

SB 402

	ASSOCIATION OF HAWAIIAN CIVIC CLUB	SUPPORT
	OFFICE OF HAWAIIAN AFFAIRS	SUPPORT
	DEPARTMENT OF THE ATTORNEY GENERAL	COMMENTS
William Aila	DEPARTMENT OF LAND AND NATURAL RESOURCES	COMMENTS



Association of Hawaiian Civic Clubs

P. O. Box 1135
Honolulu, Hawai`i 96807

JOINT SENATE COMMITTEES ON WATER & LAND
AND
TOURISM & HAWAIIAN AFFAIRS

**SENATE BILL 402 RE: TO A FINANCIAL REVIEW BY THE
OFFICE OF HAWAIIAN AFFAIRS OF COMPLIANCE
WITH SECTION 5, ACT 178, SESSION LAWS OF HAWAII, 2006**

Tuesday, February 12, 2013; 1:20pm; Room 225

Aloha Madam Chair Solomon and Chairman Galuteria of the joint committees meeting on SB402, a bill that is long overdue. I am Soulee Stroud, president of the Association of Hawaiian Civic Clubs (AHCC) speaking in support of the bill.

The AHCC Board of Directors met on January 19, 2013 and discussed the OHA legislative package. Among others, this bill was welcomed and approved by the AHCC Officers and Directors as essential to the truth with regard to the State's use of ceded lands. An accurate inventory of the lands still does not exist, and OHA has been in existence for thirty years. At the very least a financial review of this kind should reveal income derived from use of ceded lands by various State departments.

While this is necessary to carry out the letter of the law, it can be seen as a first step only, with more land inventory data required at some future time. We find it unfortunate; however, that OHA has to use its own funds that should be helping beneficiaries, to bring the State into compliance with its own statutes.

Thank you for the opportunity to testify.

Contact: jalna.keala2@hawaiiantel.net



SB402
RELATING TO A FINANCIAL REVIEW BY
THE OFFICE OF HAWAIIAN AFFAIRS OF COMPLIANCE WITH
SECTION 5 OF ACT 178, SESSION LAWS OF HAWAII 2006
Senate Committee on Water and Land
Senate Committee on Tourism and Hawaiian Affairs

February 12, 2013

1:20 p.m.

Room 225

The Office of Hawaiian Affairs (OHA) strongly **SUPPORTS** SB402, which is a bill in OHA's 2013 Legislative Package. This bill authorizes OHA, at its own expense, to conduct a financial review of the state's compliance with Act 178, Session Laws of Hawai'i 2006, Section 5, which requires all state agencies that use or manage public trust land to report all revenues generated from the use of that land. Act 178, section 5 is intended to ensure the state's accountability in the use of public trust land, and SB402 further effectuates that intent.

Act 178, in furtherance of the State's on-going constitutional obligation to Native Hawaiians, established OHA's interim pro rata share of public land trust revenue at \$15.1 million per year until the Legislature determines the appropriate payment going forward. Section 5 of Act 178 requires full disclosure of all revenues generated on public trust land. The reporting requirement promotes accountability of the state agencies charged with managing the public land trust and provides important information to the Legislature so that the state may fulfill its fiduciary obligation to Native Hawaiians and the citizens of Hawai'i fully and accurately.

In 2012, for the first time since Act 178 was enacted, all state agencies identified as managing public trust land provided an accounting of the revenues generated. Gaps in the information exist, however, because some of the agencies have not consistently reported since 2006, and some agencies do not disclose all revenues, as required by Act 178, section 5. Accordingly, OHA seeks to review the agencies' financial information to develop a complete understanding of public land trust revenues generated since 2006. We respectfully suggest that this review would be of value not only to OHA, which is entitled to a share of these revenues in support of its service to its beneficiaries, but also to the state itself as trustee of the public land trust, and to the Legislature in assuring that the laws it has passed are being followed and state agencies are appropriately managing public trust land.

Therefore, OHA urges the committee to **PASS** SB402. Mahalo for the opportunity to testify on this important measure.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013**

ON THE FOLLOWING MEASURE:

S.B. NO. 402, RELATING TO A FINANCIAL REVIEW BY THE OFFICE OF HAWAIIAN AFFAIRS OF COMPLIANCE WITH SECTION 5 OF ACT 178, SESSION LAWS OF HAWAII 2006.

BEFORE THE:

**SENATE COMMITTEES ON WATER AND LAND AND ON
TOURISM AND HAWAIIAN AFFAIRS**

DATE: Tuesday, February 12, 2013 **TIME:** 1:20 p.m.

LOCATION: State Capitol, Room 225

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

Chairs Solomon and Galuteria and Members of the Committees:

The Department of the Attorney General testifies to assure the Committees that since the enactment of Act 178, Session Laws of Hawaii 2006, the Office of Hawaiian Affairs (OHA) has received the \$15.1 million that the Legislature has determined currently constitutes OHA's share of the income and proceeds from the use of the public land trust lands, under article XII, section 6, of the State Constitution.

The Department also notes that the Legislature has never directed that 20 percent of all of the ceded land receipts collected in a year be transferred to OHA. Furthermore, since 2006, the amount required to be transferred to OHA has been a fixed dollar amount, rather than a percentage of the receipts collected. The Legislature adopted this approach to both recognize that transfers from some uses of ceded lands are restricted by federal law, pre-existing obligations, or insufficient balances in the accounts or funds into which ceded land receipts are deposited by the collecting agencies, and minimize disputes between OHA and the State about whether receipts from particular sources need to be transferred.

Copies of Act 178, Session Laws of Hawaii 2006, Executive Order No. 06-06, which includes detailed instructions for aggregating and transferring the \$15.1 million to OHA annually, and Act 15, Session Laws of Hawaii 2012, which resolved all differences between the State and OHA as to OHA's share of ceded land receipts up to and including June 30, 2012, are attached for the Committees' reference.

A Bill for an Act Relating to the Public Land Trust.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. In *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 737 P.2d 446 (1987), the Hawaii supreme court concluded that the issue of what constitutes the office of Hawaiian affairs' pro rata portion of all the revenues derived from the public land trust pursuant to article XII, section 6 of the Hawaii Constitution, is a political question for the legislature to determine. In *Yamasaki*, the office of Hawaiian affairs sought a pro rata portion of revenues arising out of the illegal mining of sand on Molokai and sales, leases, and other disposition of lands surrounding state harbors, and lands on Sand Island, the Honolulu International Airport, and the Aloha Tower complex. The supreme court declined to rule upon the substance of the case because it presented issues "of a peculiarly political nature and therefore not meet for judicial determination." *Id.*, at 175, 737 P.2d at 459.

In response to the *Yamasaki* decision, the legislature enacted Act 304, Session Laws of Hawaii 1990 (Act 304), to clarify the extent and scope of the State's constitutional obligation to provide a portion of the revenues derived from the public land trust to the office of Hawaiian affairs.

On September 12, 2001, the Hawaii supreme court ruled in *Office of Hawaiian Affairs v. State of Hawai'i*, 96 Haw. 388, 31 P.3d 901 (2001), that Act 304 was effectively repealed by its own terms, so that once again, it was necessary for the legislature to specify what portion of which receipts, from which lands the office of Hawaiian affairs was to receive a portion of the revenues under the state constitution. In its decision, the supreme court affirmed *Yamasaki*, observing:

[T]he State's obligation to native Hawaiians is firmly established in our constitution. *How* the State satisfies that constitutional obligation requires policy decisions that are primarily within the authority and expertise of the legislative branch. As such, it is incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust. *See* Haw. Const. art. XVI, §7. Although this court cannot and will not judicially legislate a means to give effect to the constitutional rights of native Hawaiians, we will not hesitate to declare unconstitutional those enactments that do not comport with the mandates of the constitution. At this juncture, we believe it fitting to quote then-state Senator Neil Abercrombie's prophetic statement to the legislature at the time HRS §10-13.5 was first enacted:

I fear that for those who are interested in seeing [OHA] move forward that they have won a Pyrrhic victory, that this is merely a skirmish in a very large battle.

[A]lthough I would be delighted to say otherwise, I regret to say that I expect that the moment this passes into statute, there will be a suit and that the business of the Office of Hawaiian Affairs is, as a result, going to be tied up in court for God-knows how many years.

Now, more than twenty years later, as we continue to struggle with giving effect to that enactment, we trust that the legislature will re-examine the State's constitutional obligation to native Hawaiians and the purpose of HRS §10-13.5 and enact legislation that most effectively and responsibly meets those obligations. (*Office of Hawaiian Affairs v. State of Hawai'i*, 96 Haw. at 401, 31 P.3d at 914 (citations omitted; emphasis in original)).

The legislature acknowledges that the State's obligation to native Hawaiians is firmly established in the state constitution. (See Haw. Const. art. XII.) While many

complex issues require the legislature's further attention and consideration in the wake of the repeal of Act 304, the legislature finds, in furtherance of the decision in *Yamasaki*, that immediate action should be taken to clearly designate the pro rata share of revenues derived from the public land trust that the office of Hawaiian affairs is to receive annually.

The legislature also finds that information pertaining to revenue generated by the public land trust should be consolidated within a single state department or agency. In prior years, it has been difficult to account for revenues generated by the public land trust because basic revenue-generating data was and is dispersed among multiple state agencies. A single state department should be responsible for compiling and providing an accounting of such information.

Accordingly, the specific purposes of this Act are to:

- (1) Provide interim measures to ensure that an adequate amount of income and proceeds is made available to the office of Hawaiian affairs from the pro rata portion of the public land trust, for the betterment of the conditions of native Hawaiians; and
- (2) Identify revenue-generating public trust lands and the amounts derived from those lands by requiring that the department of land and natural resources provide an annual accounting to the legislature.

SECTION 2. Notwithstanding the provisions of chapter 10, Hawaii Revised Statutes, including section 10-13.5, Hawaii Revised Statutes, and until further action is taken by the legislature for this purpose, the income and proceeds from the pro rata portion of the public land trust under article XII, section 6, of the state constitution for expenditure by the office of Hawaiian affairs for the betterment of the conditions of native Hawaiians for each fiscal year beginning with fiscal year 2005-2006 shall be \$15,100,000.

SECTION 3. Notwithstanding the provisions of chapter 10, Hawaii Revised Statutes, or the requirements of Executive Order No. 03-03, beginning in fiscal year 2005-2006, the departments of agriculture, accounting and general services, business, economic development, and tourism, education, land and natural resources, and transportation (for its harbors division), and any other department or agency that collects receipts from the lands within the public land trust, shall determine and transfer to the office of Hawaiian affairs that portion of their receipts from the use of lands within the public land trust collected during each fiscal quarter, necessary to ensure that a total of \$3,775,000 of revenues generated by the public land trust is transferred to the office of Hawaiian affairs, within thirty days of the close of each fiscal quarter; provided that for fiscal year 2005-2006, the departments shall have until thirty days after the close of the fiscal year to transfer a total of \$15,100,000 from their receipts from the use of lands within the public land trust collected during fiscal year 2005-2006, to the office of Hawaiian affairs whether by the procedures set out in Executive Order No. 03-03 or this Act.

The governor is expressly authorized to fix the amounts each agency shall transfer to the office of Hawaiian affairs in each quarter by executive order to implement the provisions of this section.

SECTION 4. There is appropriated out of the general revenues of the State of Hawaii the sum of \$17,500,000 or so much thereof as may be necessary for fiscal year 2005-2006 to pay to the office of Hawaiian affairs amounts received from the use of lands in the public land trust that the legislature has determined were underpaid between July 1, 2001, through June 30, 2005. The sum appropriated shall be expended by the department of budget and finance.

ACT 179

SECTION 5. Not later than January 1 of each year, the department of land and natural resources, with the cooperation of the department of budget and finance and any other state department or agency that uses or manages public lands, shall provide an accounting of all receipts from lands described in section 5(f) of the Admission Act for the prior fiscal year. With respect to each receipt, the department of land and natural resources shall identify:

- (1) The total gross amount;
- (2) The amount transferred to the office of Hawaiian affairs;
- (3) The amount retained by the State;
- (4) The account or fund in which the amount specified in paragraph (3) was transferred or deposited;
- (5) The parcel of land subject to section 5(f) of the Admission Act that generated the receipt, whether by tax map key number, department of land and natural resources inventory number, or other recognizable description; and
- (6) The state department or agency that received the total gross amount identified in paragraph (1).

The accounting shall also indicate whether any parcel of land described in section 5(f) of the Admission Act was sold or exchanged in the prior fiscal year and, if so, the amount of consideration that the State received for the respective parcels.

The office of Hawaiian affairs shall be consulted by the department of land and natural resources in determining the method in which the accounting shall be conducted.

SECTION 6. There is appropriated out of the general revenues of the State of Hawaii the sum of \$250,000 or so much thereof as may be necessary for fiscal year 2006-2007 to carry out the purpose of section 5.

The sum appropriated shall be expended by the department of land and natural resources. Should any additional funds be necessary to carry out the purpose of section 5 after the department of land and natural resources has expended the \$250,000 appropriated out of the general revenues of the State of Hawaii, the office of Hawaiian affairs shall provide the additional funds up to \$250,000.

SECTION 7. Nothing in this Act shall resolve or settle, or be deemed to acknowledge the existence of, the claims of native Hawaiians to the income and proceeds of a pro rata portion of the public land trust under article XII, section 6, of the state constitution.

SECTION 8. This Act shall take effect upon its approval.

(Approved June 7, 2006.)

ACT 179

S.B. NO. 2958

A Bill for an Act Relating to Housing.

Be It Enacted by the Legislature of the State of Hawaii:

PART I

SECTION 1. Act 196, Session Laws of Hawaii 2005 (Act 196), was passed by the legislature to address Hawaii's affordable housing and homeless crisis. Act 196 provided a number of mechanisms and incentives to increase the supply of low-

EXECUTIVE ORDER NO. 06 - 06

WHEREAS, Section 3 of Act 178, 2006 Session Laws of Hawaii, requires each agency of the State that "collects receipts from the lands within the public land trust" to determine and transfer a portion of those receipts as necessary to ensure that a total of \$3,775,000 is transferred to the Office of Hawaiian Affairs ("OHA") thirty days after the close of each fiscal quarter;

WHEREAS, Section 3 of Act 178 expressly authorizes the Governor to fix the exact amount each agency is to transfer to OHA on a quarterly basis, without regard for the provisions of chapter 10, Hawaii Revised Statutes, or the requirements of Executive Order No. 03-03;

WHEREAS, pending the Legislature's policy determinations regarding how best to give long-term "effect to the right of native Hawaiians to benefit from the ceded lands trust," OHA v. State, 96 Haw. 388, 401 (2001), it continues to be appropriate to rely upon the rationale and the procedures set out in Executive Order No. 03-03, for determining which receipts from the use of public land trust lands are to be transferred to the OHA on a quarterly basis, to satisfy the requirements of Section 3 of Act 178;

WHEREAS, because receipts for the use of lands are received in different amounts at varying intervals and frequency over the

course of a fiscal quarter or a fiscal year, the procedures set out in Executive Order No. 03-03 for segregating and transferring receipts for the use of public land trust lands to OHA need to be modified if the requirements of Section 3 of Act 178 are to be satisfied; and

WHEREAS, for purposes of this executive order, "public land trust land" is land assigned "Trust Land Status," or "5(b)," "5(e)" or "Pub. L. 88-233" status on the Department of Land and Natural Resources' State Land Inventory Listing, or described in the agency's records as land acquired by the State through Section 5(b) or 5(e) of the Admission Act or Pub. L. 88-233, or in exchange for such a parcel;

NOW, THEREFORE, I, Linda Lingle, Governor of Hawaii, pursuant to the authority conferred upon me by Section 3 of Act 178, 2006 Session Laws of Hawaii, direct that the following accounts be established, and the following determinations and procedures made and implemented, so that the requirements of Section 3 of Act 178 may be satisfied at the close of each fiscal quarter.

1. All departments and agencies that collect receipts for the use of ceded or public land trust land shall:

- a. Establish trust holding accounts to accumulate OHA's portion of each receipt that would otherwise be deposited into the general fund or a special fund, and to accumulate the

remainder of each receipt that would otherwise be deposited into the general fund for the rest of the fiscal year ("GFRTHA");

b. Determine if:

- (1) Any federal or state law precludes any portion of the receipt from being used to better the conditions of native Hawaiians; or
- (2) The transfer of any portion of the receipt will cause the department or agency to renege on any pre-existing pledge, rate covenant, or other pre-existing obligation to holders of revenue bonds or other indebtedness of the State, department, or agency;

c. If use of a receipt is not limited by the provisions of paragraph 1.b. (1) or 1.b. (2) above,

- (1) Determine OHA's share of the receipt by calculating the ceded/non-ceded fraction for the parcel that generated the receipt by area (square feet or acres), multiplying the receipt by the ceded/non-ceded fraction, and multiplying that result by 20% or any alternative percentage the Governor specifies,
- (2) Deposit the resulting amount into the appropriate trust holding account established pursuant to paragraph 1.a above to accumulate OHA's portion, and
- (3) Deposit the remaining portion of the receipt into the GFRTHA if it would otherwise be deposited into the

general fund; otherwise, deposit the remaining portion of the receipt into the appropriate special fund, using separate Treasury Deposit Receipt slips (State Accounting Form B-13) for each trust holding account into which receipts are deposited.

d. If use of a receipt is limited by paragraph 1.b.(1) or 1.b.(2) above, report the receipt as a gross receipt on the electronic spreadsheet developed by the Department of Land and Natural Resources' to effect the reporting requirements of Act 178, and deposit the entire amount to the credit of the general fund or special fund as appropriate.

e. Within ten calendar days of the close of each fiscal quarter,

- (1) Complete, and email and deliver a copy of the "Transmittal Re: Quarterly Transfer of Public Land Trust Receipts to OHA," attached here as Attachment "A," to the Department of Budget and Finance, Attn: Administrator, Budget, Program Planning and Management Division, to inform the same of the receipts collected, deposited in each of its trust holding accounts, and transferred to OHA; and
- (2) Unless the Governor directs otherwise, transfer all receipts deposited in its general and special fund trust holding accounts, other than its GFRTHAs, to OHA

by journal voucher using the accounting information and processes described in paragraph 4 below, and transmit a copy of each journal voucher used to transfer the receipts, to OHA, and to the Department of Budget and Finance with the Transmittal prepared pursuant to paragraph 1.e.(1) above.

2. No later than 12 calendar days after the close of each fiscal quarter, the Director of Finance or the Director's designee, shall

a. Compute the total amount of receipts from the use of ceded lands or lands in the public land trust deposited into the trust holding accounts during the immediately prior fiscal quarter, the total amount of receipts transferred to OHA for the immediately prior fiscal quarter, the total amount on deposit in the GFRTHA of all agencies, and the difference, if any, between the total amount of receipts transferred to OHA and \$3,775,000;

b. If the total amount of receipts transferred to OHA exceeds the \$3,775,000, notify OHA and request that OHA deposit the overpayment by journal voucher into the carry-forward trust holding account the Director establishes for that purpose, using the accounting information and processes described in paragraph 4 below;

c. If the total amount of receipts transferred to OHA is less than \$3,775,000, and unless the Governor fixes different amounts for some or all agencies, make up

(1) The shortfall by transferring up to the entire amount on deposit in the carry-forward trust holding account to OHA, by journal voucher using the accounting information and processes described in paragraph 4 below; and

(2) Any remaining difference by establishing the additional amount of receipts each agency must transfer to OHA from its GFRTHAs and special funds, to satisfy the requirements of Section 3 of Act 178 for the immediately prior fiscal quarter, and

notify each agency by email what amounts of receipts specified by the Governor or established by the Director, if any, it must transfer to OHA, from its trust holding accounts, its GFRTHA, or its special funds, to satisfy the requirements of Section 3 of Act 178.

3. No later than 15 calendar days after the close of each fiscal quarter, each department or agency shall,

(a) If notified by the Director of Finance that additional receipts must be transferred to OHA from its special funds, reverse earlier deposits of receipts into its special funds in

the amounts specified by the Director, and deposit the same into the appropriate special fund trust holding account, and

(b) Transfer all amounts specified for transfer from its GFRTHAs and its trust holding accounts, to OHA, by journal voucher using the accounting information and processes described in paragraph 4 below.

4. Accounting Information and Process.

a. Use Account No. T-YY-901-Z1; transaction codes 805 for OHA and 804 for the department or agency;


b. Include the following note under the "Explanation" section of the journal voucher: "to record transfer of funds derived from the public land trust to OHA, pursuant to Executive Order 06-06, and Act 178, 2006 Session Laws of Hawaii."

5. Immediately after all transfers to OHA for the fourth fiscal quarter are made, each department or agency shall deposit any balance remaining in any trust holding account to the credit of the general fund or the special fund into which the receipt would have been deposited if it had not been deposited into the trust holding account. The Director of Finance or the Director's designee shall transfer any balance remaining in the carry-forward trust holding account to each department or agency that transferred additional receipts to OHA in the prior fiscal year pursuant to paragraphs 2.c.(3), in amounts proportionate to

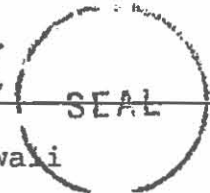
each department's or agency's total contributions to avoid any shortfall in the prior fiscal year.

Each department or agency shall also maintain a separate file for each fiscal year, of all Treasury Deposit Receipts (State Accounting Form B-13) and all journal vouchers it used to deposit receipts for the use of public land trust land to the separate trust holding accounts established under paragraph 1, and to transfer OHA's portion of the same to OHA.

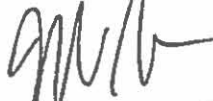
DONE at the State Capitol, Honolulu,
State of Hawaii, this 20th
day of September, 2006.



LINDA LINGLE
Governor of Hawaii



APPROVED AS TO FORM:



Mark J. Bennett
Attorney General

TRANSMITTAL TO MAKE QUARTERLY TRANSFER OF PUBLIC LAND TRUST
RECEIPTS TO OHA

Date: _____
(By Email and Messenger)

TO: Mr. Neal Miyahira
Administrator, Budget, Program Planning and Management Division
Department of Budget and Finance

FROM: _____

Department/Agency Name _____

SUBJECT: Ceded Land/Public Land Trust Receipts for Quarterly Transfer to Office of Hawaiian
Fiscal Year _____, _____ Fiscal Quarter's

80%GFTHA/20% Holding Account Name/No.	Ceded/Public Land Trust Land Total Receipts	Total Holding Account Deposits	Total Amounts Transferred to OHA
_____	\$ _____	\$ _____	\$ _____
_____	\$ _____	\$ _____	\$ _____
_____	\$ _____	\$ _____	\$ _____
_____	\$ _____	\$ _____	\$ _____
_____	\$ _____	\$ _____	\$ _____
_____	\$ _____	\$ _____	\$ _____
_____	\$ _____	\$ _____	\$ _____

If there are questions, please call or email _____
at Ext. _____; Email _____.

NOTE: Due no later than 10th Calendar Day after the end of each fiscal quarter.

ACT 15

S.B. NO. 2783

A Bill for an Act Relating to the Public Trust Lands.

Be It Enacted by the Legislature of the State of Hawaii:

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

Sections 4, 5, and 6 of the State Constitution provide:

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

SECTION 5. There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members.

SECTION 6. The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board.

In Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987), the Hawaii Supreme Court concluded that the issue of what constitutes the portion of the income and proceeds derived from the public land trust for the office of Hawaiian affairs pursuant to article XII, section 6 of the Hawaii Constitution, is a political question for the legislature to determine.

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

On September 12, 2001, the Hawaii Supreme Court ruled in Office of Hawaiian Affairs v. State of Hawaii, 96 Haw. 388, 31 P.3d 901 (2001), that Act 304 was effectively repealed by its own terms, so that it was necessary for the legislature to specify what portion of which funds, from which lands the office of Hawaiian affairs was to receive under the State Constitution.

In its decision, the Supreme Court affirmed Yamasaki, observing:

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

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

ACT 15

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

One of the purposes of this Act is to resolve and extinguish, finally and completely, any and all claims, disputes and controversies the office of Hawaiian affairs, or any other person or entity claiming by, through, or under the office, has asserted or raised, or could otherwise assert or raise, relating to the portion of the income and proceeds from the public land trust lands under sections 4 and 6 of article XII of the State Constitution or any related statute or act, the office of Hawaiian affairs received between November 7, 1978, up to and including June 30, 2012.

Another purpose of this Act is to effectively and responsibly fulfill the constitutional obligation to native Hawaiians under article XII, sections 4 and 6, of the State Constitution between November 7, 1978, up to and including June 30, 2012, by re-examining the amount of money the office of Hawaiian affairs received under article XII, section 6 of the Constitution, determining whether the office received what it should have received as its share of the income and proceeds from public land trust lands between 1978 and 2012, and providing additional resources to the office in the form of fee simple title to certain parcels of land to completely and finally fulfill the State's constitutional obligations relating to the office of Hawaiian affairs' portion of the income and proceeds from the public land trust lands under article XII, sections 4 and 6, of the State Constitution or any related statute or act, between November 7, 1978, up to and including June 30, 2012.

The legislature recognizes that the governor and the office of Hawaiian affairs have reached an agreement with respect to conveyances of land and all issues relating to the office of Hawaiian affairs' portion of the income and proceeds from the public land trust lands under sections 4 and 6 of article XII of the Constitution, between November 7, 1978, up to and including June 30, 2012.

The legislature finds that the agreement between the State and the office of Hawaiian affairs represents a joint recommendation as to the policy the legislature should adopt, to satisfy the State's constitutional obligations to native Hawaiians under article XII, sections 4 and 6 of the Constitution for the period between November 7, 1978, up to and including June 30, 2012, relating to the office of Hawaiian affairs' portion of the income and proceeds from the public land trust lands. Conveyance of the fee simple interest to the lands the governor and the trustees of the office of Hawaiian affairs identified for conveyance will allow the State to effectively and responsibly meet said constitutional obligations to native Hawaiians.

This Act, therefore, is an expression of legislative policy, not a settlement or a contract. This legislation is a legislative act without distinction from any other legislative act. As it is neither a settlement nor a contract, it can give rise to no lawsuits or claims other than an action to compel compliance with this Act's terms, nor to any claim that any future legislation is barred in any way, or leads to liability in any way, because it somehow conflicts with a settlement, settlement agreement, contract, or the provisions of this Act.

SECTION 2. Notwithstanding any other law to the contrary, the fee simple interest to the following parcels of land with the existing improvements thereon (hereinafter "the Properties") (but not including submerged land, accreted land, or any land makai of the shoreline), is conveyed to the office of Hawaiian affairs as grantee, as of July 1, 2012, as is, where is:

- (1) Lots 1, 2, 3, 4, 5, 6(portion), and 9 of File Plan 2471 filed at the Bureau of Conveyances, State of Hawaii, on February 23, 2010;
- (2) TMK (1) 2-1-15-61; and

(3) TMK (1) 2-1-15-51.

As directed by the attorney general, the appropriate boards, agencies, officers, and employees of the State shall (1) prepare and execute deeds warranting title only, and such other instruments appropriate and necessary to convey fee title and interest to the above-listed parcels with all existing improvements, to the office of Hawaiian affairs, as grantee, and (2) record the deeds and such other instruments within a reasonable period of time after the effective date of this Act, in the land court or bureau of conveyances, as appropriate. The aforesaid executed deeds and other instruments shall be delivered to the office by the State no later than _____ days after they are recorded. As these are conveyances in which the State and its agencies are the only parties, the tax imposed by section 247-1, Hawaii Revised Statutes, shall not apply to them.

For purposes of this section and this Act, "as is, where is" means that the office of Hawaiian affairs is accepting the Properties in their existing condition as of March 1, 2012, the close of the office's period for due diligence, without representations or warranties of any kind or nature. Except as set forth in the aforesaid deeds, the State makes no warranty or representation of any kind or nature, either express or implied, or arising by operation of law, including, but not limited to, any warranty of quantity, quality, condition, habitability, reliability, merchantability, workmanlike construction, suitability or fitness for a particular purpose, about the parcels of real property described in this section, any building or other improvement located on those parcels of land, any environmental contamination or conditions of those parcels of land, and the soil conditions related to those parcels of land.

The office of Hawaiian affairs has completed all due diligence investigations of the parcels necessary to satisfy itself as to the physical, environmental, economic and legal conditions relating to the parcels of land, and has indicated that it relied solely on the information it secured from its due diligence, and not on any information provided by or on behalf of the State to determine whether it wished to accept and acquire title to those parcels of land. All claims and liabilities against the State, if any, which the office of Hawaiian affairs has, may have had, or may have in the future, regarding any injury, loss, cost, damage or liability, including reasonable attorney's fees, concerning the physical, environmental, soil, economic and legal conditions of the Properties, are released, waived and extinguished.

The Properties are and shall remain (even after conveyance to the office) under the jurisdiction and authority of the Hawaii community development authority, with respect to zoning, land use conditions and all other matters over which the authority has jurisdiction and authority to act. If in the future, the jurisdiction and authority over zoning and land use conditions over the Properties is transferred to, changed to, or vested in another department or agency of the State, then the Properties shall be under the jurisdiction and authority of such other department or agency.

The conveyances required to be made by this section shall not and do not include the rights of native tenants, or any of the State's rights to minerals and metallic mines, including all geothermal rights, 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 and historic remains under chapter 6E, Hawaii Revised Statutes.

The Properties conveyed shall be and remain subject to all encumbrances (whether or not of record), the rights of native tenants, leases, contracts, agreements, permits, easements, profits, licenses, rights-of-way or other instruments applicable to any of the Properties effective or on-going on the effective date of this Act unless they expire or are terminated pursuant to their respective terms.

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These rights and encumbrances shall be set forth in the deeds conveying the Properties to the office or set forth in a license or similar agreement, a memorandum of which may be recorded concurrently with the deeds conveying the Properties to the office. Effective July 1, 2012, every reference to the present title-holder or the head of the department or agency in each such instrument, if the title-holder is a department or an agency, shall be construed as a reference to the office of Hawaiian affairs or its board of trustees.

The Properties shall be subject to all laws, except sections 206E-8, 206E-10, 206E-34, Hawaii Revised Statutes, and as otherwise provided in this Act, provided that the Hawaii community development authority may acquire by condemnation, pursuant to chapter 101, Hawaii Revised Statutes, easements, rights-of-way, rights of entry, or other rights of access in favor of lands adjoining the Properties conveyed that are under the control and management of public agencies, provided the office of Hawaiian affairs is paid just compensation for the same. The office of Hawaiian affairs shall administer the Properties in accordance with its duties under the Hawaii Constitution and as provided by law.

The instruments of conveyance executed and recorded pursuant to this Act shall specify that the office of Hawaiian affairs and any successor owner of any of the Properties shall cooperate with the State and its agencies to designate and grant such access rights and easements to the State or its agencies as may be reasonably necessary for the benefit and use of properties owned by the State or its agencies and which are adjacent to one or more of the Properties. Each of the instruments creating such access rights or granting such easements shall provide that the office, or any successor owner of the servient property, shall have the right to reasonably relocate any such access areas or easements so granted. The cost of initially identifying such access areas or designating and granting any such easements shall be paid by the State. The cost of relocating any such access areas or easements shall be paid by the office or any such successor owner, as the case may be. Each of the instruments creating such access rights or granting such easements also shall provide that the State and its agencies shall be responsible for only a reasonable share of the cost of maintaining any such access areas and easement areas, as the case may be, and that the office, its tenants, licensees, concessionaires, successors, and assigns shall not be liable for injuries or damages arising from the use of such access areas or easement areas and caused by the acts or omissions of the State, its agencies or employees, or their invitees.

SECTION 3. The passage of this Act is in full satisfaction, resolution, and discharge of any and all claims, disputes, controversies, actions, causes of action, demands, claims for relief, liability, liabilities, costs, compensations, injuries, losses, damages or expenses of any kind or nature, whether known or unknown, contingent or uncertain, patent or latent, whether at law or in equity, now existing or hereafter arising, established or inchoate, including any claim or action under chapter 661, Hawaii Revised Statutes, or for breach of trust under chapter 673, Hawaii Revised Statutes, that have been asserted or could have been asserted, or could be asserted in the future against the State by the office of Hawaiian affairs or any other person or entity claiming by, through, or under the office, in any manner arising out of, growing out of, connected with or traceable either directly or indirectly to, concerning or in any way related to any right the office of Hawaiian affairs or any other person or entity claiming by, through, or under the office may have or may have had to the portion of income and proceeds, or any other tangible right, item, or benefit related to said income and proceeds, from the public land trust lands under sections 4 and 6 of article XII of the Constitution or any related statute or act, between November 7, 1978, up to and including June 30, 2012.

All claims, disputes, controversies, actions, causes of action, demands, claims for relief, liabilities, costs, compensations, injuries, losses, damages or expenses of any kind or nature, whether known or unknown, contingent or uncertain, patent or latent, whether at law or in equity, now existing or hereafter arising, established, or inchoate, including any claim or action under chapter 661, Hawaii Revised Statutes, or for breach of trust under chapter 673, Hawaii Revised Statutes, that have been asserted or could have been asserted, or could be asserted in the future against the State by the office or any other person or entity claiming by, through, or under the office, in any manner arising out of, growing out of, connected with or traceable either directly or indirectly to, concerning or in any way related to, any right the office of Hawaiian affairs or any other person or entity claiming by, through, or under the office may have or may have had to the portion of income and proceeds, or any other tangible right, item, or benefit related to said income and proceeds, from the public land trust lands under sections 4 and 6 of article XII of the Constitution or any related statute or act, between November 7, 1978, up to and including June 30, 2012, are released, waived, and forever discharged and extinguished.

Each and every claim or suit that is predicated in any way upon an act or omission that arises out of or is in any way related to any right the office of Hawaiian affairs, or any other person or entity claiming by, through or under the office may have or may have had to the income and proceeds, or any other tangible right, item, benefit or claim or action under chapter 661, Hawaii Revised Statutes, or for breach of trust under chapter 673, Hawaii Revised Statutes, related to said income and proceeds, from the public land trust lands under sections 4 and 6 of article XII of the Constitution or any related statute or act, between November 7, 1978, up to and including June 30, 2012, is forever extinguished and barred and may not be brought by the office, or by any other person or entity claiming by, through, or under the office.

The passage of this Act shall have the effect of *res judicata*, collateral estoppel, and claim and issue preclusion as to the office of Hawaiian affairs and all persons and entities claiming by, through, or under the office, and all claims, issues and defenses which have been at issue, or which could have been, or could in the future be, at issue, including any claim or action under chapter 661, Hawaii Revised Statutes, or for breach of trust under chapter 673, Hawaii Revised Statutes, whether brought against the State or its departments, agencies, officials, or employees, directly or indirectly, by subrogation, derivative or third party action, tender, federal action, or by any other means whatsoever, arising out of or in any way related to any right the office of Hawaiian affairs, or any other person or entity claiming by, through, or under the office, to the portion of income and proceeds, and/or any other tangible right, item, or benefit related to said income and proceeds, from the public land trust lands under sections 4 and 6 of article XII of the Constitution or any related statute or act between November 7, 1978, up to and including June 30, 2012.

The office of Hawaiian affairs shall not, cannot, and is forever prohibited and barred, now and in the future, from (1) asserting, arguing, or claiming that the office was entitled to more receipts than it received pursuant to Act 178, Session Laws of Hawaii 2006, or any other duly enacted law establishing the portion of the income and proceeds from the public land trust lands the office of Hawaiian affairs is to receive under sections 4 and 6 of article XII of the Constitution, between November 7, 1978, up to and including June 30, 2012, (2) bringing an action for breach of trust under chapter 673, Hawaii Revised Statutes, to contest or claim a larger portion of the income and proceeds, and/or any other tangible right, item, or benefit related to said income and proceeds, from the public land trust lands under sections 4 and 6 of article XII of the Constitution for itself or

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its beneficiaries, or (3) asserting, arguing, or claiming that section 673-9, Hawaii Revised Statutes, does not bar a suit to contest or make a claim relating to the portion of the income and proceeds from the public land trust lands the office of Hawaiian affairs receives or is to receive under sections 4 and 6 of article XII of the Constitution. The prohibition and bar imposed by the immediately preceding sentence shall be applicable to any and all money transferred, or in the future to be transferred, to the office of Hawaiian affairs pursuant to Act 178, Session Laws of Hawaii 2006, or any other law enacted to give effect to the provisions of article XII, sections 4 and 6 of the Constitution relating to the office's portion of the income and proceeds from the public land trust lands under sections 4 and 6 of article XII of the Constitution, including, but not limited to, receipts from general leases, revocable permits, and licenses for the use of improved and unimproved parcels of public land trust lands, rents and fees for agricultural uses, rents and fees for retail, office, warehouse, medical and other uses of space in state-owned buildings and facilities, receipts from the sale of wood, rock, and other natural resources on public land trust lands, landing, docking and parking fees, rents and fees from the State's in-bond duty free, park, and other concessions, rents, fees, and reimbursements collected at state-operated hospitals and medical facilities, and fees and rents from the State's affordable housing development and rental public housing projects.

SECTION 4. To the extent that the State has made any waiver of sovereign immunity for a suit, claim, cause of action, or right of action regarding the amount of the income and proceeds the office of Hawaiian affairs is to receive from the public land trust lands pursuant to article XII, sections 4 and 6 of the Hawaii Constitution, that waiver is withdrawn.

SECTION 5. The State, while not admitting the validity of any claims, hereby resolves and satisfies all controversies and claims described in section 3 of this Act by the conveyance of the Properties described in section 2 of this Act.

SECTION 6. The Properties conveyed by this Act shall be deemed income and proceeds from the public land trust, as if the Properties had been paid out of the income and proceeds from the public land trust pursuant to article XII, section 6 of the State Constitution.

SECTION 7. Notwithstanding any other law to the contrary, the State, and the state officials who may have participated in the preparation of the provisions or the enactment of this Act, including the office of Hawaiian affairs, each of the members of its board of trustees, and its staff, shall not be subject to suit because of their participation, except if an action is brought to compel compliance with a provision of this Act, in which case the action shall be brought only against the State or the office of Hawaiian affairs, or any official necessary to compel compliance with a provision of this Act.

SECTION 8. If any provision of chapter 673, Hawaii Revised Statutes, is inconsistent with any provision of this Act, then the provisions of this Act shall prevail.

SECTION 9. (a) The provisions of this Act are not severable to the extent that if any provision of either section 2 or section 3 of this Act is held invalid or unenforceable by a final judgment of the Hawaii Supreme Court or the United States Supreme Court that resolves all issues, this Act in its entirety shall be invalid, all interests in the Properties conveyed pursuant to the provisions of

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section 2 of this Act, shall be conveyed back to their respective grantors by the office of Hawaiian affairs.

(b) There is no waiver of sovereign immunity to bring any suit, claim, cause of action, or right of action to invalidate section 2 or 3 of this Act, or to enjoin their implementation or application, and to the extent any waiver of sovereign immunity for such a suit, claim, cause of action, or right of action exists, that waiver is withdrawn.

(c) Nothing in this Act limits the legislature's exclusive authority to enact laws.

SECTION 10. This Act shall take effect on July 1, 2012.

(Approved April 11, 2012.)

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

**Testimony of
WILLIAM J. AILA, JR.
Chairperson**

**Before the Senate Committees on
TOURISM AND HAWAIIAN AFFAIRS
and
WATER AND LAND**

**Tuesday, February 12, 2013
1:20 PM
State Capitol, Conference Room 225**

**In consideration of
SENATE BILL 402
RELATING TO A FINANCIAL REVIEW BY THE OFFICE OF HAWAIIAN AFFAIRS
OF COMPLIANCE WITH SECTION 5 OF ACT 178, SESSION LAWS OF HAWAII 2006**

Senate Bill 402 grants the Office of Hawaiian Affairs the authority to conduct a financial review of the State's compliance with Section 5 of Act 178, Session Laws of Hawaii 2006. Section 5 of Act 178 requires that no later than January 1 of each year, the Department of Land and Natural Resources ("Department"), in cooperation with the Department of Budget and Finance, to "provide an accounting of all receipts from lands described in section 5(f) of the Admission Act for the prior fiscal year". The Department offers the following comments on this measure.

In compliance with Act 178, Session Laws of Hawaii 2006, the Department requests various state agencies to provide the information required under the act. All information received is included in the annual report to the Legislature. It is the responsibility of the individual state agencies to ensure compliance with the Act's reporting requirements as well as the accuracy of the information provided to the Department. The Department is not required to verify or audit the information provided by the agencies, as it would be outside the Department's mission and expertise. The Department will cooperate with any financial review.

WILLIAM J. AILA, JR.
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ESTHER KIA'AINA
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS