

JAN 19 2022

A BILL FOR AN ACT

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

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 include article XII, sections 5 and
3 6, which established the office of Hawaiian affairs and its
4 board of trustees.

5 The legislature further finds that Act 273, Session Laws of
6 Hawaii 1980, enacted as section 10-13.5, Hawaii Revised
7 Statutes, implements the office of Hawaiian affairs' pro rata
8 share and provides that "[t]wenty per cent of all funds derived
9 from the public land trust . . . shall be expended by the office
10 . . . for the 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 Hawaii State Constitution. In
16 *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 737 P.2d



1 446 (1987), the Hawaii supreme court concluded that it was
2 unable to determine the parameters of section 10-13.5, Hawaii
3 Revised Statutes, because the issue of how the twenty per cent
4 apportionment is formulated was a political question for the
5 legislature to determine.

6 In response to the *Yamasaki* decision, the office of
7 Hawaiian affairs and the governor's office entered lengthy
8 negotiations and submitted to the legislature an agreement to
9 clarify the extent and scope of the twenty per cent portion.
10 The legislature, based on this agreement, enacted Act 304,
11 Session Laws of Hawaii 1990.

12 In a memorandum dated April 28, 1993, the office of
13 Hawaiian affairs and the State memorialized the results of their
14 negotiations and noted that the office of state planning and the
15 office of Hawaiian affairs "recognize and agree that the amount
16 specified does not include several matters regarding revenue
17 which [the office of Hawaiian affairs] has asserted is due [the
18 office of Hawaiian affairs] and which [the office of state
19 planning] has not accepted and agreed to."



1 These disagreements led to litigation. The office of
2 Hawaiian affairs specified that it was seeking its pro rata
3 share of revenues received by the State based on:

4 (1) Waikiki duty free receipts (in connection with the
5 lease of ceded lands at the Honolulu International
6 Airport);

7 (2) Hilo Hospital patient services receipts;

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

11 (4) Interest earned on withheld revenues.

12 On October 24, 1996, the trial court granted the office of
13 Hawaiian affairs' motion for partial summary judgment on each of
14 its aforementioned claims. The State appealed.

15 On September 12, 2001, the Hawaii supreme court ruled in
16 *Office of Hawaiian Affairs v. State of Hawaii*, 31 P.3d 901
17 (2001) ("OHA I"), that Act 304 was effectively repealed by its
18 own terms, so that once again, it was necessary for the
19 legislature to clarify the office of Hawaiian affairs'
20 constitutional pro rata share and the statutory allocation of
21 twenty per cent of all funds to be managed and administered by



1 the office of Hawaiian affairs. In its decision, the Hawaii
2 supreme court affirmed *Yamasaki*, observing:

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

15 *Office of Hawaiian Affairs v. State of Hawaii*, 31 P.3d at
16 914 (citations omitted)."

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



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

3 Subsequently, Act 178, Session Laws of Hawaii 2006 (Act
4 178), which took effect on June 7, 2006, stated:

5 "The legislature acknowledges that the State's obligation
6 to native Hawaiians is firmly established in the state
7 constitution. (See Haw. Const. art XII)."

8 While finding that "many complex issues require the
9 legislature's further attention and consideration in the wake of
10 the repeal of Act 304," Act 178 was enacted with a stated
11 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 purpose by
16 requiring:

17 "[Until] further action is taken by the legislature for
18 this purpose, the income and proceeds from the pro rata
19 portion of the public land trust under article XII, section
20 6, of the state constitution for expenditure by the office
21 of Hawaiian affairs for the betterment of the conditions of



1 native Hawaiians for each fiscal year beginning with fiscal
2 year 2005-2006 shall be \$15,100,000."

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

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

19 Act 178 remained in effect as a purely interim legislative
20 measure setting the office of Hawaiian affairs' annual income
21 and proceeds from the public land trust for the betterment of



1 the conditions of native Hawaiians at \$15,100,000 beginning in
2 fiscal year 2005-2006, pending further legislative action on the
3 subject.

