
A BILL FOR AN ACT

RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS.

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

1 SECTION 1. In 1978, the state constitution was amended to
2 include article XII, sections 4, 5, and 6 that, among other
3 things, established the office of Hawaiian affairs and its board
4 of trustees. Sections 4 and 6 of article XII of the state
5 constitution provide:

6 **"PUBLIC TRUST**

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

14 **POWERS OF BOARD OF TRUSTEES**

15 **Section 6.** The board of trustees of the Office of Hawaiian
16 Affairs shall exercise power as provided by law: to manage and
17 administer the proceeds from the sale or other disposition of
18 the lands, natural resources, minerals and income derived from

1 whatever sources for native Hawaiians and Hawaiians, including
2 all income and proceeds from that pro rata portion of the trust
3 referred to in section 4 of this article for native Hawaiians;
4 to formulate policy relating to affairs of native Hawaiians and
5 Hawaiians; and to exercise control over real and personal
6 property set aside by state, federal or private sources and
7 transferred to the board for native Hawaiians and Hawaiians.
8 The board shall have the power to exercise control over the
9 Office of Hawaiian Affairs through its executive officer, the
10 administrator of the Office of Hawaiian Affairs, who shall be
11 appointed by the board."

12 By Act 273, Session Laws of Hawaii 1980, the legislature
13 provided that "[t]wenty per cent of all funds derived from the
14 public land trust, . . . shall be expended by the office of
15 Hawaiian affairs . . . for the purposes of this chapter." This
16 legislative directive has led to a series of lawsuits concerning
17 the practical application of the twenty per cent apportionment
18 the legislature established to implement article XII, sections 4
19 and 6, of the Constitution of the State of Hawaii.

20 In *Trustees of the Office of Hawaiian Affairs v. Yamasaki*,
21 69 Haw. 154, 737 P.2d 446 (1987), the Hawaii supreme court

1 concluded that the issue of how the apportionment is formulated
2 is a political question for the legislature to determine.

3 In response to the *Yamasaki* decision, the legislature
4 enacted Act 304, Session Laws of Hawaii 1990, to clarify the
5 extent and scope of the twenty per cent portion.

6 On September 12, 2001, the Hawaii supreme court ruled in
7 *Office of Hawaiian Affairs v. State of Hawaii*, 96 Haw. 388, 31
8 P.3d 901 (2001), that Act 304 was effectively repealed by its
9 own terms, so that once again, it was necessary for the
10 legislature to specify the apportionment to be managed and
11 administered by the office of Hawaiian affairs.

12 In its decision, the Hawaii supreme court affirmed
13 *Yamasaki*, observing:

14 "[T]he State's obligation to native Hawaiians is
15 firmly established in our constitution. *How* the State
16 satisfies that constitutional obligation requires
17 policy decisions that are primarily within the
18 authority and expertise of the legislative branch. As
19 such, it is incumbent upon the legislature to enact
20 legislation that gives effect to the right of native
21 Hawaiians to benefit from the ceded lands trust. See
22 Haw. Const. art. XVI, §7 . . . [W]e trust that the

1 legislature will re-examine the State's constitutional
2 obligation to native Hawaiians and the purpose of HRS
3 § 10-13.5 and enact legislation that most effectively
4 and responsibly meets those obligations."

5 *Office of Hawaiian Affairs v. State of Hawaii*, 96 Haw. at 401,
6 31 P.3d at 914 (citations omitted).

7 In reviewing the entire history of the issue of the State's
8 obligation to transmit to the office of Hawaiian affairs a part
9 of the income and proceeds from the public land trust, the
10 legislature finds that the issue has evolved into two principal
11 aspects, one looking to the past, the other looking to the
12 future.

13 With regard to the past, the legislature finds that in
14 addition to the amounts of income and proceeds previously paid
15 to the office of Hawaiian affairs, further resources should be
16 provided to the office of Hawaiian affairs that represent a re-
17 examination and final determination by the legislature for the
18 period between November 7, 1978 (the ratification date of
19 article XII, sections 4, 5, and 6 of the Constitution of the
20 State of Hawaii), and July 1, 2009, with regard to income and
21 proceeds from the lands in the public trust referred to in
22 article XII, section 4, of the Hawaii constitution.

