

JAN 19 2018

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
8 Hawaii. The board shall elect a chairperson from its
9 members.

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



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

11 This legislative directive has led to a series of lawsuits
12 concerning the office of Hawaiian affairs' constitutional pro
13 rata share and the statutory allocation of twenty per cent of
14 all funds that the legislature established to implement article
15 XII, sections 4 and 6, of the state constitution. In *Trustees*
16 *of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 737
17 P.2d 446 (1987), the Hawaii supreme court concluded that it was
18 unable to determine the parameters of section 10-13.5, Hawaii
19 Revised Statutes, because the issue of how the twenty per cent
20 apportionment is formulated was a political question for the
21 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 \$35,000,000 as the office of Hawaiian
10 affairs' annual share of the income and proceeds of
11 the public land trust beginning in fiscal year 2018-
12 2019. This amount does not include patient service
13 fees generated from state hospitals on public land
14 trust land and residential rental payments and fees
15 generated from state housing facilities on public land
16 trust land, to which the office of Hawaiian affairs
17 has not disclaimed an interest therein;
- 18 (2) Transfer to the office of Hawaiian affairs a sum of
19 \$119,000,000 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, 2018. 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;

8 (3) Require the continued annual accounting of all
9 receipts from lands described in section 5(f) of the
10 Admission Act; and

11 (4) Establish a public land trust revenues committee to
12 study and make recommendations every six years
13 regarding the amount of the income and proceeds from
14 the public land trust that the office of Hawaiian
15 affairs shall receive annually.

16 SECTION 2. Notwithstanding the provisions of chapter 10,
17 Hawaii Revised Statutes, including section 10-13.5, Hawaii
18 Revised Statutes, and until further action is taken by the
19 legislature for this purpose, the income and proceeds from the
20 pro rata portion of the public land trust under article XII,
21 section 6 of the state constitution for expenditure by the



1 office of Hawaiian affairs for the betterment of the conditions
2 of native Hawaiians for each fiscal year beginning with fiscal
3 year 2018-2019 shall be \$35,000,000.

4 SECTION 3. Notwithstanding the provisions of chapter 10,
5 Hawaii Revised Statutes, including section 10-13.5, Hawaii
6 Revised Statutes, beginning in fiscal year 2018-2019, the
7 departments of agriculture; accounting and general services;
8 business, economic development, and tourism; defense; education;
9 health; land and natural resources; and transportation (for its
10 harbors and highways divisions), and any other department or
11 agency that collects receipts from the lands within the public
12 land trust, including but not limited to the University of
13 Hawaii, shall determine and transfer to the office of Hawaiian
14 affairs that portion of their receipts from the use, sale,
15 lease, or other disposition of lands within the public land
16 trust collected during each fiscal quarter, necessary to ensure
17 that a total of \$8,750,000 of receipts generated by the public
18 land trust is transferred to the office of Hawaiian affairs,
19 within thirty days of the close of each fiscal quarter; provided
20 that for fiscal year 2018-2019, the departments shall have until
21 thirty days after the close of the fiscal year to transfer a



1 total of \$35,000,000 from their receipts from the use, sale, or
2 exchange of lands within the public land trust collected during
3 fiscal year 2018-2019, to the office of Hawaiian affairs by the
4 procedures set forth in this Act.

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

9 SECTION 4. No later than twelve days after the close of
10 each fiscal quarter, the director of finance or the director's
11 designee shall determine the total amount of receipts
12 transferred by any department or agency that collects receipts
13 from the lands within the public land trust to the office of
14 Hawaiian affairs during the immediately prior fiscal quarter.

15 If the total amount of receipts transferred to the office
16 of Hawaiian affairs is less than \$8,750,000 in the immediately
17 prior fiscal quarter, and unless the governor fixes the amounts
18 each agency shall transfer to the office of Hawaiian affairs,
19 the director of finance or the director's designee shall:

20 (1) Make up the difference between \$8,750,000 and the
21 amount of receipts transferred in the immediately



1 prior fiscal quarter by transferring up to the entire
2 amount on deposit in the carry-forward trust holding
3 account established by the director of finance
4 pursuant to executive order 06-06; or

- 5 (2) Make up the difference between \$8,750,000 and the
6 amount of receipts transferred in the immediately
7 prior fiscal quarter by establishing the additional
8 amount of receipts that each agency must transfer to
9 the office of Hawaiian affairs pursuant to section 3
10 of this Act.

