the lands at Lualualei, the consultant's preliminary estimates (the only estimates available at the time of our work) of lost income for the territorial period were about $4.5 million and for the statehood period about $13.2 million. The consultant's preliminary estimate of the current market value for these lands was $68.7 million.

On the basis of our review of the methodologies used by the consultant and available public real estate records, as well as discussions with the consultant and a private real estate appraiser, we believe that the methodologies used to estimate lost income and current market values were generally reasonable.

The State Plans to Submit a Claim for Federal Compensation

Hawaii plans to make an initial claim on behalf of native Hawaiians for federal compensation for the improper withdrawal of homelands during the territorial period and for the continued federal use of lands at Lualualei. We understand that the amount of the claim will be based on the estimates of lost income and appraisals of current market value that the state's consultant prepared for those parcels verified by the state as homelands.

Whether native Hawaiians merit federal compensation for unauthorized withdrawals of Hawaiian homelands is a matter for the Congress to decide. If the Congress decides that compensation is merited, we have two comments about determining an amount of compensation: First, the state's estimates of lost income from withdrawn parcels do not represent rental income that the Hawaiian Homes Commission would have received if these homelands had not been withdrawn. Second, we found that many of the withdrawals of parcels for nonfederal public purposes may have had little adverse effect on native Hawaiians or on the Commission's program because the withdrawals appear to have either benefited native Hawaiians or involved lands that were unsuitable for homesteading or leasing.

Commission Received Authorized Revenues From 1921 Through 1958

HHCA and subsequent amendments established funding caps for revenues that were to be made available to the Commission from (1) the rental of Hawaiian homelands under general leases and (2) territorial sugarcane leases and water licenses. Revenues received from these sources in excess of the funding caps were to be transferred to the territorial government and, thus, would not have been available for the Commission's use.

The funding caps associated with the rental revenues to be made available to the Commission were as follows:

- Initially, HHCA established a $1 million cumulative funding cap for revenues that the Commission could receive from the rental of Hawaiian homelands and from territorial sugarcane leases and water licenses. This cap would have been reached in 1928 had the cap not been raised by the Congress to $2 million.
- The $2 million cap was reached 5 years later, in 1933, and the Commission was precluded from receiving any additional rental revenues until 1943.
- Beginning in 1943, rental revenues were limited by biennial funding caps as provided for in two amendments to HHCA. The Commission received funding at the biennial cap levels from 1943 through 1958. We could not

determine whether the Commission received funding at the cap level for the period in 1959 preceding statehood.

Since the Commission received rental revenues at authorized levels from 1921 through 1958, rental income would not have been lost to the Commission because homeland parcels were withdrawn during this period.

Impact of Withdrawals on Native Hawaiians Varied

Of the 37 withdrawals of homelands for nonfederal public purposes by territorial governors' executive orders and proclamations included in the consultant's study, we found that, for the territorial period, 9 withdrawals appeared to have primarily benefited native Hawaiians; 14 withdrawals appeared to have had little adverse impact on native Hawaiians; and the remaining 14 withdrawals did not primarily benefit native Hawaiians.

Of the nine withdrawals that appeared to have benefited native Hawaiians, we found that five set aside lands for two schools that primarily served native Hawaiian communities. Three additional withdrawals—two for a beach park and one for a tree nursery—appear to have benefited adjacent native Hawaiian communities. One withdrawal set aside land for a reservoir to furnish water to native Hawaiian homesteads.

Fourteen withdrawals appeared to have had little adverse impact on native Hawaiians. One of these withdrawals set aside 11,000 acres for a hunting and game reserve. We found that this land consisted of sparsely vegetated lava beds in a remote location and therefore appeared unsuitable for homesteading. In addition, efforts to lease these lands before they were withdrawn were unsuccessful. The remaining 13 withdrawals set lands aside for forest reserves. We understand, on the basis of our review of documents and discussions with state representatives, that these lands were unsuitable for homesteading because of poor terrain and location. We also noted that the state's consultant estimated relatively minimal values for lost income associated with these 14 withdrawals.

