
A BILL FOR AN ACT

RELATING TO INCREASING THE OFFICE OF HAWAIIAN AFFAIRS' PRO RATA
SHARE OF PUBLIC LAND TRUST FUNDS.

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

1 SECTION 1. The legislature finds that in 1978, the state
2 constitution was amended to establish the office of Hawaiian
3 affairs and its board of trustees.

4 Article XII, sections 4, 5, and 6 of the state constitution
5 provide as follows:

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

13 **Section 5.** There is hereby established an Office
14 of Hawaiian Affairs. The Office of Hawaiian Affairs
15 shall hold title to all the real and personal property
16 now or hereafter set aside or conveyed to it which



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

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



1 control over the Office of Hawaiian Affairs through its
2 executive officer, the administrator of the Office of
3 Hawaiian Affairs, who shall be appointed by the board.
4 Act 273, Session Laws of Hawaii 1980, enacted section
5 10-13.5, Hawaii Revised Statutes, to implement the office of
6 Hawaiian affairs' pro rata share and provide that "[t]wenty per
7 cent of all funds derived from the public land trust . . . shall
8 be expended by the [Office of Hawaiian Affairs] . . . for the
9 purposes of this chapter."

10 This legislative directive has led to a series of lawsuits
11 concerning the office of Hawaiian affairs' constitutional pro
12 rata share and the statutory allocation of twenty per cent of
13 all funds that the legislature established to implement article
14 XII, sections 4 and 6, of the state constitution. In *Trustees*
15 *of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 737
16 P.2d 446 (1987), the Hawaii supreme court concluded that it was
17 unable to determine the parameters of section 10-13.5, Hawaii
18 Revised Statutes, because the issue of how the twenty per cent
19 apportionment is formulated was a political question for the
20 legislature to determine.



1 In response to the *Yamasaki* decision, the office of
2 Hawaiian affairs and the governor's office entered into lengthy
3 negotiations and submitted to the legislature an agreement to
4 clarify the extent and scope of the twenty per cent portion.
5 The legislature, based on this agreement, enacted Act 304,
6 Session Laws of Hawaii 1990.

7 In a memorandum dated April 28, 1993, the office of
8 Hawaiian affairs and the State memorialized the results of their
9 negotiations and noted that "[the office of state planning] and
10 [the Office of Hawaiian Affairs] recognize and agree that the
11 amount specified in section 1 hereof does not include several
12 matters regarding revenue which [the Office of Hawaiian Affairs]
13 has asserted is due [the Office of Hawaiian Affairs] and which
14 [the office of state planning] has not accepted and agreed to."
15 These disagreements led to litigation. The office of Hawaiian
16 affairs specified that it was seeking its pro rata share of
17 revenues received by the State based on:

- 18 (1) Waikiki Duty Free receipts (in connection with the
19 lease of ceded lands at the Honolulu international
20 airport);
21 (2) Hilo hospital patient services receipts;



1 (3) Receipts from the Hawaii housing authority and the
2 housing finance and development corporation for
3 projects situated on ceded lands; and

4 (4) Interest earned on withheld revenues.

5 On October 24, 1996, the trial court granted the office of
6 Hawaiian affairs' motion for partial summary judgment on each of
7 its aforementioned claims, finding that:

8 (1) The State is required to pay the office of Hawaiian
9 affairs its pro rata portion of rents or fees
10 collected from the Duty Free concessions at the
11 State's airports;

12 (2) The State's activities of providing affordable housing
13 are proprietary in nature and subject to the office of
14 Hawaiian affairs' pro rata share;

15 (3) Patient service fees, cafeteria sales, and rental
16 income at Hilo hospital "is clearly a proprietary
17 rather than sovereign exercise of power" which does
18 not shield the Hilo hospital's income from being
19 characterized as revenue subject to the office of
20 Hawaiian affairs' pro rata share; and



1 (4) "The State is required to pay [the Office of Hawaiian
2 Affairs] its pro rata share of the interest earned by
3 the State from ceded land revenues derived from the
4 Public Land Trust."

5 The State appealed.

6 On October 27, 1997, the United States Congress enacted the
7 Department of Transportation and Related Agencies Appropriations
8 Act of 1998, Public Law 105-66, which provided that monies paid
9 for claims related to ceded lands and diverted from airport
10 revenues were not subject to repayment. Public Law 105-66
11 provided further that nothing in the Act was to affect the
12 obligations of the State of Hawaii to Native Hawaiians in
13 connection with ceded lands, except to make clear that airport
14 revenues may not be used to satisfy such obligations directly.
15 The office of Hawaiian affairs had previously been paid
16 \$28,200,000 from airport revenue funds.

17 On September 12, 2001, the Hawaii supreme court ruled in
18 *Office of Hawaiian Affairs v. State of Hawai'i*, 96 Haw. 388, 31
19 P.3d 901 (2001), ("OHA I") that Act 304 (1990) was effectively
20 repealed by its own terms, so that once again, it was necessary
21 for the legislature to clarify the office of Hawaiian affairs'



1 constitutional pro rata share and the statutory allocation of
2 twenty per cent of all funds to be managed and administered by
3 the office of Hawaiian affairs. In its decision, the Hawaii
4 supreme court affirmed *Yamasaki*, observing:

5 [T]he State's obligation to native Hawaiians is firmly
6 established in our constitution. How the State satisfies
7 that constitutional obligation requires policy decisions
8 that are primarily within the authority and expertise of
9 the legislative branch. As such, it is incumbent upon the
10 legislature to enact legislation that gives effect to the
11 right of native Hawaiians to benefit from the ceded lands
12 trust. See Haw. Const. art. XVI, section 7. . . . [W]e
13 trust that the legislature will re-examine the State's
14 constitutional obligation to native Hawaiians and the
15 purpose of HRS §10-13.5 and enact legislation that most
16 effectively and responsibly meets those obligations.
17 *OHA I*, 96 Haw. At 401, 31 P.3d at 914 (citations omitted).

18 On April 28, 2006, the Hawaii supreme court ruled in *Office*
19 *of Hawaiian Affairs v. State of Hawai'i*, 110 Haw. 338, 366, 133
20 P.3d 767, 795 (2006) ("OHA II"), that consistent with its ruling
21 in OHA I, "it is incumbent upon the legislature to enact



1 legislation that gives effect to the right of native Hawaiians
2 to benefit from the ceded lands trust."

3 Subsequently, the legislature enacted Act 178, Session Laws
4 of Hawaii 2006, which took effect on June 7, 2006, and
5 specifically acknowledged that "the State's obligation to native
6 Hawaiians is firmly established in the state constitution. (See
7 Haw. Const. art XII)."

8 While the legislature found that "many complex issues
9 require the legislature's further attention and consideration in
10 the wake of the repeal of Act 304," Act 178 was enacted with a
11 stated purpose of providing "interim measures to ensure that an
12 adequate amount of income and proceeds is made available to the
13 [Office of Hawaiian Affairs] from the pro rata portion of the
14 public land trust, for the betterment of the conditions of
15 native Hawaiians." Act 178 carried out this interim purpose by
16 requiring "the income and proceeds from the pro rata portion of
17 the public land trust under article XII, section 6, of the state
18 constitution for expenditure by the office of Hawaiian affairs
19 for the betterment of the conditions of native Hawaiians for
20 each fiscal year beginning with fiscal year 2005-2006 shall be
21 \$15,100,000." Specifically, Act 178 noted this interim amount



1 was "[until] further action is taken by the legislature for this
2 purpose." This \$15,100,000 was based, in part, on certain
3 ancillary receipts from the state airports.

4 Subsequently, addressing past-due amounts owed to the
5 office of Hawaiian affairs, Act 15, Session Laws of Hawaii 2012,
6 was enacted to implement an agreement between the State and the
7 office of Hawaiian affairs for the State to convey certain lands
8 in Kakaako Makai on Oahu valued at approximately \$200,000,000 to
9 allow the State to give effect to the right of native Hawaiians
10 to benefit from the public land trust and to fulfill its
11 constitutional obligations under article XII, sections 4 and 6
12 of the state constitution for the period between November 7,
13 1978, up to and including June 30, 2012, relating to the office
14 of Hawaiian affairs' portion of the income and proceeds from the
15 public land trust.

16 However, Act 15 did not address the State's constitutional
17 obligations under article XII, sections 4 and 6 relating to the
18 office of Hawaiian affairs' pro rata share of the income and
19 proceeds from the public land trust generated after June 30,
20 2012.



1 Act 178, Session Laws of 2006, remained in effect as an
2 interim legislative measure setting the office of Hawaiian
3 affairs' annual income and proceeds from the public land trust
4 for the betterment of the conditions of native Hawaiians at
5 \$15,100,000 beginning in fiscal year 2005-2006, pending further
6 legislative action on the subject.

7 The second purpose of Act 178 was identifying "revenue-
8 generating public trust lands and the amounts derived from those
9 lands by requiring that the department of land and natural
10 resources provide an annual accounting to the legislature."
11 Based on the annual accounting of the amounts derived from the
12 public trust and additional research commissioned by the office
13 of Hawaiian affairs of receipts from the public land trust in
14 fiscal year 2015-2016, the minimum amount of total gross public
15 land trust receipts from sources that the office of Hawaiian
16 affairs has a past or current claim was found to be \$174,816,220
17 in fiscal year 2015-2016. Twenty per cent of this amount from
18 fiscal year 2015-2016 is \$34,963,244.

19 The legislature finds that it is now in the best interests
20 of the office of Hawaiian affairs, its beneficiaries, the State,
21 and all citizens of Hawaii to enact another interim legislative



1 measure regarding the office of Hawaiian affairs' constitutional
 2 pro rata share of the public land trust for the betterment of
 3 the conditions of native Hawaiians, in light of the information,
 4 data, and facts provided to the legislature by state agencies
 5 since the enactment of Act 178, Session Laws of Hawaii 2006,
 6 more than a decade ago.

7 Accordingly, the purpose of this Act is to serve as an
 8 interim measure to:

9 (1) Establish \$ as the office of Hawaiian affairs'
 10 annual share of the income and proceeds of the public
 11 land trust beginning in fiscal year 2019-2020. This
 12 amount does not include patient service fees generated
 13 from state hospitals on public land trust land and
 14 residential rental payments and fees generated from
 15 state housing facilities on public land trust land, to
 16 which the office of Hawaiian affairs has not
 17 disclaimed an interest therein;

18 (2) Transfer to the office of Hawaiian affairs a sum of
 19 \$ to pay the office of Hawaiian affairs
 20 amounts received from the use of the public land trust
 21 that the legislature has determined were underpaid



1 between July 1, 2012 and June 30, 2019. This amount
 2 does not include patient service fees generated from
 3 state hospitals on public land trust land and
 4 residential rental payments and fees generated from
 5 state housing facilities on public land trust land, to
 6 which the office of Hawaiian affairs has not
 7 disclaimed an interest therein; and

8 (3) Require an annual detailed audit of all funds derived
 9 from receipts from lands described in section 5(f) of
 10 the Admission Act.

11 SECTION 2. Notwithstanding the provisions of chapter 10,
 12 Hawaii Revised Statutes, including section 10-13.5, Hawaii
 13 Revised Statutes, and until further action is taken by the
 14 legislature for this purpose, the income and proceeds from the
 15 pro rata portion of the public land trust under article XII,
 16 section 6 of the state constitution for expenditure by the
 17 office of Hawaiian affairs for the betterment of the conditions
 18 of native Hawaiians for each fiscal year beginning with fiscal
 19 year 2019-2020 shall be \$.

20 SECTION 3. Notwithstanding the provisions of chapter 10,
 21 Hawaii Revised Statutes, including section 10-13.5, Hawaii



1 Revised Statutes, beginning in fiscal year 2019-2020, the
2 departments of agriculture; accounting and general services;
3 business, economic development, and tourism; defense; education;
4 health; land and natural resources; and transportation (for its
5 harbors and highways divisions), and any other department or
6 agency that collects receipts from the lands within the public
7 land trust, including but not limited to the University of
8 Hawaii, shall determine and transfer to the office of Hawaiian
9 affairs that portion of their receipts from the use, sale,
10 lease, or other disposition of lands within the public land
11 trust collected during each fiscal year, necessary to ensure
12 that a total of \$ of receipts generated by the public
13 land trust is transferred to the office of Hawaiian affairs,
14 within thirty days of the close of each fiscal year; provided
15 that for fiscal year 2019-2020, the departments shall have until
16 thirty days after the close of the fiscal year to transfer a
17 total of \$ from their receipts from the use, sale,
18 lease, or other disposition of lands within the public land
19 trust collected during fiscal year 2019-2020, to the office of
20 Hawaiian affairs by the procedures set forth in this Act.



1 SECTION 4. Beginning on July 1, 2020, the director of
2 finance or the director's designee shall determine the total
3 amount of receipts transferred by any department or agency that
4 collects receipts from the lands within the public land trust to
5 the office of Hawaiian affairs during the immediately prior
6 fiscal year.

7 If the total amount of receipts transferred to the office
8 of Hawaiian affairs is less than \$ in the immediately
9 prior fiscal year, the director of finance or the director's
10 designee shall:

11 (1) Make up the difference between \$ and the
12 amount of receipts transferred in the immediately
13 prior fiscal year by transferring up to the entire
14 amount on deposit in the carry-forward trust holding
15 account established by the director of finance
16 pursuant to executive order 06-06; or

17 (2) Make up the difference between \$ and the
18 amount of receipts transferred in the immediately
19 prior fiscal year by establishing the additional
20 amount of receipts that each agency must transfer to



1 the office of Hawaiian affairs pursuant to section 3
2 of this Act.

3 If the total amount of receipts transferred to the office
4 of Hawaiian affairs is more than \$ in the immediately
5 prior fiscal year, the director of finance shall notify the
6 office of Hawaiian affairs and request that the office of
7 Hawaiian affairs transfer the amount in excess of \$ into
8 the carry-forward trust holding account established by the
9 director of finance pursuant to executive order 06-06. This
10 subsection shall not apply to a transfer of receipts at the
11 close of fiscal year 2019-2020.

12 SECTION 5. There is appropriated out of the general
13 revenues of the State of Hawaii the sum of \$ less the
14 funds in the carry-forward trust holding account established by
15 the director of finance pursuant to executive order 06-06, or so
16 much thereof as may be necessary for fiscal year 2019-2020 to
17 pay to the office of Hawaiian affairs amounts received from the
18 use of lands in the public land trust that the legislature has
19 determined were underpaid between July 1, 2012 through June 30,
20 2019.



1 The sum appropriated shall be expended by the department of
2 budget and finance.

3 The director of finance shall transfer the funds in the
4 carry-forward trust holding account established by the director
5 of finance pursuant to executive order 06-06, to the office of
6 Hawaiian affairs.

7 SECTION 6. Not later than January 1 of each year, the
8 department of land and natural resources, with the cooperation
9 of the department of budget and finance and any other department
10 or agency that collects receipts from the lands within the
11 public land trust, including the University of Hawaii, shall
12 provide an accounting of all receipts from lands described in
13 section 5(f) of the Admission Act for the prior fiscal year.
14 With respect to each receipt, the department of land and natural
15 resources shall identify:

- 16 (1) The total gross amount;
- 17 (2) The amount transferred to the office of Hawaiian
18 affairs;
- 19 (3) The amount retained by the State;
- 20 (4) The account or fund in which the amount specified in
21 paragraph (3) was transferred or deposited;



1 (5) The parcel of land subject to section 5(f) of the
2 Admission Act that generated the receipt, whether by
3 tax map key number, department of land and natural
4 resources inventory number, or other recognizable
5 description; and

6 (6) The state department or agency that received the total
7 gross amount identified in paragraph (1).

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

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

18 SECTION 8. Any funds transferred shall be deemed income
19 and proceeds from the public land trust, just as if the funds
20 had been paid out of the income and proceeds from the public



1 land trust pursuant to article XII, section 6, of the state
2 constitution and shall be audited annually.

3 SECTION 9. This Act shall take effect on July 1, 2050;
4 provided that section 5 shall take effect on July 1, 2019.



Report Title:

Public Land Trust; OHA; Pro Rata Share; DLNR; Appropriation

Description:

Establishes the OHA's pro rata share of the public land trust. Transfers funds to OHA for underpayment of the public land trust funds for 7/1/2012 to 6/30/2019. Requires the DLNR to provide an annual accounting of receipts from public land trust lands. Appropriates funds. (HB402 HD1)

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