4 The second purpose of Act 178 was the identification of
5 "revenue-generating public trust lands and the amounts derived
6 from those lands by requiring that the department of land and
7 natural resources provide an annual accounting to the
8 legislature." For fiscal years 2011-2012, 2012-2013, 2013-2014,
9 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019, 2019-
10 2020, and 2020-2021, the State reported to the legislature total
11 gross public land trust revenues in the amounts of \$150,939,203,
12 \$159,971,589, \$163,322,176, \$178,043,261, \$177,617,893,
13 \$202,528,564, \$225,079,055, \$289,767,657, and \$229,631,870,
14 respectively, or an average of \$197,433,474 over the ten fiscal
15 years. Twenty per cent of the average reported gross revenue
16 for fiscal years 2011-2012 through 2020-2021 is \$39,486,695.
17 The current overpayments to the office of Hawaiian affairs for
18 fiscal years 2011-2012 through 2020-2021 total approximately
19 \$25,000,000.

20 The legislature finds that it is now in the best interests
21 of the office of Hawaiian affairs, the State, and all citizens



1 of Hawaii to enact another interim legislative measure regarding
2 the office of Hawaiian affairs' constitutional pro rata share of
3 the public land trust for the betterment of the conditions of
4 native Hawaiians, in light of the information, data, and facts
5 provided to the legislature by state agencies over the last ten
6 fiscal years.

7 The legislature further finds that a public land trust
8 revenues negotiating committee within the office of Hawaiian
9 affairs is necessary to resolve these outstanding questions.
10 Given the sensitive nature of the anticipated negotiations and
11 the respective positions of the parties, including the
12 membership of the governor or the governor's representative, the
13 legislature finds it necessary to provide an exemption from part
14 I, chapter 92, Hawaii Revised Statutes, thereby precluding
15 public participation in the process. Moreover, the ultimate
16 settlement and details resulting from the public land trust
17 negotiating committee shall be approved by the legislature,
18 which process shall be open to public comment.

19 Accordingly, the purpose of this Act is to serve as a
20 purely interim measure to:



- (1) Return to the office of Hawaiian affairs certain moneys that the office of Hawaiian affairs transferred to the State in response to claims by the department of budget and finance that the moneys constituted overpayments of public land trust receipts to the office of Hawaiian affairs for fiscal years 2012-2013, 2013-2014, and 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019, 2019-2020, and 2020-2021; establish that any claimed overpayments to the office of Hawaiian affairs for fiscal years 2021-2022 and 2022-2023 are not required to be returned to the State; and ensure that any shortfalls in quarterly amounts paid to the office of Hawaiian affairs under this Act are timely paid to the office of Hawaiian affairs upon discovery of the shortfall; and
- (2) Establish 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 office of Hawaiian affairs shall receive annually.



1 SECTION 2. Notwithstanding the provisions of Act 178,
2 Session Laws of Hawaii 2006; chapter 10, Hawaii Revised
3 Statutes, and the requirements of executive order 06-06;
4 beginning in fiscal year 2021-2022:

5 (1) All departments and agencies that collect receipts for
6 the use, sale, lease, or other disposition of the
7 public land trust shall each fiscal quarter transfer
8 to the office of Hawaiian affairs twenty per cent of
9 each receipt derived from the use, sale, lease, or
10 other disposition of the public land trust, unless
11 precluded by federal law; provided that in no event
12 shall the total amount of receipts transferred to the
13 office of Hawaiian affairs for any fiscal quarter be
14 less than \$; and

15 (2) If at any time the department of budget and finance,
16 office of Hawaiian affairs, or any other state agency
17 discovers that the total amount of receipts
18 transferred to the office of Hawaiian affairs for any
19 fiscal quarter fell short of the amount required by
20 this Act, the director of finance or the director's
21 designee shall ensure that within ten days of the



1 discovery of the shortfall, an amount equal to the
2 shortfall be transferred to the office of Hawaiian
3 affairs.

4 For the purposes of this section, "receipt" means all
5 proceeds, fees, charges, rents, or other income, or any portion
6 thereof, derived from any sale, lease, license, permit, or other
7 similar proprietary disposition, permitted use, or activity,
8 that is situated upon and results from the actual use of lands
9 comprising the public land trust, and including any penalties or
10 levies exacted as a result of a violation of the terms of any
11 proprietary disposition, but excluding any income, proceeds,
12 fees, charges, or other moneys derived through the exercise of
13 sovereign functions and powers including:

- 14 (1) Taxes;
15 (2) Regulatory or licensing fees;
16 (3) Fines, penalties, or levies;
17 (4) Registration fees;
18 (5) Moneys received by any public educational institution,
19 including the University of Hawaii, and the community
20 college system, from its educational programs and



- 1 ancillary services, such as tuition, registration
2 fees, meals, books, grants, or scholarships;
3 (6) Interagency and intra-agency administrative fees or
4 assessments;
5 (7) Moneys derived from or provided in support of penal
6 institutions and programs;
7 (8) Grants, carry-overs, and pass-throughs;
8 (9) Federal moneys, including federal-aid, grants,
9 subsidies, and contracts;
10 (10) Moneys collected from the sale or dissemination of
11 government publications; and
12 (11) Department of defense proceeds on state-improved
13 lands.

14 SECTION 3. Notwithstanding the provisions of Act 178,
15 Session Laws of Hawaii 2006; chapter 10, Hawaii Revised
16 Statutes, and the requirements of executive order 06-06; the
17 department of budget and finance shall provide to the office of
18 Hawaiian affairs the moneys in the carry-forward trust holding
19 account established pursuant to executive order 06-06 to which
20 the office of Hawaiian affairs transferred moneys in response to
21 claims by the department of budget and finance that the moneys



1 constituted overpayments of public land trust receipts to the
2 office of Hawaiian affairs for fiscal year 2012-2013, fiscal
3 year 2013-2014, fiscal year 2014-2015, fiscal year 2015-2016,
4 fiscal year 2016-2017, fiscal year 2017-2018, fiscal year 2018-
5 2019, fiscal year 2019-2020, and fiscal year 2020-2021, plus any
6 overpayment moneys the office of Hawaiian affairs transfers to
7 the carry-forward trust holding account for fiscal year 2021-
8 2022 and fiscal year 2022-2023. There shall be \$ to
9 be left in the holding account to act as contingency payments to
10 meet the minimum \$ quarterly payment.

11 SECTION 4. There is established a public land trust
12 revenues negotiating committee consisting of the president of
13 the senate or the president's designee, the speaker of the house
14 of representatives or the house speaker's designee, the governor
15 or the governor's designee, and the chairperson of the office of
16 Hawaiian affairs or the chairperson's designee. The committee
17 shall not be subject to the requirements of part I of chapter
18 92, Hawaii Revised Statutes.

19 The committee shall engage in discussions with the purpose
20 of resolving the matter of the amount of the income and proceeds
21 from the public land trust that the office of Hawaiian affairs



1 shall receive annually under the State Constitution and other
2 state law. The committee shall submit a status report on the
3 progress of the committee's discussions to the legislature no
4 later than twenty days prior to the convening of the regular
5 session of 2023, and shall submit a final report containing the
6 committee's findings and recommendations, including any proposed
7 legislation, to the legislature no later than twenty days prior
8 to the convening of the regular session of 2024.

9 SECTION 5. Nothing in this Act shall be deemed to resolve
10 or settle the claims of native Hawaiians to the income and
11 proceeds of a pro rata portion of the public land trust under
12 article XII, section 6, of the Hawaii State Constitution.

13 SECTION 6. Any funds transferred pursuant to this Act
14 shall be deemed income and proceeds from the public land trust,
15 just as if the funds had been paid out of the income and
16 proceeds from the public land trust pursuant to article XII,
17 section 6, of the Hawaii State Constitution.

18 SECTION 7. This Act shall take effect upon its approval.
19

INTRODUCED BY: _____



S.B. NO. 2021

Report Title:

Office of Hawaiian Affairs; Public Land Trust; Public Land Trust Revenues Negotiating Committee

Description:

Requires agencies that collect receipts for any disposition of the public land trust to each fiscal quarter transfer to the Office of Hawaiian Affairs twenty per cent of each receipt from the disposition. Returns to the Office of Hawaiian Affairs certain moneys previously claimed as public land trust overpayments to the office. Establishes a public land trust revenues negotiating committee exempted from part I of chapter 92, Hawaii Revised Statutes.

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

