

STAND. COM. REP. NO.

192

Honolulu, Hawaii

FEB 12 2021

RE: S.B. No. 1317
S.D. 1

Honorable Ronald D. Kouchi
President of the Senate
Thirty-First State Legislature
Regular Session of 2021
State of Hawaii

Sir:

Your Committee on Hawaiian Affairs, to which was referred
S.B. No. 1317 entitled:

"A BILL FOR AN ACT RELATING TO PUBLIC LAND TRUST FUNDS,"

begs leave to report as follows:

The purpose and intent of this measure is to provide the
Department of Hawaiian Home Lands with the funds to which the
Office of Hawaiian Affairs is entitled under article XII, section
6, of the Hawaii State Constitution and section 10-13.5, Hawaii
Revised Statutes. Specifically, this measure:

- (1) Requires agencies that collect receipts related to the
public land trust to transfer twenty percent of such
receipts to the Office of Department of Hawaiian Home
Lands on a quarterly basis;
- (2) Sets the minimum aggregate quarterly transfer of
receipts to the Department of Hawaiian Home Lands at
\$3,775,000;
- (3) Directs the Director of Finance to transfer funds to the
Department of Hawaiian Home Lands in satisfaction of any
quarterly shortfall;
- (4) Transfers to the Department of Hawaiian Home Lands all
overpayment funds collected in fiscal year 2012-2013



through fiscal year 2020-2021 from the carry-forward trust holding account established pursuant to Executive Order No. 06-06, plus any additional overpayments collected in the holding account in fiscal year 2021-2022 and 2022-2023; and

- (5) Establishes a public land trust revenues negotiating committee to make recommendations to the Legislature for resolving the matter of the amount of the income and proceeds from the public land trust that the Department of Hawaiian Home Lands shall receive annually.

Your Committee received testimony in opposition to this measure from the Department of Land and Natural Resources, Office of Hawaiian Affairs, and the Center for Hawaiian Sovereignty Studies. Your Committee received comments on this measure from the Department of Agriculture, Department of the Attorney General, Department of Budget and Finance, Department of Hawaiian Home Lands, University of Hawai'i System, Office of Information Practices, Hawaii Health Systems Corporation, and League of Women Voters.

Your Committee finds that there is a constitutional obligation for the State to provide a sufficient sum of income and proceeds as the pro rata share of the public land trust for the betterment of the conditions of native Hawaiians. Act 178, Session Laws of Hawaii 2006 (Act 178), put in place annual payments of \$15,100,000 from the pro rata portion of the public land trust to the Office of Hawaiian Affairs in acknowledgment of the State's constitutional obligation. However, Act 178 was passed with the intention that it would be an interim measure until the Legislature could further assess the complexities of the issue, including in part gathering information on revenue-generating public trust lands and amounts derived from those lands. Your Committee finds that since Act 178 was passed, the Legislature has received additional information from the departments and the Office of Hawaiian Affairs on the annual amounts derived from the public land trust. For fiscal years 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019, and 2019-2020, the State reported to the legislature total gross Public Land Trust receipts in the amounts of \$150,939,203, \$159,971,589, \$163,322,176, \$178,043,261, \$177,617,893, \$202,528,564, \$225,079,055, \$289,767,657, and



\$229,631,870 respectively, or an average of \$197,433,474 over the last nine fiscal years. Twenty per cent of the average reported gross receipts for fiscal years 2011-2012 through 2019-2020 is \$39,486,695.

Your Committee further finds that the Hawaiian Homes Commission Act provides for the rehabilitation of the native Hawaiian people through a government-sponsored homesteading program for individuals having at least fifty percent blood quantum. Despite constitutional obligation of the Department of Hawaiian Home Lands and Hawaiian Homes Commission under article XII, section 1, of the Hawaii State Constitution, the State has failed to provide sufficient funds to the Department of Hawaiian Home Lands to minimize the number and waiting time on its waiting lists for homesteads to a reasonable level. Additionally, the Department of Hawaiian Home Lands does not currently receive sufficient funding to meet its goal in reducing the waiting list by ninety percent over the next decade. Therefore, this measure is needed to provide for a source of revenue to allow the Department of Hawaiian Home Lands to meet its constitutional amendments in alleviating the waitlist.

Despite the ongoing, urgent economic crisis faced by the State, this measure does not require any general fund appropriations, nor does it require state agencies to set aside more funds than they are already required. This measure intends to ensure that the full twenty percent of public land trust receipts that agencies set aside as native Hawaiians' pro rata share can be used to benefit native Hawaiians.

However, your Committee has heard the concerns of the Office of Hawaiian Affairs that although both the Office of Hawaiian Affairs and the Department of Hawaiian Home Lands have trusts rooted in the Admission Act and the Hawaii State Constitution, and have a similar history of underfunding by the State, the basis for the State's obligation to each entity is distinct and the spending of each trust fund is separately overseen by each organization's governing body pursuant to the Hawaii State Constitution. Article XII, section 6, of the Hawaii Constitution designates the Office of Hawaiian Affairs as the receiving agency for all the pro rata portion receipts that go toward the betterment of the conditions of native Hawaiians. There is no analogous provision in the Hawaii State Constitution that provides the Department of Hawaiian



Home Lands with any portion of the receipts collected from the lands of the public land trust. Moreover, the Hawaii State Constitution does not specify the amount, percentage, or nature of the income or proceeds from the lands referred to in article XII, section 4, of the Hawaii State Constitution that must be transferred to the Office of Hawaiian Affairs. The Department of Hawaiian Home Lands administers a different trust comprised of different lands under the Hawaiian Homes Commission Act.

The Office of Hawaiian Affairs noted further concerns that by halting the transfer for public land transfers to the Office of Hawaiian Affairs, this measure would thereby abdicate the State's constitutional obligations under the Public Land Trust. Redirecting receipts to the Department of Hawaiian Home Lands may impede the State's obligation under article XII, section 6, of the Hawaii State Constitution, which provides that "all income and proceeds from that pro rata portion of the [public land trust]...for native Hawaiians" is to be managed and administered by the Board of Trustees of the Office of Hawaiian Affairs. By diverting these revenues to the Department of Hawaiian Home Lands, this measure could be interpreted to supplant the State's separate and independent constitutional obligation to sufficiently fund the administration and operation of the Department of Hawaiian Home Lands.

The Department of the Attorney General also noted concerns that this measure requires state agencies to transfer twenty percent of each receipt or gross income derived from the public land trust. Transferring twenty percent of gross income could adversely affect important governmental programs, which could come in the form of higher lease rents in affordable housing projects, higher fees at state harbors, and an increased cost of services operated by the State on public lands, which would be passed onto consumers, businesses, and taxpayers. The Department highlighted its trust responsibilities to exercise a level of care and skill in administering the trust as a person of ordinary prudence; therefore, transferring twenty percent of gross income without consideration of the detrimental impact to the trust and the enterprises thereon would not be an exercise of ordinary prudence.

Your Committee has heard the additional concerns of the Department of the Attorney General that this measure would require all agencies collecting receipts from the public land trust to



indiscriminately transfer twenty percent of such receipts to the Office of Hawaiian Affairs. In *Office of Hawaiian Affairs v. State*, 96 Haw. 388, 31 P.3d 901 (2001), the United States' Supreme Court ruled that a twenty percent transfer requirement as applied to the Department of Transportation's airport revenues conflicted with federal transportation statutes. Therefore, this measure's return to a twenty percent transfer requirement for all agencies may raise issues of preemption.

Furthermore, your Committee also notes the concerns of the Department of the Attorney General and Department of Budget and Finance regarding the carry-forward trust holding account established by Executive Order 06-06, due to the financial strain caused by the coronavirus disease-2019 (COVID-19) pandemic, which has had a negative impact on the ability of state agencies to collect revenue that may result in insufficient sums to meet the minimum \$3,775,000 quarterly payments. Additionally, if the amounts in the holding account are transferred to the Department of Hawaiian Home Lands, there will be no contingency funds to meet the minimum payments as set by Act 178. The Department of Budget and Finance also presented concerns that the measure does not provide a framework for administering the transfer of ceded land payments to the Department of Hawaiian Home Lands.

Your Committee has additionally heard the concerns of the Hawaii Health Systems Corporation, Department of Agriculture, and the Department of Land and Natural Resources that this measure places undue hardships on their agency operations.

Your Committee has also heard the concerns of the University of Hawai'i System citing article X, section 5, of the Hawaii State Constitution, which states that the University shall have title to all real and personal property conveyed to it, which shall be held in public trust to further its purposes as a model indigenous-serving university.

While the Department of Hawaiian Home Lands acknowledged that the Department does not currently receive sufficient funding to develop house lots for all applicants on the waiting list, the Department of Hawaiian Home Lands provided comments that the Hawaii State Constitution established the Office of Hawaiian Affairs to manage and administer the proceeds from the sale or



other disposition of the lands and income from the public land trust.

Your Committee has heard the concerns of the Office of Information Practices that the measure as drafted would exempt the public land trust revenues negotiation committee from being subject to chapter 92, Hawaii Revised Statutes, because this exemption creates the appearance that the sensitivity of negotiations precludes public participation in the process.

Accordingly, in response to the numerous concerns of the testifiers, your Committee has amended this measure by:

- (1) Updating dollar amounts referenced in section 1;
- (2) Inserting language in section 1 to acknowledge the sensitive nature of anticipated negotiations and provide an explanation for the exemption of the public land trust revenues negotiating committee from part I of chapter 92, Hawaii Revised Statutes;
- (3) Clarifying that the quarterly transfer of receipts shall occur unless precluded by federal law;
- (4) Inserting a blank dollar amount for the minimum total amount of receipts transferred to the Department of Hawaiian Affairs for any fiscal quarter;
- (5) Inserting a definition for the term "receipt";
- (6) Inserting a blank dollar amount required to be left in the holding account to act as contingency payments;
- (7) Clarifying that the public land trust revenues negotiating committee is exempt from part I of chapter 92, Hawaii Revised Statutes, rather than the entire chapter;
- (8) Inserting language to clarify that nothing in this measure shall diminish the revenues owed to the office of Hawaiian affairs pursuant to Act 178, session laws of Hawaii 2006, or any other law providing for the office of Hawaiian affairs' pro rata portion of the public land



trust under article XII, section 6, of the Hawaii State Constitution; and

- (9) Making technical, nonsubstantive amendments for the purposes of clarity and consistency.

As affirmed by the record of votes of the members of your Committee on Hawaiian Affairs that is attached to this report, your Committee is in accord with the intent and purpose of S.B. No. 1317, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. 1317, S.D. 1, and be referred to your Committees on Ways and Means and Judiciary.

Respectfully submitted on
behalf of the members of the
Committee on Hawaiian Affairs,




MAILE S.L. SHIMABUKURO, Chair



The Senate
Thirty-First Legislature
State of Hawai'i

Record of Votes
Committee on Hawaiian Affairs
HWN

Bill / Resolution No.:*	Committee Referral:	Date:		
SB 1317	HWN, WAM/JDC	2/9/2021		
<input type="checkbox"/> The Committee is reconsidering its previous decision on this measure. If so, then the previous decision was to: _____				
The Recommendation is:				
<input type="checkbox"/> Pass, unamended 2312 <input checked="" type="checkbox"/> Pass, with amendments 2311 <input type="checkbox"/> Hold 2310 <input type="checkbox"/> Recommit 2313				
Members	Aye	Aye (WR)	Nay	Excused
SHIMABUKURO, Maile S.L. (C)	X			
KEOHOKALOLE, Jarrett (VC)	X			
ACASIO, Laura	X			
IHARA, Jr., Les		X		
FEVELLA, Kurt			X	
TOTAL	3	1	1	
Recommendation:				
<input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted				
Chair's or Designee's Signature:				
				
Distribution:				
Original File with Committee Report	Yellow Clerk's Office	Pink Drafting Agency	Goldenrod Committee File Copy	

*Only one measure per Record of Votes