The remaining 14 withdrawals did not primarily benefit native Hawaiians, according to the information that we reviewed. These withdrawals set lands aside for such purposes as parks, a refuse dump, a fire station, a reservoir, and tree nurseries.

Agency Comments

After reviewing a draft of this report's discussion of opinions on the federal government's relationship to native Hawaiians, the methods used by the state to estimate lost income and market value for specific land parcels, and the state's plans to seek federal compensation, the Governor of Hawaii made a number of comments.

In his comments, the Governor questioned our explanation of certain court rulings on the status of native Hawaiians and the federal government's relationship to native Hawaiians. We reviewed the court decisions and, after careful analysis, continue to believe our explanations are accurate, and therefore made no revisions on the basis of the Governor's comments. The Governor also stated his view that both the state and the federal government must collaborate in restoring and strengthening the resources provided by the Congress for native Hawaiians. We revised our report, where appropriate, on the basis of the Governor's comments. (Appendix I contains the Governor's letter and our responses to specific comments.)

After receiving the Governor's written comments, we completed our review of the propriety of certain withdrawals of homelands by territorial governors' executive orders and proclamations. As you requested, we discussed the results of our review with officials from Hawaii rather than seeking written comments from the state. We met with Hawaii's Deputy Attorney General; the Chairman, Hawaiian Homes Commission; and other interested state representatives. The Deputy Attorney General indicated disagreement with the reasoning we used in reaching our opinions on the propriety of homeland withdrawals. Nevertheless, we continue to believe that (1) the territorial governors lacked authority under HHCA to withdraw homelands for nonfederal purposes and (2) while the governors also lacked authority to withdraw homelands for federal purposes, the President had such authority under the Organic Act.

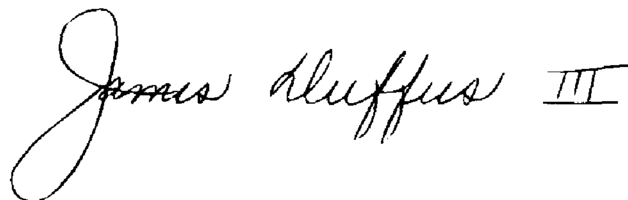
We also requested comments from Interior on this report's discussion of opinions on the federal government's relationship to native Hawaiians, the methods used by the state's consultant to estimate lost income from and appraise current market value for specific land parcels, and the state's plans to seek federal compensation. But Interior, without explanation, decided not to comment.

We conducted our review between September 1992 and February 1994 in accordance with generally accepted government auditing standards. In

carrying out our work, we reviewed relevant reports and records containing information on Hawaiian homelands issues and on specific parcels of land considered by Hawaii to have been improperly withdrawn. We also talked with several officials from the state of Hawaii and the consulting firm that estimated lost income and appraised current market value. A detailed discussion of our scope and methodology is contained in appendix II.

As arranged with your offices, unless its contents are announced earlier, we plan no further distribution of this report until 30 days after the date of this letter. At that time, we will send copies to appropriate congressional committees, the Secretary of the Interior, officials from the state of Hawaii, and other interested parties. We will also make copies available to others on request.

If you or your staff have any questions, please contact me on (202) 512-7756. Major contributors to this report are listed in appendix III.



James Duffus III
Director, Natural Resources
Management Issues

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Abbreviations

DHHL	Department of Hawaiian Homelands
DLNR	Department of Land and Natural Resources
GAO	General Accounting Office
HHCA	Hawaiian Homes Commission Act

Comments From the State of Hawaii

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

EXECUTIVE CHAMBERS

HONOLULU

JOHN WAIHEE
GOVERNOR

September 7, 1993

Mr. James Duffus III
Director, Natural Resources
Management Issues
U. S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Duffus:

Enclosed is the State of Hawaii's response to the findings in the General Accounting Office's (GAO) draft report entitled, Hawaiian Homelands: Hawaii's Efforts to Address Land Use Issues (GAO/RCED-93-191). We want to express our appreciation for the time and effort your staff took to review 72 years of misuse of Hawaiian home lands and our State's determination to remedy these wrongs.

We concur with some of the findings and disagree with others. Our response addresses each disputed finding separately. Further discussion is urged on several critical points. As you may know, both the Departments of Interior and Justice are currently reviewing previous positions taken on these issues. Therefore, it is my opinion that the GAO should not finalize its report while this review is being conducted, or render major conditions to its findings.

I firmly believe that both the State and the Federal governments must collaborate in restoring and strengthening the resources provided by Congress for native Hawaiians and hope that in the near future the means to do so can be agreed upon.

With kindest regards,

Sincerely,

JOHN WAIHEE

Enclosure

Response to General Accounting Office Draft Report,
Hawaiian Homelands: Hawaii's Efforts to Address Land Use Issues
(GAO/RCED-93-191)

Now on p. 2.

Report - page 2, paragraph 1

"These questions focused on whether the federal government has a trust responsibility to native Hawaiians and, thus, might have an obligation to compensate native Hawaiians for any improper withdrawals of Hawaiian homelands."

Response

See comment 1.

This statement of the question assumes that a determination of a federal trust responsibility is required before compensation for improper withdrawals of Hawaiian home lands can be made. An improper withdrawal constitutes a statutory violation, and compensation is due on that factor, independent of whether there is a trust responsibility. Therefore we request that the sentence be revised as follows:

" These questions focused on whether the federal government has a trust responsibility to native Hawaiians, as well as whether it has an obligation to compensate for improper withdrawals of Hawaiian home lands."

Now on p. 2.
See comment 2.

Report - Page 2, paragraph 3

"Federal courts have concluded that the federal government currently has no trust responsibility to native Hawaiians..."

Response

In Price vs. Akaka, August 23, 1993, the Ninth Circuit reaffirmed that native Hawaiians have standing in federal court to bring a 42 U.S.C. Section 1983 action under Hawaii's Admission Act Section 5(f) for breach of trust. Thus we request that the sentence be revised as follows:

"Federal courts have recently concluded that the federal government currently has a trust responsibility to native Hawaiians under Section 5(f) of the Admissions Act, but has not addressed whether such a responsibility existed during Hawaii's territorial period."

State of Hawaii 1 September 7, 1993

Now on p. 8.

Report - page 3, paragraph 1

"Interior has generally expressed the opinion that the federal government does not and never has had a trust responsibility. The Department of Justice concurs with Interior's opinion."

Response

See comment 3.

Recent discussions with both Interior and Justice by the State of Hawaii have indicated that these agencies are reviewing their previous opinions. We request that the sentence be revised as follows:

"Interior has previously expressed the opinion that the federal government does not and never has had a trust responsibility. The Department of Justice has concurred with Interior's opinion. However, both agencies are currently reviewing those positions."

Report - page 3, paragraph 2 and 3

The draft report asserts that there is disagreement over whether lands occupied by the U.S. Navy at Lualualei should be considered Hawaiian home lands.

Response

See comment 4.

There has been no court finding that changes the original designation of Lualualei as "available lands" in 1921 and no opinion that the withdrawal of Lualualei lands was legal under the HHCA. The refusal to consider the State's arguments to return Lualualei due to the expiration of the statute of limitations under the quiet title act in federal court does not mean Lualualei was not, and is not now, Hawaiian home lands.

Now on p. 5.

Report - page 5, footnote 1

"However, 12 of the 43 parcels were listed as pending verification by other state agencies,..."

See comment 5.