1 Additionally, the legislature finds that the dollar value of
2 \$ represents the legislature's re-examination and
3 final determination of the resources that should be provided to
4 the office of Hawaiian affairs for the period between November
5 7, 1978, and July 1, 2009.

6 The legislature also finds that the resources valued at
7 \$ will be provided to the office of Hawaiian affairs
8 in two phases. In the first phase, the legislature by this Act
9 shall convey to the office of Hawaiian affairs the fee simple
10 interest in certain parcels of real property. In the second
11 phase, the legislature in 2010 will pass an act that conveys to
12 the office of Hawaiian affairs resources totaling the value of
13 the phase I properties' county tax assessment, as of the
14 effective date of this Act, subtracted from \$, in the
15 form of conveyance of real property in fee simple.

16 With regard to the future, the legislature finds that the
17 public interest is best served by the legislature deferring
18 temporarily a re-examination of what amount of income and
19 proceeds from the lands in the public trust referred to in
20 article XII, section 4, of the Hawaii constitution should be
21 provided to the office of Hawaiian affairs annually beginning on
22 July 1, 2009. In this light, the annual amount will, for the

1 time being, continue to be set by Act 178, Session Laws of
2 Hawaii 2006, which stated:

3 ". . . [U]ntil further action is taken by the
4 legislature for this purpose, the income and proceeds
5 from the pro rata portion of the public land trust
6 under article XII, section 6, of the state
7 constitution for expenditure by the office of Hawaiian
8 affairs for the betterment of the conditions of native
9 Hawaiians for each fiscal year beginning with fiscal
10 year 2005-2006 shall be \$15,100,000."

11 The legislature recognizes that in January 2008, the
12 governor and the office of Hawaiian affairs reached a settlement
13 agreement with respect to all issues relating to the portion of
14 the income and proceeds from the lands in the public trust for
15 the period between November 7, 1978, and July 1, 2008, that the
16 office of Hawaiian affairs was to receive. However, the
17 settlement agreement did not take effect because it was
18 conditioned on certain legislative action that did not occur.

19 This Act is an expression of legislative policy and not a
20 settlement or a contract. This legislation is a legislative act
21 without distinction from any other legislative act. As it is
22 neither a settlement nor a contract, it can give rise to no

1 lawsuits or claims to enforce it, nor to any claim in the future
2 that any future legislation is barred in any way, or leads to
3 liability in any way, because it somehow conflicts with a
4 settlement, settlement agreement, or contract.

5 The purpose of this Act is to allow the State to most
6 effectively and responsibly make progress toward meeting part of
7 its constitutional obligation to native Hawaiians by addressing
8 the additional amount of income and proceeds that the office of
9 Hawaiian affairs is to receive from the public trust pursuant to
10 article XII, sections 4 and 6, of the Hawaii constitution, for
11 the period from November 7, 1978, to July 1, 2009, by:

- 12 (1) Conveying certain parcels of real property in fee
13 simple to the office of Hawaiian affairs; and
- 14 (2) Supporting the conveyance with appropriate provisions,
15 such as exempting all the conveyed lands from the
16 definition of "public lands" in chapter 171, Hawaii
17 Revised Statutes, and exempting the conveyed lands
18 located in Kakaako from the authority of the Hawaii
19 community development authority under chapter 206E,
20 Hawaii Revised Statutes.

21 SECTION 2. (a) Subject to the rights of the office of
22 Hawaiian affairs set forth in section 8 of this Act including

1 but not limited to the right to inspect and reject any or all of
2 the properties described in this section, all right, title, and
3 interest in the following parcels of land with the existing
4 improvements thereon, including submerged land, accreted land,
5 or any land makai of the shoreline, shall be conveyed in
6 accordance with section 8 of this Act in fee simple to the
7 office of Hawaiian affairs:

- 8 (1) Kakaako Makai: (Lots 2, 3, 4, 5, and 9 as identified
9 on the final Kakaako park subdivision map dated
10 October 15, 2007, and approved by the city and county
11 of Honolulu department of planning and permitting on
12 November 9, 2007); except the TMK: 2-1-058:41 and 2-1-
13 058:110;
- 14 (2) Kahana Valley and Beach Park: (TMK: 5-2-01:1, 5-2-02:
15 all, and 5-2-5:1 and 21 as described in Act 5,
16 Sessions Laws of Hawaii 1987) and (TMK: 5-2-05:3);
- 17 (3) La Mariana and submerged lands: (TMK: 1-2-23:52);
- 18 (4) Accreted peninsula bordered by Kalihi Stream and
19 Moanalua Stream: (TMK: 1-1-3:3);
- 20 (5) Heeia wetlands or fishpond: (TMK: 4-6-05:01);
- 21 (6) Mauna Kea: Mauna Kea Scientific Reserve: (TMK: 3-4-4-
22 015: 9 and 12); Mauna Kea Ice Age Natural Area

1 Reserve: a 143.5 acre square parcel around Puu Pohaku,
2 located to the west of the summit area and a 3,750
3 acre triangular-shaped parcel extends from
4 approximately 10,070 ft (3,069 m) up to 13,230 ft
5 (4,033 m) at the upper tip of the parcel; and

6 (7) State-owned fishponds statewide: as identified in the
7 Hawaiian Fishponds: Fishpond Database developed
8 pursuant to a grant/cooperative agreement from the
9 National Oceanic and Atmospheric Administration,
10 Project No. R/AQ-60 (sponsored by the University of
11 Hawaii Sea Grant College Program, SOEST, under
12 Institutional Grant No. NA36RG0507 Year 31 from NOAA
13 Office of Sea Grant, Department of Commerce).

14 The land described in this section shall be held in trust
15 pursuant to article XII, sections 4, 5, and 6, of the Hawaii
16 constitution, and shall be subject to all laws, including
17 section 171-58, Hawaii Revised Statutes, except as otherwise
18 provided in this Act.

19 Because these are conveyances in which the State and its
20 agencies are the only parties, the tax imposed by section 247-1,
21 Hawaii Revised Statutes, shall not apply to them.

1 The property conveyed shall be subject to all encumbrances,
2 whether or not of record, rights of native tenants, leases,
3 contracts, agreements, permits, easements, profits, licenses,
4 rights-of-way, or other instruments applicable to any land
5 conveyed by this section effective or ongoing on the effective
6 date of this Act, which shall remain in full force and effect.
7 The Mauna Kea parcels, as listed in paragraph (6), shall be
8 subject to Decision and Order of the Circuit Court of the Third
9 Circuit, Civil No. 04-1-397 (January 7, 2007); provided that
10 upon the completion of the requisite action, the Board of Land
11 and Natural Resources shall cease to manage the parcels
12 transferred by this Act. These encumbrances may be set forth in
13 the instruments conveying the property to the office of Hawaiian
14 affairs or set forth in a license or similar agreement, a
15 memorandum of which may be recorded concurrently with the
16 instruments conveying the property to the office of Hawaiian
17 affairs. Effective upon conveyance of the property to the
18 office of Hawaiian affairs pursuant to this Act, every reference
19 to the current title-holder or the head of the department or
20 agency in each such instrument, if the title-holder is a
21 department or an agency, shall be construed to be a reference to
22 the office of Hawaiian affairs or its board of trustees.

1 After the conveyances are made, the property shall be
2 subject to all laws, except as otherwise provided in this Act.
3 The office of Hawaiian affairs shall administer the property in
4 accordance with its duties under the Hawaii constitution and as
5 provided by law.

6 (b) The office of Hawaiian affairs shall cooperate with
7 other state agencies to designate and grant such access rights
8 and easements as may be reasonably necessary for the benefit and
9 use of adjoining properties owned by the State. Each of the
10 instruments creating such access rights or granting such
11 easements shall provide that the office of Hawaiian affairs, or
12 any successor owner of the servient property, shall have the
13 right to reasonably relocate any such access areas or easements
14 so granted. The cost of initially identifying such access areas
15 or designating and granting any such easements shall not be the
16 responsibility of the office of Hawaiian affairs. The cost of
17 relocating any such access areas or easements shall be paid by
18 the office of Hawaiian affairs or any such successor owner, as
19 the case may be. Each of the instruments creating such access
20 rights or granting such easements shall also provide that the
21 office of Hawaiian affairs shall only be responsible for a
22 reasonable share of the cost of maintaining any such access

1 areas and easement areas, as the case may be, and that the
2 office, its tenants, licensees, concessionaires, successors, and
3 assigns shall not be liable for injuries or damages arising from
4 the use of such access areas or easement areas by other state
5 agencies or their invitees.

