



EXECUTIVE CHAMBERS
HONOLULU

NEIL ABERCROMBIE
GOVERNOR

Testimony SB 2783
Relating to the Public Trust Lands

HOUSE COMMITTEE ON FINANCE
Representative Marcus Oshiro, Chair
Representative Marilyn Lee, Vice Chair

March 29, 2012
1:30 pm Room 308

Chair Oshiro, Vice Chair Marilyn Lee, and members of the committee, thank you for hearing Senate Bill 2783, Relating to the Public Trust Lands. I respectfully request your support of this important measure.

Last year, my administration and the Office of Hawaiian Affairs (OHA) began discussions regarding claims to income and proceeds from the public trust lands dating back to 1978. These discussions resulted in an agreement that is embodied in Senate Bill 2783.

In accordance with the Legislature's authority to determine OHA's appropriate portion of income and proceeds from ceded lands, we are presenting this agreement in principal for your consideration and approval.

In summary, the agreement would convey approximately \$200 million worth of land in Kaka'ako Makai to OHA. No cash would be paid. In exchange for the land, any and all claims regarding OHA's share of ceded land receipts from November 7, 1978 through July 1, 2012, would be resolved.

I believe this agreement is pono and benefits both Native Hawaiians and the entire State of Hawaii. As you consider this agreement, I and my administration will work with you through the vetting process and I look forward to these discussions.

Again, mahalo for the opportunity to testify in support.



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Again, mahalo for the opportunity to testify in support.



SB2783
RELATING TO THE PUBLIC TRUST LANDS
House Committee on Finance

March 29, 2012

1:30 p.m.

Room 308

The Board of Trustees of the Office of Hawaiian Affairs (OHA) strongly **SUPPORTS** SB2783. This bill will finally right a decades-old wrong by resolving the State's outstanding constitutional obligation to OHA that accrued as a result of the State's failure to pay OHA its proper share of public land trust revenues between 1978 and 2012.

If enacted, SB2783 will resolve the State's outstanding past due revenues debt by transferring approximately \$200 million worth of land in Kaka'ako Makai to OHA. The \$200 million amount represents a compromise between the State and OHA regarding the value of the disputed claims.

SB2783 provides the Legislature an opportunity to finally put to rest an issue that has plagued the State government and OHA for more than three decades, and that the Hawai'i Supreme Court has ruled is primarily the Legislature's responsibility to address. Appropriate legislative action will help fulfill the State's solemn obligation to OHA and will have a positive impact on OHA's beneficiaries and the State government.

The following background information may be useful during your Committee's consideration:

- Following many years of relatively small transfers to OHA, Act 304, Session Laws of Hawaii of 1990, sought to establish how the State would carry out its constitutional and statutory mandate to dedicate 20 percent of public land trust revenues to OHA's activities.
- Act 35, Session Laws of Hawaii 1993, appropriated \$136.5 million in general obligation bond funds to OHA as a settlement of undisputed claims to that point in time.
- Act 329, Session Laws of Hawai'i 1997, established OHA's pro rata share to be \$15.1 million for each of the fiscal years 1997-1998 and 1998-1999.
- In 2001, the Hawai'i Supreme Court ruled that Act 304 was invalid due to a conflict between federal law and one of the Act's technical provisions.

- Act 34, Session Laws of Hawai'i 2003, required the transfer of several million dollars to OHA to help continue the revenue stream following the invalidation of Act 304.
- Executive Order No. 03-03 set forth Governor Lingle's procedure for continuing the revenue stream.
- Act 178, Session Laws of Hawai'i 2006, included an interim provision setting OHA's annual amount of public land trust revenues at \$15.1 million and providing a lump sum payment of \$17.5 million for certain amounts that the Legislature determined were underpaid between July 1, 2001 and June 30, 2005.

We thank you for considering this bill. The issue is complex, but when 30 years of struggle to address this issue are examined, one key truth remains: it is ultimately the Legislature's kuleana to resolve this important issue. We look forward to working with the Legislature, as we have done over the years, toward a fair and just resolution of this matter.

We respectfully urge your Committee to PASS SB2783. Mahalo for the opportunity to testify on this important measure.

HEIL ABERCROMBIE
GOVERNOR
STATE OF HAWAII



ALBERT "ALAPAKI" NAHALE-A
CHAIRMAN
HAWAIIAN HOMES COMMISSION
MICHELLE K. KAUHANE
DEPUTY TO THE CHAIRMAN

STATE OF HAWAII
DEPARTMENT OF HAWAIIAN HOME LANDS

P. O. BOX 1879
HONOLULU, HAWAII 96805

TESTIMONY OF ALAPAKI NAHALE-A, CHAIRMAN
HAWAIIAN HOMES COMMISSION
BEFORE THE HOUSE COMMITTEE ON FINANCE
IN SUPPORT OF

SB 2783, RELATING TO THE PUBLIC LAND TRUST

March 29, 2012

Aloha Chair Oshiro, Vice-Chair Lee, and Members of the Committee:

The Department of Hawaiian Home Lands (DHHL) strongly supports SB 2783 as it proposes a settlement of the Office of Hawaiian Affairs (OHA) claims against the State for its share of public land trust revenues from 1978 to 2012. The department commends both Governor Abercrombie and the Office of Hawaiian Affairs for committing to resolve this long-standing issue.

Self-determination is the best path forward for Native Hawaiians and this settlement is a foundation for that. The settlement transfers resources owed to Native Hawaiians, and with these resources OHA can create a better future for our Hawaiian community. DHHL and OHA are partners in serving the native Hawaiian community through our respective fiduciary responsibilities, and this partnership was solidified last September through the joint quarterly meetings with the Hawaiian Homes Commission and the OHA Board of Trustees.

We strongly support the Office of Hawaiians in their efforts to resolve its claims, and we look forward to further collaborating with OHA for the betterment of Hawaiians.

Department of Hawaiian Home Lands
March 29, 2012
SB 2783
Page 2 of 2

Mahalo for the opportunity to testify on this important measure.
We respectfully request your committees' approval of this settlement
legislation.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:

S.B. NO. 2783, RELATING TO THE PUBLIC TRUST LANDS.

