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EMPLOYEES' RETIREMENT SYSTEM
HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND
OFFICE OF THE PUBLIC DEFENDER

ADMINISTRATIVE AND RESEARCH OFFICE
BUDGET, PROGRAM PLANNING AND
MANAGEMENT DIVISION
FINANCIAL ADMINISTRATION DIVISION
OFFICE OF FEDERAL AWARDS MANAGEMENT (OFAM)

WRITTEN ONLY

TESTIMONY BY LAUREL A. JOHNSTON
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
TO THE SENATE COMMITTEE ON WAYS AND MEANS
ON
SENATE BILL NO. 2136, S.D. 1



**February 23, 2018
10:30 a.m.
Room 211**

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

Senate Bill No. 2136, S.D.1 proposes to increase the pro rata share of the annual receipts from the use of the lands of the public land trust transferred to the Office of Hawaiian Affairs to an unspecified amount; directs that the balance in a holding account established by Executive Order No. 06-06 and an unspecified lump sum general fund appropriation be paid to OHA by the end of this fiscal year; makes the annual increase retroactively effective from July 1, 2012; requires the Department of Budget and Finance (B&F) to provide an annual accounting of all receipts from the lands described in Section 5(f) of the Admissions Act; and establishes a committee which is to meet every six years to study and make recommendations to the Legislature regarding the annual amount of the income and proceeds from the lands of the public land trust OHA is to receive.

B&F recognizes that the Legislature should periodically review and, if appropriate, adjust what OHA receives as its share of the receipts from the use of public

land trust lands to better the conditions of native Hawaiians under Article XII, Section 6 of the State Constitution.

The Department of Budget and Finance offers the following comments and data for your consideration.

Attachment 1 is a summary of the Section 5(f) lands receipt reports compiled by the Department of Land and Natural Resources (DLNR) for FY 2007 to FY 2017. Total gross receipts increased from \$128.48 million in FY 2007 to \$202.53 million in FY 2017. This increase is due primarily to an increase in revenues from Department of Transportation's (DOT) Airports and Harbors Divisions, which account for 75 percent of the total gross receipts for FY 2017.

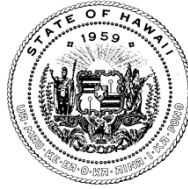
Attachment 2 is the Conference Committee Report to Act 178, Session Laws of Hawai'i 2006, which states that only "certain ancillary receipts" from the Airports Division's HIA Terminal Rental Revenue, HIA Terminal Concession Revenue, Non-HIA Aeronautical Revenue, and Non-HIA Concession/Other Terminal Revenue were considered in establishing OHA's \$15.1 million share in 2006. Regarding these two revenue sources, we note that federal law prohibits the State from transferring airport revenues to OHA, and the Harbors Division has committed increased revenues to support bond issuances for the Harbors Modernization project.

Attachment 3 illustrates the impact on each revenue source of OHA's original proposal of an increase from \$15 to \$35 million per year. As can be seen, ceded land assessments would increase from 20 percent to over 30 percent for most programs. Thus, B&F strongly urges the Legislature to consult with the affected departments to determine what the impact to their operations is likely to be, and what increases in rent and/or user fees that the departments will need to impose to comply with any proposed increase in revenues to OHA beyond the current level.

Regarding Section 6 (transferring responsibility for maintaining the Section 5(f) lands receipts reports from DLNR to B&F), B&F does not have the expertise, trained staff, or resources to maintain and upgrade the Section 5(f) lands receipts reporting system. DLNR has the experience, information and resources, namely the electronic land inventory system, to do this. For these reasons, B&F believes it would be counter-productive to move the system to our department.

Thank you for your consideration of our comments.

Attachments



Testimony by:
JADE T. BUTAY
INTERIM DIRECTOR

Deputy Directors
ROY CATALANI
ROSS M. HIGASHI
EDWIN H. SNIFFEN
DARRELL T. YOUNG

IN REPLY REFER TO:

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

February 23, 2018
10:30 a.m.
State Capitol, Room 211

LATE

S.B. 2136 S.D. 1
RELATING TO INCREASING THE OFFICE OF HAWAIIAN AFFAIRS' PRO RATA
SHARE OF PUBLIC LAND TRUST FUNDS

Senate Committee on Ways and Means

The Department of Transportation respectfully submits **comments with strong concerns** regarding this bill, which proposes to establish an interim measure to address the pro rata share of public land trust revenues to be paid to the Office of Hawaiian Affairs (OHA). This legislation is yet another temporary measure that defers permanent resolution; it does not clarify the language in the Constitution of the State of Hawaii and the Hawaii Revised Statutes to address the long-standing political question of how to appropriately calculate the pro rata share.

The Airports Division does not make any transfers to OHA as such transfers violate federal law, and the Highways Division, with the exception of a transfer made last year in the amount of \$40,693, generally does not make transfers due to similar federal restrictions. The Harbors Division contributed \$13.5 million of the \$15.1 million, about 90%, transferred from the State to OHA in Fiscal Year 2017.

The Harbors Division is a completely self-funded enterprise, generates its revenue through harbor user fees and tariffs, and annually honors its obligation to transfer the appropriate sums owed to OHA. If this bill is adopted with provisions that require the Harbors Division to transfer more than 20% of the revenues from public land trust parcels under its jurisdiction, its bond rating will be down-graded resulting in higher interest rates for project financing, it will lower the debt coverage ratio which will limit the amount to borrowed through a bond issuance, and it will have fewer cash reserves available for port recovery and resiliency in the event of a disaster. Collectively, these direct impacts will significantly slow the ongoing implementation of the Harbors Modernization Plan and delay much-needed improvements to the commercial harbor facilities. To mitigate these impacts, the harbor user fees would need to be increased thereby increasing shipping costs of consumer goods. Additionally, the Highways Division would be similarly affected with respect to its bond rating and availability of resources for projects.

Testimony of DOT on S.B. 2136 S.D. 1
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Given the critical role of transportation infrastructure to the well-being of our communities and our economy, the DOT submits that this bill may create unacceptable risks to the State's ability to fulfill its responsibility for essential infrastructure maintenance and improvement.

Thank you for the opportunity to provide testimony.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-NINTH LEGISLATURE, 2018**

ON THE FOLLOWING MEASURE:

S.B. NO. 2136, S.D. 1, RELATING TO INCREASING THE OFFICE OF HAWAIIAN AFFAIRS' PRO RATA SHARE OF PUBLIC LAND TRUST FUNDS.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

LATE

DATE: Friday, February 23, 2018

TIME: 10:30 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): WRITTEN COMMENTS ONLY. For more information, call Charleen M. Aina, Deputy Attorney General, at 586-1292

Chair Dela Cruz and Members of the Committee:

The Department of the Attorney General offers the following comments.

The purpose of this S.B. No. 2136, S.D. 1, is to increase the Office of Hawaiian Affairs' ("OHA") annual share of the income and proceeds from the use of land subject to the public trust under section 5(f) of the Admission Act, and article XII, sections 4 and 6, of the State Constitution.

The bill as introduced increased OHA's current share of \$15.1 million, set in 2006 by Act 178, Session Laws of Hawaii 2006, to \$35 million, as requested by OHA. It also appropriated general funds and transferred funds in a holding account established by the Executive Order 06-06 to implement Act 178, totaling \$119 million to OHA, to make the increase retroactively effective as of July 1, 2012. Both versions of the bill explain at page 10, lines 11-18, that the \$19.1 million annual increase is based on an accounting of the total gross receipts collected from the lands of the public land trust reported by state agencies for fiscal year 2015-2016 commissioned by OHA.

The S.D. 1 does not include a dollar amount for the increase OHA seeks or for the general fund appropriation that will be needed to make the increase effective retroactively to July 1, 2012, as OHA requests. However, it does require each agency that transfers funds to OHA, to make up any shortfall in a prior quarter's transfer to OHA, by making an additional transfer of "an equal percentage" of its following quarter's

receipts, to OHA, if there are insufficient funds in the Department of Budget and Finance's holding account to make up the shortfall.

To date, the Legislature has used three different approaches to implement article XII, section 6, of the State Constitution, and provide OHA with a share of the receipts from the lands the State holds as a public trust under section 5(f) of the Admission Act.

In 1980, the Legislature concluded that section 5(f) sets out five purposes, and enacted section 10-13.5, Hawaii Revised Statutes, which specified that OHA's share was to be "Twenty per cent of all funds derived from the public land trust." That approach was abandoned after the Supreme Court concluded in Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1997), that it could not resolve OHA's claims because it lacked judicially discoverable and manageable standards for determining which "funds," from which lands of the public trust, OHA was entitled to take its 20 percent share. DOT's Harbors Division collected fees and charges from ships that tied up to piers built on submerged lands, but much of those charges were assessed to allow DOT to pay interest to the holders of DOT Harbors Revenue Bonds.

In 1990, at the joint suggestion of OHA and the Waihee Administration, the Legislature amended section 10-13.5 to describe OHAs' share as "Twenty per cent of all revenue derived from the public land trust," and added a definition of "revenue" which excluded any receipt from the public land trust lands "derived through the exercise of sovereign functions and powers." Three years after these amendments were made, OHA filed the OHA I suit because the Waihee Administration and OHA could not resolve differences about whether some of the moneys state agencies collected, including moneys the Hawaii Health System collected for patient services in hospitals located on ceded lands, and the State's two housing agencies collected from the sale or rentals of affordable housing built on ceded lands, were derived from the exercise of "sovereign" or "proprietary" functions or powers.

The Legislature adopted a third approach for describing OHA's share, by enacting Act 329, Session Laws of Hawaii 1997, which amended chapter 10 to include section 10-13.3, entitled "Interim revenue," to fix the exact amount of OHA's share for

fiscal years 1997-1998 and 1998-1999 at \$15.1 million. The Legislature used the same approach in 2006. It enacted Act 178 which again fixed OHA's share of public land trust land receipts at \$15.1 million. The \$15.1 million share, which OHA has received since July 1, 2006, was based on some, but not all of the receipts state agencies collected from the use of ceded lands. See Conf. Comm. Rep. No. 101-06.

OHA proposes that the Legislature increase its share of the annual receipts from the public land trust lands from \$15.1 million to \$35 million. OHA's rationale for the increase is that \$35 million represents 20 percent of all the receipts state agencies collect for the use of public land trust lands in fiscal year 2015-2016. OHA's request brings us full-circle to 1980, section 10-13.5, Hawaii Revised Statutes, and, arguably, to Yamasaki.

Nothing precludes the Legislature from enacting a law that substitutes \$35 million for the \$15.1 million share Act 178 established in 2016. In OHA v. State, 96 Hawai'i 388, 401, 31 P.3d 901, 914 (2001), the Hawaii Supreme Court said, only the Legislature can establish what OHA's share of those income and proceeds is:

. . . .the 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.

It is important to appreciate, however, that some of the gross receipts agencies that own or manage ceded lands collect have nothing to do with the use of public land trust lands. In addition to rent, agencies collect moneys from tenants for their utilities and real property taxes. Substantial portions of DOT Airports and Harbors fees and charges are assessed to pay the periodic interest and/or principal for the revenue bonds they issued for capital improvement projects. Historically, while most of the agencies that transfer receipts from the use of public land trust lands to OHA have been able to assess rents, fees, and charges sufficient to transfer \$15.1 million to OHA, OHA's \$15.1 million share was not based on only a small portion of the Airports Division's "ancillary receipts and not the Division's total gross receipts.

Enacting a statute that more than doubles OHA's share of the gross receipts from the ceded land, and requires all agencies that own or manage ceded lands and collect receipts from their use to cover shortfalls in any quarter's transfer, by an additional amount based on an "equal percentage," without knowing whether the proposal is feasible, could have serious consequences. Commitments should only be made if they can realistically be expected to be kept. At minimum, the Legislature needs to know whether, and how the agencies affected by this bill can and will be able to annually transfer the \$35 million OHA requests.



LATE

OFFICE OF HAWAIIAN AFFAIRS

Date: February 23, 2018
To: Senate Committee on Ways and Means
Via: Online Testimony Submission
From: Resource Management Chair Carmen Hulu Lindsey of the Office of Hawaiian Affairs
Subject: **Testimony in Support of Senate Bill 2136 Senate Draft 1**

Aloha Senate Committee on Ways and Means,

Mahalo for your consideration for this measure. I offer this testimony in **support of SB 2136 SD1 – RELATING TO INCREASING THE OFFICE OF HAWAIIAN AFFAIRS’ PRO RATA SHARE OF PUBLIC LAND TRUST FUNDS.**

As the constitution mandates 20% of the pro rata share of all public land trust (PLT) revenue, the Office of Hawaiian Affairs is advocating that the legislature uphold their mandate.

The proper funds allocated to OHA will ensure more of our people can be served. This measure will seek to ensure that OHA’s constitutional and statutory right to a pro rata share is more adequately reflected and that the state’s PLT obligations to Native Hawaiians are fulfilled, by: (1) Establishing \$35 million as an interim reflection of the 20% of PLT revenues that should be transferred annually to OHA, beginning in fiscal year 2018-2019, with certain limited exceptions; (2) Transferring \$119 million to OHA for underpaid PLT revenues between July 1, 2012 and June 30, 2018; (3) Requiring continued annual accounting of revenues from PLT lands; and (4) Convening a Public Land Trust Revenues Committee every six years, to review and make recommendations regarding OHA’s portion of PLT revenues.

Mahalo nui for your consideration of this measure.

Sincerely,

Trustee Hulu Lindsey

Chairperson of the Committee on Resource Management of the Office of Hawaiian Affairs