Response

State agencies have already verified 8 of the 12 as belonging to DHHL. One of 12 parcels, Governor's Executive Order(GEO) No. 898, is privately owned and DHHL acknowledges this. There remain only 3 of the 12 parcels still pending verification currently: GEO Nos. 197, 437, and 1393.

Now on pp. 6-8.

Report - pages 6-8

Discussion on whether the federal courts have addressed the issue of a federal trust responsibility and what the Departments of Interior and Justice have previously held.

Response

See comment 6.

The draft report appears to confuse whether a trust exists with whether the U.S. would be liable for claims in federal courts. The two issues are separate and distinct. It also misrepresents the findings in the case known as Keaukaha II by citing a footnote which is a dicta and not a holding. It does not indicate that since the spring of 1993 both Interior and Justice have been reviewing their previous opinions.

Now on p. 14.

Report - page 11-13

The draft report notes that some parcels included in the study have not been verified as Hawaiian home lands. It also states that condemnation of Hawaiian home lands appears to be a proper withdrawal under the HHCA.

Response

See comment 7.

The point must be made in the GAO report that any claims for federal compensation will be based only on verified Hawaiian home lands, not on whether the parcels were included in the appraisal study. To expedite claims, the State has chosen to conduct appraisals on a parallel track with the claims verification process. It is misleading to let future readers of this report assume that claims will be based on inclusion in the appraisal study rather than verification of Hawaiian home lands status.

See comment 8.

There is no question that Lualualei was designated "available lands" by Congress. And there is no question that the President's discretionary Executive Order powers do not prevail over an act of Congress which expressly prohibits such withdrawals. To pose the issue as a disagreement between the Navy and the State of Hawaii does not provide Congress with any insight into the eventual resolution. We request that the report clearly state that the withdrawals were statutory violations of the Hawaiian Homes Commission Act of 1920.

Now on pp. 8-11.
See comment 9.

Paragraph 3 on page 12 leaves out a crucial piece of information about the lands condemned by the Navy in 1945 and 1946. These parcels had been alienated from the Hawaiian home lands inventory prior to the time of the condemnation from the private title holders. Thus the condemnation procedures may have been

unexceptional, but they still did not remedy the original wrongful takings. And it also follows that the Admission Act did nothing to remedy the original wrongful takings.

Now on p. 14.

Report - page 13, paragraph 2

The draft report states concerns about using the appraisal study results for federal compensation claims.

Response

See comment 7.

Again the draft report omits the crucial information that any federal compensation claims will be based on verified parcels only. Since this information has been available to GAO from the beginning of its study, it is misleading to include arguments based on the opposite assumption.

Now on p. 14.

Report - page 13

The report states,*"Whether federal compensation for native Hawaiians is appropriate is a matter for the Congress to decide."* (emphasis added).

Response

See comment 10.

This is a misleading statement that should be revised to read as follows, "Whether federal compensation for statutory violations of an Act of Congress is appropriate is a matter for Congress to decide."

Now on pp. 14-15.

Report - page 14-15

The draft report asserts that the Section 213 funding "cap" restrictions rules out compensation for lost lease rent above the cap.

See comment 11.

Response

Just compensation for a taking is not lease rent; rather it is replacement of property. Likewise, back rent for wrongful use should not come within the Section 213 cap for the reason that the land was not voluntarily leased to generate revenue as allowed under Section 212. By its own terms, an executive order is not a lease and could not be considered a Section 212 lease. Nor could damages for wrongful use of the lands be Section 212 income. In any case an award of damages for a wrong or the settlement of a lawsuit to make whole the HHC for the United States' misuse of the lands could not itself be the subject of the Section 213 revenue cap under the terms of the Act. Therefore the cap should not and cannot be retroactively applied to limit the remedies due to the HHC. [See May 21, 1993 letter from Bill Tam, State of

State of Hawaii 4 September 7, 1993

Hawaii Deputy Attorney General, to Richard Johnson, Esq., Office of General Counsel, GAO]

If this argument is being made to justify the lack of lease rent on the part of other governmental agencies during that period of time - that is, if HHL received rent, it could only receive income up to a cap anyway - then the entire argument misses the point. Lease rent paid on a timely basis would have allowed HHL choices in its operation.

