

# OHA: A Celebration Of Ten Years

## OHA: the struggle for Legitimacy—Part 3

The period in OHA's history from 1983 to 1985 was marked by a few tumultuous controversies that overshadowed all of its day-to-day operations and helped to fix the future course of the Office. For this reason, Chapter III, "OHA—The Struggle for Legitimacy" is not a chronological story, but a study of four distinct episodes, all of which occurred at roughly the same time. We hope that a careful reading of these complex yet vitally important "topics" will help you understand how OHA—and the Hawaiian community—came of age in the mid-1980s.

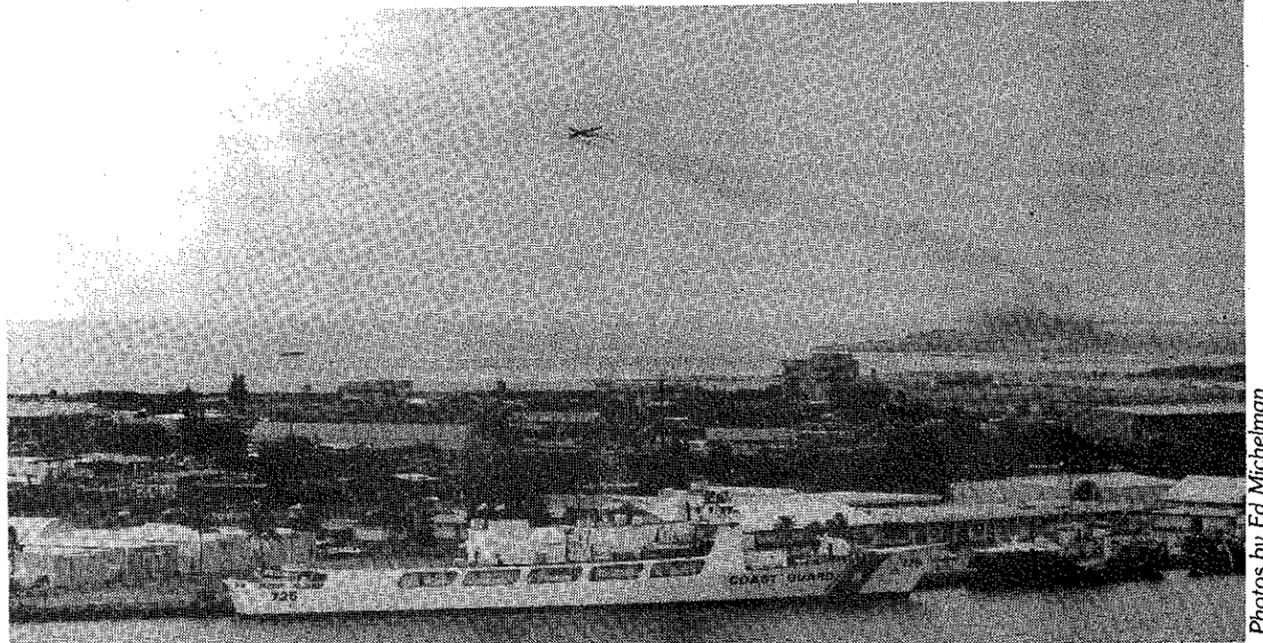
by Curt Sanburn  
Special to Ka Wai Ola O OHA

At this point in OHA's history, it's important to understand the laws—the state constitutional amendments and the enabling legislation—which created the agency and set up a revenue source to fund its mission. Bear with us through a quick review of OHA's legal history:

In 1978, Hawai'i voters ratified constitutional amendments to create OHA for the betterment of Hawaiians and to fund its activities through a share of revenues from the "public land trust"; that is, the crown and government lands (approximately 1.75 million acres) ceded to the U.S. government at the time of annexation in 1898 and transferred by the U.S. to the newly created State of Hawaii in 1959.

A condition of that transfer, spelled out in the Admissions Act, was that the state must use any income from the public land trust for any of five explicit purposes, including the "betterment of the conditions of native Hawaiians." This condition was the basis for the State Legislature's formula to fund OHA: a one-fifth (or 20 percent) share of public land trust revenues. The formula became law in 1980. By law, then, the newly created Office of Hawaiian Affairs was entitled to 20 percent of all funds generated from the public land trust, to be used for the betterment of "native Hawaiians," those with 50 percent or more Hawaiian blood.

One would think that was the end of it, but it was only the beginning.



Photos by Ed Michelman

In its 1984 lawsuit against the State of Hawai'i, OHA sought its legal share of ceded land revenues from Honolulu International Airport, shipping facilities on Sand Island and at Honolulu Harbor (below).

## OHA vs. State of Hawai'i

On April 9, 1983, the Board of Trustees of the Office of Hawaiian Affairs authorized well-known attorney Boyce Brown to proceed with a lawsuit against the State of Hawai'i. The suit sought to retrieve OHA's 20 percent share of a \$1.8 million settlement reached between the state and Moloka'i Ranch Inc. regarding illegal sand mining done by the ranch on public trust, or "ceded" lands at Kaluakoi, Moloka'i.

The technicalities of the suit were complex, but its historic importance cannot be overestimated. For the first time in its brief existence, OHA was not going to be polite. In fact, OHA would go all the way and demand its rightful and legal share of all public land trust revenues.

But OHA was already receiving about \$1.2 million every year from the public land trust

revenues, at least from those revenues collected by the Department of Land and Natural Resources. Wasn't that enough?

"No, it wasn't enough," says former Trustee Rod Burgess who, as chairman of OHA's land committee during those crucial years, led the charge for full payments from the public land trust. "We were going after our 20 percent of revenues from our lands, Hawaiian lands, and it wasn't up to the discretion of the state what OHA would get paid—the law was specific. We were going after what we were entitled to."

As the trustees and their advisors became more knowledgeable about the public, or "ceded" land trust, became aware that they were being short-changed by the state. This was at about the same time that they realized that the monies they were getting from the trust, between \$1.2 and \$1.5 million annually, was barely enough to staff the office and pay overhead, much less service the needs of the Hawaiian community.

According to Trustee Moses Keale, "The Molokai sand-mining suit happened at a time when we were dickering with the state about what revenues from which lands OHA should get. The law said we get 20 percent from all income, period, but the department chiefs within the Ariyoshi administration had different ideas. So we had this jockeying back and forth."

Summarizing the Board's reasoning for the suit, constitutional lawyer Jon Van Dyke, a professor at the UH Law School and a long-time adviser to OHA, says "There was a lot of frustration, a feeling that the state was not responsive to OHA's concerns and claims, a sense the administration was nickel-and-dimeing OHA constantly."

The Department of Transportation (DOT), for example, wasn't sharing any of its revenue (estimated at \$100 million annually) with OHA, even though the income-producing Honolulu International Airport and harbors throughout the state were on ceded land. The Department of Land and Natural Resources (DLNR), which was

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providing all of OHA's ceded lands income, mostly from agricultural lease rents, had no way to ensure a full accounting for its quarterly payments to OHA, payments which fluctuated with every quarter, depending on payments DLNR's tenants were—or were not—making.

The Moloka'i sand mining suit, spearheaded by Trustees Walter Ritte, Rod Burgess and Hayden Burgess and endorsed unanimously by the Board, was the first effort to raise this complex but vital issue of fairness and legal entitlement in the courts.

OHA's claims against the state made the newspaper headlines. To judge by the reaction, from commentators and editorial writers, you'd have thought that OHA (whose mandate was to help all Hawaiians, and whose annual budget would barely cover the purchase of a single home in Kahala) was being ungrateful.

Requests for a meeting with then-Governor Ariyoshi went unanswered. A meeting between Ariyoshi's DOT director, Ryokichi "Ricky" Higashionna, and a delegation from OHA ended quickly and nastily when Higashionna promised the delegation that OHA wasn't getting a penny from DOT and then threw them out of his office.

Finally, a few OHA trustees met with the governor in early 1984. He backed his appointed department heads, refusing to make any concessions. Instead, Hawaii's chief executive suggested OHA initiate a second, "friendly" lawsuit against the State of Hawaii, a suit that would settle the whole question of public trust lands revenues once and for all.

"The governor's suggestion was totally surprising and shocking," Burgess says. "He had the discretionary authority to resolve the situation without a suit, but he went for the suit because he probably knew the financial impact of a negotiated settlement with OHA would have been significant. His concerns were strictly political; he had a hot potato on his hands and rather than make the decision himself, he passed the buck to the judiciary.

"This was the same governor," Burgess says, "who had promised us an 'open door policy' and here he was, on the first big issue we raised, and his open door becomes a closed-door policy. The suit was the only avenue he gave us."

Analyzing the situation from the perspective of seven years later, Trustee Keale says, "Nobody, including the governor, was ready to commit to OHA politically. They were hoping we would just fade away."

The trustees went back to their offices and did exactly what Ariyoshi suggested. They hired a second high-profile attorney, David Schutter, to join Boyce Brown in a second lawsuit to claim one-fifth of the revenues from all DOT lands and from lands under the proposed Aloha Tower redevelopment and land leased to Matson Navigation Company at Sand Island in Honolulu Harbor. The stakes were high: OHA's projected 20 percent share of annual revenues from these lands was estimated at somewhere between \$10 and \$20 million.

The newspaper headlines announcing the second suit on March 9, 1984 were even bigger this time.

Very quickly a lot happened. Powerful state House Speaker and part-Hawaiian Henry Peters met with seven trustees and urged them to withdraw the suit. Governor Ariyoshi publicly warned that the suit would adversely affect the state's revenue bonds. A month later, Circuit Court Judge Edwin Honda heard arguments for a summary judgement as to whether OHA had legal standing to sue the state. (A year later, after several delays, Honda allowed the suit to proceed.)

In the most shocking development to come out of the lawsuit, Deputy Attorney General James Dannenberg suggested that OHA was not in a position to sue because its trustees were elected by one racial group, which was unconstitutional under the equal protection clause. Dannenberg was, in fact, challenging OHA's very existence in the process of arguing the state administration's case.

Jon Van Dyke remains mystified by Dannenberg's suggestion that OHA was unconstitutional, especially after the Attorney General's office had already issued an opinion confirming OHA's legality in 1982. Van Dyke figures the challenge, as confused as it was, was "tactical, in the sense of trying to throw an obstacle in the litigation and scare the trustees; to say, in effect, 'Look, you guys are getting uppity, and if you pursue this line of reasoning, we're going to argue that you don't even exist.'"

In a March 8, 1984 statement released to the press at the time of the lawsuit, the trustees said: "The suit has been filed with great reluctance and only after two and one-half years of attempts to negotiate a fair and reasonable settlement with the state administration. Because the Department of Transportation refuses even to discuss our entitlements, we are left no option other than to seek justice in the courts.

"The Board of Trustees literally has no discretion in this matter. To ignore the DOT's adamant refusal to comply with the law would be a breach of fiduciary duty which could subject us to a suit by any of our beneficiaries."

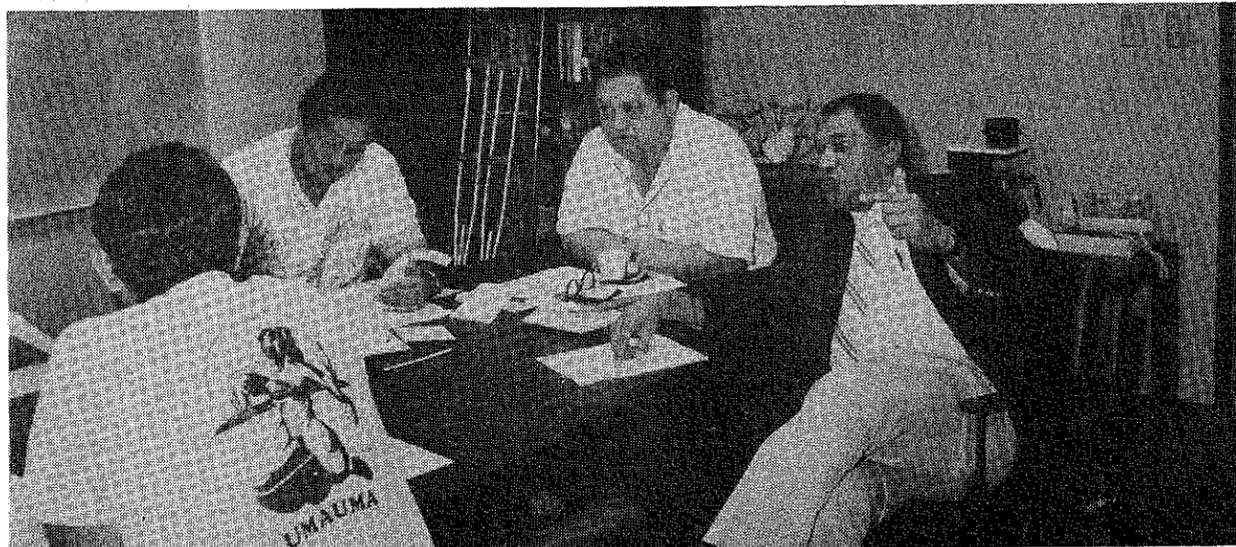
After years of stalling and delay, the Moloka'i and DOT cases (which had been consolidated into one suit) made their way to the U.S. Supreme Court which, on October 13, 1987, refused to hear OHA's claim against the state.

The high cost was saying, in effect, that the state legislature should clarify itself.

The matter was destined to be decided politically, by negotiation with the new and more sympathetic administration of Governor John Waihee, who had been instrumental in the creation of OHA at the 1978 Constitutional Convention. These negotiations led to the historic ceded lands settlement between OHA and the state in 1990.

This chapter in OHA's history was a long and difficult one, seven years of legal maneuvering and acrimonious debate, both inside OHA and among the Hawaiian community, and in the state at large. There were those who urged OHA to be patient and those who thought lawsuits violated the principle of ho'oponopono. There were those who thought suing the State of Hawaii was "treason." To the general public, the endless headlines and courtroom clashes probably looked like so much wasteful, legalistic wheel-spinning, very far from the dream of a Hawaiian political entity leading Hawaiians in the creation of a better—and independent—community.

If the trustees had done nothing and meekly accepted whatever was offered, OHA might have been more "popular" with Hawaii's established power structure, but by the same token it would have become an ineffectual and dependent political tool, destined to pay lip service to the needs of the Hawaiian community with no resources to meet the challenges and goals that had been so optimistically charted in 1978. Through this battle, as exhausting as it was, the Office matured as an advocate for Hawaiian entitlements and proved that it must be taken seriously.



State Senator and former OHA Trustee Peter Apo meets with the OHA Board of Trustees in early 1983. Shown at the table are Trustees Walter Ritte (back to camera), Moses Keale and Gard Kealoha.



Windward O'ahu residents listen intently to testimony during its hearing in Waimanalo in 1982.

## Hawaiians vs. Rea

On his last day in office in early 1981, President Jimmy Carter named nine commissioners to the Native Hawaiians Study Commission (NHSC), a Congressionally-mandated investigation into the purpose and concerns of Native Hawaiians. The purpose of the NHSC was to recommend actions that might be initiated by the U.S. Congress to address the troubling social and economic gaps between Native Hawaiian (here defined as either full or part-Hawaiian) and the general population in Hawai'i.

For Hawaiians at the time, including the trustees of the Office of Hawaiian Affairs, the study commission represented a bright, shining promise. Here was all the power and prestige of the nation's capital ready to focus, for a moment, on the symptoms and the root cause of Hawaiians' dispossession from their own land.

Hawaiians were optimistic that the study commission would document the U.S. role in the illegal overthrow of the Hawaiian monarchy in 1893 and that it would perhaps be honor-bound to recommend some kind of official apology and a plan for reparations from the federal government to the Hawaiian people.

When Ronald Reagan was sworn in as Carter's successor, he quickly disbanded the NHSC, citing it as an example of government waste. At least one member of the Reagan administration called the Commission a "boondoggle."

Eventually, however, pressure from Hawai'i

File photo



Photo by Dennis Oda, courtesy Honolulu Star-Bulletin

Members of the Native Hawaiian Studies Commission

## Administration

Republicans, who argued that the Commission was ordered by Congress, succeeded in getting it reinstated. To fill the nine-member study commission, Reagan appointed five loyal, middle-level bureaucrats from his administration and a businessman, along with three Hawaiians: Kina'u Kamalii, Rodger Betts and Winona Beamer. Kamalii, a staunch Republican and the head of Reagan's Hawai'i campaign in 1980 was named chairperson.

The Commission, controlled by its part-time Washington bureaucrats, spent a year gathering and compiling information. They held a week-long series of hearings in Hawai'i (which two of the commissioners did not attend) and released an impressively thick draft document of findings for review and comment in September of 1982.

The NHSC draft findings sent a shock wave through the Hawaiian community. On the crucial topics of U.S. responsibility for the 1893 overthrow and claims by native Hawaiians against the government as a result of the overthrow, the U.S. government was exonerated, and the Commission concluded that under present law, native Hawaiians had no legal standing to make any claims.

The reaction from the Hawaiian community and others was swift and vociferous.

The report showed a "startling bias and lack of objectivity," according to comments prepared by attorney Melody MacKenzie for the Office of Hawaiian Affairs. MacKenzie went on to say that the report "makes statements which lack supporting authority and, in many instances, the report is argumentative rather than impartial." Parts of the report are "so biased," MacKenzie wrote, "as to cast doubt on the credibility of the Commission."

OHA Trustee Joe Kealoha called the report "a total disappointment."

U.S. Sen. Daniel Inouye, who had been instrumental in pushing for the Commission, publicly called the study "a negative report that attempts to rewrite history in certain instances.

"That report," he went on sarcastically, "will support . . . the contention that nothing wrong was done and it was long ago, so let's forget about it."

Commission Chairperson Kina'u Kamalii tried to calm the storm of protest by reminding critics that their comments would be considered before the final report with its list of recommendations was released a year later.

But Kamalii, as well as Betts and Beamer, were

up against a formidable group of Washington insiders whose sympathies lay less with the plight of the Hawaiians than with the Reagan administration's cost-cutting agenda and its notable lack of compassion for minorities. One key commissioner had been associated with a group that opposed American Indians in court; another represented the Justice Department in litigation against native Alaskans. In addition to their prejudices, critics charged that the Commission did research that was slipshod, hasty and second-hand.

OHA sent two official representatives, attorneys Melody MacKenzie and Jon Van Dyke, to Washington for the last two days of Commission hearings before the release of the final report in March 1983. It was a last-ditch effort to persuade the majority to consider some language in the report on reparations for the 1893 overthrow, and to address the analogies that could be drawn between the treatment of the Hawaiians and other native peoples by the United States. They were not allowed to speak, however, and they returned home bewildered by the procedural gamesmanship with which the mainland commissioners controlled the meetings. The whole thing was a "bizarre charade," according to their published account of the trip.

On March 4, 1983, the Commission voted 6-3 to reject language that would admit U.S. wrongdoing in the 1893 overthrow, paving the way for the Final

Report of the Commission, which would be presented to Congress on June 23. The three Hawaii commissioners disassociated themselves from the entire 300-page document and announced plans to issue a minority report to accompany the majority report to Congress.

For Kina'u Kamalii, the experience was so unhappy that she said publicly that she would probably abandon the Republican Party, just as it had abandoned the Hawaiians.

Looking back, most observers nevertheless see the Native Hawaiians Study Commission as a watershed event in Hawaiian affairs. Because of the endless headlines and controversy, the fact of U.S. involvement in the illegal overthrow of the sovereign Hawaiian nation and resulting claims for native compensation became more widely understood and discussed than ever before in Hawaii's history.

But there is a long-lasting downside as well. According to Sen. Inouye, every time he proposes federal legislation to benefit native Hawaiians, his congressional colleagues pull out the Native Hawaiians Study Commission to prove him wrong. For the time being, it remains the official "study," and until it's replaced with another Congressional commission study, it will remain the sourcebook on Hawaiian affairs for the nation's lawmakers.



Photo by Williams Photography

Newly inaugurated Trustee Hayden Burgess explains to the press his decision not to take the public oath of office.

## Learning about sovereignty

Veteran Wai'anae lawyer and activist Hayden Burgess campaigned for OHA trustee twice, in 1980 when the first board was elected (he lost), and again in 1982 when he won as O'ahu trustee. He ran his campaign on the issue of Hawaiian independence. His agenda, he says, was to "to use OHA as a stepping stone toward internationalizing the issue of Hawaiian sovereignty. Second, of course, was to address the programs for bettering the conditions of the Hawaiians.

"I've always said that OHA must afford the step closer to Hawaiian independence," says the intense and articulate former trustee. "OHA itself would never be the independent government or entity, but it could bring us closer to that independence."

Burgess, a cousin of fellow trustee and political ally Rod Burgess, made his point from the very start of his term as trustee, when he refused to take the public oath of office to uphold the constitution and laws of the United States. His action was controversial, and Burgess remembers the shouting and recriminations directed at him during the first board meeting he attended, but he defends his action calmly: "A statement had to be

made right at the very beginning so that my intentions were clear, so that people would not think I was a hypocrite. So I made a very loud statement at the beginning."

Burgess' association with the World Council of Indigenous Peoples, made up of indigenous groups from the Pacific, South America, Central America, North America and Scandinavia who considered themselves to be under colonization, had a profound effect on his outlook. He says he learned that "the struggle for self-determination was a commonality that bound almost all indigenous peoples around the world; and that colonizers, whether they were American or French or what have you, essentially follow the same footprint, stepping over indigenous peoples."

Burgess had no authority to represent OHA on the World Council, but he brought back to the Board of Trustees valuable information about organizations and efforts that were similar to OHA's mission to achieve self-determination for the Hawaiian people. Burgess encouraged his fellow trustees to travel and attend meetings of

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indigenous and native-rights groups around the globe.

Rod Burgess gives his cousin due credit for expanding the other trustees' vision: "He got them thinking that our task was not a lonely exercise in futility. Hayden showed us that there were other native peoples in the same boat, that there was a course of action we could realistically pursue."

Early meetings with Maori leaders in New Zealand and later in Honolulu were especially fruitful. Rod Burgess was impressed by what he learned, and he speaks longingly about the advances in self-determination made by his Polynesian brothers in New Zealand: "In a lot of ways, the Maori people were more advanced than we Hawaiians were, particularly in terms of land claims and native rights. There is a real co-existence of two distinct cultures in New Zealand, Maori and western. The Maori is acknowledged, his rights to the land are acknowledged, his cultural heritage is acknowledged, and every village and town had its own marae, or meeting house, each with its beautiful carvings." The marae is the traditional hub of the Maori community and the symbolic anchor for the native culture.

"The Maori," Burgess says, "openly resisted the melting-pot theory, and they did it proudly, with their heads up and lots of support. It was the opposite of what was happening in Hawai'i, where the Hawaiians were hiding. To express that kind of attitude here would have been considered open rebellion."

In late 1981, OHA invited representatives of New Zealand's Department of Maori Affairs to moderate a conference of Hawaiian groups called "E Hawai'i Au," held on the grounds of an estate in Nu'uuanu.

Later, OHA joined a new organization called the Indigenous Peoples International (IPI) made up of native agencies like OHA including the U.S. Bureau of Indian Affairs, Canada's Department of Indian Affairs, Australia's Office of Aboriginal Affairs and New Zealand's Department of Maori Affairs.

As a result of its communion with other native peoples OHA became more worldly, with a better perspective on its own goals and plans. According to Trustee Moses Keale, who defines himself as a "conservative" among the trustees, "being exposed to the Indian nations and the South Pacific Commission broadened my perspective on what sovereignty is all about. Before, in my limited view, I thought sovereignty was treason. But now, sovereignty is how one defines it. Basically, it's the right of a people to exist."

## The fate of Walter Ritte

The issue of OHA's "sovereignty" in relation to the state of Hawai'i split the Board of Trustees right down the middle in July 1984 when Trustee Walter Ritte was convicted of a felony involving night hunting and illegal gun possession on his home island of Moloka'i.

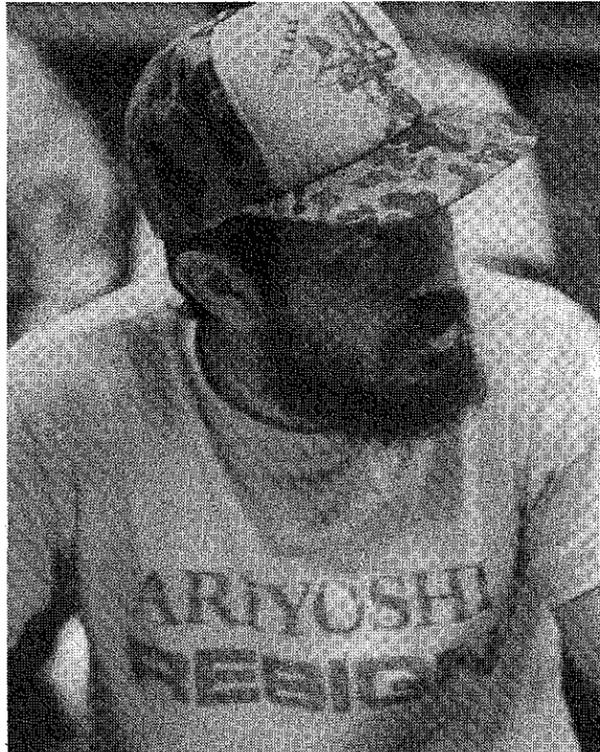


Photo by Ed Michelman

**Trustee Walter Ritte wears his infamous t-shirt shortly before his conviction for hunting violations on Moloka'i.**

By state law, convicted felons cannot remain in elected office. The state Attorney General's office sought to remove Ritte from his OHA trusteeship once he was convicted, arguing that OHA's trustees are subject to state law.

There were those, including Ritte and fellow trustees Rod Burgess and Hayden Burgess, who disagreed, who felt that only OHA or the Hawaiian people themselves could remove a trustee. According to them, the state had no jurisdiction. They saw the case as a fundamental test of OHA's independence.

It was no secret to anyone that Walter Ritte was an outspoken advocate for OHA entitlements and other Hawaiian rights, and that he had often led OHA's charge against the state government in pursuit of those ends. At one point, he wore a T-shirt that said, in large letters, "Ariyoshi Resign."

Ritte was pictured wearing the shirt in both of Honolulu's two major daily newspapers at the height of the controversy.

It was also no secret that the charges against Ritte were circumstantial and far from irrefutable. (In fact, the conviction was overturned on appeal for lack of evidence, but not before the damage had been done.) Some thought the aggressive pursuit of a conviction by the Maui district attorney was engineered solely to remove Ritte from his influential position.

In a guest editorial in the *Honolulu Advertiser* dated May 25, 1984, writer and Hawaiian activist Stephen K. Morse, a distant cousin and close friend to the embattled trustee, echoed that suspicion when he wrote, "Implications as to why the government went to such pain to convict Walter should be obvious. He was a political threat, a thorn in its side, one who challenged the party line . . . Walter's conviction was neither fair nor just. It was merely a convenient excuse for the government to get him out of its hair . . . a political power play to silence him and render him ineffective as a leader of Hawaiian people."

On Moloka'i, Ritte organized a straw poll, or referendum, on whether he should be allowed to keep his trusteeship and on other questions about OHA's "independence." Ritte vowed that he would step down if the voters asked him to.

Out of 504 Hawaiian who voted, 375 thought Ritte should keep his seat; 419 thought it should be left up to Hawaiians whether Ritte kept his seat; and 446 thought Hawaiians should determine their own destiny.

Despite the sentiment of Moloka'i and elsewhere within the Hawaiian community, the OHA trustees were divided. Trustee-at-large Gard Kealoha was a vocal advocate for removing Ritte from office; other trustees were less vocal but were inclined to listen to legal opinion from the Attorney General's office. Finally, after several meetings and intense public attention and debate, six trustees issued a statement announcing their decision to side with the Attorney General. But Ritte held on. He finally agreed to step down when he failed to get a court injunction against his removal from the board. The trustees appointed Louis Hao, a Maui County employee, to fill the vacancy.

"To me," Ritte said at the time to reporters, "(the judge's ruling) was predictable. The outcome was predictable."

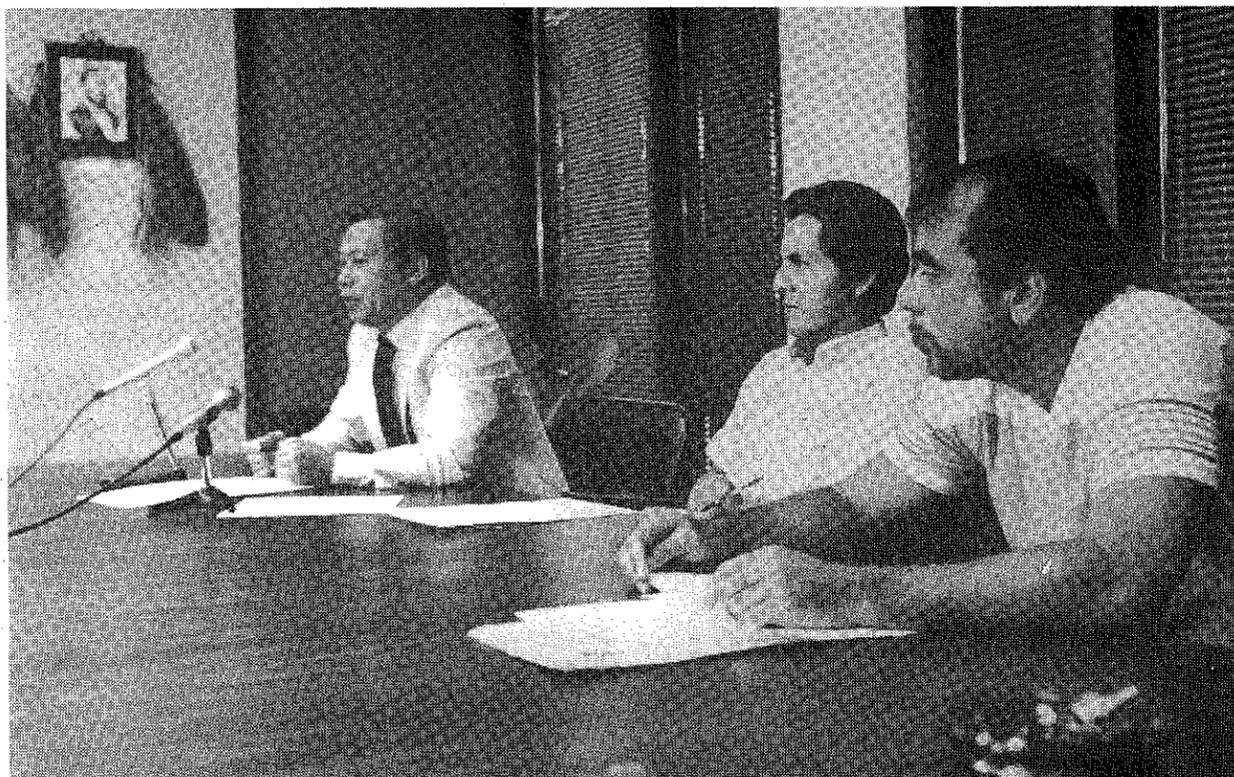
Months later, Ritte's conviction was overturned, but it was too late.

Vindicated by the courts, Ritte has mellowed, and he now says he understands how difficult it was for the trustees. "It was so emotional and fast-moving," he says, "and there were so many things going on. It was a difficult decision for each trustee to make. It was so touch-and-go right down to the final decision. The emotions were so strong, they cloud my memory."

Trustee Moses Keale, who sided with the majority of trustees against Ritte, now says that he would have supported Ritte, given hindsight, given Ritte's eventual acquittal, knowing what he now knows.

"When you look at the horse from the back," Keale says, "after it's gone, it's easier to understand. If we look at sovereignty and the importance of the move toward some kind of sovereignty for OHA, yeah, I should have supported him, but my vote then was part of my upbringing. It was drummed into me that you obey the law. The policeman is always right."

*To be continued*



File photo

**Jose Carlos-Morales (center) of the World Council of Indigenous Peoples meets with OHA trustees in July 1984. With him are Trustees Hayden Burgess (left) and Rod Burgess.**

**Curt Sanburn, educated at Iolani School and Yale, writes on Hawai'i affairs.**