
A BILL FOR AN ACT

RELATING TO THE PUBLIC TRUST LANDS SETTLEMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. In 1978, the Constitution of the State of
2 Hawaii was amended to include article XII, sections 4, 5, and 6,
3 which established the office of Hawaiian affairs and its board
4 of trustees.

5 Sections 4, 5, and 6 of article XII of the state
6 constitution provide:

7 SECTION 4. The lands granted to the State of Hawaii
8 by Section 5(b) of the Admission Act and pursuant to
9 article XVI, section 7, of the State Constitution,
10 excluding therefrom lands defined as "available lands" by
11 section 203 of the Hawaiian Homes Commission Act, 1920, as
12 amended, shall be held by the State as a public trust for
13 native Hawaiians and the general public.

14 SECTION 5. There is hereby established an office of
15 Hawaiian affairs. The office of Hawaiian affairs shall
16 hold title to all the real and personal property now or
17 hereafter set aside or conveyed to it which shall be held
18 in trust for native Hawaiians and Hawaiians. There shall



1 be a board of trustees for the office of Hawaiian affairs
2 elected by qualified voters who are Hawaiians, as provided
3 by law. The board members shall be Hawaiians. There shall
4 be not less than nine members of the board of trustees;
5 provided that each of the following islands have one
6 representative: Oahu, Kauai, Maui, Molokai and Hawaii.
7 The board shall select a chairperson from its members.

8 SECTION 6. The board of trustees of the office of
9 Hawaiian affairs shall exercise power as provided by law:
10 to manage and administer the proceeds from the sale or
11 other disposition of the lands, natural resources, minerals
12 and income derived from whatever sources for native
13 Hawaiians and Hawaiians, including all income and proceeds
14 from that pro rata portion of the trust referred to in
15 section 4 of this article for native Hawaiians; to
16 formulate policy relating to affairs of native Hawaiians
17 and Hawaiians; and to exercise control over real and
18 personal property set aside by state, federal or private
19 sources and transferred to the board for native Hawaiians
20 and Hawaiians. The board shall have the power to exercise
21 control over the Office of Hawaiian Affairs through its



1 executive officer, the administrator of the Office of
2 Hawaiian Affairs, who shall be appointed by the board.

3 In *Trustees of the Office of Hawaiian Affairs v. Yamasaki*,
4 69 Haw. 154, 737 P.2d 446 (1987), the Hawaii supreme court
5 concluded that the issue of what constitutes the portion of the
6 income and proceeds derived from the public land trust for the
7 office of Hawaiian affairs pursuant to article XII, section 6 of
8 the state constitution, is a political question for the
9 legislature to determine.

10 In response to the *Yamasaki* decision, the legislature
11 enacted Act 304, Session Laws of Hawaii 1990, to clarify the
12 extent and scope of the State's obligation to provide a portion
13 of the funds derived from the public land trust to the office of
14 Hawaiian affairs.

15 On September 12, 2001, the Hawaii supreme court ruled in
16 *Office of Hawaiian Affairs v. State of Hawai'i*, 96 Haw. 388, 31
17 P.3d 901 (2001), that Act 304 was effectively repealed by its
18 own terms, so that once again, it was necessary for the
19 legislature to specify what portion of which funds, from which
20 lands the office of Hawaiian affairs was to receive under the
21 State Constitution.



1 In its decision, the Hawaii supreme court affirmed

2 *Yamasaki*, observing:

3 [T]he State's obligation to native Hawaiians is firmly
4 established in our constitution. How the State satisfies
5 that constitutional obligation requires policy decisions
6 that are primarily within the authority and expertise of
7 the legislative branch. As such, it is incumbent upon the
8 legislature to enact legislation that gives effect to the
9 right of native Hawaiians to benefit from the ceded lands
10 trust. See Haw. Const. art. XVI, §7. . . .

11 . . . we trust that the legislature will re-examine the
12 State's constitutional obligation to native Hawaiians and
13 the purpose of HRS § 10-13.5 and enact legislation that
14 most effectively and responsibly meets those obligations.

15 *Office of Hawaiian Affairs v. State of Hawai'i*, 96 Haw. at 401,
16 31 P.3d at 914 (citations omitted).

17 The purpose of this Act is to:

18 (1) Finally and completely resolve any and all claims and
19 disputes relating to the portion of income and
20 proceeds from the lands of the public land trust for
21 use by the office of Hawaiian affairs, including under
22 sections 4 and 6 of article XII of the State



1 Constitution and any relevant statute or act, between
2 November 7, 1978 and July 1, 2008; and

3 (2) Fix, prospectively, the minimum amount of income and
4 proceeds from the lands of the public land trust that
5 are to be paid to the office of Hawaiian affairs to
6 use under section 6 of article XII of the Constitution
7 at \$15,100,000 each fiscal year.

8 SECTION 2. Chapter 10, Hawaii Revised Statutes, is amended
9 by adding a new section to part I to be appropriately designated
10 and to read as follows:

11 **§10- Payment and use of income and proceeds from public**
12 **land trust lands.** (a) Beginning July 1, 2008, \$15,100,000 of
13 the income and proceeds collected for the use of public land
14 trust lands during any fiscal year shall be paid to the office
15 in equal quarterly increments of \$3,775,000, to use to implement
16 the provisions of article XII, sections 4 and 6 of the state
17 constitution regarding the income and proceeds of the public
18 land trust. The governor shall be expressly authorized to
19 identify the income and proceeds from the public land trust
20 lands from which the \$15,100,000 is to be paid, and to fix, in
21 the governor's discretion, the portion of each receipt that each
22 state agency receiving the income and proceeds shall contribute



1 toward the \$15,100,000 payment, after giving due consideration
2 to whether federal or state law prohibits any portion of the
3 income and proceeds collected from being used by the office, or
4 whether payment to the office of any portion of the income and
5 proceeds collected will cause the agency to renege on any pre-
6 existing pledge, rate covenant, or other pre-existing obligation
7 to holders of revenue bonds or other indebtedness of the State
8 or its agencies; provided that in no event shall the payment to
9 the office for any fiscal year be less than \$15,100,000. The
10 governor shall issue executive orders as necessary, to implement
11 this provision. Each quarterly payment shall be made to the
12 office no later than thirty days after the close of each fiscal
13 quarter.

