

JAN 26 2009

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

"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.

OFFICE OF HAWAIIAN AFFAIRS; ESTABLISHMENT OF

BOARD OF TRUSTEES

16 **Section 5.** There is hereby established an Office of
17 Hawaiian Affairs. The Office of Hawaiian Affairs shall hold
18 title to all the real and personal property now or hereafter set



1 aside or conveyed to it which shall be held in trust for native
2 Hawaiians and Hawaiians. There shall be a board of trustees for
3 the Office of Hawaiian Affairs elected by qualified voters who
4 are Hawaiians, as provided by law. The board members shall be
5 Hawaiians. There shall be not less than nine members of the
6 board of trustees; provided that each of the following Islands
7 have one representative: Oahu, Kauai, Maui, Molokai and Hawaii.
8 The board shall select a chairperson from its members.

9 **POWERS OF BOARD OF TRUSTEES**

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



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

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

11 In *Trustees of the Office of Hawaiian Affairs v. Yamasaki*,
12 69 Haw. 154, 737 P.2d 446 (1987), the Hawaii supreme court
13 concluded that the issue of how the apportionment is formulated
14 is a political question for the legislature to determine.

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

18 On September 12, 2001, the Hawaii supreme court ruled in
19 *Office of Hawaiian Affairs v. State of Hawaii*, 96 Haw. 388, 31
20 P.3d 901 (2001), that Act 304 was effectively repealed by its
21 own terms, so that once again, it was necessary for the



1 legislature to specify the apportionment to be managed and
2 administered by the office of Hawaiian affairs.

3 In its decision, the Hawaii supreme court affirmed
4 *Yamasaki*, observing:

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

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

17 *Office of Hawaiian Affairs v. State of Hawaii*, 96 Haw. at 401,
18 31 P.3d at 914 (citations omitted).

19 In reviewing the entire history of the issue of the State's
20 obligation to transmit to the office of Hawaiian affairs a part
21 of the income and proceeds from the public land trust, the
22 legislature finds that the issue has evolved into two principal



1 aspects, one looking to the past, the other looking to the
2 future.

3 With regard to the past, the legislature finds that in
4 addition to the amounts of income and proceeds previously paid
5 to the office of Hawaiian Affairs, further resources should be
6 provided to the office of Hawaiian Affairs that represent a re-
7 examination and final determination by the legislature for the
8 period between November 7, 1978 (the ratification date of
9 article XII, sections 4, 5, and 6 of the Constitution of the
10 State of Hawaii), and July 1, 2008, with regard to income and
11 proceeds from the lands in the public trust referred to in
12 article XII, section 4, of the Hawaii constitution.

13 Additionally, the legislature finds that the dollar value of
14 \$200,000,000 represents the legislature's re-examination and
15 final determination of the resources that should be provided to
16 the office of Hawaiian Affairs for the period between November
17 7, 1978, and July 1, 2008.

18 The legislature also finds that the resources valued at
19 \$200,000,000 will be provided to the office of Hawaiian Affairs
20 in two phases. In the first phase, the legislature by this Act
21 conveys to the office of Hawaiian Affairs the fee simple
22 interest in certain parcels of real property valued at,



1 respectively, the city and county of Honolulu tax assessed value
2 for 2008-2009 of \$92,719,415 (certain property in Kakaako on
3 Oahu) and the county of Hawaii tax assessed value for 2007-2008
4 of \$34,483,725 (certain property in Hilo, Hawaii), for a
5 combined value of \$127,203,140. In the second phase, the
6 legislature in 2010 will pass an act that conveys to the office
7 of Hawaiian Affairs resources totaling \$72,796,860 in value, in
8 the form of conveyance of real property in fee simple.

