

TESTIMONY

SB 995

LATE



TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2009

WRITTEN TESTIMONY

ON THE FOLLOWING MEASURE:

S.B. NO. 995, RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS.

BEFORE THE:

SENATE COMMITTEE ON WATER, LAND, AGRICULTURE, AND HAWAIIAN AFFAIRS

DATE: Friday, February 13, 2009 TIME: 3:30 PM

LOCATION: State Capitol, Room 229

TESTIFIER(S): Mark J. Bennett, Attorney General
WRITTEN TESTIMONY ONLY

Chair Hee and Members of the Committee:

The Administration does not at this time take any position on the overall intent of this measure. We note, however, that this bill does not include an effort to resolve "future payment" issues. We testify to point out portions of S.B. No. 995 which we believe have serious problems irrespective of the merits of moving this concept forward at this time.

This bill authorizes the transfer of land totaling \$200,000,000 in value to OHA, in two phases. The first transfer which includes land in Hilo and Kakaako valued at \$127,203,140, is to be made by October 1, 2009 or six months after OHA receives access to that property and all documents related to that property from the State, with which to conduct due diligence. The second transfer of yet to be identified land is to be made by an act passed by the Legislature in 2010. See page 5, lines 16-22, and page 6, lines 1-5.

At "its sole and absolute discretion," and without any recourse on the State's behalf by the Legislature or the Executive Branch, OHA is allowed to unilaterally reject the Hilo or Kakaako lands, by individual parcels or in their entirety, without having, or specifying any cause. See page 20, lines 14-22. If that occurs, again without any further

input from the Legislature or the Executive Branch, the \$2,796,860 balance for which land must be transferred in 2010, must be increased by the 2008-2009 tax assessed value of the property OHA rejects. In other words, the actual lands to be transferred are unknown at this time. They could ultimately encompass lands wholly different from those described in the bill.

This also means that the State could then be faced with the real possibility that once contiguous property would be fragmented and substantially de-valued by OHA's rejection of some but not all of the parcels that make up the Hilo and Kakaako property.

The bill also makes no provision for either undoing the first transfer of lands that this bill effectuates, or offsetting the value of the lands that are transferred, against future efforts to finally resolve issues relating to the past, should legislation to effectuate the 2010 transfer of land not pass.

We also note that the bill should cover the period between November 7, 1978 and July 1, 2009, rather than July 1, 2008.

There are also technical problems which we will bring to the attention of this committee and the other committees to which it is referred at the appropriate time.


OFFICE OF HAWAIIAN AFFAIRS
Legislative Testimony

LATE TESTIMONY

SB 995
RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS

Senate Committee on Water, Land, Agriculture, and Hawaiian
Affairs

February 13, 2009
Room 229

3:30 p.m.

Aloha Chair Hee, Vice Chair Tokuda, and Members. This testimony is presented on behalf of Chair Apoliona and the OHA Board of Trustees. **OHA strongly supports Senate Bill No. 995** Relating to the Office of Hawaiian Affairs.

The purpose of this bill is to allow the State to most effectively and responsibly make progress toward meeting part of its constitutional obligation to Native Hawaiians pursuant to sections 4 and 6 of Article XII of the State Constitution by addressing the additional amount of income and proceeds that OHA is to receive from the public land trust for the period from November 7, 1978 to July 1, 2008. The bill would accomplish this by conveying to OHA in fee simple certain parcels of real property in Kaka'ako Makai in Honolulu and along the Banyan Drive resort area in Hilo, Hawai'i. The combined value of the Honolulu and Hilo properties is about \$127.2 million. The bill says that in 2010, additional, yet-to-be-determined real property valued at about \$72.8 million will be conveyed to OHA, bringing the total value of the conveyed properties to \$200 million.

This bill provides the opportunity for the Legislature to take a major step in resolving an issue that has remained incompletely addressed for three decades and that the Hawai'i Supreme Court has ruled is primarily under the authority and responsibility of the Legislature. The bill would help fulfill the State's solemn obligation to Hawaiians.

The bill is based on the results of negotiations, and of extensive beneficiary and legislative feedback from 2008, when other related legislation was introduced. OHA held over 45 meetings in the community and spent several months addressing comments received from those meetings. For example, to address concerns raised by the community, the legislation does not resolve future claims and instead continues the annual payments of \$15.1 million to OHA. Also in response to concerns, OHA is doing full due diligence on the lands.