BEFORE THE:

HOUSE COMMITTEE ON FINANCE

DATE: Thursday, March 29, 2012

TIME: 1:30 p.m.

LOCATION: State Capitol, Room 308

TESTIFIER(S): David M. Louie, Attorney General, or
Charleen M. Aina, Deputy Attorney General

Chair Oshiro and Members of the Committee:

The Attorney General urges passage of this bill.

The fundamental objective of this bill is to finally and completely resolve all of the longstanding differences between the State and the Office of Hawaiian Affairs (OHA) about OHA's portion of the income and proceeds from the use of ceded lands. Article XII, section 6 of the State Constitution specifies OHA is to receive a portion of the income and proceeds from the ceded lands with which to better the conditions of native Hawaiians, as provided by law. While most of OHA's claims to income and proceeds from the ceded lands have been resolved, at least three disputes relating to whether OHA should have received a portion of the State's receipts from its hospitals situated on ceded lands, and its rental housing and affordable housing development programs, and a larger portion of the airports' duty free concession leases, are still outstanding. OHA, the Governor, and the Attorney General agree that these and any and all other disputes relating to OHA's portion of ceded land receipts from the period November 7, 1978 through June 30, 2012, need to be resolved.

This bill was drafted jointly by the Attorney General and OHA, and introduced in the Legislature at the request of the Governor. It presents the Governor's and OHA's mutually agreed to proposal for resolving these three claims, and any and all other claims OHA has, had, or may have to the income and proceeds from the public land trust lands under article XII, sections 4 and 6 of the State Constitution, for the period November 7, 1978 through June 30, 2012.

The proposal is presented in the form of this bill because under article XII, section 6 of the State Constitution and the Hawaii Supreme Court's decisions in Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987) (Yamasaki), Office of Hawaiian Affairs v. State, 96 Hawai'i 388, 31 P.3d 901 (2001) (OHA I), and Office of Hawaiian Affairs v. State, 110 Hawai'i 338, 133 P.3d 767 (2006) (OHA I), only the Legislature can specify what OHA's portion of the income and proceeds from the public land trust lands is, and resolving all of OHA's remaining claims for that period is contingent upon the Legislature specifying what the State's obligation under the State Constitution is for that period.

It is important to understand that the bill does not address and thus cannot effect claims relating to, arising out of, or founded upon self-governance, sovereignty, the overthrow of the Kingdom of Hawaii, annexation by the United States, the Hawaiian Homes Commission Act, or what OHA's portion of the income and proceeds from the public land trust lands is today, or prospectively. As to what OHA's portion is today, Act 178, Session Laws of Hawaii 2006, specifies that OHA must receive \$15.1 million of the income and proceeds from the public land trust lands annually, and only this or a future legislature can change what that portion is, or how it is to be quantified in the future.

We are pleased that OHA's trustees are willing to compromise and resolve all differences about its portion of ceded land receipts, in exchange for the nine parcels of land at Kaka'ako Makai preliminarily valued at \$200 million that will be conveyed to OHA if this bill passes without objection. All of the parcels of land are already zoned commercial, are contiguous to each other, and thus are suited for master planning. They are also located in the midst of an area of Honolulu that is already experiencing significant and long-range redevelopment.

Conveying the lands should not adversely affect the State's interests. OHA has agreed and the bill provides that the lands conveyed are to remain under the jurisdiction and subject to the authority of the Hawaii Community Development Authority (HCDA) with respect to zoning, land use, and all other matters over which HCDA is authorized to act. Similarly, OHA has agreed and the bill specifies that the conveyances do not include the State's interest in minerals and metallic mines, including rights to geothermal energy, submerged lands, surface or ground water, or the State's regulatory and ownership rights, if any, over, or to historic properties, aviation artifacts, burial sites, and prehistoric remains under chapter 6E, Hawaii Revised Statutes.

OHA has also agreed to continue all rights and encumbrances, including leases, easements, and rights of entry, applicable to all of the parcels conveyed, and allow reasonable access rights and easements to state agencies for the benefit and use of their adjoining properties.

S.B. No. 2783 is the product of OHA's and our combined efforts to resolve disputes that have strained the relations between OHA and the State for almost as long as article XII, sections 4 and 6 of the State Constitution have provided that the Legislature shall earmark a portion of the ceded land receipts for OHA to use to better the conditions of native Hawaiians. We believe the bill's provisions are fair and just, and that OHA agrees that they are fair and just. Since 2006, Act 178 has told us how much OHA is to receive as its portion of the income and proceeds from the public land trust lands. Resolving all disputes as to what OHA's portion was before then is long overdue.¹

The Attorney General respectfully requests that the Committees pass this measure so that all disputes regarding OHA's portion of the income and proceeds from the public land trust lands can be resolved and satisfied by the Legislature.

¹ A chronology of how and when the disputes arose is attached to this testimony.

CHRONOLOGY

In 1978, the State Constitution was amended by the delegates to the Constitutional Convention to implement the provision in section 5(f) of the Admission Act that authorizes the lands, and income and proceeds from the lands ceded back to the State by the United States at Statehood, to be used to better the conditions of native Hawaiians. The delegates added article XII, sections 4, 5 and 6 to the State Constitution, to establish OHA, and to direct the Legislature to enact laws that expressly earmarked income and proceeds from the ceded lands for OHA to use, to better the conditions of native Hawaiians. These amendments were ratified by the voters on November 7, 1978.