The following are our specific comments on the Governor of Hawaii's September 7, 1993, letter. Page references in the letter refer to a draft of this report.

GAO Comments

1. We revised the report in accordance with this comment.

2. The court in Price v. Akaka, 1993 U.S. App. LEXIS 28577 (9th Cir., November 2, 1993), and other courts have held that native Hawaiians may bring suit in federal court under 42 U.S.C. § 1983 for the state's breach of its trust responsibility under section 5(f). These decisions have not discussed the existence of a federal trust responsibility under section 5(f); therefore, no change was made to our report.

3. We revised our report to reflect the Interior Solicitor's November 1993 decision to withdraw a January 1993 opinion regarding the federal government's relationship to native Hawaiians.

4. The material referred to was included in a draft of this report and has been deleted.

5. We revised our report to reflect the status of these parcels.

6. The report correctly states that the proposition at issue is a holding, because the statement at issue is a legal determination on which the outcome of the case turned. The Keaukaha I case, which contains the footnote in question, discussed whether the Hawaii Admission Act and the Hawaiian Homes Commission Act gave native Hawaiians standing to sue the Hawaiian Homes Commission for alleged breaches of the state's trust responsibility and alleged violations of the Commission Act, stemming from certain transfers of Hawaiian homelands. The court held that no such right to sue existed.[8]

As one of their arguments in favor of such a right to sue, the native Hawaiian plaintiffs argued that the United States was a trustee for Hawaiian homelands under the Admission Act. Case law has established, under the "co-plaintiff" doctrine, that native Americans, as beneficiaries of a federal trusteeship, may sue whenever the United States could have sued on their behalf in its role as their trustee. The native Hawaiian plaintiffs in

[8] Id. at 1224, 1227. The Keaukaha II case held that native Hawaiian plaintiffs do have a private right of action under 42 U.S.C. § 1983. 588 F.2d 1216, 1224, 1227 (9th Cir. 1978). Although that opinion indicates that the state's trust obligation is "rooted in federal law [the Admission Act]," the opinion does not conclude that the federal government is a trustee.

Keaukaha argued that they should be allowed to sue under the co-plaintiff doctrine because the United States is a trustee for Hawaiian homelands just as it is for lands it administers on behalf of native Americans. The Ninth Circuit rejected this argument, stating that the co-plaintiff doctrine did not apply to native Hawaiians because the United States is not a trustee for the homelands under the Admission Act.

7. We revised our report to clarify that claims for federal compensation are planned to be made for verified Hawaiian homelands.

8. On pages 6 through 7, we present our opinion regarding the propriety of certain withdrawals. Concerning the withdrawal of Lualualei lands, we state our view that the President had authority under the Organic Act to withdraw lands for the use and purposes of the United States.

9. The material referred to was included in a draft of this report and has been deleted.

10. The statement was revised to clarify that compensation would be for unauthorized withdrawals of homelands.

11. The purpose of our discussion of the congressional funding caps limiting the amount of rental income to be made available to the Commission is to inform the Congress that the Commission did not forgo or "lose" rental income from the withdrawn lands.

Objectives, Scope, and Methodology

As requested by Senators Daniel K. Akaka and J. Bennett Johnston, we (1) obtained information on federal, state, and court views and opinions on whether the federal government had or has a trust responsibility for native Hawaiians; (2) determined the authority of the territorial governors to withdraw certain homelands; and (3) reviewed the approach and methodology used by a consultant to the state of Hawaii to estimate the lost income from and the current market value for specific parcels of lands considered to be Hawaiian homelands.