14 (b) As long as the office retains the statutory right to
15 receive an annual payment of income and proceeds from the public
16 land trust lands of at least \$15,100,000, no suit for damages or
17 any other relief may be brought against the State, or its
18 departments, agencies, officers, or employees, by the office or
19 any other person or entity, with respect to any controversy,
20 claim, cause of action, or right of action arising out of, or
21 relating to any right the office or any other person or entity
22 may have to income, proceeds, or any other tangible right, item,



1 or benefit from the public land trust lands under sections 4 and
2 6 of article XII of the state constitution or any statute or
3 act, and to the extent any waiver of sovereign immunity for such
4 a suit, claim, cause of action, or right of action still exists,
5 that waiver is withdrawn.

6 (c) For each and every fiscal year following June 30,
7 2008, during which the office retained the statutory right to
8 receive an annual payment of income and proceeds from the public
9 land trust lands of at least \$15,100,000, each and every claim
10 for damages or any other relief against the State, or its
11 departments, agencies, officers, or employees, by the office or
12 any other person or entity, with respect to any controversy,
13 claim, cause of action, or right of action arising out of, or
14 relating to any right the office or any other person or entity
15 may have to income, proceeds, or any other tangible right, item,
16 or benefit from the public land trust lands under sections 4 and
17 6 of article XII of the state constitution or any statute or act
18 is forever barred, and to the extent any waiver of sovereign
19 immunity for such a suit, claim, cause of action, or right of
20 action still exists, that waiver shall be withdrawn."



1 SECTION 3. Section 10-2, Hawaii Revised Statutes, is
2 amended by adding a new definition to be appropriately inserted
3 and to read as follows:

4 "Public land trust lands" mean those lands:

- 5 (1) That were ceded to the United States by the Republic
6 of Hawaii under the joint resolution of annexation,
7 approved July 7, 1898 (30 Stat. 750), or acquired in
8 exchange for lands so ceded, and that were conveyed to
9 the State by section 5(b) of the Admission Act; except
10 for lands defined as "available lands" by section 203
11 of the Hawaiian Homes Commission Act, 1920, as
12 amended;
- 13 (2) That were retained by the United States under sections
14 5(c) and 5(d) of the Admission Act, and later conveyed
15 to the State under section 5(e) of the Admission Act;
16 and
- 17 (3) That were ceded to and retained by the United States
18 under sections 5(c) and 5(d) of the Admission Act and
19 later conveyed to the State pursuant to Pub. L. 88-233
20 (77 Stat. 472)."

21 SECTION 4. Section 10-3, Hawaii Revised Statutes, is
22 amended to read as follows:



1 **"§10-3 Purpose of the office.** The purposes of the office
2 of Hawaiian affairs include:

3 (1) The betterment of conditions of native Hawaiians [~~—A~~
4 ~~pro rata portion of all funds derived from the public~~
5 ~~land trust shall be funded in an amount to be~~
6 ~~determined by the legislature for this purpose, and~~
7 ~~shall be held and used solely as a public trust for~~
8 ~~the betterment of the conditions of native Hawaiians.~~
9 ~~For the purpose of this chapter, the public land trust~~
10 ~~shall be all proceeds and income from the sale, lease,~~
11 ~~or other disposition of lands ceded to the United~~
12 ~~States by the Republic of Hawaii under the joint~~
13 ~~resolution of annexation, approved July 7, 1898 (30~~
14 ~~Stat. 750), or acquired in exchange for lands so~~
15 ~~ceded, and conveyed to the State of Hawaii by virtue~~
16 ~~of section 5(b) of the Act of March 18, 1959 (73 Stat.~~
17 ~~4, the Admissions Act), (excluding therefrom lands and~~
18 ~~all proceeds and income from the sale, lease, or~~
19 ~~disposition of lands defined as "available lands" by~~
20 ~~section 203 of the Hawaiian Homes Commission Act,~~
21 ~~1920, as amended), and all proceeds and income from~~
22 ~~the sale, lease, or other disposition of lands~~



1 ~~retained by the United States under sections 5(c) and~~
2 ~~5(d) of the Act of March 18, 1959, later conveyed to~~
3 ~~the State under section 5(e)];~~

4 (2) The betterment of conditions of Hawaiians;

5 (3) Serving as the principal public agency in this State
6 responsible for the performance, development, and
7 coordination of programs and activities relating to
8 native Hawaiians and Hawaiians; except that the
9 Hawaiian Homes Commission Act, 1920, as amended, shall
10 be administered by the Hawaiian homes commission;

11 (4) Assessing the policies and practices of other agencies
12 impacting on native Hawaiians and Hawaiians, and
13 conducting advocacy efforts for native Hawaiians and
14 Hawaiians;

15 (5) Applying for, receiving, and disbursing, grants and
16 donations from all sources for native Hawaiian and
17 Hawaiian programs and services; and

18 (6) Serving as a receptacle for reparations."

19 SECTION 5. Section 206E-3, Hawaii Revised Statutes, is
20 amended by amending subsection (b) to read as follows:

21 "(b) The authority shall consist of [~~thirteen~~] fourteen
22 voting members. The director of finance, the director of



1 business, economic development, and tourism, the comptroller,
2 and the director of transportation, or their respective
3 designated representatives shall serve as ex officio, voting
4 members. One member of the authority shall be appointed by the
5 chairperson of the office of Hawaiian affairs. One member shall
6 be appointed by the governor from a list of not less than three
7 prospective appointees submitted by the president of the senate,
8 and one member shall be appointed by the governor from a list of
9 not less than three prospective appointees submitted by the
10 speaker of the house of representatives. Seven members shall be
11 appointed by the governor for staggered terms pursuant to
12 section 26-34; provided that four members shall be appointed at
13 large and, initially, three members, hereinafter referred to as
14 county members, shall be selected from a list of ten prospective
15 appointees recommended by the local governing body of the county
16 in which the initial designated district is situated; and
17 provided further that when vacancies occur in any of the three
18 positions for which the members were selected from a list of
19 county recommendations, the governor shall fill such vacancies
20 on the basis of one from a list of four recommendations, two
21 from a list of seven recommendations, or three from a list of
22 ten recommendations. The list of recommendations shall be made



1 by the local governing body of the county. If an additional
2 district is designated by the legislature, the total membership
3 of the authority shall be increased as prescribed above by the
4 appointment of three additional members, except as provided for
5 in section 206E-191. Notwithstanding section 92-15, a majority
6 of all members shall constitute a quorum to do business, and the
7 concurrence of a majority of all members shall be necessary to
8 make any action of the authority valid; except that, on any
9 matter relating solely to a specific community development
10 district, the members representing districts other than that
11 specific community development district shall neither vote, nor
12 shall they be counted to constitute a quorum, and concurrence
13 shall be required of a majority of that portion of the authority
14 made up of all ex officio voting members, members at large, and
15 county and district members representing the district for which
16 action is being proposed in order for such action to be valid.
17 All members shall continue in office until their respective
18 successors have been appointed and qualified. Except as herein
19 provided, no member appointed under this subsection shall be an
20 officer or employee of the State or its political subdivisions."

21 SECTION 6. Section 206E-8, Hawaii Revised Statutes, is
22 amended to read as follows:



1 " ~~[+]§206E-8[+]~~ **Use of public lands; acquisition of state**
2 **lands.** (a) Any provision of chapter 171 to the contrary
3 notwithstanding, the governor may set aside public lands located
4 within community development districts to the authority for its
5 use.

6 (b) If state lands under the control and management of
7 other public agencies are required by the authority for its
8 purposes, the agency having the control and management of those
9 required lands [~~shall~~], upon request by the authority and with
10 the approval of the governor, shall convey, or lease such lands
11 to the authority upon such terms and conditions as may be agreed
12 to by the parties.

13 (c) Notwithstanding the foregoing, no public lands shall
14 be set aside, conveyed, or leased to the authority as above
15 provided if such setting aside, conveyance, or lease would
16 impair any covenant between the State or any county or any
17 department or board thereof and the holders of bonds issued by
18 the State or such county, department, or board.

19 (d) The provisions of this section shall not apply to the
20 land conveyed in fee simple to the office of Hawaiian affairs by
21 this Act, except that the authority may acquire by condemnation
22 pursuant to chapter 101 easements, rights-of-way, rights of



1 entry, or other rights of access in favor of lands adjoining the
2 property conveyed that is under the control and management of
3 public agencies where the office of Hawaiian affairs is paid
4 just compensation for the same."

5 SECTION 7. Section 206E-10, Hawaii Revised Statutes, is
6 amended to read as follows:

7 "[+]§206E-10[+] **Condemnation of real property.** The
8 authority, upon making a finding that it is necessary to acquire
9 any real property for its immediate or future use for the
10 purposes of this chapter, may acquire the property by
11 condemnation pursuant to chapter 101, including property already
12 devoted to a public use. Such property shall not thereafter be
13 taken for any other public use without the consent of the
14 authority. No award of compensation shall be increased by
15 reason of any increase in the value of real property caused by
16 the designation of a community development district or plan
17 adopted pursuant to a designation, or the actual or proposed
18 acquisition, use or disposition of any other real property by
19 the authority. The provisions of this section shall not apply
20 to the land conveyed in fee simple to the office of Hawaiian
21 affairs by this Act; except that the authority may acquire by
22 condemnation pursuant to chapter 101 easements, rights-of-way,



1 rights of entry, or other rights of access in favor of lands
2 adjoining the property conveyed that is under the control and
3 management of public agencies where the office of Hawaiian
4 affairs is paid just compensation for the same."

5 SECTION 8. Section 206E-34, Hawaii Revised Statutes, is
6 amended to read as follows:

7 "[+]§206E-34 Cultural public market.[+]" (a) There shall
8 be established within the Hawaii community development authority
9 a state cultural public market.

10 (b) The cultural public market shall be located on state
11 land within the Kakaako Makai area and developed pursuant to
12 sections 206E-31, 206E-32, and 206E-33. A public parking lot
13 shall be included.

14 (c) The Hawaii community development authority shall:

15 (1) Designate and develop the state-owned land for the
16 cultural public market;

17 (2) Accept, for consideration, input regarding the
18 establishment of the cultural public market from the
19 following departments and agencies:

20 (A) The department of agriculture;

21 (B) The department of business, economic development,
22 and tourism;



- 1 (C) The department of land and natural resources;
- 2 (D) The department of labor and industrial relations;
- 3 and
- 4 (E) The Hawaii tourism authority;
- 5 (3) Consider and determine the propriety of using public-
- 6 private partnerships in the development and operation
- 7 of the cultural public market;
- 8 (4) Develop, distribute, and accept requests for proposals
- 9 from private entities for plans to develop and operate
- 10 the cultural public market; and
- 11 (5) Ensure that the Hawaiian culture is the featured
- 12 culture in the cultural public market.
- 13 (d) Requests for proposals for the cultural public market
- 14 shall contemplate but not be limited to the inclusion of the
- 15 following types of facilities and services:
- 16 (1) Retail outlets for ethnically diverse products;
- 17 (2) Venues for businesses with ethnic themes, including
- 18 restaurants and other service-related businesses;
- 19 (3) Theaters, stages, and arenas designed to showcase
- 20 cultural performing artists as well as community
- 21 performing arts;



- 1 (4) Exhibition space or museums that showcase artwork
- 2 created by international and local artists; and
- 3 (5) Museums or other educational facilities focusing on
- 4 the history and cultures of the various ethnic groups
- 5 within Hawaii, including Hawaiian history.

6 (e) The provisions of this section shall not apply to the
7 land conveyed in fee simple to the office of Hawaiian affairs by
8 this Act."

9 SECTION 9. Section 10-13.3, Hawaii Revised Statutes, is
10 repealed.

11 ~~["**§10-13.3** **Interim revenue.** Notwithstanding the~~
12 ~~definition of revenue contained in this chapter and the~~
13 ~~provisions of section 10-13.5, and notwithstanding any claimed~~
14 ~~invalidity of Act 304, Session Laws of Hawaii 1990, the income~~
15 ~~and proceeds from the pro rata portion of the public land trust~~
16 ~~under article XII, section 6 of the state constitution for~~
17 ~~expenditure by the office of Hawaiian affairs for the betterment~~
18 ~~of the conditions of native Hawaiians for each of fiscal year~~
19 ~~1997-1998 and fiscal year 1998-1999 shall be \$15,100,000."]~~

20 SECTION 10. Section 10-13.5, Hawaii Revised Statutes, is
21 repealed.



1 [~~"§10-13.5 Use of public land trust proceeds. Twenty per~~
2 ~~cent of all funds derived from the public land trust, described~~
3 ~~in section 10-3, shall be expended by the office, as defined in~~
4 ~~section 10-2, for the purposes of this chapter."~~]

5 SECTION 11. Act 178, Session Laws of Hawaii 2006, is
6 amended by repealing section 3.

7 [~~"SECTION 3. Notwithstanding the provisions of chapter 10,~~
8 ~~Hawaii Revised Statutes, or the requirements of Executive Order~~
9 ~~No. 03-03, beginning in fiscal year 2005-2006, the departments~~
10 ~~of agriculture, accounting and general services, business,~~
11 ~~economic development, and tourism, education, land and natural~~
12 ~~resources, and transportation (for its harbors division), and~~
13 ~~any other department or agency that collects receipts from the~~
14 ~~lands within the public land trust, shall determine and transfer~~
15 ~~to the office of Hawaiian affairs that portion of their receipts~~
16 ~~from the use of lands within the public land trust collected~~
17 ~~during each fiscal quarter, necessary to ensure that a total of~~
18 ~~\$3,775,000 of revenues generated by the public land trust is~~
19 ~~transferred to the office of Hawaiian affairs, within thirty~~
20 ~~days of the close of each fiscal quarter; provided that for~~
21 ~~fiscal year 2005-2006, the departments shall have until thirty~~
22 ~~days after the close of the fiscal year to transfer a total of~~



1 ~~\$15,100,000 from their receipts from the use of lands within the~~
2 ~~public land trust collected during fiscal year 2005-2006, to the~~
3 ~~office of Hawaiian affairs whether by the procedures set out in~~
4 ~~Executive Order No. 03-03 or this Act.~~

5 ~~The governor is expressly authorized to fix the amounts~~
6 ~~each agency shall transfer to the office of Hawaiian affairs in~~
7 ~~each quarter by executive order to implement the provisions of~~
8 ~~this section."]~~

9 SECTION 12. (a) Notwithstanding any law to the contrary,
10 the fee simple interest to the following parcels of land with
11 the existing improvements thereon, except for submerged land,
12 accreted land, or any land makai of the shoreline, shall be
13 conveyed to the office of Hawaiian affairs:

- 14 (1) Kaka'ako Makai: (Lots 2, 3, 4, 5, and 9 as identified
15 on the final Kakaako park subdivision map dated
16 October 15, 2007 and approved by the city and county
17 of Honolulu department of planning and permitting on
18 November 9, 2007);
- 19 (2) Kalaeloa Makai: (TMK: (1)-9-1-31:1); and
- 20 (3) Hilo Banyan drive: Bayview Banyan Corp. (TMK: (3)-2-1-
21 5:21); country club condo hotel (TMK: (3)-2-1-5:20);
22 Hilo Hawaiian hotel (TMK: (3)-2-1-3:5); Naniloa hotel



1 and golf course (TMK: (3)-2-1-1:12; TMK: (3)-2-1-5:13,
2 14, 16, 17, 27, 32, 39, 41, 42, 46); Reed's bay resort
3 hotel (TMK: (3)-2-1-5:22); Uncle Billy's Hilo Bay
4 Hotel Inc. (TMK: (3)-2-1-5:9, 12, 33, 34, 35, 45, 47).

5 (b) As directed by the attorney general, the appropriate
6 boards, agencies, officers, and employees of the State shall:

- 7 (1) Execute instruments of conveyance as may be necessary
8 and proper to the office of Hawaiian affairs, as
9 grantee, to convey the interest and title of the State
10 and its boards and commissions to these lands and
11 improvements in fee simple; and
- 12 (2) Record the instruments in the land court or bureau of
13 conveyances, as appropriate.

14 As these are conveyances in which the State and its
15 agencies are the only parties, the tax imposed by section 247-1,
16 Hawaii Revised Statutes, shall not apply to them.

17 The conveyances made by this section shall not include any
18 of the State's rights to minerals, or surface or ground water.

19 The property conveyed shall be and remain subject to all
20 encumbrances, whether or not of record, rights of native
21 tenants, leases, contracts, agreements, permits, easements,
22 profits, licenses, rights-of-way, or other instruments



1 applicable to any land conveyed by this section effective or
2 on-going on the effective date of this Act, which shall remain
3 in full force and effect. These encumbrances may be set forth
4 in the deeds conveying the property to the office or set forth
5 in a license or similar agreement, a memorandum of which may be
6 recorded concurrently with the deeds conveying the property to
7 the office. Beginning July 1, 2008, every reference to the
8 present title-holder or the head of the department or agency in
9 each such instrument, if the title-holder is a department or an
10 agency, shall be construed as a reference to the office of
11 Hawaiian affairs or its board of trustees.

12 After the conveyances are made and while the office of
13 Hawaiian affairs owns the property, the office shall cooperate
14 with the State to designate and grant such access rights and
15 easements to the State as may be reasonably necessary for the
16 benefit and use of adjoining properties owned by the State. The
17 office shall not be required to approve any access rights or
18 grant any access easements to the State that would materially
19 diminish the value of the servient property or that would
20 materially interfere with the use of the servient property by
21 the office or any lessee, tenant, licensee, concessionaire, or
22 other occupant of the property. Each of the instruments



1 creating such access rights or granting such easements shall
2 provide that the office, or any successor owner of the servient
3 property, shall have the right to reasonably relocate any such
4 access areas or easements so granted. The cost of initially
5 identifying such access areas or designating and granting any
6 such easements shall be paid by the State. The cost of
7 relocating any such access areas or easements shall be paid by
8 the office or any such successor owner, as the case may be.
9 Each of the instruments creating such access rights or granting
10 such easements also shall provide that the State shall be
11 responsible for a reasonable share of the cost of maintaining
12 any such access areas and easement areas, as the case may be,
13 and that the State shall indemnify the office, its tenants,
14 licensees, concessionaires, successors, and assigns, from any
15 liability arising from the use of such access areas or easement
16 areas by the State or its invitees.

17 Except as set forth in this Act, beginning on July 1, 2008,
18 the State shall not impose new leases, contracts, agreements,
19 permits, or other instruments upon any land conveyed by this
20 section.

21 SECTION 13. The passage of this Act shall be in full
22 satisfaction and resolution of all controversies at law and in



1 equity, known or unknown, now existing or hereafter arising,
2 established or inchoate, arising out of or in any way related to
3 any right the office of Hawaiian affairs or any other person or
4 entity may have to income, proceeds, or any other tangible
5 right, item, or benefit, from the public land trust lands under
6 sections 4 and 6 of article XII of the state constitution or any
7 statute or act, which arose between November 7, 1978 and July 1,
8 2008; thus, upon the passage of this Act, each and every claim
9 or suit that is predicated in any way upon an act or omission
10 that arises out of or is in any way related to any right the
11 office of Hawaiian affairs or any other person or entity may
12 have to the income, proceeds, or any other tangible right, item,
13 or benefit from the public land trust lands under sections 4 and
14 6 of article XII of the state constitution or any statute or
15 act, that occurred between November 7, 1978 and July 1, 2008,
16 shall be forever barred and may not be brought by the office of
17 Hawaiian affairs or by any other person or entity.

18 The passage of this Act shall have the effect of *res*
19 *judicata* as to all persons, claims, and issues that arise and
20 defenses that have been at issue, or that could have been, or
21 could in the future be, at issue, that arose between November 7,
22 1978 and July 1, 2008, whether brought against the State or its



1 departments, agencies, officials, and employees, directly or
2 indirectly, by subrogation, derivative or third party action,
3 tender, federal action, or by any other means whatsoever arising
4 out of or in any way related to any right the office of Hawaiian
5 affairs or any other person or entity may have to the income,
6 proceeds, or any other tangible right, item, or benefit from the
7 public land trust lands under sections 4 and 6 of article XII of
8 the state constitution or any statute or act.

9 SECTION 14. The State, while not admitting the validity of
10 any claim, hereby resolves and satisfies all controversies and
11 claims described in section 13 of this Act by:

12 (1) The payment of \$13,189,860, for which general
13 obligation bond funds are authorized and appropriated
14 in section 15 of this Act; and

15 (2) The conveyance of the land and improvements made in
16 section 12 of this Act.

17

18 SECTION 15. The director of finance is authorized to issue
19 general obligation bonds in the sum of \$13,189,860 or so much
20 thereof as may be necessary and the same sum or so much thereof
21 as may be necessary is appropriated for fiscal year 2008-2009



1 for the purpose of making the payment described in section 14 of
2 this Act.

3 Any funds remaining unexpended or unencumbered as of June
4 30, 2009, shall lapse as of such date.

5 The sum appropriated shall be expended by the department of
6 budget and finance by making the required payment to the office
7 of Hawaiian affairs no later than June 30, 2009.

8 SECTION 16. The real property conveyances made under this
9 Act, and the funds paid under this Act regardless of the means
10 of financing, shall be deemed income and proceeds from the
11 public land trust, as if they had been paid out of the income
12 and proceeds from the public land trust pursuant to article XII,
13 section 4 and article XII, section 6 of the state constitution.

14 SECTION 17. Notwithstanding any other law to the contrary,
15 the State, and the state officials who may have participated in
16 the preparation of the provisions or the enactment of this Act,
17 including the office of Hawaiian affairs, each of the members of
18 its board of trustees, and its staff, shall not be subject to
19 suit because of their participation, except if an action is
20 brought to enforce the provisions of this Act, in which case the
21 action shall be brought only against the State and any official
22 necessary to the enforcement of the provisions of this Act.



1 SECTION 18. If any provision of chapter 673, Hawaii
2 Revised Statutes, is inconsistent with any provision of this
3 Act, the provisions of this Act shall prevail.

4 SECTION 19. (a) The provisions of this Act shall not be
5 severable to the extent that if any one or more of sections 9,
6 10, 11, 13, or 15 of this Act, or the provisions of subsections
7 (b) or (c) of the new section added to chapter 10, Hawaii
8 Revised Statutes, by section 2 of this Act, or subsection (a) of
9 section 12 of this Act, or the application of any one or more of
10 said sections or subsections is held invalid or unenforceable,
11 this Act in its entirety shall be invalid and:

12 (1) Sections 10-2, 10-3, 10-13.3, 10-13.5, 206E-3, 206E-8,
13 206E-10, and 206E-34, Hawaii Revised Statutes, and
14 section 3 of Act 178, Session Laws of Hawaii 2006,
15 shall be reenacted in the form in which they read on
16 the day before the effective date of this Act;

17 (2) All interests in the lands and improvements conveyed
18 by the provisions of section 12 of this Act, shall be
19 conveyed back to their respective grantors by the
20 office of Hawaiian affairs, but in such case:

21 (A) The State shall:



- 1 (i) Indemnify the office of Hawaiian affairs
- 2 with regard to any environmental claims
- 3 asserted by any third party against the
- 4 office of Hawaiian affairs arising solely
- 5 from time periods when the State held the
- 6 fee title to the lands; and
- 7 (ii) Indemnify the office of Hawaiian affairs
- 8 with regard to those portions of any
- 9 environmental claims asserted by any third
- 10 party against the office of Hawaiian affairs
- 11 arising solely from time periods when the
- 12 State held the fee title to the lands; and
- 13 (B) The office of Hawaiian affairs shall:
- 14 (i) Indemnify the State with regard to any
- 15 environmental claims asserted by any third
- 16 party against the State, arising solely from
- 17 time periods when the office of Hawaiian
- 18 affairs held the fee title to the lands; and
- 19 (ii) Indemnify the State with regard to those
- 20 portions of any environmental claims
- 21 asserted by any third party against the
- 22 State solely from time periods when the



1 office of Hawaiian affairs held the fee
2 title to the lands; provided that at the
3 option of the office of Hawaiian affairs, if
4 in lieu of conveying back the lands and
5 improvements conveyed by the provisions of
6 section 12 of this Act to the State, the
7 office of Hawaiian affairs opts not to
8 reconvey the lands, the office shall pay the
9 director of finance \$186,810,140, of which
10 the director shall deposit \$94,090,725 into
11 the special land and development fund of the
12 department of land and natural resources for
13 all of the property conveyed to the office
14 other than at Kaka'ako Makai, and pay
15 \$92,719,415 to the Hawaii community
16 development authority for the property at
17 Kaka'ako Makai; and

- 18 (3) The \$13,189,860 payment paid back to the director of
19 finance by the office of Hawaiian affairs and
20 deposited into the bond fund as defined in section 37-
21 62, Hawaii Revised Statutes.



1 (b) There shall be no waiver of sovereign immunity to
 2 bring any suit, claim, cause of action, or right of action to
 3 invalidate sections 9, 10, 11, 13, or 15 of this Act, or the
 4 provisions of subsections (b) or (c) of the new section added to
 5 chapter 10, Hawaii Revised Statutes, by section 2 of this Act,
 6 or subsection (a) of section 12 of this Act, or the application
 7 of any one or more of said sections or subsections, and to the
 8 extent any waiver of sovereign immunity for such a suit, claim,
 9 cause of action, or right of action still exists, that waiver
 10 shall be withdrawn.

11 SECTION 20. Statutory material to be repealed is bracketed
 12 and stricken. New statutory material is underscored.

13 SECTION 21. This Act shall take effect on July 1, 2008.

14

INTRODUCED BY:

Calvin K. Aoy
 BY REQUEST

JAN 18 2008



Report Title:

Public Trust Lands Settlement

Description:

Resolves claims and disputes relating to the portion of income and proceeds from the lands of the public land trust for use by the office of Hawaiian affairs between 11/7/1978 and 7/1/2008; fixes prospectively the minimum amount of income and proceeds from the lands of the public land trust that are to be paid to the office of Hawaii affairs at \$15,100,000 each fiscal year. Effective 07/01/08.



SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") dated January 17, 2008, is made by and on behalf of the following entities: (i) the Office of Hawaiian Affairs (hereinafter referred to as "OHA"), a body corporate existing under the Constitution and laws of the State of Hawai'i, whose principal place of business and mailing address is 711 Kapi'olani Boulevard, Suite 500, Honolulu, Hawai'i 96813, and (ii) the State of Hawai'i (hereinafter referred to as "STATE"), a state of the United States of America. OHA and STATE are referred to collectively herein as the "Parties."

THE PARTIES TO THIS AGREEMENT HEREBY AGREE AS FOLLOWS:

Proposed Legislation

This Agreement is contingent upon passage of legislation negotiated by the Parties and submitted or to be submitted to the Hawai'i State Legislature (hereinafter referred to as "Proposed Legislation") or upon further agreement by both of the Parties as to any changes to the Proposed Legislation. A true copy of the Proposed Legislation is attached hereto as Exhibit "A." This Agreement shall be null and void ab initio unless either: 1) The Proposed Legislation is enacted in substantially the form attached hereto, without material changes or 2) Any material changes to the Proposed Legislation are agreed to in writing by both Parties. The Proposed Legislation, including with any agreed-to changes, is also referred to as "the Act."

This Agreement and the Proposed Legislation have two primary purposes: (1) to resolve and settle, finally and completely, any and all claims and disputes relating to the portion of income and proceeds from the lands of the public land trust for use by OHA, including under sections 4 and 6 of Article XII of the Constitution and any relevant statute or act, between November 7, 1978 and July 1, 2008; and (2) to fix, prospectively, the minimum amount of income and proceeds from the lands of the public land trust that are to be paid to OHA to use under section 6 of Article XII of the Constitution at \$15,100,000 each fiscal year.

In the event any provision of this Agreement is inconsistent with any provision of the Proposed Legislation, the Proposed Legislation shall control.

Effective Date

This Agreement shall take effect on the date the Act becomes law or on such other date as may be agreed to in writing by the Parties.

Claims Against the STATE

The release, waiver and discharge of claims against the STATE are governed by the Act, and are in addition to the waiver of claims against the STATE by OHA set out below.

Waiver of Claims Against the STATE

OHA releases, waives, and forever discharges claims as follows:

1) For claims which arose between November 7, 1978 up to and including June 30, 2008:

OHA releases, waives, and forever discharges any and all claims of any kind concerning, relating to, or arising out of controversies at law and in equity, known or unknown, now existing or hereafter arising, established, or inchoate, arising out of or in any way related to any right OHA or any other person or entity may have to income, proceeds, or any other tangible right, item, or benefit, from the public land trust lands under sections 4 and 6 of Article XII of the Constitution or any statute or act.

Each and every claim or suit that is predicated in any way upon an act or omission that arises out of or is in any way related to any right OHA or any other person or entity may have to the income, proceeds, or any other tangible right, item, or benefit from the public land trust lands under sections 4 and 6 of Article XII of the Constitution or any statute or act, that occurred between November 7, 1978 up to and including June 30, 2008, is forever barred

and may not be brought by OHA or by any other person or entity.

OHA further agrees that this Agreement shall have the effect of *res judicata* as to all persons, claims, and issues which arise and defenses which have been at issue, or which could have been, or could in the future be, at issue, which arose between November 7, 1978 up to and including and June 30, 2008, whether brought against the STATE or its departments, agencies, officials, and employees, directly or indirectly, by subrogation, derivative or third party action, tender, federal action, or by any other means whatsoever arising out of or in any way related to any right OHA or any other person or entity may have to the income, proceeds, or any other tangible right, item, or benefit from the public land trust lands under sections 4 and 6 of Article XII of the Constitution or any statute or act.

2) For claims on or after July 1, 2008:

For each and every fiscal year following June 30, 2008, during which OHA retained the statutory right to receive an annual payment of income and proceeds from the public land trust lands of at least \$15,100,000, OHA releases, waives, and forever discharges any and all claims of any kind concerning, relating to, or arising out of each and every claim for damages or any other relief against the STATE, or its departments, agencies, officers, or employees, by the office or any other person or entity, with respect to any controversy, claim, cause of action, or right of action arising out of, or relating to any right OHA or any other person or entity may have to income, proceeds, or any other tangible right, item, or benefit from the public land trust lands under sections 4 and 6 of Article XII of the Constitution or any statute or act. Such claims are forever barred, and to the extent any waiver of sovereign immunity for such a suit, claim, cause of action, or right of action still exists, that waiver is withdrawn by the Proposed Legislation.

Settlement Payment

Without admitting the validity of any claim, and in order to resolve all outstanding issues relating to income and proceeds from the public-land-trust funds that OHA alleges are due OHA between November 7, 1978 and July 1, 2008, the STATE shall deed or pay to OHA, as the case may be, real property and cash. The identification and settlement value of the real property is set forth in Exhibit "B" attached hereto (hereinafter referred to as "Settlement Properties"). That real property is conveyed to OHA by the Act. \$13,189,860 in cash shall be paid to OHA by the STATE, no later than June 30, 2009. The manner of conveyance of the real property and the source of funds for the payment of cash is as set forth in the Act.

Environmental Due Diligence

For the purpose of this Environmental Due Diligence section of the Agreement, the Kalaeloa Makai property shall be viewed as one separate and discrete property with a settlement value of \$59,607,000, all Hilo Banyan Drive properties shall be viewed as one separate and discrete property with a settlement value of \$34,483,725, and all Kaka'ako Makai properties shall be viewed as one separate and discrete property with a settlement value of \$92,719,415.

OHA shall have until September 1, 2009 to conduct environmental due diligence.

If, with regard to any of the three properties, each of these conditions is satisfied: 1) Environmental contamination on the property is discovered; 2) The environmental contamination reduces the fair market value of the property¹ by more than 25% (i.e., the fair market value of the property taking into account the environmental contamination is more than 25% less than what the fair market value of the property would have been had the environmental contamination not been present) (the total such reduction in the fair market value is the "reduction

¹ Fair market value shall be determined taking into account land and any structures on the property.

in value amount")²; 3) OHA has the ability to tender unencumbered title to the property back to the STATE; 4) The property is in materially the same condition it was in when conveyed to OHA; and 5) OHA provides the STATE written evidence of 1, 2, 3, and 4, no later than October 1, 2009 ("Environmental Contamination Rights Notice")--then OHA shall have the "Environmental Contamination Rights" with regard to that property, as set forth below.

If the STATE does not accept that OHA has met each of the five conditions listed above with regard to one (or more) of the three properties, it may demand Binding Arbitration within 90 days from receipt of OHA's written "Environmental Contamination Rights Notice." Failure by the STATE to inform OHA of a decision within 90 days shall be deemed a demand for Binding Arbitration. Such Binding Arbitration shall be conducted by Keith Hunter pursuant to the rules of DPR.³ The arbitration shall decide a single issue: "Has OHA proven by a preponderance of the evidence that it has separately satisfied each of conditions 1-5 above?"⁴ If the answer is "No," OHA has no further rights.⁵

If the STATE does accept that OHA has separately satisfied each of conditions 1-5 above, or if the arbitrator determines that OHA has separately satisfied each of conditions 1-5 above by answering the single issue arbitration question "Yes," thus giving rise to "Environmental Contamination Rights" with regard to the property at issue, then the STATE shall have two options:

Option 1--The STATE shall accept a re-conveyance of the property from OHA, which re-conveyance must

² For example, if the fair market value of a property, assuming there was no environmental contamination present, is \$1000, and the fair market value of the property taking into account the environmental contamination is \$600, the "reduction in value amount" is \$400.

³ If Keith Hunter is unable or unwilling to serve, the Parties shall either agree in writing on an arbitrator and the rules of arbitration, or submit the matter to a court of competent jurisdiction for the selection of a single arbitrator.

⁴ During the Binding Arbitration the Parties may mutually agree, but are not obligated to agree, to allow the arbitrator to also decide the "Option 2 Amount" described below, in the same arbitration.

⁵ If there is such an arbitration, or an arbitration concerning "the Option 2 Amount," the fair market value shall be as of either July 1, 2009, or the date of the arbitration, whichever is earlier.

satisfy conditions 3 and 4 above, and shall pay OHA within two years, subject to legislative appropriation (that the Parties agree to support and submit to the 2010 Legislature), 75% of the settlement value of each property as set forth herein: Kaka`ako Makai \$69,539,561 (75% of \$92,719,415); Hilo Banyan Drive \$25,862,794 (75% of \$34,483,725); Kalaeloa Makai \$44,705,250 (75% of \$59,607,000). In the event the Legislature declines to appropriate the money, OHA shall have no further remedy, except to retain or return the property.

Option 2--The STATE shall, within two years, pay OHA, subject to legislative appropriation (that the Parties agree to support and submit to the 2010 Legislature), the amount by which the "reduction in value amount" exceeds 25% of the settlement value of each property as set forth herein: Kaka`ako Makai \$23,179,854 (25% of \$92,719,415); Hilo Banyan Drive \$8,620,931 (25% of \$34,483,725); Kalaeloa Makai \$14,901,750 (25% of \$59,607,000) ("the Option 2 Amount").⁶ If the STATE selects Option 2, it shall inform OHA of the amount it believes is the appropriate "Option 2 Amount." In the event the Legislature declines to appropriate the money, OHA shall have no further remedy, except to retain the property.

OHA may accept the "Option 2 Amount" offered by the STATE, negotiate with the STATE for a different "Option 2 Amount," or seek "Binding Arbitration" as to the "Option 2 Amount." If the STATE exercises Option 2, OHA shall have 30 days, or such other time as agreed to in writing by the

⁶ For example, if the STATE were to elect Option 2 with regard to the Hilo Banyan Drive property, OHA would be entitled to the amount, if any, by which the "Reduction in Value Amount" exceeded \$8,620,931. The Parties understand that it is possible that even if environmental contamination is discovered, it may only affect the value of a part of each property. For example, if environmental contamination were discovered on the Hilo Hawaiian Hotel property (part of the Hilo Banyan Drive property), that might not affect the value of the Reed's Bay Resort Hotel property (another part of the Hilo Banyan Drive property). Thus, even if the fair market value of the affected lot itself were reduced by more than 25%, Condition 2 above might not be met, because the fair market value of the property as a whole must be reduced by 25% or more because of environmental contamination, before Condition 2 above is met.

Parties, in which to accept the "Option 2 Amount" offered by the STATE. If OHA does not timely accept the "Option 2 Amount" offered by the STATE, it will be deemed to have demanded Binding Arbitration as to the "Option 2 Amount." Such Binding Arbitration shall be conducted by Keith Hunter pursuant to the rules of DPR.⁷

The STATE shall make reasonably available to OHA and to OHA's authorized representatives during regular business hours, the STATE's files that contain, with regard to the three properties: (i) copies of soil reports, site plans, engineering reports, archaeological and historical studies, plans and surveys; (ii) zoning entitlement and other land use documents and records, including, without limitation, all current governmental permits, approvals and authorizations; (iii) copies of notices from governmental agencies regarding any violations of laws or ordinances; (iv) copies of all leases and correspondence with any lessees under any of the leases; (v) copies of licenses and concession agreements and all correspondence with any of the parties to such licenses and concession agreements; (vi) copies of any other agreements affecting or relating to any of the properties, and correspondence with any of the parties to such other agreements; (vii) copies of any existing surveys, and aerial photos; and (viii) copies of all plans and other documents relating to any improvements on any of the properties (the material described in clause (i) through clause (viii) above are, collectively, the "Due Diligence Documents").

Mediation

If the Parties have any dispute concerning enforcement of this Agreement, the Parties hereby agree to submit the dispute to Keith Hunter for mediation.

No Arbitration

The Parties have not agreed to arbitrate any dispute other than as specifically set forth herein.

⁷ If Keith Hunter is unable or unwilling to serve, the Parties shall either agree on an arbitrator and the rules of arbitration, or submit the matter to a court of competent jurisdiction for the selection of a single arbitrator.

Title Insurance

OHA may, if it chooses, procure title insurance to any of the properties at its own expense.

Proration

If the STATE receives rent from the properties conveyed to OHA attributable to periods after July 1, 2008, it shall pay to OHA the amounts attributable to any periods after that date. If the State incurs expenses for the properties like taxes, maintenance fees, assessments, association dues, utility charges, for periods after July 1, 2008, OHA shall pay the STATE the amounts attributable to any periods after that date.

In the event that the amount of any rent or expense is not known July 1, 2008, the Parties agree that such items shall be prorated at that date upon the basis of the best information available, and shall be adjusted when the actual amount(s) of such items are known, with appropriate charges and credits to be made.

Other Terms

This Agreement and its terms shall survive the transfer of the parcels to OHA.

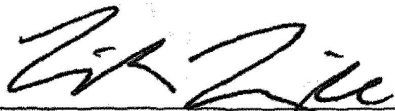
This Agreement neither represents nor is to be construed as an acknowledgement or admission of any negligence, misconduct, liability, or fault of any kind whatsoever by any party.

The STATE does not admit to or concede the validity of any claim, but has entered into this Agreement in order to resolve and satisfy all controversies and claims described in the Proposed Legislation.

The Parties agree that no statement of fact or opinion has been made by either to the other, or by anyone acting on behalf of either to the other, to induce the execution of this Agreement, other than as expressly set forth in this Agreement and that this Agreement is executed freely

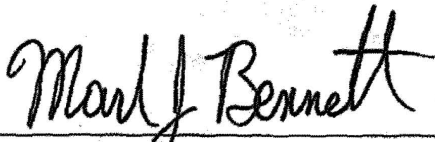
on the part of each party hereto. The Parties also represent and agree: (1) that they may hereafter discover facts in addition to or different from those they now know or believe to be true with respect to the subject matter of these releases; and (2) that this Agreement and the releases given in this Agreement shall fully remain in effect, notwithstanding the subsequent discovery or existence of any such additional or different facts.

The terms of this Agreement have been negotiated at arm's length among the Parties represented by experienced counsel. As a result, the rule of "interpretation against the draftsman" shall not apply in any dispute over interpretation of the terms of this Agreement.

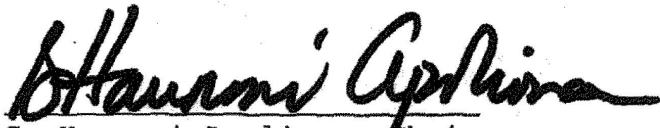


Linda Lingle, Governor
State of Hawai'i

Approved:



Mark J. Bennett, Attorney General



S. Haunani Apoliona, Chairperson
Office of Hawaiian Affairs

Approved:



Robert G. Klein, Counsel to the Board of Trustees