In 1979, chapter 10 was added to the Hawaii Revised Statutes to initiate implementation of article XII, sections 4, 5 and 6. Section 10-13.5, Hawaii Revised Statutes, was added in 1980, to establish OHA's portion of the income and proceeds from the ceded lands, and prescribe how that portion was to be quantified. It provided: "Twenty per cent of all funds derived from the public lands trust, described in section 10-3, shall be expended by the office, . . . for the purposes of this chapter."²

From 1980 through 1982, state agencies, principally the Department of Land and Natural Resources ("DLNR"), transferred 20% of what they received in rents and proceeds from leases or the sale of ceded lands to OHA. However, in 1983, OHA filed Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987) ("Yamasaki") to claim that in addition to the rents it was already receiving, 20% of the proceeds from the DLNR's sale of sand from a beach on Molokai, and the income and proceeds from the sale, lease and other disposition

²Section 10-3 described the "public lands trust" as being comprised of

all proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and conveyed to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 4, the Admissions Act), (excluding therefrom lands and all proceeds and income from the sale, lease, or disposition of lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended), and all proceeds and income from the sale, lease, or other disposition of lands retained by the United States under sections 5(c) and 5(d) of the Act of March 18, 1959, later conveyed to the State under section 5(e).

of ceded lands, including in particular, receipts from the Department of Transportation ("DOT") Harbors Division's Aloha Tower Development Agreement, were owed.

In 1987, the Hawaii Supreme Court concluded that it could not resolve OHA's claims because sections 10-13.5 and 10-3 were neither sufficiently detailed nor facially consistent to glean which income and proceeds were subject to section 10-13.5's 20% apportionment.

After the Yamasaki decision was issued, the Legislature enacted Act 395, Session Laws of Hawaii 1988, which required in section 5 that the Governor propose a plan that retroactively resolved all controversies relating to the ceded lands public trust between August 21, 1959 (Statehood) and July 1, 1988, the effective date of the act. Representatives of the Waihee Administration and OHA trustees and staffers met regularly for 30 months thereafter, to identify where the ceded lands were being used and how much income and proceeds they were generating, to establish what OHA's portion of the income and proceeds from the public trust lands would be for purposes of going forward, as well as retroactively, and to prescribe how the portion would be quantified.

In 1990, Governor Waihee and OHA's trustees jointly submitted a bill to the Legislature to codify the results of their efforts. The bill was enacted as Act 304, Session Laws of Hawaii 1990.³ Act 304 amended chapter 10 to prescribe that only "revenue" or income and proceeds from the use of public land trust lands for "proprietary" functions, would be subject to section 10-13.5's 20% apportionment for OHA. In addition, section 8 of the bill outlined how the Director of Finance and OHA were to review and reconcile receipts and payments to OHA during the period January 16, 1980 through June 30, 1991, and recommend a sum for appropriation by the Legislature to settle all claims relating to the ceded land public trust for that 11 year period.

After Act 304's passage, the Director of Finance retained Ernst and Young, and OHA retained Deloitte and Touche ("D&T") to conduct detailed surveys and reconcile differences between their respective accounts. Each prepared detailed reports of the review and reconciliation effort. According to the Executive Summary of D&T's December 15, 1992

³ Except for the period between July 1, 1997 through June 30, 1999, when Act 329, Session Laws of Hawaii 1997, fixed OHA's portion of the income and proceeds from the public land trust lands at \$15.1 million. to facilitate negotiations between the State and OHA to settle OHA I, Act 304's "20% of proprietary income and proceeds" methodology served as the measure of OHA's portion of the income and proceeds from the public land trust lands until the Supreme Court's decision repealing Act 304 in OHA I was issued on September 12, 2001.

Report on Ceded Lands for the Period 1981 through 1991, the Memorandum signed by representatives of the Governor and OHA on April 27 and 28, 1993, respectively, and the June 4, 1993 letter receipt to OHA Chairman Clayton Hee from Harold Matsumoto of the Office of the Governor, see attached, most of OHA's claims for additional income and proceeds were resolved by State payments to OHA in 1990, 1992, and 1993 in excess of \$136 million. The unresolved claims were limited to what the Memorandum refers to in Item 7 as "Excluded Items:" DLNR lease premiums, previously unreported ceded land receipts collected by DLNR and the Department of Accounting and General Services, DOT airports' duty free lease rent revenues, certain DOT Harbors' receipts, Department of Health cafeteria receipts, interest income, patient service revenues from state hospitals situated on ceded lands, Duty Free Shoppers (DFS) Waikiki sales, DFS lease cancellation fee, miscellaneous airport revenues, and receipts from State public rental housing and affordable housing development programs.

The first of two OHA v. State lawsuits was filed in 1994 to assert its claims to the Excluded Items. Judge Heely agreed that OHA should have received 20% of Interest Income, Patient Service Revenues, rental and affordable housing receipts, and DFS Waikiki Sales, and entered summary judgment in OHA's favor. The State appealed. While the appeal was pending in the Hawaii Supreme Court, Congress passed the Forgiveness Act which precluded states, including Hawaii, from paying airport revenues to native groups, including Native Hawaiians. The State brought the act to the attention of the Hawaii Supreme Court because section 16 of Act 304 provided for its repeal if any provision of the act conflicted with federal law. In September 2001, the Hawaii Supreme Court issued its decision in Office of Hawaiian Affairs v. State, 96 Hawa'i 388, 31 P.3d 901 (2001) ("OHA I"). The decision declared that Act 304 had been repealed by its own terms upon Congress' passage of the Forgiveness Act, and reinstated the 1980 version of section 10-13.5 as the measure of OHA's portion of the income and proceeds from the public land trust lands.

However, no payments to OHA were made until 2003, when payments resumed pursuant to Executive Order No. 03-03 which Governor Lingle issued on February 11, 2003, see attached. In addition, the Legislature enacted Act 34, Session Laws of Hawaii 2003, which appropriated the sums from fiscal years 2001 and 2002 that had been withheld from OHA after the OHA I decision was issued because Yamasaki had previously declared the 1980 version of section 10-

13.5 ineffective. Payments to OHA continued pursuant to Executive Order No. 03-03 until the Legislature enacted Act 178, Session Laws of Hawaii 2006, and Governor Lingle issued Executive Order No. 06-06, see attached. Since 2006, OHA has received \$15.1 million annually, without reliance on either the 1980 provisions of section 10-13.5 (which remains a part of the Hawaii Revised Statutes but has been held in abeyance by section 2 of Act 178), or Act 304's "20% of proprietary income and proceeds" methodology (which was repealed after Congress enacted the Forgiveness Act).

