

## Long wait for justice

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**Abstract:** Caroline Bright was part of a class-action lawsuit filed nearly 14 years ago against the state for breaching its trust obligation to get Native Hawaiian beneficiaries onto homestead lots. After a six-week trial in 2009, a state judge ruled that the state and Department of Hawaiian Home Lands, which manages the 203,000-acre trust on behalf of beneficiaries, breached their fiduciary duty by not issuing homesteads on a timely basis. Because of such factors, the trial determining liability for the waitlist claims was not held until August 2009, the fourth date change for that proceeding. [...]even after the state assumed responsibility for the trust as a condition of statehood (the federal government remains a co-trustee), insufficient funding for infrastructure development has been a perennial problem, cited in multiple reports and in Hifo's ruling.

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**Full text:** Caroline Bright applied for a homestead lease in 1959, the year Hawaii became a state. She died last year at age 87, still waiting for one.

"She gave up on them," said her daughter, singer Teresa Bright. "She lost hope."

Caroline Bright was part of a class-action lawsuit filed nearly 14 years ago against the state for breaching its trust obligation to get Native Hawaiian beneficiaries onto homestead lots.

After a six-week trial in 2009, a state judge ruled that the state and Department of Hawaiian Home Lands, which manages the 203,000-acre trust on behalf of beneficiaries, breached their fiduciary duty by not issuing homesteads on a timely basis. Judge Eden Elizabeth Hifo also determined that the breaches of trust from 1959 to 1988 caused the plaintiffs economic harm and that the state must pay compensation.

But Bright and nearly 300 other plaintiffs already have died without seeing a penny of damages. The lawsuit, known as Kalima v. State (Leona Kalima is the lead plaintiff), was filed on behalf of more than 2,700 beneficiaries, many of them elderly.

Even though the state was found liable for damages four years ago, the case is nowhere close to being resolved. Another trial must be held to help determine what rental values will be used to calculate damages related to the beneficiaries' long waits.

After that, the court still must decide whether the state was liable for other breaches the plaintiffs alleged, including lost applications and the awarding of homestead lots that were uninhabitable. Appeals could prolong the outcome.

The state, as it has over the past 14 years, is expected to vigorously defend its position in court. In those 14 years, it has not made a single offer to settle out of court with the 2,721 class members.

Plaintiff attorneys Tom Grande and Carl Varady say the state has rebuffed every one of their settlement overtures and has gone so far as to suggest that 2,721 separate trials be held, if necessary, to decide damages.

As the legal wrangling continues, more class members, whose average age is 65, are expected to die before the lawsuit is resolved.

"This is a travesty," said former Gov. John Waihee, the state's first Native Hawaiian governor. "To me, it's compounding the initial breach."

Some plaintiffs likely will suffer the same fate as Bright, dying before getting a homestead lot or any compensation. Thirteen plaintiffs died last year. About 60 have died since Hifo, now retired, ruled the state was

liable for damages.

Barring an out-of-court settlement, the litigation could drag on for years.

"I see no light at the end of the tunnel for this case," said Gil Johnston, a University of Chicago law professor who is familiar with Hawaiian home land issues, practiced here in the 1970s and read Hifo's ruling at the Star-Advertiser's request.

Attorney General David Louie said the state is committed to resolving the case in a fair and equitable manner and is willing to consider a reasonable settlement that protects the state's interests.

The two sides, however, remain far apart. That raises the possibility that the claims ultimately may have to be resolved by the Hawaii Supreme Court, according to Louie. Asked about the prolonged litigation, Louie cited multiple factors, including the complexities of a case involving thousands of claims pegged to events dating as far back as half a century ago.

This isn't a standard personal injury or contract-dispute case, which has plenty of legal precedent, and the Kalima litigation raises numerous issues that have never been addressed by the courts, Louie added.

He also noted that the case was on hold for 51½ years while the Hawaii Supreme Court ruled on an appeal, and since that 2006 decision, five different lower-court judges have presided over the case, adding to the longer-than-usual duration.

Because of such factors, the trial determining liability for the waitlist claims was not held until August 2009, the fourth date change for that proceeding. For the past 21½ years, the legal wrangling has been over how damages will be calculated.

"There are serious, fundamental differences in the way we view the case (compared) with the plaintiffs' attorneys," Louie told the Star-Advertiser. "That doesn't mean their view necessarily is wrong or our view necessarily is wrong. We have a different take and because there's no precedent on these things, it requires the court to rule on some of these."

#### TROUBLED HISTORY

Native Hawaiian advocates consider the delays yet more evidence of the many injustices beneficiaries have suffered since the passage of the Hawaiian Homes Commission Act of 1920.

The federal law, which was actually enacted in 1921, created the trust to help return Hawaii's native people to their land and assist in their economic self-sufficiency.

To be eligible for the 99-year residential, farming and ranching leases at \$1 annually, beneficiaries must be at least 50 percent Hawaiian. But many who have sought homesteads over the years have encountered problems and delays, some attributed to state mismanagement.

Much of the land originally set aside for the trust was considered marginal, partly because of its remoteness and lack of infrastructure. And even after the state assumed responsibility for the trust as a condition of statehood (the federal government remains a co-trustee), insufficient funding for infrastructure development has been a perennial problem, cited in multiple reports and in Hifo's ruling.

The lack of funding has contributed to the waitlist swelling to more than 26,000 beneficiaries today.

"The story of what has happened with the Hawaiian Homes waitlist is not one we can be proud of as a state," said Waihee, who served as governor from 1986 to 1994.

The Kalima lawsuit was filed in December 1999 after the state disbanded an administrative panel created during the Waihee administration to review beneficiaries' breach-of-trust claims covering August 1959 to June 1988.

The panel was dissolved before its work was completed.

The 2,721 plaintiffs in the class-action case submitted administrative claims that were never settled, including nearly 475 beneficiaries who the panel recommended should get about \$18 million in damages. Among those was Bright, who was entitled to \$63,000, according to panel records.

In the end, no claimant received any damages or relief through the administrative process, leaving the plaintiffs with no option but to sue, their attorneys say.

The failed attempt to resolve the breaches administratively and the delays in getting compensation through the court system have added to critics' contentions that state officials do not take to heart their trust obligations to Native Hawaiians.

"It doesn't seem to resonate with them that they're failing to do this," said Alan Murakami, an attorney with the Native Hawaiian Legal Corp. "Nobody seems to value the promise we made to Hawaiians."

#### FINANCIAL ROADBLOCKS

Beyond the complicated legal arguments that underscore the Kalima case, beneficiaries speak of hardships endured as they waited for homesteads. Some say they were given opportunities to apply for leases but couldn't qualify financially to build a home.

The federal and state laws do not require a beneficiary to be financially qualified, and some advocates say those who can't qualify are the ones most in need of homesteads.

Zalei Kamaile, 60, said she spent a year living on the beach in 2006 with her elderly mother and a disabled friend, then spent another year living in a shelter. She said she has been on the DHHL waitlist since 1989 and still has no homestead.

The now-defunct administrative panel recommended that Kamaile, a musician and full-time caregiver for her 85-year-old mother, be paid \$10,800 in damages for not receiving a homestead on a timely basis.

"Why do we have to beg for something that us Hawaiian people are entitled to?" asked Kamaile, who now lives in public housing with her mother and friend. "We struggle. We're not saying everyone else doesn't. But some people struggle more than others."

Caroline Bright also spoke of tough financial times.

In a deposition she gave before the 2009 trial, the Kaneohe resident talked about her struggle to raise three children as a single mother -- she divorced in 1963 -- and said having a homestead would have helped.

"We were so poor," the retired state worker said.

Her daughter, Teresa, eventually built her mother a home on family land in Kaneohe. When asked at the trial about the prospect of getting a homestead, Bright noted her age, then 84, and replied, "It's too late for me."

Because the court still must decide issues related to how damages will be calculated and whether the state is liable for other breaches, no one is certain how much is at stake financially. But if the now-disbanded administrative panel's recommendations are an indication, the state potentially could be on the hook for tens of millions of dollars.

The panel's recommendations averaged about \$38,000 per claimant. Some plaintiffs have extrapolated that number to conclude the state faces potential damages of \$100 million.

The court, however, already has narrowed the scope of who is entitled to damages -- something the plaintiffs have challenged.

In a ruling last year, Judge Virginia Crandall determined that six years was a reasonable wait for a homestead lease and only the time beyond that would be used to calculate damages. She also ruled that if a beneficiary were offered a homestead lease but declined it, he or she would no longer be entitled to damages from that point forward.

#### SUSPICIOUS DELAY

Some plaintiffs and others following the case believe the state's strategy is to delay the outcome -- and a potentially huge tab -- as long as possible. The death of plaintiffs also could work to the state's advantage, they say.

If a plaintiff dies without a homestead, the damages could be capped at that point, given that the amount would be based on how long the person waited for a homestead award. The wait stops at death.

Johnston, the Chicago law professor and chief litigator for the Legal Aid Society of Hawaii in the early 1970s, said delaying the class-action case as long as possible would be in the state's best interest, increasing the likelihood that something eventually will go wrong for the opposing side.

"They're doing the same thing that insurance companies do in personal injury cases: stall, stall, stall," Johnston said.

Varady said the state's strategy has remained essentially unchanged through the administrations of Govs. Ben Cayetano, Linda Lingle and Neil Abercrombie, opposing virtually every motion or proposal made by the plaintiffs.

When a mediator was appointed in 2007 to help the two sides reach a settlement, the plaintiffs submitted an offer with three possible approaches. But the state never countered and instead pulled out of the mediation.

"The state, through Govs. Cayetano, Lingle and now Abercrombie, has done everything it can to bury these claims," Varady said. "The kupuna are passing without any justice or compensation for the disenfranchisement and delays they've suffered from the misuse, mismanagement and misappropriation of the lands that belong to them."

Louie denied that the state is using stall tactics, saying the court would not allow that. He said he has a duty to all Hawaii citizens to make a reasoned assessment of each claim.

"We are not objecting just to object," he said. "We are not making frivolous objections."

He said any litigation involving Native Hawaiians is important to the state, which has numerous attorneys working on the case.

Louie also said the state realizes that many plaintiffs are elderly. "We're certainly sympathetic to that factor."

But because the plaintiffs' attorneys chose to pursue this as a class-action case, the state has to deal with the plaintiffs as a group, not individually, he added.

Cayetano, who was governor from 1994 until 2002, said in an email that he didn't remember much about the case but if the state already lost and damages were the issue, the lawsuit should have been settled. Hifo's liability ruling came seven years after Cayetano left office. Cayetano was lieutenant governor under Waihee.

Mark Bennett, Lingle's attorney general, did not respond to requests for comment.

While the Kalima case focuses on trust breaches up until June 1988, it does not address alleged breaches after that. State law permits beneficiaries to sue the state for post-1988 claims.

But as the Kalima case indicates, going to court is no easy task.

Big Island resident Herk Freitas, 66, one of the plaintiffs, said he's frustrated and angry that the class-action case has taken so long to litigate.

Freitas has been waiting for an agriculture lot for more than 25 years. He received a residential homestead in 1985 -- but only after discovering that DHHL lost his 1976 application and he threatened to sue, according to Freitas and records from the administrative panel. The panel recommended Freitas receive \$123,000 in damages.

"This is a political game with the state," he said. "It's sickening. It's disgusting."

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