11 If the total amount of receipts transferred to the office
12 of Hawaiian affairs is more than \$8,750,000 in the immediately
13 prior fiscal quarter, the director of finance shall notify the
14 office of Hawaiian affairs and request that the office of
15 Hawaiian affairs transfer the amount in excess of \$8,750,000
16 into the carry-forward trust holding account established by the
17 director of finance pursuant to executive order 06-06. This
18 subsection shall not apply to a transfer of receipts at the
19 close of fiscal year 2018-2019.

20 SECTION 5. There is appropriated out of the general
21 revenues of the State of Hawaii the sum of \$119,000,000, less



1 the funds in the carry-forward trust holding account established
2 by the director of finance pursuant to executive order 06-06,
3 including the amount of the unauthorized expenditure from that
4 carry-forward trust holding account to the harbors division of
5 the department of transportation in fiscal year 2015-2016, or so
6 much thereof as may be necessary for fiscal year 2017-2018 to
7 pay to the office of Hawaiian affairs amounts received from the
8 use of lands in the public land trust that the legislature has
9 determined were underpaid between July 1, 2012 through June 30,
10 2018.

11 The sum appropriated shall be expended by the department of
12 budget and finance.

13 The director of finance shall transfer the funds in the
14 carry-forward trust holding account established by the director
15 of finance pursuant to executive order 06-06, including the
16 amount of the unauthorized expenditure from that carry-forward
17 trust holding account to the harbors division of the department
18 of transportation in fiscal year 2015-2016, to the office of
19 Hawaiian affairs.



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

- 10 (1) The total gross amount;
- 11 (2) The amount transferred to the office of Hawaiian
12 affairs;
- 13 (3) The amount retained by the State;
- 14 (4) The amount or funds in which the amount specified in
15 paragraph (3) was transferred or deposited;
- 16 (5) The parcel of land subject to section 5(f) of the
17 Admission Act that generated the receipt, whether by
18 tax map key number, department of land and natural
19 resources inventory number, or other recognizable
20 description; and



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

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

8 The office of Hawaiian affairs shall be consulted by the
9 department of land and natural resources in determining the
10 method in which the accounting shall be conducted and in
11 ensuring that the accounting is accurate and inclusive of all
12 receipts generated by the public land trust.

13 SECTION 7. (a) There is established within the department
14 of land and natural resources a public land trust revenues
15 committee consisting of:

16 (1) The governor, who shall serve as chairperson of the
17 committee;

18 (2) The president of the senate;

19 (3) The speaker of the house of representatives; and

20 (4) The chairperson of the office of Hawaiian affairs.



1 (b) No later than one hundred eighty days prior to the
2 convening of the regular session of 2024, and every six years
3 thereafter, the public land trust revenues committee shall study
4 and make recommendations to the governor and the legislature,
5 including any proposed legislation, regarding the annual amount
6 of the income and proceeds from the public land trust that the
7 office of Hawaiian affairs shall receive annually under the
8 state constitution and other state law.

9 (c) The public land trust revenues committee shall submit
10 its findings and recommendations, including any proposed
11 legislation, to the legislature no later than twenty days prior
12 to the commencement of the convening of the regular session of
13 2024, and every six years thereafter.

14 (d) The public land trust revenues committee shall not be
15 subject to the requirements of chapter 92, Hawaii Revised
16 Statutes.

17 SECTION 8. Nothing in this Act shall resolve or settle, or
18 be deemed to acknowledge the existence of, the claims of native
19 Hawaiians to the income and proceeds of a pro rata portion of
20 the public land trust under article XII, section 6, of the state
21 constitution.



1 SECTION 9. This Act shall take effect upon its approval;
2 provided that section 5 shall take effect on July 1, 2018.

3

INTRODUCED BY:


By Request



S.B. NO. 2136

Report Title:

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

Description:

Establishes \$35,000,000 as the Office of Hawaiian Affairs' pro rata share of the public land trust. Transfers \$119,000,000 less certain funds to the Office of Hawaiian Affairs for underpayment of the public land trust funds for 7/1/12 to 6/30/18. Requires the Department of Land and Natural Resources to provide an annual accounting of receipts from lands described in section 5(f) of the Admissions Act. Establishes a committee to recommend the annual amount of the income and proceeds from the public land trust that the Office of Hawaiian Affairs shall receive annually. Appropriates funds.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