In July 2003, OHA filed the second Office of Hawaiian Affairs v. State ("OHA II") lawsuit to reassert its claims to the Excluded Items. That suit was dismissed by the circuit court, OHA appealed, and the Hawaii Supreme Court affirmed the lower court's dismissal of OHA's complaint and claims as untimely filed. OHA v. State, 110 Hawai'i 338, 133 P.3d 767 (2006).

For the last seven or eight years, representatives of OHA and the Lingle and Abercrombie Administrations have met to try and resolve the remaining disputes about the Excluded Items. The remaining disputes appear only to be about airports' duty free concession leases, patient service and other operating revenues generated at state hospitals situated on ceded lands, and the Hawaii Public Housing Authority's rental and Hawaii Housing Finance and Development Corporation's affordable housing programs.



KAMEHAMEHA SCHOOLS®

March 29, 2012

Written Testimony to the House Committee on Finance

By

Walter Thoemmes III, Chief of Staff
Kamehameha Schools

Hearing Date: Monday, March 29, 2012

Rep. Marcus Oshiro, Chair
Members of the House Committee on Finance

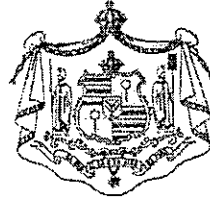
**Re: Testimony SUPPORTING SB 2783 - Relating to the Public
Land Trust**

This is an important matter for our people, and after years of discussion and deliberation it needs to be resolved as quickly as possible.

Kamehameha Schools supports the Office of Hawaiian's Affairs' efforts to resolve this matter in the best interest of OHA's beneficiaries and intended beneficiaries.

If the Kaka'ako properties proposed in this settlement - as described in SB2783 - are the properties that OHA ultimately acquires, we would be happy to engage with them in exploring possibilities for our respective properties in Kaka'ako makai. We look forward to that day.

Mahalo for allowing us to share our mana'o on this important matter.



**O'ahu Council
Association of Hawaiian Civic Clubs**

P.O. Box 37874
Honolulu, Hawaii 96837-1122

March 28, 2012

**TESTIMONY IN SUPPORT OF SB2783
RELATING TO THE PUBLIC TRUST LANDS**

Hearing, Thursday, March 29, 2012, 1:30 p.m., Conference Room 308, State Capitol

Representative Marcus R. Oshiro, Chair
Representative Marilyn B. Lee, Vice Chair
Members, Committee on Finance

Aloha mai, Representative Oshiro a me Representative Lee and members of the
Committee on Finance

The Board of Directors of the O'ahu Council of the Association of Hawaiian Civic Clubs testifies in support of SB 2783, Relating to the Public Trust Lands. The bill, when enacted, will convey Kakaako Makai lands to the Office of Hawaiian Affairs and will resolve all disputes and controversies, and extinguishes, discharges and bars all claims, suits, and actions relating to OHA's portion of income and proceeds from the public trust lands for the period November 7, 1978 through June 30, 2012.

We further understand that the proposed settlement agreement does not address, is not intended to address, and shall have no effect upon claims, disputes and controversies which may exist, relating to Hawaiian sovereignty, the overthrow of the Hawaiian Kingdom including any alleged claims to crown or government lands, the Hawaiian Homes Commission Act, or claims against the United States.

We applaud the Governor's initiative to settle this long-standing issue. It is evident in the various hearings and by the passage of this bill by the following committees that Senate and House members also see the merits of settling this long-standing outstanding debt to OHA as fair and in the best interest of all: Senate Committee on Hawaiian Affairs, Senate Committee on Water, Land, and Housing, Senate Committee on Judiciary and

Labor, Senate Committee on Ways and Means; House Committee on Hawaiian Affairs, House Committee on Water, Land, and Ocean Resources, and the House Committee on Judiciary in passing this legislation. We note that this is the third attempt in resolving OHA's claim for its share of revenue from the Public Land Trust for the period November 7, 1978 to June 30, 2012.

We urge your passage of SB 2783. Mahalo for the opportunity to provide this testimony in support of SB 2783.

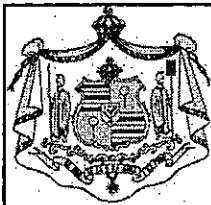
Me kealoha pumehana

A handwritten signature in black ink that reads "Mahealani Cypher". The signature is written in a cursive style with a prominent flourish at the end of the name.

MAHEALANI CYPHER
President

About the O'ahu Council, Association of Hawaiian Civic Clubs (AHCC)

The O'ahu Council is one of five councils that comprise the AHCC. It advocates actions that enhance the civic, economic, educational, health and social welfare of our communities and elevates the social and intellectual status of all Hawaiians. Twenty-five clubs located throughout the island of O'ahu comprise the council.



Association of Hawaiian Civic Clubs

P. O. Box 1135

Honolulu, Hawai`i 96807

TESTIMONY OF PRESIDENT SOULEE STROUD

SENATE BILL 2783 RELATING TO THE PUBLIC LAND TRUST

HOUSE COMMITTEE ON FINANCE

Thursday, March 29, 2012; 1:30 pm; Room 308

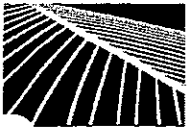
Aloha, Chairman Oshiro, Vice Chair Lee and members of the House Committee on Finance.

The Association of Hawaiian Civic Clubs is pleased to testify in support of Senate Bill 2783 which will convey certain parcels of land in Kakaako Makai to the Office of Hawaiian Affairs to resolve all disputes, controversies, claims, suits and actions related to the portion of income and proceeds from the public trust fund lands for the period of November 7, 1978 through June 30, 2012.

The critical words here are "November 7, 1978 to June 30, 2012," the period of time that this land transfer is meant to resolve. Nothing more, and nothing less. In the past, attempts have been made to apply a global settlement to resolve past debts due to Native Hawaiians, and we have watched this legislation closely to be able to assure our members that the present measure is only for a time certain.

We have testified several times in support of this bill and our position to support the passage of SB 2783 remains the same. However, if it will assist the committees to make a supportive decision, we are happy to testify once again. Thank you for the opportunity to reiterate our position as advocates in the conveyance of Kakaako Makai parcels to the Office of Hawaiian Affairs.

Contact: jalna.keala2@hawaiiantel.net



PBR HAWAII
& ASSOCIATES, INC.

March 27, 2012

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Executive Vice-President

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Principal

W. FRANK BRANDT, FASLA
Chairman Emeritus

TESTIMONY OF FRANK BRANDT, CHAIRMAN EMERITUS

BEFORE THE HOUSE COMMITTEE ON FINANCE
IN SUPPORT OF

SB 2783, RELATING TO THE PUBLIC TRUST LANDS

HEARING

Date: Thursday, March 29, 2012
Time: 1:30 PM
Place: Conference Room 308
State Capitol
415 South Beretania Street

Aloha Chair M. Oshiro, Vice Chair M. Lee, and Committee Members:

ASSOCIATES

TOM SCHNELL, AICP
Senior Associate

RAYMOND T. HIGA, ASLA
Senior Associate

VIN K. NISHIKAWA, ASLA
Associate

KIMI MIKAMI YUEN, LEED[®] AP
Associate

SCOTT ALIKA ABRIGO, LEED[®] AP
Associate

SCOTT MURAKAMI, ASLA, LEED[®] AP
Associate

DACHENG DONG, LEED[®] AP
Associate

My name is Frank Brandt, Chairman Emeritus and Founder of the Land Planning firm PBR HAWAII. Thank you for the opportunity to testify in support of SB 2783 which resolves the Office of Hawaiian Affairs' (OHA) claims to income and proceeds as a result of the State's failure to pay OHA its share of revenue between 1978 and 2012.

PBR HAWAII has been intimately involved in the Hawaiian community for over 40 years and in that time has provided planning services for the benefit of Native Hawaiians and the State. In 1994, PBR HAWAII developed a report for OHA entitled *Inventory and Acquisition of Public Trust Lands*, which was prepared in anticipation of resolving the claims to ceded land revenue in Hawai'i as described in the Native Hawaiian Claims Settlement Act. This study concerned the acquisition, disposition and management of ceded lands from the State of Hawaii Land Inventory. Two primary goals of this study were to: 1) acquire developed or undeveloped lands with the highest income production potential; and 2) acquire lands on which to build and rebuild vital sustainable Hawaiian communities.

The study included the establishment of selection criteria to analytically identify parcels that may be desirable for acquisition in accordance with the stated goals. In applying the selection criteria to the State Land Inventory, we were able to provide OHA with priority lists of parcels equal to 20 percent of the value of all crown and government (ceded) lands. The Kaka'ako parcels were listed at the top of the Income Production or Potential List for acquisition.

It is very satisfying to know that with the passage of SB 2783, OHA will finally be able to move forward with a land base that has been identified, studied, and planned, for significant long range development and revenue. I applaud OHA and the State legislature for their continued effort in completing a settlement agreement in this 2012 legislative session. Thank you for the opportunity to testify.

Mahalo,

PBR HAWAII

W. Frank Brandt, FASLA
Chairman Emeritus

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Unity, Equality, Aloha for All

Testimony by Kenneth R. Conklin, Ph.D. in opposition to SB2783
for hearing Thursday March 29, 2012 before House Committee on Finance
on behalf of himself and the Center for Hawaiian Sovereignty Studies

One small step for OHA, one giant leap toward racial apartheid in Hawaii. This bill threatens to slice off another piece of the multiracial State of Hawaii, handing it over to a racially exclusionary entity. This process is slowly killing our state through the death of 1,000 cuts.

That's the big picture regarding the Kakaako Makai lands agreement between Governor Abercrombie and OHA which this bill seeks to enact into law.

Let me move from the general to the specific. First I'll describe that big picture. Then I'll point out that any "settlement" reached by OHA will be disavowed by the Akaka tribe or Act 195 tribe, because they will say that OHA was a state agency which had no right to speak on behalf of the Native Hawaiian people or the tribe. Finally I'll discuss the ownership of ceded lands and allocation of revenues from them.

THE BIG PICTURE

I recently published a book you all should read. It's not in bookstores but is available in the library or from the publisher through
<http://tinyurl.com/2a9fqa> .

The title says it all: "Hawaiian Apartheid -- Racial Separatism and Ethnic Nationalism in the Aloha State."

Since 1978 the government of Hawaii has been facilitating the development an Evil Empire of racially separate governmental and private institutions exclusively for ethnic Hawaiians. The Office of Hawaiian Affairs (OHA) was founded on three pillars of racial separatism: Only ethnic Hawaiians could

vote for OHA trustees; only ethnic Hawaiians could run for OHA trustee; and only ethnic Hawaiians could receive benefits from OHA. The first pillar was knocked down by the U.S. Supreme Court in *Rice v. Cayetano*. The second pillar was knocked down by the U.S. District Court in Honolulu and the 9th Circuit Court of Appeals in *Arakaki v. State of Hawaii*. But the third pillar remains standing despite substantively correct lawsuits dismissed on technicalities.

In response to those lawsuits, the Akaka bill has been continuously re-introduced in Congress for nearly 12 years, with zealous support from our Governor, Attorney General, and nearly every member of our Legislature. The Akaka bill seeks to authorize creation of a racially exclusionary government for all persons worldwide who have a drop of Hawaiian native blood -- that is the primary requirement for membership. The bill would authorize transfer of land, money, and jurisdictional authority to the phony Akaka tribe.

The whole concept of a racially exclusionary government is evil. And unlike any of the real Indian tribes which include a small number of people in a restricted and usually remote area of land, this one would legally segregate 20% of the entire population of a State, and perhaps 50% of the State's lands; thus deserving the label "apartheid."

Hawaii's Evil Empire of racially exclusionary institutions has grown so powerful that hardly any public officials will dare to stand up against it. The multiracial, multicultural society of Hawaii has hardly any voice in government to advocate for unity and equality; because the wealthy, powerful institutions of the Evil Empire have silenced their voice through the expenditure of untold millions of dollars in lobbying, advertising, school curriculum, and outright intimidation. Remember those expensive, racist Kau Inoa commercials beamed into our living rooms at least 200 times, or newspaper ads "explaining" the Akaka bill?

In case the Akaka bill does not get enacted, OHA created "Plan B" to expand the Evil Empire almost as effectively anyway by passing Act 195 last year. The idea is to get our compliant Governor and Legislature, plus the Counties and private groups, to transfer land, money, and jurisdictional authority directly to a clone of OHA -- a plan already being implemented.

On O'ahu the County of Honolulu used tax dollars plus money from several

environmental groups to purchase the entire Waimea Valley. OHA made only a small contribution, but was given the deed to the entire valley. In Waokele O Puna on Hawaii Island, OHA again contributed only a small portion of the purchase price but ended up with the deed to the entire parcel of 40 square miles.

Bills are now pending in the Legislature that would create racially stacked commissions to manage Ha'iku Valley and Makua Valley, with OHA having seats on those boards, and including a provision for outright transfer of the entire valley to the Akaka tribe or Act 195 tribe. OHA keeps asking for money to build its new headquarters, which would become the national capitol of the new Akaka tribal nation (until 'Iolani Palace which taxpayers renovated is handed over). Now comes the State of Hawaii ready to give away \$200 Million of public land to OHA through this current bill.

If the Akaka bill passes, or the Act 195 tribe actually builds a membership roll and tribal council, then the leadership of the new tribe will negotiate with the State of Hawaii for enormous amounts of land, money, and jurisdictional authority -- and who will stand up to protect the rights of the general public? Not our legislators!

Why should the State of Hawaii give away anything at this time, in the face of future negotiations where more will be demanded? Would a business owner give away part of something even before he enters negotiations where his opponent is demanding all of it?

The time is now to begin protecting all Hawaii's people against wealthy, powerful, greedy race-based institutions seeking to grab as much as they can at the expense of everyone else. Hawaii is experiencing the death of 1,000 cuts. Waimea Valley and Waokele O Puna were two of those cuts. This bill would take another cut out of the State of Hawaii, continuing the erosion of our tax base. To stop death by 1,000 cuts there must come a time when the knife is brushed aside before it can cut again.

OHA IS A STATE AGENCY WHICH LACKS THE AUTHORITY TO SPEAK ON BEHALF OF THE FUTURE TRIBE.

On the mainland, Indian tribes often enter into contracts with state or county governments, or with private companies. But when disputes arise, the tribes assert their sovereign rights and refuse to submit themselves to

the jurisdiction of non-tribal courts. Vendors go unpaid, while workers or visitors on tribal lands who get injured are unable to sue for damages.

We already hear Hawaiian sovereignty activists saying that under international law, any agreements with state or federal governments, or decisions by state or federal courts, will have no force or effect on the future Nation of Hawaii, because the Nation of Hawaii was under belligerent occupation and its actions were taken under duress.

OHA is a State agency. Any future tribal government or Nation of Hawaii is likely to disavow any negotiated settlement reached between OHA and the State of Hawaii. OHA trustees are elected by all Hawaii voters, regardless of race. Therefore OHA trustees cannot claim to speak on behalf of Native Hawaiians in disputes between the State and Native Hawaiians.

The State of Hawaii will feel bound to abide by whatever agreements it makes with OHA. But Native Hawaiians will never feel bound to abide by agreements made by OHA allegedly on their behalf.

Since this legislature seems to be rushing headlong to support creation of the Act 195 tribe, you should not make any so-called "settlement" with the soon-to-be-defunct entity OHA. Wait for the tribe to build its membership roll and elect its officers, who will then have the authority to make an agreement with the State. So-called "past due" monies are part of the eventual package to be negotiated.

CEDED LANDS AND REVENUES

It is historically, legally, and morally wrong to allocate government land, or revenues from land, for exclusive use by a racial group. Neither Kingdom law, nor the Organic Act for annexation, nor the Statehood Admissions Act, contemplated or required the creation of OHA. The Constitutional amendment that created OHA in 1978 was passed by the smallest number of yes votes among all the amendments coming out of the Constitutional Convention; and the amendment creating OHA would have been defeated except that blank votes were counted as yes votes at that time, contrary to the way we count blank votes today.

The decision to set aside 20% of ceded land revenue for OHA in 1978 was an arbitrary and capricious enactment of an ordinary law. It is NOT part of our

Constitution -- the Legislature can AND SHOULD repeal the 20% law at any time.

The public lands of Hawaii, including the ceded lands, belong to all the people of Hawaii without racial distinction. During the Kingdom, following the Mahele, the government lands were held by the government on behalf of all the people, just as now. The Crown lands also became government property by act of the Kingdom Legislature, gladly signed by the King, to issue government bonds to pay a mortgage lien on the Crown Lands the King had incurred to pay the King's personal (gambling) debts. Thereafter the government owned the Crown Lands, while income from the Crown Lands was set aside to maintain the office of head of government in his official capacity but not as his private property. Thus, when the monarchy ended, the Crown lands and government lands were indistinguishable, all held by government as public lands to benefit all the people without regard to race -- both then and now.

The Statehood Act of 1959 does not require setting aside any ceded land income specifically for any racial group. It identified 5 purposes for the use of ceded land revenues, and explicitly said that part or all of the revenue could be used for any one or more of those 5 purposes.

When 100% of ceded land revenues was sent to the public schools from 1959 to 1979, the result was that 26% of ceded land revenues were thereby used for the betterment of Native Hawaiians, without need for racial separatist designation, simply because 26% of the children were of that racial group. Wasn't that a wonderful idea? Why not do that again?

It must also be noted that the section 5(f) language identifying "betterment of native Hawaiians" as one purpose for spending ceded land revenues explicitly defined "native Hawaiians" as that term was used in the Hawaiian Homes Commission Act of 1920, which required 50% native blood quantum. Therefore neither OHA, nor the anticipated Akaka tribe, is a proper receptacle for ceded land revenue, since OHA beneficiaries and Akaka tribe members are defined as needing only to have a single drop of the magic blood.