WITNESS MY HAND AND SEAL OF OFFICE
THIS 15th DAY OF FEBRUARY 2006

The bill contains a provision in Section 4 that requires that the property conveyances made under the bill shall be deemed income and proceeds from the public land trust. This is important to ensure that the payments and transfers are counted towards the State's constitutional obligation under Article XII, section 6, to provide OHA with a pro rata share of the public land trust revenues.

While a detailed historical narrative of the issue of land trust revenues would not be appropriate in this testimony, kindly note the following:

- Following many years of relatively small transfers to OHA, Act 304, Session Laws of Hawaii of 1990, sought to establish how the State would carry out its state constitutional and statutory mandate to dedicate 20 percent of public land trust revenues to OHA's activities.
- Act 35, Session Laws of Hawaii 1993, appropriated \$136.5 million in general obligation bond funds to OHA as a settlement of undisputed claims to that point in time.
- Act 329, Session Laws of Hawaii 1997, established OHA's pro rata share to be \$15.1 million for each of the fiscal years 1997-1998 and 1998-1999.
- In 2001, the Hawaii Supreme Court ruled that Act 304 was invalid due to a conflict between one of its technical provisions and federal law.
- Act 34, Session Laws of Hawaii 2003, required the transfer of several million dollars to OHA to help continue the revenue stream following the court ruling against Act 304.
- Executive Order No. 03-03 set forth Governor Lingle's procedure for continuing the revenue stream.
- Act 178, Session Laws of Hawaii 2006, included an interim provision setting OHA's annual amount of land trust revenues at \$15.1 million and providing a lump sum payment of \$17.5 million for certain amounts that the Legislature determined were underpaid between July 1, 2001 through June 30, 2005.

Following the passage of Act 178, OHA resumed negotiations with the Attorney General over remaining unresolved issues. In

LAW OFFICE OF
DAVID M. HARRIS

the course of those negotiations, the parties agreed on the sum of \$200 million as being owed. The Attorney General suggested that the debt could be satisfied by a combination of land and money. OHA agreed with that suggestion and undertook to establish internal programs and staffing to manage any such real property that OHA would receive, either in these negotiations or otherwise. OHA engaged Dr. Stephen Roulac, an internationally known real estate consultant, to assist us. Dr. Roulac interviewed all of the OHA Trustees in order to understand how OHA's real estate management capacities could be maximized. His final report was adopted by the Board of Trustees on June 6, 2007.

Some people have been circulating a preliminary report by Dr. Roulac to attempt to show that OHA's Trustees and staff are incapable of managing real estate. That is a misuse of the document. Dr. Roulac's preliminary report is being erroneously called an audit. In actuality, it was merely a review of the existing capacities of OHA as a basis for developing the final strategy. It was not an audit.

The preliminary document led to the Board's adoption of OHA's "Real Estate Vision, Mission, and Strategy Policy" on June 6, 2007, which contains clear guidelines designed to enable OHA to competently manage real properties that it receives, however they may be received. As a result, authorized positions in OHA's Land Management hale have gone from three to twelve, and separate legal entities (LLCs) have been created to hold certain property and protect the Trust from liability. Particular to this bill, the Trustees proposed selections of land based not on small details but by approving criteria derived from our long-term real estate asset allocation. The lands proposed for acquisition by OHA in this bill are consistent with those Board-adopted criteria and will serve to promote OHA's mission of the betterment of the conditions of Native Hawaiians.

We thank you for taking all of these points into consideration. The issue is complex, but when all the small points are stripped away, and thirty years of struggle to address this issue are examined, one key truth remains: it is ultimately the Legislature's task to resolve the issue. You have before you OHA's considered attempt at a solution, and we urge your Committee to respond favorably to this bill.

Mahalo for the opportunity to testify.



LATE TESTIMONY

LEGISLATIVE TESTIMONY
SB 995
RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS

SENATE COMMITTEE ON COMMITTEE ON WATER, LAND, AGRICULTURE, AND
HAWAIIAN AFFAIRS

February 13, 2009

3:30 p.m.

Conference Room 229

Aloha Chair Hee, Vice Chair Tokuda and Members. 'O wau 'o Jonah Hau'oli Akaka, Director of Education at the Office of Hawaiian Affairs and beneficiary of OHA, I wish to express my support of Senate Bill 995 relating to the Office of Hawaiian Affairs.

I feel that it is about time that the State meet its constitutional obligation to Native Hawaiians by addressing the amount of income and proceeds that OHA is to receive from the public land trust for the period from November 7, 1978 to July, 2008.

I believe it is reasonable that in making progress toward meeting its obligation the State convey to OHA in fee simple, certain parcels of real property in Kaka'ako Makai in Honolulu and along the Banyan Drive resort area in Hilo, Hawai'i. OHA is doing full due diligence on the lands and will have an opportunity to reject properties which do not serve its best interests. Moreover, the fee simple conveyances should be free of certain any other State controls, allowing the lands to be put to use in OHA programs.

While OHA's mission and powers are broad, it has already demonstrated its capacity and ability to manage Waimea Valley, Wao Kele O Puna, and other properties which it has brought within its kuleana.

This bill provides the opportunity for the Legislature to take a major step in resolving an issue that has remained incompletely addressed for three decades and that the Hawai'i Supreme Court has ruled is primarily under the authority and responsibility of the Legislature. The bill would help fulfill the State's solemn and continuing obligation to Hawaiians.

I urge your Committee to respond favorably to this bill.

Mahalo for the opportunity to testify.



LATE TESTIMONY

LEGISLATIVE TESTIMONY

SB 995
RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS

SENATE COMMITTEE ON COMMITTEE ON WATER, LAND, AGRICULTURE, AND
HAWAIIAN AFFAIRS

February 13, 2009

3:30 p.m.

Conference Room 229

Aloha Chair Hee, Vice Chair Tokuda and Members. I am BJ Allen, Executive Director, State Council on Hawaiian Heritage and a beneficiary of the OHA. I wish to express my support of Senate Bill 995 relating to the Office of Hawaiian Affairs.

I feel that it is about time that the State meets its constitutional obligation to Native Hawaiians by addressing the amount of income and proceeds that OHA is to receive from the public land trust for the period from November 7, 1978 to July, 2008.

I believe it is reasonable that in making progress toward meeting its obligation the State convey to OHA in fee simple, certain parcels of real property in Kaka'ako Makai in Honolulu and along the Banyan Drive resort area in Hilo, Hawai'i. OHA is doing full due diligence on the lands and will have an opportunity to reject properties which do not serve its best interests. Moreover, the fee simple conveyances should be free of certain any other State controls, allowing the lands to be put to use in OHA programs.

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This bill provides the opportunity for the Legislature to take a major step in resolving an issue that has remained incompletely addressed for three decades and that the Hawai'i Supreme Court has ruled is primarily under the authority and responsibility of the Legislature. The bill would help fulfill the State's solemn and continuing obligation to Hawaiians.

I urge your Committee to respond favorably to this bill.

Mahalo for the opportunity to testify.



KO'OLAUPOKO HAWAIIAN CIVIC CLUB

February 13, 2009

WME TESTIMONY

TO: Sen. Clayton Hee, Chair
And Members
Senate Committee on Water, Land, Agriculture & Hawaiian
Affairs

FROM: Mahealani Cypher, President
Ko'olaupoko Hawaiian Civic Club

SUBJECT: S. B. 995, Relating to the Office of Hawaiian Affairs

With reservations, the Ko'olaupoko Hawaiian Civic Club supports Senate Bill 995 as a partial settlement of claims against the State of Hawai'i for the use of Hawaiian ceded lands between 1978 and the present.

We are disappointed that this bill does not offer as meaningful a package as was submitted to this Legislature a year ago, nor does it offer as much as was offered in the 1990s by then-Governor Cayetano.

However, we appreciate the efforts that have gone into crafting this legislation, and offer the following suggested comments and amendments:

1. The land valuations for the parcels noted in this legislation are based on 2008 values which have declined significantly since a year ago. Therefore, additional parcels should be added to this legislation's partial settlement package.
2. The bill should be amended to include conservation lands in Ha'iku Valley at Ko'olaupoko, O'ahu, conveyed to the State of Hawai'i approximately 10 years ago, and any other significant Hawaiian cultural resources on non-Ceded state lands.

Mahalo for this opportunity to offer our mana'o.

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LATE TESTIMONY

LATE TESTIMONY

LEGISLATIVE TESTIMONY

**SB995, RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS
SENATE COMMITTEE ON WATER, LAND, AGRICULTURE, AND HAWAIIAN AFFAIRS**

Friday, February 13, 2009

3:30 p.m.

Conference Room 229

Aloha Chairperson Hee, Vice Chairperson Tokuda, and committee members. My name is Carol Ho'omanawanui and I am Hawaiian. I support Senate Bill 995 relating to the Office of Hawaiian Affairs.

I believe this bill is an opportunity for the Legislature to resolve the past due amount of the income and proceeds that OHA is to receive from the public land trust. This bill will also help fulfill the State's on-going obligation to Hawaiians which is clearly established in our constitution.

The proposed properties to be conveyed to OHA currently generate income and/or have the potential for future income. The ability for OHA to have other sources of income is reassuring to me because it means OHA will have additional resources to carry out programs that benefit Hawaiians—both current and future generations, including myself and my family.

One of the purposes of OHA is the betterment of conditions of native Hawaiians and Hawaiians. This purpose is very broad and OHA will need a lot of resources in order to fulfill it. I think it's important that OHA initially be given properties that generate positive cash flow so that the management and stewardship costs of the properties received by OHA do not take away resources from programs that currently serve Hawaiians.

Please do not leave this issue for another generation of legislators and Hawaiians to resolve. I urge this committee to pass SB995. Mahalo for the opportunity to testify.

WIT TESTIMONY

LEGISLATIVE TESTIMONY

SB 995

RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS

SENATE COMMITTEE ON COMMITTEE ON WATER, LAND, AGRICULTURE, AND
HAWAIIAN AFFAIRS

February 13, 2009

3:30 p.m.

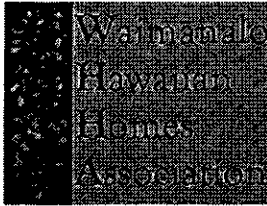
Conference Room 229

Aloha Chair Hee, Vice Chair Tokuda and Members. I am Shirley Swinney, President for Malu'ohai Residents Association, a Hawaiian homestead in Kapolei. Mahalo for this opportunity to testify **in support** of Senate Bill 995 that amends the law to provide for the Office of Hawaiian Affairs to receive a portion of the income and proceeds from land in the public trust.

As a leader of a Hawaiian homestead community association, I respectfully urge that you pass this bill. By providing the fee simple conveyance of certain parcels of land from State controls, this bill would allow the lands to be put to use in OHA programs. Through its various programs, the Office of Hawaiian Affairs reaches all the beneficiaries of the trust and help build stronger and healthier Hawaiian communities.

This bill provides the opportunity for the Legislature to take a major step in resolving an issue that has remained incompletely addressed for three decades and that the Hawai'i Supreme Court has ruled is primarily under the authority and responsibility of the Legislature. The bill would help fulfill the State's solemn and continuing obligation to Hawaiians.

We respectfully ask that you approve this bill and thank you for this opportunity to testify.



P.O. Box 353, Waimanalo, Hawaii 96795-0353

WAIMANALO HAWAIIAN HOMES ASSOCIATION
LAW TESTIMONY

TESTIMONY IN SUPPORT OF

SB 995

RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS

SENATE COMMITTEE ON WATER, LAND, AGRICULTURE, AND HAWAIIAN AFFAIRS

February 13, 2009

3:30 p.m.

Conference Room 229

Aloha Chair Hee, Vice Chair Tokuda and Members of the Senate Committee on Water, Land, Agriculture, and Hawaiian Affairs.

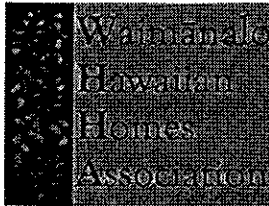
I am Paul P. Richards, President of the Waimanalo Hawaiian Homes Association (WHHA) and a beneficiary of the Department of Hawaiian Home Lands (DHHL) and the Office of Hawaiian Affairs (OHA.) I wish to express my support of Senate Bill 995 relating to the Office of Hawaiian Affairs.

I feel it is appropriate of a time the State should meet its constitutional obligation to Native Hawaiians by addressing the amount of income and proceeds OHA should receive from the public land trust for the period from November 7, 1978 to July, 2008.

Furthermore, I believe it is reasonable in making adequate steps forward as a sign of progress in meeting the obligations the State convey to OHA in fee simple, certain parcels of real property in Kaka'ako Makai in Honolulu and along the Banyan Drive resort area in Hilo, Hawai'i. OHA is performing a full due diligence on the lands and will have an opportunity to reject properties which they feel do not serve its best interests. Moreover, the fee simple conveyances should be free of certain any other State controls, allowing the lands to be put to use in OHA programs.

While OHA's mission and powers are broad, it has already demonstrated its capacity and ability to manage Waimea Valley, Wao Kele O Puna, and other properties which it has brought within its stewardship.

Paul P. Richards, President • Roxanne Hanawahine, 1st Vice President • N. Kilauea Wilson, 2nd Vice President • Maile Villarin, Recording and Corresponding Secretary • John K. Sang, Treasurer • Mary Ann Crowell, Historian • Roy Sang, Director • Squeaky Peahi, Director • Heidi "Ilima" Ho-Ramseyer • Anthony H. Sang, Sr., Director



P.O. Box 353, Waimanalo, Hawaii 96795-0353

LATE TESTIMONY

Page 2

This bill provides the opportunity for the Legislature to take a major step in resolving an issue that has remained incomplete and unaddressed for three decades. Furthermore, the Hawai'i Supreme Court ruled it is primarily under the authority and responsibility of the Legislature to resolve and settle the matter. This bill and its companion bill would help fulfill the State's solemn and continuing obligation to the Hawaiian population.

I urge your Committee to respond favorably by placing your full support to this bill. Mahalo for allowing me to submit this testimony.

O 'au me ka ha'aha'a (Humbly yours,)

Paul P. Richards

Paul P. Richards, President
Waimanalo Hawaiian Homes Association (WHHA)

HISTORIC HAWAII FOUNDATION

WTL TESTIMONY

VIA EMAIL: WTLTestimony@capitol.hawaii.gov

To: Senator Clayton Hee, Chair
Senator Jill N. Tokuda, Vice Chair
Committee on Water, Land, Agriculture and Hawaiian Affairs

From: Kiersten Faulkner *Kiersten Faulkner*
Executive Director, Historic Hawai'i Foundation

Committee Date: Friday, February 13, 2009
3:30 p.m.
Room 229

Subject: Support for SB995, Relating to the Office of Hawaiian Affairs

On behalf of Historic Hawai'i Foundation (HHF), I am writing in support of SB995, which would address the amount of income and proceeds that OHA is to receive from the public land trust for the period from November 1978 to July 2008.

Since 1974, Historic Hawai'i Foundation has been a statewide leader for historic preservation. HHF works to preserve the unique architectural and cultural heritage of Hawai'i and believes that historic preservation is an important element in the present and future quality of life, environmental sustainability and economic vitality of the state.

Historic Hawai'i Foundation is one of the beneficiaries of OHA's grant program. In 2008, a substantial grant to HHF was used to initiate the Preservation Resource Center, which provides technical assistance to stewards of cultural and historic properties. It specifically supports a circuit rider program to provide increased services to the neighbor islands and rural areas, as well as information services and technical assistance to homeowners, caretakers, businesses and public agencies with responsibilities for historic resources. In the first five months of the program, the field services include over 350 individual contacts in support of cultural resources.

The historic and cultural sites of Hawai'i are irreplaceable. It takes many people working together to ensure that the historic places we use and enjoy today will be here for future generations. To ensure that the special places of Hawai'i are preserved, used and enjoyed, all people need to work together to protect the heritage and physical legacy of the Islands.

The Office of Hawaiian Affairs has demonstrated leadership in perpetuating the cultural sites of the Islands for the benefit of the Hawaiian people and for the community at large. By resolving outstanding claims, OHA will be able to have greater certainty and resources to provide for its beneficiaries. By ending a long-unsettled issue, all parties will be able to turn their time, energy and attention to the betterment of Hawai'i.



LINDA LINGLE
GOVERNOR
STATE OF HAWAII



STATE OF HAWAII
DEPARTMENT OF HAWAIIAN HOME LANDS
P.O. BOX 1879
HONOLULU, HAWAII 96805

MICAH A. KANE
CHAIRMAN
HAWAIIAN HOMES COMMISSION

KAULANA H. PARK
DEPUTY TO THE CHAIRMAN

ROBERT J. HALL
EXECUTIVE ASSISTANT

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TESTIMONY OF MICAH A. KANE, CHAIRMAN
HAWAIIAN HOMES COMMISSION

BEFORE THE SENATE COMMITTEE ON WATER, LAND, AGRICULTURE AND
HAWAIIAN AFFAIRS

ON SB 995
RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS

February 13, 2009

Chair Hee, Vice-Chair Tokuda and Members of the Committee:

The Hawaiian Homes Commission and the Department of Hawaiian Home Lands supports the intent of SB 995. This bill attempts to resolve longstanding claims and disputes relating to public land trust proceeds due to the Office of Hawaiian Affairs (OHA). The time is long overdue to bring closure and resolution to these claims.

On January 26, 2009, Trustee Apoliona and OHA Administrator Clyde Namuo presented the terms of the settlement and requested the support of the Hawaiian Homes Commission. We support the intent of SB 995 and urge the Legislature to pass a bill to effectuate a settlement that reconciles wrongs done to the Hawaiian people.

LATE TESTIMONY

The Hawaiian Homes Commission will continue to dialogue with homestead leaders and will continue to share our opinion on the proposed legislation.

Mahalo for the opportunity to testify on this important bill.

LATE TESTIMONY

Legislature State of Hawaii
Senate Committee on Water, Land, Agriculture and Hawaiian Affairs
Senate Committee on Ways and Means

Hearing scheduled for
Friday, February 13, 2009 at 3:30 p.m.
On SB 995 relating to Office of Hawaiian Affairs; Public Land Trust

Testimony by H. William Burgess on his own behalf and on behalf of Aloha for All¹

Aloha and good afternoon Chairs Clayton Hee and Donna Mercado Kim and members of these important Senate committees.

I am an attorney who practiced law in Hawaii for 35 years until I retired in 1994. For the last ten years my wife and I and our friends and supporters have been advocating and litigating for the basic principle that Aloha is for everyone --- that every citizen of Hawaii, whatever his or her ancestry, is entitled to the equal protection of the laws and equal privileges and immunities under the laws. A major part of our efforts has been to preserve and support the Ceded Lands Trust for the benefit of **all** the people of Hawaii, not just for a favored few.

I speak against SB 995. It deals with the 1.2 million acres of the ceded lands separate from the 200,000 acres set aside under the Hawaiian Homes Commission Act. SB 995 would allow or require the State and the Governor and other responsible state officials to violate this portion of the Ceded Lands Trust and breach the fiduciary duty the State of Hawaii, as Trustee of the federally-created Ceded Lands Trust, owes to all its citizens.

The Ceded lands Trust is a federal trust for all the people of Hawaii, not just Native Hawaiians.

Decades of advertising by OHA seem to have created the impression in many peoples' minds that the ceded lands are held only or especially for native Hawaiians. That is incorrect. The ceded lands trust is for the benefit of all the people of Hawaii. The U.S. Supreme Court has confirmed that. So has the Ninth Circuit. So has the Hawaii Supreme Court.

In footnote 9 to the Ninth Circuit Court's decision filed August 7, 2007, the Court noted that "the lands ceded in the Admission Act are to benefit 'all the people of Hawaii,' not simply Native Hawaiians." *Day v. Apoliona*, 496 F.3d 1027, 1034 (9th Cir.

¹ Aloha for All, is a multi-ethnic group of men and women, all residents, taxpayers and property owners in Hawaii who believe that Aloha is for everyone and every citizen is entitled to the equal protection of the laws without regard to her or his ancestry.

2007) (emphasis in original), citing Justice Breyer's concurring opinion with whom Justice Souter joined in *Rice v. Cayetano*, 528 U.S. 495, 525 (2000), "But the Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii." (The 1.2 million acres consists of the 1.4 million acres returned to Hawaii upon statehood under Admission Act §5(b), less the about 200,000 acres Congress had set aside in 1921 as "available lands" under the Hawaiian Homes Commission Act. See also, Admission Act §5(g). It is this same about 1.2 million acres which is the corpus of the Ceded Lands Trust which is the source of the moneys claimed by OHA and proposed to be paid to OHA by SB 995).

"The federal government has always recognized the people of Hawaii as the equitable owners of all public lands; and while Hawaii was a territory, the federal government held such lands in 'special trust' for the benefit of the people of Hawaii." *State v. Zimring*, 58 Hawaii 106, 124, 566 P.2d 725 (1977).

"Excepting lands set aside for federal purposes, the equitable ownership of the subject parcel and other public land in Hawaii has always been in its people. Upon admission, trusteeship to such lands was transferred to the State, and the subject land has remained in the public trust since that time." *Id* at 125.

Just this month, the State of Hawaii acknowledged in its brief to the United States Supreme Court in *State v. OHA*, No. 07-1372, that the State's Trust obligations as to the ceded lands "run to all the people of Hawaii, and not just Native Hawaiians." State Brf. at 9; and

urged the high court to hold that the Apology Resolution does not repeal the Newlands Resolution or the Admission Act; that those federal laws foreclose OHA's claim that Native Hawaiians have title to the ceded lands; and those federal enactments also "foreclose any judicial remedy that rests on the potential validity of such claims."

The State's June 4, 2008 revelation. The Ceded Lands Trust generates no net income from which distributions to beneficiaries could lawfully be made.

On June 4, 2008 in *Day v. Apoliona*, the State of Hawaii, apparently for the first time in history, publicly accounted, at least in part, for and acknowledged that the Ceded Lands Trust costs the State many times more annually than the 1.2 million acres bring in. The State also acknowledged that this disparity between trust expenses and receipts has occurred in every year since statehood; and that the State has never before disclosed this information to the District Court or to the Ninth Circuit.

The Ceded Lands Trust distributions to OHA as "income and proceeds from that pro rata portion of the trust ... for native Hawaiians" have all been based on a false premise that only the pro rata of the net income for Native Hawaiians is going to OHA.

Trust law as to distributions to income beneficiaries.

In *Day* at 496 F.3d 1033 the Court reaffirmed that basic trust law principles apply to the Ceded Lands Trust.

(1) Uniform Principal and Income Act, "UPIA" HRS 557A-102, Definitions:

"Beneficiary" includes, ... in the case of a trust, an income beneficiary and a remainder beneficiary."

"Income beneficiary" means a person to whom a trust's net income is or may be payable.

"Income interest" means an income beneficiary's right to receive all or part of the net income, whether the terms of a trust require it to be distributed or authorize it to be distributed at the trustee's discretion.

"Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period.

Under UPIA, HRS 557A-103, Fiduciary duties; general principles

(a) In allocating receipts and disbursements to or between principal and income, ... a fiduciary: ...

(3) Shall administer a trust ... in accordance with this chapter if the terms of the trust ... do not contain a different provision or do not give the fiduciary a discretionary power of administration; and ...

(b) In exercising ... a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries.

The Restatement of the Law, Second, Trusts, 1959,
puts it this way:

§ 233 Allocation of Receipts and Expenses to Principal or Income.

(1) Except as otherwise provided by the terms of the trust, if property is held in trust to pay the income to a beneficiary for a designated period and thereafter to pay the principal to another beneficiary,

(a) the former beneficiary is entitled to, and only to, the net income during such period, and

(b) the latter beneficiary is entitled to the principal on the expiration of such period.

(2) The net income is ascertained by subtracting expenditures allocable to income from receipts allocable to income.

State: Beneficiaries only entitled to net income.

The State of Hawaii in its May 2, 1997 Appellant's Amended Opening Brief in *State*, Civ. No. 94-0205-1 before the Hawaii Supreme Court made the same point beginning at (SER F in No. 08-16668 page 254):

"Revenue" Includes Only Net Income. Not Gross Receipts.

Even if OHA's 20% share were to be calculated on a basis that included income from improvements as well as from the land, the partial summary judgments for OHA would still be inappropriate. Under Act 304, "Revenue" means all proceeds, fees, charges, rents, or other income or any portion thereof, derived from [various specified sources]." Thus, "revenue" refers to types of "income." A treatment consistent with the delineation of the trust in Section 5(f) of the Admission Act as consisting of the "lands and the income there from." And the word "income," although not specifically defined in the statute, has a settled meaning in the law generally and in the law of trusts in particular.

"Income" – and therefore "revenue" – does not mean gross receipts, as the Circuit Court apparently assumed. To the contrary, it is a well-established principle of the law of trusts that beneficiaries are entitled only to the net income from the trust. *In re Bernice P. Bishop Estate*, 36 Haw. 403, 427 (1943) (Kemp, C.J.) (noting that "'annual income' clearly refers to the net annual income"): *id.* at 464 ("[t]he word 'income' as employed in the will unquestionably means net income") (Peters, J., concurring in part and dissenting in part: emphasis added).

2A SCOTT & FRATCHER, THE LAW OF TRUSTS § 182, at 550 (4th ed. 1987) (trustee's duty to pay income to beneficiary is limited to paying "the net income, after deducting from the gross income the expenses properly incurred in the administration of the trust").

Thus, where the trust consists of an on-going business enterprise, the trustee's duty to pay income to the beneficiaries relates only to the net income, *i.e.*, the income remaining after the trust has paid for the costs of goods and services needed to operate the business or administer the trust. See *In re Sulzer's Estate*, 185 A. 793, 796 (Pa. 1936); *Smith v. Jones*, 162 So. 496, 498 (Fla. 1935); *Woodard v. Wright*, 22 P. 1118, 1119 (Cal. 1889); 3A SCOTT & FRATCHER, *supra*, § 244, at 324-325 ("[i]t is obvious that the cost of administering a trust should be borne by the trust estate and not by the trustees personally if those costs are properly incurred"): *id.* at 323.

In addition to operating expenses, net income also takes into account depreciation or amortization of the capital cost of improvements that the State has constructed at taxpayer expense on ceded land. 3A SCOTT & FRATCHER, *supra*, § 244, at 325. There is no dispute that the State had the right to construct improvements upon the ceded land; not even OHA claims that the State had the right to construct improvements upon the ceded land; not even OHA claims that the State breached its fiduciary duties by constructing, say, the Honolulu International Airport, public housing, or hospitals on ceded land.

What this means, then is that OHA is not entitled to 20% of the gross receipts of the Hilo Hospital or the public housing, but only to 20% of the net income (if any) from those facilities (unless they are sovereign functions, see subpoint C, *infra*). Any other interpretation leads to absurd results.

LATE TESTIMONY

Absent compelling evidence of a contrary legislative intent – and there is none – it is untenable to conclude that the Legislature meant in adopting Act 304 to depart from settled principles of trust law and to mandate such a fiscally imprudent state of affairs.

The magnitude of distributions.

Since 1980, acting under color of the above State of Hawaii constitutional and statutory requirements, the State has been distributing to OHA what the State characterized as “income and proceeds” from the pro rata portion of the 1.2 million acres of the Ceded Lands Trust for the betterment of the conditions of native Hawaiians. The distributions to OHA began with fiscal year ended June 30, 1981 and continued to the present. The 2007 Financial Report of OHA, show Public Land Trust balance of \$452,703,266 exclusively for the betterment of native Hawaiian and Hawaiian beneficiaries. During that almost three decades the State has made NO distributions exclusively for the rest of the beneficiaries.

OHA owes the State. SB 995 calls for the State to give OHA another \$200M of land and money to meet part of its constitutional obligation to native Hawaiians for the period from November 7, 1978, to July 1, 2008. The State has already given OHA over \$400M from the Ceded Lands Trust purportedly as the pro rata share of the trust income exclusively for native Hawaiian and Hawaiian beneficiaries. We now know that the trust has never, at least since 1959, generated any net income. Instead of further misapplication of trust funds, the State should recover from OHA all the moneys already paid under false premises.

Please reject SB 995. Mahalo.

Honolulu, Hawaii February 13, 2009.



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TESTIMONY

SB 995

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(END)