6 (c) Notwithstanding subsection (b), the office of Hawaiian
7 affairs shall not be required to approve any access rights or
8 grant any access easements to other state agencies that would
9 materially diminish the value of the servient property or that
10 would materially interfere with the use of the servient property
11 by the office or any lessee, tenant, licensee, concessionaire,
12 or other occupant of the property, unless otherwise provided by
13 law.

14 (d) The conveyances made by this section shall not include
15 any of the State's rights to minerals or surface or ground
16 water. As directed by the attorney general, the appropriate
17 boards, agencies, officers, and employees of the State shall:

18 (1) Execute instruments of conveyance as may be necessary
19 and proper to the office of Hawaiian affairs, as
20 grantee, to convey the interest and title of the State
21 and its boards and commissions to these lands and
22 improvements in fee simple; and

1 (2) Record the instruments in the land court or bureau of
2 conveyances, as appropriate.

3 (e) This section shall not limit the power of the
4 legislature to enact any laws.

5 (f) The office of Hawaiian affairs shall transfer
6 management and control of all parcels, as described in
7 subsection (a), to the sovereign native Hawaiian entity upon its
8 recognition by the United States and the State. All terms,
9 conditions, agreements, and laws affecting the parcels, as
10 described in subsection (a), shall remain in effect until
11 expressly terminated.

12 SECTION 3. The real property conveyances made under this
13 Act shall be deemed income and proceeds from the lands in the
14 public trust referred to in article XII, sections 4 and 6, of
15 the Hawaii constitution, as if they had been paid out of the
16 income and proceeds from such lands pursuant to article XII,
17 sections 4 and 6, of the Hawaii constitution. With regard to
18 any properties conveyed to the office of Hawaiian affairs under
19 this Act that are part of the public land trust referred to in
20 article XII, sections 4 and 6, of the Hawaii constitution,
21 nothing in this Act shall remove those properties from that
22 public land trust.

1 SECTION 4. To the extent that the State has waived
2 sovereign immunity for a suit, claim, cause of action, or right
3 of action regarding the amount of income and proceeds the office
4 of Hawaiian affairs is to receive from the public trust pursuant
5 to article XII, sections 4 and 6, of the Hawaii constitution,
6 that waiver is withdrawn.

7 SECTION 5. Section 171-2, Hawaii Revised Statutes, as
8 amended to read as follows:

9 **"§171-2 Definition of public lands.** "Public lands" means
10 all lands or interest therein in the State classed as government
11 or crown lands previous to August 15, 1895, or acquired or
12 reserved by the government upon or subsequent to that date by
13 purchase, exchange, escheat, or the exercise of the right of
14 eminent domain, or in any other manner; including accreted lands
15 not otherwise awarded, submerged lands, and lands beneath tidal
16 waters which are suitable for reclamation, together with
17 reclaimed lands which have been given the status of public lands
18 under this chapter, except:

- 19 (1) Lands designated in section 203 of the Hawaiian Homes
20 Commission Act, 1920, as amended;
- 21 (2) Lands set aside pursuant to law for the use of the
22 United States;

- 1 (3) Lands being used for roads and streets;
- 2 (4) Lands to which the United States relinquished the
3 absolute fee and ownership under section 91 of the
4 Hawaiian Organic Act prior to the admission of Hawaii
5 as a state of the United States unless subsequently
6 placed under the control of the board of land and
7 natural resources and given the status of public lands
8 in accordance with the State Constitution, the
9 Hawaiian Homes Commission Act, 1920, as amended, or
10 other laws;
- 11 (5) Lands to which the University of Hawaii holds title;
- 12 (6) Lands to which the Hawaii housing finance and
13 development corporation in its corporate capacity
14 holds title;
- 15 (7) Lands to which the Hawaii community development
16 authority in its corporate capacity holds title;
- 17 (8) Lands to which the department of agriculture holds
18 title by way of foreclosure, voluntary surrender, or
19 otherwise, to recover moneys loaned or to recover
20 debts otherwise owed the department under chapter 167;
- 21 (9) Lands which are set aside by the governor to the Aloha
22 Tower development corporation; lands leased to the

1 Aloha Tower development corporation by any department
2 or agency of the State; or lands to which the Aloha
3 Tower development corporation holds title in its
4 corporate capacity;

5 (10) Lands which are set aside by the governor to the
6 agribusiness development corporation; lands leased to
7 the agribusiness development corporation by any
8 department or agency of the State; or lands to which
9 the agribusiness development corporation in its
10 corporate capacity holds title; [~~and~~]

11 (11) Lands to which the high technology development
12 corporation in its corporate capacity holds title[~~;~~];
13 and

14 (12) Lands conveyed to the office of Hawaiian affairs
15 pursuant to Act _____, Session Laws of Hawaii 2009."

16 SECTION 6. Section 206E-32, Hawaii Revised Statutes, is
17 amended to read as follows:

18 "**§206E-32 District; established, boundaries.** The Kakaako
19 community development district is established. The district
20 shall include that area bounded by King Street; Piikoi Street
21 from its intersection with King Street to Ala Moana Boulevard;
22 Ala Moana Boulevard, inclusive, from Piikoi Street to its

1 intersection with the Ewa boundary of Ala Moana Park also
2 identified as the Ewa boundary of tax map key 2-3-37:01; the Ewa
3 boundary of tax map key 2-3-37:01 from its intersection with Ala
4 Moana Boulevard to the shoreline; the shoreline from its
5 intersection with the property line representing the Ewa
6 boundary of property identified by tax map key 2-3-37:01 to the
7 property line between Pier 2 and Pier 4; the property line
8 between Pier 2 and Pier 4 from its intersection with the
9 shoreline to Ala Moana Boulevard; Ala Moana Boulevard from its
10 intersection with the property line between lands identified by
11 Pier 2 and Pier 4 to Punchbowl Street; and Punchbowl Street to
12 its intersection with King Street; provided that the following
13 parcels at Pier 1 and Pier 2 shall be deleted from the Kakaako
14 community development district boundaries and conveyed to the
15 department of land and natural resources to be set aside for the
16 department of transportation and the foreign-trade zone division
17 of the department of business, economic development, and
18 tourism, to ensure continued maritime and foreign commerce use:
19 all of lot 3 and parcels 2, 3-A, A, and B of the Forrest Avenue
20 subdivision, as shown on the map filed with the bureau of
21 conveyances of the State of Hawaii as file plan 2335; and lots
22 A-1 and A-2, as shown on map 2, filed in the office of the

1 assistant registrar of the land court of the State of Hawaii
2 with land court application 1328; and provided further that all
3 existing easements affecting and appurtenant to the parcels to
4 be deleted from the Kakaako community development district
5 boundaries shall not be affected by this change.

6 The district shall also include that parcel of land
7 identified by tax map key 2-1-14:16, situated mauka of Pier 6
8 and Pier 7 and makai of Nimitz Highway, being the site for the
9 existing Hawaiian Electric power plant and related facilities.

10 Any other provision of this section or of this chapter
11 notwithstanding, the Kakaako community development district
12 shall not include any lands conveyed in fee simple to the office
13 of Hawaiian affairs pursuant to Act _____, Session Laws of Hawaii
14 2009; provided further that these lands shall not be subject to
15 any other of the provisions of this chapter."

16 SECTION 7. Section 10-13.3, Hawaii Revised Statutes, is
17 repealed.

18 ~~["~~§10-13.3~~ ~~Interim revenue.~~ Notwithstanding the~~
19 ~~definition of revenue contained in this chapter and the~~
20 ~~provisions of section 10-13.5, and notwithstanding any claimed~~
21 ~~invalidity of Act 304, Session Laws of Hawaii 1990, the income~~
22 ~~and proceeds from the pro rata portion of the public land trust~~

1 ~~under article XII, section 6 of the state constitution for~~
2 ~~expenditure by the office of Hawaiian affairs for the betterment~~
3 ~~of the conditions of native Hawaiians for each of fiscal year~~
4 ~~1997-1998 and fiscal year 1998-1999 shall be \$15,100,000."]~~

5 SECTION 8. (a) During regular business hours, the State
6 shall make available to the office of Hawaiian affairs and its
7 authorized representatives the State's files that contain any of
8 the following regarding properties to be conveyed to the office
9 pursuant to this Act:

- 10 (1) Copies of soil reports, site plans, engineering
11 reports, archaeological and historical studies, plans,
12 and surveys;
- 13 (2) Zoning entitlement and other land use documents and
14 records including, without limitation, all current
15 governmental permits, approvals and authorizations;
- 16 (3) Copies of notices from governmental agencies regarding
17 any violations of laws or ordinances;
- 18 (4) Copies of all leases and correspondence with any
19 lessees under any of the leases;
- 20 (5) Copies of licenses and concession agreements and all
21 correspondence with any of the parties to such
22 licenses and concession agreements;

1 (6) Copies of any other agreements affecting or relating
2 to any of the property, and correspondence with any of
3 the parties to such other agreements;

4 (7) Copies of any existing surveys, and aerial photos; and

5 (8) Copies of all plans and other documents relating to
6 any improvements on any of the property.

7 (b) The State shall permit the office of Hawaiian affairs
8 and its authorized representatives to enter upon and conduct
9 reasonable physical inspections of the property to be conveyed
10 to the office of Hawaiian affairs under this Act, including
11 subsurface investigations under the property and inspections of
12 the buildings and other improvements located upon the property;
13 provided that such entry and inspections shall be conducted in a
14 manner that reasonably minimizes interference with the use of
15 the property by the occupants of the property.

16 (c) The office of Hawaiian affairs shall have until the
17 later of:

18 (1) October 1, 2009; or

19 (2) Six months after the State has provided the office
20 with access to all the documents and property
21 described in subsections (a) and (b);

1 to conduct a due diligence investigation of the property to be
2 conveyed to the office pursuant to this Act.

3 (d) If the office of Hawaiian affairs determines in its
4 sole and absolute discretion that there exists any condition
5 with respect to any of the property to be conveyed to the office
6 pursuant to this Act that makes the property unsuitable for the
7 intended uses of the property by the office of Hawaiian affairs,
8 the office may reject any or all of the property to be conveyed
9 to it pursuant to this Act by written notice to the State given
10 by not later than October 1, 2009, or six months after the State
11 has provided the office with access to all the documents and
12 property described in subsections (a) and (b).

13 (e) Upon receipt of written notice from the office of
14 Hawaiian affairs as and by the date provided in subsection (d)
15 that any or all of the property, including but not limited to
16 any one or more lot or tax map key parcel, to be conveyed to the
17 office is rejected, then the property identified by the office
18 of Hawaiian affairs shall not be conveyed to the office pursuant
19 to this Act and the value of real property to be conveyed to the
20 office of Hawaiian affairs in 2010, as described in section 1 of
21 this Act, shall be increased by the value of the county tax

1 assessment, as of the effective date of this Act, of the
2 rejected real property.

3 (f) The State shall convey to the office any property
4 which has not been rejected by the office as provided in
5 subsection (d) by not later than thirty days after the date by
6 which the office of Hawaiian affairs was required to notify the
7 State of such rejection as provided in subsection (d).

8 SECTION 9. In printing this Act, the Revisor of Statutes
9 shall substitute in sections 171-2 and 206E-32, Hawaii Revised
10 Statutes, of sections 5 and 6, the corresponding act number of
11 this Act.

12 SECTION 10. Statutory material to be repealed is bracketed
13 and stricken. New statutory material is underscored.

14 SECTION 11. This Act shall take effect on July 1, 2009.

Report Title:

Office of Hawaiian Affairs; Public Land Trust

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 7/1/2009; conveys certain parcels of real property in fee simple to the office of Hawaiian affairs. (SD1)