On January 20, 2008 in the Honolulu Star-Bulletin, Jon Van Dyke wrote: "the revenue generated from these lands to be used for five named purposes ..."

No Jon, not really. There was no requirement to spend one dime on any particular one of those purposes. Van Dyke laments "During the next two decades, however, the state failed to allocate any of the revenue specifically for this purpose [betterment of native Hawaiians], devoting almost all of it to public education. To address this failure ..." No Jon, not really. As I explained above, Native Hawaiians received 26% of the ceded land revenues without any need for racist set-asides. Furthermore, it was not a failure to send the money to the public schools, who now get zero money from the ceded lands because 20% of gross revenue sent to OHA exceeds 100% of net income after allowing for capital improvements and operating expenses for which we all pay.

TELL OHA TO SPEND ITS HOARDED CASH AND STOP GIVING THEM MORE

OHA already has about \$400 Million. Most of that money has been sucked out of Hawaii's economy and sent to New York for stock market investments. OHA occasionally makes small grants to its "beneficiaries" but very little money reaches the maka'ainana (the 99%; the commoners). It's time to stop feeding the beast. Repeal the law sending 20% of ceded land revenues to OHA. You can repeal that law tomorrow by a simple majority vote.

In the past OHA has sued the State of Hawaii (can a hand sue its arm?) for past-due "rent" "owed" for the 20% share of revenue. Does anybody think that won't happen again? Stop this craziness. Repeal the 20% law.

Submitted by Bill Meheula, attorney for Office of Hawaiian Affairs on the OHA-State proposed \$200 million settlement.

My below comments are directed to the House Finance Committee members.

Hearing is scheduled for March 29, 2012, 1:30pm.

The measure is SB 2783.

The Committee is requesting two (2) copies.

By the proposed OHA settlement, OHA is releasing claims for it's pro rata portion of the income and proceeds from the public land trust that derives from the Hawaii Constitution for the period 1978 to 2012.

OHA believes that there is widespread support for this settlement within the community and among the Legislators, and we believe the settlement is pono and will provide a positive example of Native Hawaiians partnering with the general public to jointly resolve disputes.

The majority of these claims were resolved by the 1993 \$130 million payment and the amounts OHA has received since then, including the \$15.1 million per year received pursuant to Act 178 (2006). The remaining unsettled claims are for \$136 million from Duty Free Shops rent, and claims relating to State hospitals (\$126 million) and State housing projects (\$36 million) on public land trust lands. These claims were based on Act 304 (1990) which had clarified OHA's entitlement to public land trust revenues.

Unfortunately, in 2001, the Hawaii Supreme Court invalidated Act 304, which meant that the hospital and housing claims were less viable.

Thus, the remaining strong claim is for the \$136 million DFS amount, which after taking all factors into consideration the State was willing to settle all past due claims for \$200 million.

A significant factor was that sovereign immunity bars any right to interest unless otherwise waived. However, since Act 304 included the only waiver of sovereign immunity applicable to interest on this claim and Act 304 was invalidated, there is no current statutory right to interest on the OHA revenue claims. Therefore, the longer OHA waits to resolve this case, the less valuable it becomes.

For these reasons, OHA believes that 30-acres in Kakaako Makai with an appraised value of \$200 million is fair consideration to settle the past due claims. These parcels likely will appreciate given the increased development anticipated in the surrounding areas. This land also provides the emerging Native Hawaiian government with a campus in urban Honolulu.

If this past due claim is resolved by passage of the settlement bill, OHA's future right to public land trust revenue will continue to be governed by Act 178 (2006) that provides OHA with \$15.1 million annually. Act 178 also mandates that DLNR accurately compile data on the collection of public land trust revenues that the Legislature may use to adjust future payments to OHA.

While some legislators may understandably also want the proposed settlement to also address OHA's right to future revenues, Native Hawaiians have uniformly rejected this approach

because the \$200 million does not provide compensation for future claims and there is no means to accurately calculate the value of future revenues. In any event, the resolution of OHA's right to future revenues will be decided through the political process because the Hawaii Supreme Court has ruled that OHA cannot litigate this issue.

SB682 was not proposed by OHA. It was proposed by well-meaning Senators who believe that \$200 million is insufficient to satisfy this past due constitutional obligation. For reasons set forth above, I respectfully disagree with that assessment. While OHA appreciates their efforts to increase the value of the settlement, OHA does not want SB682 to interfere with passage of SB2783. In addition, if in the future OHA wants to include residential use on any of the proposed 10 parcels, OHA will vet its desired use with HCDA and the community, and fully describe how any residential use will integrate with use of its other parcels. OHA respects CPAC's intentions and positions, and truly appreciates CPAC's support of SB2783, and if OHA receives these 10 parcels, OHA will work with CPAC to insure proper use and develop of this precious aina.

OHA looks forward to working with the Administration and the Legislature to finally resolve this thirty-year issue for the benefit of Native Hawaiians and the people of Hawaii.

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S.B. 2783

Relating to the Public Trust Lands

House Committee on Finance

Hearing on Thursday, March 29, 2012, at 1:30 p.m.

Chair Oshiro, Vice Chair Lee, and members of the House Committee on Finance:

Mahalo for the opportunity to submit this testimony in **support** of S.B. 2783. I am an Associate Professor at the William S. Richardson School of Law and Director of Ka Huli Ao Center for Excellence in Native Hawaiian Law. I submit this testimony, however, in my personal capacity and as a Native Hawaiian attorney who has worked, litigated, and written on Native Hawaiian legal issues, particularly in relation to the public land trust, for many years.