To obtain information on the relationship between the federal government and native Hawaiians, we reviewed relevant federal legislation, federal and state court rulings, and official opinions from the federal government and the state of Hawaii. For the opinions of the federal government, we reviewed opinions from the Department of the Interior. We discussed these opinions with Interior and Department of Justice officials. In determining Hawaii's views, we reviewed opinions and related documents from and had discussions with officials of the Office of the Attorney General for the state of Hawaii. We also reviewed the 1983 Federal-State Task Force Report on the Hawaiian Homes Commission Act (HHCA) and other reports on the subject by the Hawaii Advisory Committee to the U.S. Commission on Civil Rights and the state of Hawaii.

To determine the validity of territorial executive orders, we examined the executive orders as well as territorial and state documents discussing the history and background of the relevent parcels of land. We also reviewed applicable legislation and court rulings.

In reviewing Hawaii's approach and methodology for estimating lost income and current market value, we conducted most of our work at the state's Department of Hawaiian Home Lands (DHHL) and Department of Land and Natural Resources (DLNR). We also met with the state's consultant who prepared the estimates. These estimates were prepared in two groups. The first appraisal group included 43 executive orders and proclamations from the territorial period. For federal compensation, this first group included only lost income estimates. The second group was for land at Lualualei, Oahu, and it contained lost income and current market value estimates for federal compensation. The second appraisal report was available only in draft form during our review.

We visited several parcels set aside on the islands of Oahu and Hawaii where most of the land appraised was located. On Oahu, we accompanied DHHL officials and the consultant on their initial survey of the land at

Lualualei. On the island of Hawaii, we met with DHHL employees from their East and West Hawaii District Offices. However, we were unable to view some of the parcels on the island of Hawaii because of their remote locations. We did not go to the islands of Molokai, Kauai, or Maui to view the parcels of land appraised on those islands.

For all of the properties appraised, we reviewed the mathematical calculations the consultant used in determining the lost income estimates. We found several mathematical calculation errors in the draft Lualualei appraisal that we directly communicated to the state of Hawaii so corrections could be made in the final report. We also reviewed the mathematical calculations for the current market value estimates for the military land at Lualualei.

We reviewed comments provided by Hawaii on the two groups of appraisal reports to see what concerns were raised and how they were resolved. At the time of our review, Hawaii was in the process of commenting on the draft Lualualei appraisal report. We reviewed comments provided by DHHL, but comments had not yet been provided by DLNR. We do not know what impact the comment and review process will have on the final appraisal report for Lualualei.

In evaluating the lost income estimates, we reviewed files and interviewed officials at DHHL and DLNR. In reviewing these files, to the extent data were available, we examined

- the use of each parcel from the date of HHCA's enactment on July 9, 1921, to the date the parcel was withdrawn to determine if the highest and best use the consultant used was appropriate;
- the rental income generated by each parcel, and the rental income generated by surrounding parcels, to determine if the lost income the consultant estimated was reasonable;
- information provided by Hawaii to the consultant about the properties to determine if the information provided was complete and accurate; and
- the historical events surrounding parcels, including the involvement of the Hawaiian Homes Commission.

We also looked for any evidence that the status of any of the land as Hawaiian homelands was being questioned. We noted several factual errors in the property inventory DHHL provided to the consultant for the land at Lualualei. Since the Lualualei appraisal was still in draft form, we

directly informed DHHL of these errors so the appropriate corrections could be made in the final report.

Our review methodology for estimates for the land at Lualualei was basically the same as that for the 43 parcels in the first appraisal report. However, our review of the actual lost income estimate for Lualualei was not as extensive as for the 43 parcels because (1) the legislative funding cap precluded the Hawaiian Home Commission from receiving additional rental revenues for most of the territorial period, (2) the appraisal was in draft form, and (3) for the majority of the territorial period, the lost income estimate for most of the parcels in Lualualei was a nominal $10, $15, or $25 per year.

We gathered documents showing the income and territorial appropriations that the Hawaiian Homes Commission received during the territorial period from DHHL, DLNR, and the state's Attorney General.

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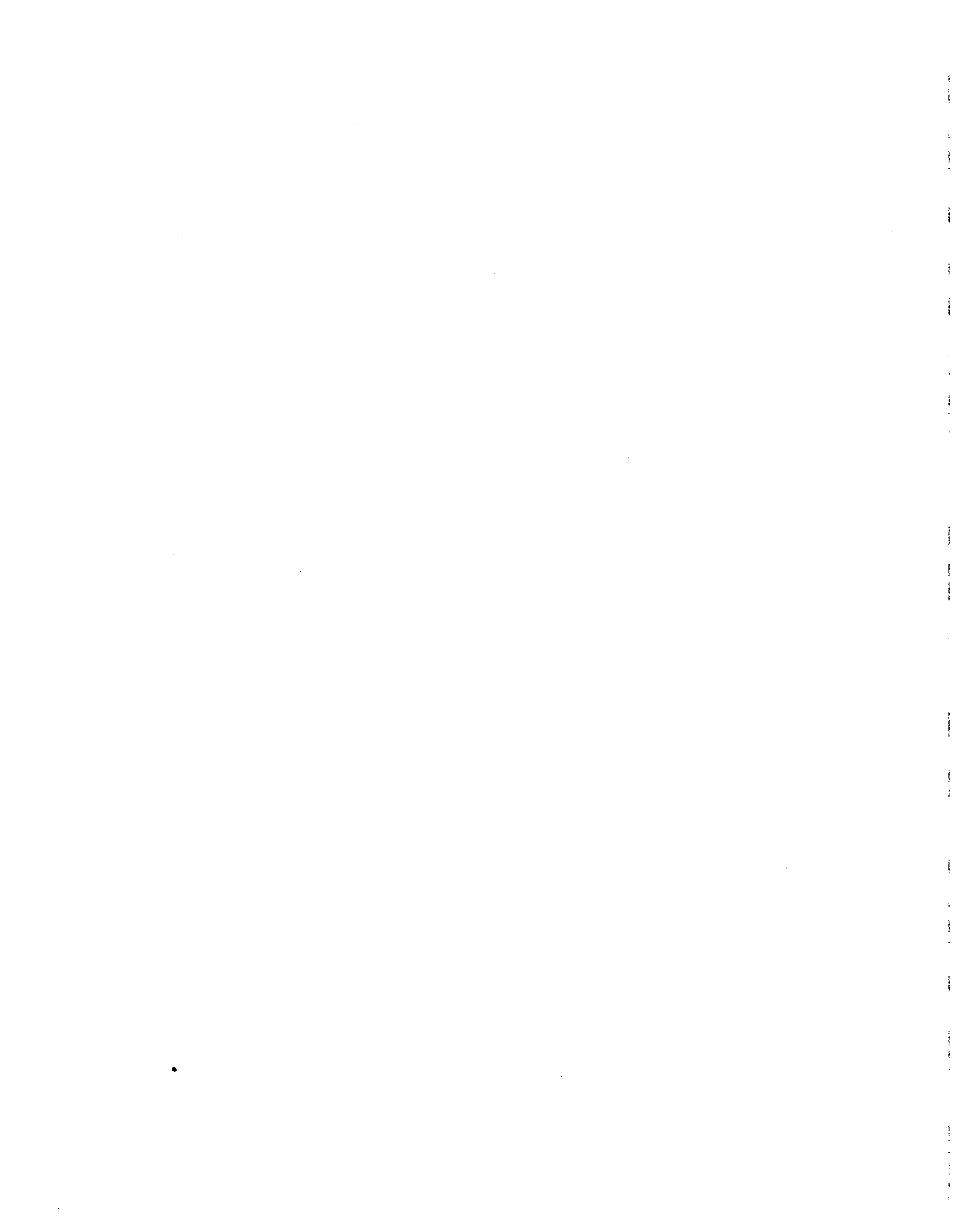

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