9 With regard to the future, the legislature finds that the
10 public interest is best served by the legislature deferring
11 temporarily a re-examination of what amount of income and
12 proceeds from the lands in the public trust referred to in
13 article XII, section 4, of the Hawaii constitution should be
14 provided to the office of Hawaiian Affairs annually beginning on
15 July 1, 2008. In this light, the annual amount will, for the
16 time being, continue to be set by Act 178, Session Laws of
17 Hawaii 2006, which stated:

18 ". . . [U]ntil further action is taken by the legislature
19 for this purpose, the income and proceeds from the pro rata
20 portion of the public land trust under article XII, section
21 6, of the state constitution for expenditure by the office
22 of Hawaiian affairs for the betterment of the conditions of



1 native Hawaiians for each fiscal year beginning with fiscal
2 year 2005-2006 shall be \$15,100,000."

3 The legislature recognizes that in January 2008, the
4 governor and the office of Hawaiian affairs reached a settlement
5 agreement with respect to all issues relating to the portion of
6 the income and proceeds from the lands in the public trust for
7 the period between November 7, 1978, and July 1, 2008, that the
8 office of Hawaiian affairs was to receive. However, the
9 settlement agreement did not take effect because it was
10 conditioned on certain legislative action that did not occur.

11 This Act is an expression of legislative policy and not a
12 settlement or a contract. This legislation is a legislative act
13 without distinction from any other legislative act. As it is
14 neither a settlement nor a contract, it can give rise to no
15 lawsuits or claims to enforce it, nor to any claim in the future
16 that any future legislation is barred in any way, or leads to
17 liability in any way, because it somehow conflicts with a
18 settlement, settlement agreement, or contract.

19 The purpose of this Act is to allow the State to most
20 effectively and responsibly make progress toward meeting part of
21 its constitutional obligation to native Hawaiians by addressing
22 the additional amount of income and proceeds that the office of

1 Hawaiian Affairs is to receive from the public trust pursuant to
2 article XII, sections 4 and 6, of the Hawaii constitution, for
3 the period from November 7, 1978, to July 1, 2008, by:

- 4 (1) Conveying certain parcels of real property in fee
5 simple to the office of Hawaiian affairs; and
- 6 (2) Supporting the conveyance with appropriate provisions,
7 such as exempting all the conveyed lands from the
8 definition of "public lands" in chapter 171, Hawaii
9 Revised Statutes, and exempting the conveyed lands
10 located in Kakaako from the authority of the Hawaii
11 community development authority under chapter 206E,
12 Hawaii Revised Statutes.

13 SECTION 2. Section 10-13.3, Hawaii Revised Statutes, is
14 repealed.

15 ~~["§10-13.3] Interim revenue. Notwithstanding the~~
16 ~~definition of revenue contained in this chapter and the~~
17 ~~provisions of section 10-13.5, and notwithstanding any claimed~~
18 ~~invalidity of Act 304, Session Laws of Hawaii 1990, the income~~
19 ~~and proceeds from the pro rata portion of the public land trust~~
20 ~~under article XII, section 6 of the state constitution for~~
21 ~~expenditure by the office of Hawaiian affairs for the betterment~~



1 ~~of the conditions of native Hawaiians for each of fiscal year~~
2 ~~1997-1998 and fiscal year 1998-1999 shall be \$15,100,000."]~~

3 SECTION 3. (a) Subject to the rights of the office of
4 Hawaiian affairs set forth in section 8 of this Act including
5 but not limited to the right to inspect and reject any or all of
6 the properties described in this section, all right, title, and
7 interest in the following parcels of land with the existing
8 improvements thereon, except for submerged land, accreted land,
9 or any land makai of the shoreline, shall be conveyed in
10 accordance with section 8 of this Act in fee simple to the
11 office of Hawaiian affairs:

- 12 (1) Kakaako Makai: (Lots 2, 3, 4, 5, and 9 as identified
13 on the final Kakaako park subdivision map dated
14 October 15, 2007, and approved by the city and county
15 of Honolulu department of planning and permitting on
16 November 9, 2007); and
- 17 (2) Hilo Banyan drive: Bayview Banyan Corp. (TMK: (3)-2-
18 1-5:21); Country Club Condo Hotel (TMK: (3)-2-1-5:20);
19 Hilo Hawaiian Hotel (TMK: (3)-2-1-3:5); Naniloa Hotel
20 and Golf Course (TMK: (3)-2-1-1:12; TMK: (3)-2-1-5:13,
21 14, 16, 17, 27, 32, 39, 41, 42, 46); Reed's Bay Resort



1 Hotel (TMK: (3)-2-1-5:22); Uncle Billy's Hilo Bay
2 Hotel Inc. (TMK: (3)-2-1-5:9, 12, 33, 34, 35, 45, 47).

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

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

11 The property conveyed shall be subject to all encumbrances,
12 whether or not of record, rights of native tenants, leases,
13 contracts, agreements, permits, easements, profits, licenses,
14 rights-of-way, or other instruments applicable to any land
15 conveyed by this section effective or ongoing on the effective
16 date of this Act, which shall remain in full force and effect.

17 These encumbrances may be set forth in the instruments conveying
18 the property to the office of Hawaiian affairs or set forth in a
19 license or similar agreement, a memorandum of which may be
20 recorded concurrently with the instruments conveying the
21 property to the office of Hawaiian affairs. Effective upon
22 conveyance of the property to the office of Hawaiian affairs



1 pursuant to this Act, every reference to the current title-
2 holder or the head of the department or agency in each such
3 instrument, if the title-holder is a department or an agency,
4 shall be construed to be a reference to the office of Hawaiian
5 affairs or its board of trustees.

6 After the conveyances are made, the property shall be
7 subject to all laws, except as otherwise provided in this Act.
8 The office shall administer the property in accordance with its
9 duties under the Hawaii constitution and as provided by law.

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



1 the case may be. Each of the instruments creating such access
2 rights or granting such easements shall also provide that the
3 office of Hawaiian affairs shall only be responsible for a
4 reasonable share of the cost of maintaining any such access
5 areas and easement areas, as the case may be, and that the
6 office, its tenants, licensees, concessionaires, successors, and
7 assigns shall not be liable for injuries or damages arising from
8 the use of such access areas or easement areas by other state
9 agencies or their invitees.

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

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



1 (1) Execute instruments of conveyance as may be necessary
2 and proper to the office of Hawaiian affairs, as
3 grantee, to convey the interest and title of the State
4 and its boards and commissions to these lands and
5 improvements in fee simple; and

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

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

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

21 SECTION 5. To the extent that the State has waived
22 sovereign immunity for a suit, claim, cause of action, or right



1 of action regarding the amount of income and proceeds the office
2 of Hawaiian affairs is to receive from the public trust pursuant
3 to article XII, sections 4 and 6, of the Hawaii constitution,
4 that waiver is withdrawn.

5 SECTION 6. Section 171-2, Hawaii Revised Statutes, as
6 amended to read as follows:

7 "§171-2 Definition of public lands. "Public lands" means
8 all lands or interest therein in the State classed as government
9 or crown lands previous to August 15, 1895, or acquired or
10 reserved by the government upon or subsequent to that date by
11 purchase, exchange, escheat, or the exercise of the right of
12 eminent domain, or in any other manner; including accreted lands
13 not otherwise awarded, submerged lands, and lands beneath tidal
14 waters which are suitable for reclamation, together with
15 reclaimed lands which have been given the status of public lands
16 under this chapter, except:

17 (1) Lands designated in section 203 of the Hawaiian Homes
18 Commission Act, 1920, as amended;

19 (2) Lands set aside pursuant to law for the use of the
20 United States;

21 (3) Lands being used for roads and streets;



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



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

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

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

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

15 SECTION 7. Section 206E-32, Hawaii Revised Statutes, is
16 amended to read as follows:

17 "**§206E-32 District; established, boundaries.** The Kakaako
18 community development district is established. The district
19 shall include that area bounded by King Street; Piikoi Street
20 from its intersection with King Street to Ala Moana Boulevard;
21 Ala Moana Boulevard, inclusive, from Piikoi Street to its
22 intersection with the Ewa boundary of Ala Moana Park also



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



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

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

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

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

- 20 (1) Copies of soil reports, site plans, engineering
- 21 reports, archaeological and historical studies, plans,
- 22 and surveys;



- 1 (2) Zoning entitlement and other land use documents and
2 records including, without limitation, all current
3 governmental permits, approvals and authorizations;
- 4 (3) Copies of notices from governmental agencies regarding
5 any violations of laws or ordinances;
- 6 (4) Copies of all leases and correspondence with any
7 lessees under any of the leases;
- 8 (5) Copies of licenses and concession agreements and all
9 correspondence with any of the parties to such
10 licenses and concession agreements;
- 11 (6) Copies of any other agreements affecting or relating
12 to any of the property, and correspondence with any of
13 the parties to such other agreements;
- 14 (7) Copies of any existing surveys, and aerial photos; and
- 15 (8) Copies of all plans and other documents relating to
16 any improvements on any of the property.
- 17 (b) The State shall permit the office of Hawaiian affairs
18 and its authorized representatives to enter upon and conduct
19 reasonable physical inspections of the property to be conveyed
20 to the office of Hawaiian affairs under this Act, including
21 subsurface investigations under the property and inspections of
22 the buildings and other improvements located upon the property;



1 provided that such entry and inspections shall be conducted in a
2 manner that reasonably minimizes interference with the use of
3 the property by the occupants of the property.

4 (c) The office of Hawaiian affairs shall have until the
5 later of:

6 (1) October 1, 2009; or

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

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

12 (d) If the office of Hawaiian affairs determines in its
13 sole and absolute discretion that there exists any condition
14 with respect to any of the property to be conveyed to the office
15 pursuant to this Act that makes the property unsuitable for the
16 intended uses of the property by the office of Hawaiian affairs,
17 the office may reject any or all of the property to be conveyed
18 to it pursuant to this Act by written notice to the State given
19 by not later than October 1, 2009, or six months after the State
20 has provided the office with access to all the documents and
21 property described in subsections (a) and (b).



1 (e) Upon receipt of written notice from the office of
2 Hawaiian affairs as and by the date provided in subsection (d)
3 that any or all of the property, including but not limited to
4 any one or more lot or tax map key parcel, to be conveyed to the
5 office is rejected, then the property identified by the office
6 of Hawaiian affairs shall not be conveyed to the office pursuant
7 to this Act and the value of real property to be conveyed to the
8 office of Hawaiian affairs in 2010, as described in section 1 of
9 this Act, shall be increased by the city and county of Honolulu
10 tax assessed value for 2008-2009 for property identified in
11 section 3 of this Act but not conveyed to the office of Hawaiian
12 affairs located in Kakaako Makai or by the county of Hawaii tax
13 assessed value for 2007-2008 for property identified in section
14 3 of this Act but not conveyed to the office of Hawaiian affairs
15 located in the Banyan Drive area of Hilo, county of Hawaii.

16 (f) The State shall convey to the office any property
17 which has not been rejected by the office as provided in
18 subsection (d) by not later than thirty days after the date by
19 which the office of Hawaiian affairs was required to notify the
20 State of such rejection as provided in subsection (d).


21 SECTION 9. Statutory material to be repealed is bracketed
22 and stricken. New statutory material is underscored.



1 SECTION 10. This Act shall take effect on July 1, 2009.

2

INTRODUCED BY: _____



By Request

Report Title:

Office of Hawaiian Affairs; Public Land Trust

Description:

Amends the law to provide for the office of Hawaiian affairs to receive a portion of the income and proceeds from land in the public land trust.