S.B. 2783 would resolve claims related to revenues due to the Office of Hawaiian Affairs for the period from OHA's creation on November 7, 1978, through June 30, 2012. I have carefully reviewed this bill with several objectives in mind:

- First, to ensure that S.B. 2783 does not waive any claims of the Native Hawaiian people to sovereignty, lands, or other natural and cultural resources.
- Second, to determine whether the settlement itself is fair – in other words, acknowledging that a settlement by its very nature means that each party must compromise in some respects, is the \$200 million adequate compensation.
- Finally, to make certain that current laws, such as HRS Chap. 673, waiving the State's sovereign immunity for breaches of trust, would not be negatively impacted by S.B. 2783.

My review of the bill indicates that it does not waive any broader claims of the Native Hawaiian people; it relates solely to claims for the income and proceeds due OHA from the public land trust under sections 4 and 6 of article XII of the Constitution. Secondly, while one could dispute the exact amount due OHA, OHA's efforts to settle the revenue issue through the courts have failed. The Hawai'i Supreme Court, while acknowledging the State's trust responsibility and duty to fulfill the terms of the State Constitution, has consistently held that this is an issue for the Legislature to resolve. Given all of the relevant factors, the \$200 million amount appears fair to both OHA and the State. Moreover, I understand that OHA has done its "due diligence" in reviewing the specific Kaka'ako parcels proposed for the settlement. S.B. 2783 has no negative impact on the waiver of State sovereign immunity under Chap. 673 or similar laws; it basically confirms the current state of the law. Finally, this bill does not affect the current amount of revenue, set in Act 178 (2006), that OHA receives from the public land trust.

This is a significant bill. It will ensure that the Legislature is fully implementing its responsibilities under the State Constitution related to the public land trust revenue due OHA. It will bring closure to a contentious issue that has often divided our community. It will immediately provide OHA with additional funding to support its beneficiary initiatives and with the potential to provide a robust revenue stream in the future. I strongly urge its passage.

FINTestimony

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, March 28, 2012 6:40 PM
To: FINTestimony
Cc: soor001@hawaii.rr.com
Subject: Testimony for SB2783 on 3/29/2012 1:30:00 PM

Testimony for FIN 3/29/2012 1:30:00 PM SB2783

Conference room: 308
Testifier position: Support
Testifier will be present: No
Submitted by: Richard Soo
Organization: Kalawahine Streamside Association
E-mail: soor001@hawaii.rr.com
Submitted on: 3/28/2012

Comments:

FINTestimony

From: mailinglist@capitol.hawaii.gov
ent: Thursday, March 29, 2012 9:49 AM
To: FINTestimony
Cc: info@schha.com
Subject: Testimony for SB2783 on 3/29/2012 1:30:00 PM

Testimony for FIN 3/29/2012 1:30:00 PM SB2783

Conference room: 308
Testifier position: Support
Testifier will be present: No
Submitted by: Kamaki Kanahele, Chairman
Organization: SCHHA
E-mail: info@schha.com
Submitted on: 3/29/2012

Comments:

FINTestimony

From: mailinglist@capitol.hawaii.gov
ent: Thursday, March 29, 2012 9:50 AM
To: FINTestimony
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Subject: Testimony for SB2783 on 3/29/2012 1:30:00 PM

Testimony for FIN 3/29/2012 1:30:00 PM SB2783

Conference room: 308
Testifier position: Support
Testifier will be present: No
Submitted by: Mike Kahikina, Legislation Committee Chair
Organization: SCHHA
E-mail: info@schha.com
Submitted on: 3/29/2012

Comments:

FINTestimony

From: mailinglist@capitol.hawaii.gov
ent: Thursday, March 29, 2012 9:50 AM
To: FINTestimony
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Testimony for FIN 3/29/2012 1:30:00 PM SB2783

Conference room: 308
Testifier position: Support
Testifier will be present: No
Submitted by: Lorraine Rapozo, President
Organization: Sovereign MokuPuni Council O Kauai
E-mail: info@schha.com
Submitted on: 3/29/2012

Comments:

FINTestimony

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, March 29, 2012 9:50 AM
To: FINTestimony
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Testimony for FIN 3/29/2012 1:30:00 PM SB2783

Conference room: 308
Testifier position: Support
Testifier will be present: No
Submitted by: Jared Aiwohi, President
Organization: Sovereign Moku-puni Council O Maui
E-mail: info@schha.com
Submitted on: 3/29/2012

Comments:

FINTestimony

From: mailinglist@capitol.hawaii.gov
ent: Thursday, March 29, 2012 9:51 AM
To: FINTestimony
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Testimony for FIN 3/29/2012 1:30:00 PM SB2783

Conference room: 308
Testifier position: Support
Testifier will be present: No
Submitted by: Kammy Purdy, President
Organization: Sovereign MokuPuni Council O Molokai
E-mail: info@schha.com
Submitted on: 3/29/2012

Comments:

FINTestimony

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, March 29, 2012 9:51 AM
To: FINTestimony
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Testimony for FIN 3/29/2012 1:30:00 PM SB2783

Conference room: 308
Testifier position: Support
Testifier will be present: No
Submitted by: Beatrice Hew Len, Secretary
Organization: Sovereign Moku-puni Council O Oahu
E-mail: info@schha.com
Submitted on: 3/29/2012

Comments:

FINTestimony

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, March 29, 2012 9:52 AM
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Testimony for FIN 3/29/2012 1:30:00 PM SB2783

Conference room: 308
Testifier position: Support
Testifier will be present: No
Submitted by: Annie Au Hoon, President
Organization: Kewalo Hawaiian Homestead Community Assn, SCHHA
E-mail: info@schha.com
Submitted on: 3/29/2012

Comments:

FINTestimony

From: mailinglist@capitol.hawaii.gov
ent: Thursday, March 29, 2012 9:52 AM
To: FINTestimony
Cc: info@schha.com
Subject: Testimony for SB2783 on 3/29/2012 1:30:00 PM

Testimony for FIN 3/29/2012 1:30:00 PM SB2783

Conference room: 308
Testifier position: Support
Testifier will be present: No
Submitted by: Herbert Hew Len, President
Organization: Waianae Kai Homestead Community Assn, SCHHA
E-mail: info@schha.com
Submitted on: 3/29/2012

Comments: