

**REPORT ON  
PUBLIC LAND TRUST  
“INCOME AND PROCEEDS” DUE OHA**

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## **1. EXECUTIVE SUMMARY**

From the creation of the Office of Hawaiian Affairs by State constitutional amendment in 1978, OHA and the State of Hawai‘i have disagreed over what portion of the income and proceeds from the public land trust should be transferred to OHA.

In 1987, 2001 and 2006, the Hawai‘i Supreme Court repeatedly held that the Legislature has a constitutional obligation to pass legislation to clarify the amount of revenues derived from the public land trust that should be annually transferred to OHA. In the 2006 decision, the Court held that the Legislature must pay OHA its fair share of revenue generated from State airports that sit on public land trust lands, and that the Legislature must pass legislation to fairly address this and other outstanding public land trust revenue disputes.

In 2008, after four years of due diligence and discussions with the Lingle administration, OHA and the State entered into a settlement agreement that would transfer to OHA land and cash in the total amount of \$200 million to satisfy OHA’s claim to past due revenues from the public land trust for the years 1978 to 2008. The settlement agreement also provided that in future years OHA would receive at least \$15.1 million annually and established a reporting process that would provide information on revenues generated by the public land trust. Legislation to adopt that settlement failed in the 2008 session for several reasons. The main reason was that the \$15.1 million future payment portion of the settlement and the release of claims that addressed that portion of the settlement were unacceptable to key legislators.

In the 2009 session, OHA returned with proposed legislation that again attempted to obtain approval of the \$200 million past due settlement but expressly omitted the going forward portion of the settlement. The going forward revenue issues were to be addressed by Act 178 (2006) that provides OHA with \$15.1 million annually and any change in that policy would be addressed by future legislation. This proposal failed to get out of conference committee during the 2009 legislative session primarily because no agreement could be reached among the conferees on whether the legislation should also address a global resolution of the State’s public land trust obligations to OHA.

In 2010, OHA will ask the legislature to satisfy the past due obligations by enacting legislation establishing the past due obligation of \$200 million and providing the manner of payment over time as follows:

For each fiscal year beginning with fiscal year 2015-2016 (July 1, 2015 through June 30, 2016), the State shall pay at least \$30,000,000 to the office of Hawaiian affairs; provided that the obligation to make payments of at least \$30,000,000 as set forth in this section shall continue until the \$200,000,000 and applicable interest has been paid to the office of Hawaiian affairs; provided further that the State shall pay the office of Hawaiian affairs interest on any remaining balance owed from July 1, 2010 at the rate provided for in section 662-8, Hawaii Revised

Statutes, which is currently at 4 percent a year; provided further that nothing in this Act shall bar the State from paying to the office of Hawaiian affairs, in a monetary payment or monetary payments, all or part of the \$200,000,000 prior to July 1, 2015.

With regard to the future, OHA will recommend that the Legislature defer a re-examination of what amount of the public land trust revenues should be provided to OHA for the time being and leave in place Act 178 (2006).

OHA believes that this proposal is fair given the State's current economic status, and also satisfies the State's constitutional obligation to OHA to provide the appropriate amount of public land trust revenues to OHA. If the State fails to adopt this proposal or any other fair and constitutionally appropriate legislation during the 2010 legislative session, the State will have once again violated its constitutional obligations to OHA under standards previously determined by the Hawai'i Supreme Court.

This report contains a chronology of the events surrounding the negotiations for settlement of OHA’s claim to past due and future payments on income and proceeds from the lands of the “public land trust.”<sup>1</sup>

## **2. EARLY HISTORY**

The ongoing dispute over income and proceeds from the lands of the public land trust between the Office of Hawaiian Affairs (“*OHA*”) and the State of Hawai‘i centers around approximately 1.2 million acres of lands received by the State of Hawai‘i at Statehood in 1959; it is intertwined with the overall claims of Hawaiians to approximately 1.8 million acres of crown, government and public lands once belonging to the Kingdom of Hawai‘i, commonly referred to as the “ceded lands” from which the public land trust lands largely derive.

In the 1898 “*Joint Resolution To provide for annexing the Hawaiian Islands to the United States*,” the Republic of Hawai‘i “ceded and transferred” to the United States absolute fee and ownership of the 1.8 million acres described above. The annexation impliedly placed these public lands into a special public trust, as it required that all revenue or proceeds from said lands “shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.” The “Organic Act” of April 30, 1900 gave the control and management of these lands to the government of the Territory of Hawai‘i.

The Admission Act, which was passed in 1959, transferred a portion of these lands and explicitly created the public land trust to be held by the State of Hawai‘i. Importantly, subsection 5(f) of the Admissions Act recognized the public trust status of this portion of the “ceded lands,” stating that:

***The lands granted to the State of Hawaii by subsection (b) of this section. . . , shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide. . . (Emphasis added.)***

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<sup>1</sup> Hereinafter, reference to “public land trust lands” refers to:

(1) Lands ceded to the United States by the Republic of Hawai‘i under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and granted to the State of Hawai‘i by virtue of section 5(b) of the Admission Act of 1959; or

(2) Lands retained by the United States under sections 5(c) and 5(d) of the Admission Act of 1959 and later conveyed to the State under section 5(e).

For many years after the initial passage of the Admission Act, the majority of the proceeds from the public land trust were provided to the Department of Education for public schools, a listed 5(f) purpose. In 1978, an amendment created article XII of the Constitution of the State of Hawai‘i. Article XII reiterated the public trust status of the lands. Section 4 of Article XII states that:

The lands granted to the State of Hawaii by *Section 5(b) of the Admission Act* and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, *shall be held by the State as a public trust for native Hawaiians and the general public*. (Emphasis added.)

Section 6 of Article XII provides that OHA shall receive any funds and proceeds for native Hawaiians and Hawaiians, and “manage and administer . . . all *income and proceeds from that pro rata portion of the trust referred to in section 4* of this article for native Hawaiians . . .” (Emphasis added.)

### **3. 1979-1993: CHAPTER 10 - CLARIFYING PAYMENTS DUE TO OHA**

#### **A. Hawai‘i Revised Statutes Chapter 10 (1979)**

In 1979, the Legislature enacted Hawai‘i Revised Statutes Chapter 10, which, according to the Supreme Court of Hawai‘i in *Office of Hawaiian Affairs v. State*, 96 Hawai‘i 388, 31 P.3d 901 (2001) (“*OHA I*”), “set forth the purposes of OHA and described the powers and duties of the Board of Trustees.” The Legislature then amended Chapter 10 in 1980 to add § 10-13.5, which states as follows:

Twenty per cent *of all funds* derived from the public land trust, described in section 10-3, shall be expended by the office, as defined in section 10-2, for the purposes of this chapter. (Emphasis added.)

Despite the passage of § 10-13.5, clarity was lacking as to what “twenty percent of all funds” mandated as payment. Demonstrative of the ambiguity of section 10-13.5 is a study by the Legislative Auditor that noted that “[f]iscal issues are difficult to identify until what precisely the Office of Hawaiian Affairs (OHA) is entitled to receive under HRS chapter 10 is clarified.” *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 165, 737 P.2d 446, 453 (1987) (“*Yamasaki*”). At that time, OHA was receiving approximately \$1.5 million annually from public land trust income and proceeds.

## B. OHA v. Yamasaki (1987)

On September 7, 1983, OHA's trustees filed a "Complaint for Declaratory and Injunctive Relief" in *The Trustees of the Office of Hawaiian Affairs v. Yamasaki* against the Attorney General of the State, the Chairman of the Board of Land and Natural Resources, and the Director of Finance in their official capacities due to the "unsettled state of affairs regarding funds to be owed to OHA." *Yamasaki*, 69 Haw. at 165, 737 P.2d at 453. On appeal, Terence S. Yamamoto, Deputy Attorney General, represented the State Attorney General, the Department of Land and Natural Resources ("**DLNR**") and the Director of Finance. Boyce R. Brown, Jr. and Jerel D. Fonseca, with David C. Schutter and Stacy Moniz with them on the briefs, represented the Trustees of OHA. At issue was realization of revenues from the proceeds arising out of the sale of sand from Pāpōhaku Beach, Moloka'i. *Id.* On March 8, 1984, the Trustees filed a second Complaint against the aforementioned parties and also named the Director of Transportation and the Aloha Tower Development Corporation as defendants. *Id.* The Complaint sought to receive "20% of all of the income and proceeds' derived by the State from 'sales, leases or other dispositions of [various] 5(f) Trust Lands.'" *Id.*

Despite ruling that the issues at bar were not justiciable, the Hawai'i Supreme Court identified issues surrounding OHA and the public land trust. The court recognized that in creating OHA in 1979, "the legislature acknowledged that 'much [was] left to subsequent legislatures, the Office of Hawaiian Affairs, and its board of trustees to work out the appropriate boundaries of the public trust.'" *Id.* at 172, 737 P.2d at 457. The court also identified legislative committee reports which identify uncertainties with respect to the ceded lands comprising the trust and "the funds derived therefrom[,]" concluding that:

the many uncertainties surrounding the matter of ceded lands and the disposition of revenues generated by the use of ceded lands can best be resolved by ascertaining what and where exist or arise from their use, and the effect on all parties concerned with the use distribution of revenues generated from ceded lands.

*Id.* at 173, 737 P.2d at 457. Accordingly, the court held that "the seemingly clear language of HRS § 10-13.5 actually provides no '**judicially discoverable and manageable standards**' for resolving the disputes and they cannot be decided without 'initial policy determinations of a kind clearly for nonjudicial discretion.'" *Id.* (Emphasis added.)

## C. Act 304 (1990)

In 1990, the Legislature of the State of Hawai'i enacted Act 304. Following the Supreme Court's urging in *Yamasaki*, Act 304 amended HRS § 10-13.5 to provide that OHA be paid "twenty per cent of all **revenues** derived from the public land trust." Act 304 defined revenue as:

all proceeds, fees, charges, rents, or other income, or any portion thereof, derived from any sale, lease, license, permit, or other similar *proprietary disposition*, permitted use, or activity, that is situated upon and results from the actual use of lands comprising the public land trust . . . but excluding any income, proceeds, fees, charges, or other moneys derived -through the exercise of *sovereign functions* and powers including:

- (1) Taxes;
  - (2) Regulatory or licensing fees;
  - (3) Fines, penalties, or levies;
  - (4) Registration fees;
  - (5) Moneys received by any public educational institution, including the **University of Hawaii**, and the community college system, from its educational programs and ancillary services, such as tuition, registration fees, meals, books, grants, or scholarships;
  - (6) Inter-agency and intra-agency administrative fees or assessments;
  - (7) Moneys derived from or provided in support of penal institutions and programs;
  - (8) Grants, carry-overs, and pass-throughs;
  - (9) Federal moneys, including federal-aid, grants, subsidies, and contracts;
  - (10) Moneys collected from the sale or dissemination of government publications; and
  - (11) Department of defense proceeds on state-improved lands.
- (Emphasis added.)

Section 8 of Act 304 provided for a determination of the amount past due to OHA from the public land trust and *the rates of interest* to be applied:

***The department of budget and finance and the office of Hawaiian affairs shall determine the actual amount equivalent to twenty per cent of the revenue under sections 10-2 and 10-13.5 which is payable to the office, less any moneys appropriated and received under section 10 of this Act, or received by the office from the department of land and natural resources, or any other agency, pursuant to sections 10-2 and 10-13.5 during the period of June 16, 1980 through June 30, 1991. Interest on such actual amount, at the rate of six per cent a year, compounded annually, from June 16, 1980 to June 17, 1982, and at the rate of ten per cent a year, compounded annually, from June 18, 1982, shall be added to such actual amount until paid.*** (Emphasis added.)

Section 8 was important because absent this statutory entitlement to prejudgment interest, there is no legal right to prejudgment interest in non-contract cases against the State. See *Taylor-Rice v. State*, 105 Hawai'i 104, 109, 111, P.3d 659, 664, 666 (2004) (“HRS § 662-2 provides in clear and unambiguous language that ‘[t]he State ... shall not be liable for interest prior to judgment

[.]’ This constitutes a plain *reservation* of immunity with respect to pre-judgment interest on judgments rendered against the State.”).

Section 16 of Act 304 contained a poison pill provision which invalidated the Act in its entirety in the event the Act is “*held to conflict with any federal or state law, rules, or regulations.*” (Emphasis added.) In the event of invalidation, the laws previously in force would be reenacted in their last existing form.

#### **4. 1993-1995: OHA UNDER ACT 304**

##### **A. \$130M Settlement (1993)**

On April 16, 1993, the Hawai‘i State Legislature passed Act 35 which authorized the issuance of \$136.5 million in general obligation bond funds to satisfy the State's obligation to native Hawaiians for the unsegregated use of ceded lands between 1981 and 1990. Specifically, the Act provided that:

There is appropriated a sum not to exceed \$136,500,000 out of the general obligation bond funds of the State of Hawaii or so much thereof as may be necessary for the period March 1, 1993, to February 28, 1995, for the purposes of this Act. Any funds remaining unexpended or unencumbered as of February 29, 1996, shall lapse as of such date.

On April 27, 1993, OHA, the Department of Budget & Finance, and the Office of State Planning (“*OSP*”) entered into a *Memorandum of Agreement* to settle certain amounts owed from June 16, 1980 through June 30, 1991, and pursuant to Section 8 of Act 304, which provided for the calculation of past due payments owed from the “revenue” resulting from the public land trust and for the interest under such. The Memorandum authorized payment of \$111,859,000.00 to OHA as payment for the period of June 16, 1980 through June 30, 1991. This amount was adjustable subject to audit, and subsequently increased to **\$129,584,488.85**. In arriving at this amount, OHA used Gary Nishikawa of Deloitte & Touche and the State used Coopers & Lybrand.

The accounting methodology that was used to arrive at the \$129,584,488.85 amount was subsequently used by the State to arrive at the annual Chapter 10 revenue payments to OHA from 1992 to 1996. This resulted in OHA receiving approximately **\$15 million** annually in Chapter 10 revenue payments during those years. This was generally calculated as \$9 million from non-airport revenues and \$6 million from airport landing fees.

The Memorandum concerned only agreed upon certain sources of ceded lands revenue. Section 7 of the Memorandum provides as follows:

7. Excluded Matters. Notwithstanding any other provisions of this Memorandum to the contrary, *OSP and OHA recognize and agree that the Amount specified in section 1*

**hereof does not include several matters regarding revenue which OHA has asserted is due to OHA and which OSP has not accepted and agreed to.** (Emphasis added.)

The State subsequently satisfied the \$130 million settlement through two warrants on June 4, 1993.

### **B. OHA I Complaint Filed (1994)**

On January 14, 1994, OHA initiated *Office of Hawaiian Affairs v. State*, Civ. No. 94-0205-01 (“**OHA I**”) seeking payment of OHA’s “pro rata share” of public land trust revenues from contested sources not settled in the 1993 *Memorandum of Agreement*. OHA was represented by attorney James E. Duffy Jr., Colbert Matsumoto and Leslie Kobayashi. The State of Hawai‘i was represented by Deputy Attorneys General Charleen M. ‘Āina and Dorothy Sellers, and Andrew L. Frey *Pro Hac Vice*. In *OHA I*, OHA alleged entitlement to an additional \$15 million annually from the “several matters regarding revenue which OHA has asserted is due to OHA and which OSP has not accepted and agreed to” as referred to in section 7 of the 1993 *Memorandum of Agreement*. Those several matters included: (1) Waikīkī Duty Free receipts (in connection with the lease of public land trust lands at the Honolulu International Airport); (2) Hilo Hospital patient services receipts; (3) receipts from the Hawai‘i Housing Authority and the Housing Finance and Development Corporation (“HHA/HFDC”) for projects situated on public land trust lands; and (4) interest earned.

### **C. HCDCH Amended Complaint Filed (1995)**

On August 11, 1995, OHA, through its then trustees (Abraham Aiona, Moanike‘ala Akaka, Rowena Akana, Billie Beamer, A. Frenchy Desoto, Clayton H.W. Hee, Kīna‘u Boyd Kamali‘i, Moses K. Keale, Sr., and Samuel L. Kealoha, Jr.) along with individual plaintiffs (Pia Thomas Aluli, Jonathan Kamakawiwo‘ole Osorio, Charles Ka‘ai‘ai, and Keoki Maka Kamaka Ki‘ili) filed their first amended complaint against the Housing and Community Development Authority of Hawai‘i and the State of Hawai‘i in *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai‘i*, Civ. No. 94-4207-11 (“**HCDCH**”). Attorney Sherry Broder represented OHA, Attorneys Bill Meheula, Hayden Aluli and David Liu represented the individual plaintiffs, and Deputy Attorneys General Margery Bronster, Sonia Faust and Dawn N.S. Chang represented the State of Hawai‘i. Initially, OHA and the individual plaintiffs filed separate complaints in November 1994. The amended complaint sought an injunction preventing the sale of both property in Leiali‘i which was former crown lands, and all ceded lands in the State of Hawai‘i. The complaint alleged that the sale of ceded lands would be made “without regard for the claims of Hawaiians to those lands” and thus breaches fiduciary duties the State owes to native Hawaiians.

#### **D. Judge Heely Rules in Favor of OHA in *OHA I* (1996)**

On October 24, 1996, Circuit Court Judge Daniel G. Heely granted OHA's motion for summary judgment in *OHA I*, ruling that, under Act 304, OHA was entitled to revenues from Waikīkī Duty Free, Hilo Hospital, HHA/HFDC, and interest on the past due revenues.

In finding that OHA was due revenues for Waikīkī Duty Free, Judge Heely concluded that, as the State calculates the rents for the Airport Duty Free based on gross sales generated from the Airport and Waikīkī Shops, "the percentage rent the State charges based on off-Airport gross sales is clearly rent or a fee for the use of Airport facilities, . . . located on Public Trust Lands." Thus, the State was required to pay OHA a pro rata share from Waikīkī Duty Free concessions.

In finding entitlement to revenues from HFDC and HHA, Judge Heely rejected the State's argument that revenues from HFDC and HHA are based on sovereign functions and thus exempt from payment under HRS Chapter 10 because HRS § 10-2 listed exempted State activities and HFDC and HHA are not listed. Further, Judge Heely found that the Admission Act made no such distinction, and as such the definition of "revenues must be strictly construed."

Judge Heely relied on decisions in other jurisdictions to find that State hospitals are proprietary in function, and that State run hospitals do not meet the traditional definition of sovereign functions. Further, as Hilo Hospital was not excluded in § 10-2, Act 304, it "must be construed broadly to include such income as 'revenues.'"

#### **5. 1996-2000 OHA IN THE LATE 90'S**

##### **A. U.S. Dept. Of Transportation - OHA Payments Contrary to Federal Law (1996)**

In a September 1996 report, the U. S. Department of Transportation Inspector General concluded that the State's payments to OHA between 1992 and 1995 in the amount of \$28.2 million for OHA's pro rata share of airport revenues "were a diversion of airport revenue" in violation of federal law. *OHA I*, 96 Hawai'i at 396, 31 P.3d at 909. The USDOT sought investigation pursuant to:

(1) the Airport and Airway Improvement Act of 1982, (codified at 49 U.S.C. § 47107(b)(1)), which directed airport owners to use "all revenues generated by the airport . . . for the capital or operating costs of the airport, the local airport system, or other local facilities which are owned or operated by the owner or operator of the airport and directly related to the actual transportation of passengers or property"; and (2) the Federal Aviation Administration (FAA) Authorization Act of 1994, (codified at 49 U.S.C. § 47107(1)(2)(b)), which **prohibited the "use of airport revenues for general economic development,**

**marketing, and promotional activities unrelated to airports or airport systems[.]”(Emphasis added.)**

Id. (internal citations omitted). Following investigation, the Inspector General concluded “State’s payments to OHA between 1992 and 1995 in the amount of \$28.2 million ‘were a diversion of airport revenue in violation of 49 § U.S.C. 47107(b)’ because ‘OHA provided no services for the \$28.2 million.’” *Id.*

**B. Governor Cayetano and Airlines Oppose Judge Heely’s Decision (1996)**

Also in September 1996, Governor Ben Cayetano and the Airlines Committee of Hawai‘i (“ACH”), jointly denounced Judge Heely’s decision in *OHA I*, claiming that airport landing fees would need to more than triple in order to satisfy payments to OHA.

In October of 1996, ACH released a white paper entitled the “Potential Airport-Related Economic Impact” of Judge Heely’s ruling in *OHA I*. As a result of the projected landing fee increase, ACH warned that payments to OHA of its pro rata share of airport revenues could result in the following:

***Higher landing fees and a reduction in the number of flights to Hawaii would necessarily result in increased transportation costs, for international, domestic and interisland passengers and cargo.***

***Fewer visitors to the islands would result in dire consequences for an economy so dependent on tourism.*** Hotel occupancy would be adversely impacted. The budding convention business would likely suffer. Sales and retail industries would lose important tourist dollars. Decreased revenues generated by these industries would reduce transient accommodations tax and general excise tax revenues. These “ripple” effects would greatly impede any progress the State has made in recovering from the economic recession of the first half of this decade.

***In addition, given the potential impact upon the State’s finances, it is foreseeable that the State may be forced to curtail funding for important public services.*** Certainly, it would become more difficult for the State to achieve optimum bond ratings, making it more expensive for the State to finance important public projects.

***In addition to these direct impacts, the circuit court’s ruling would have a much larger “domino” effect on Hawaii’s economy.*** (Emphasis added.)

**C. Attorney General Bronster Initially Opposes USDOT Report (1996)**

By letter dated November 11, 1996 to the State of Hawai‘i Department of Transportation, Attorney General Bronster disputed the findings of the USDOT Inspector General’s report,

which found disposition of airport revenues to OHA under Act 304 violated FAA requirements regarding dispersal of airport revenues. In her letter, Attorney General Bronster stated that:

Following Act 304's passage, the question of payment of these expenses out of the airport special fund as an operating expense of the airport system was submitted to, discussed with, and agreed to by the State and the airline users of the airport system. ***As such, we view the subject payment of \$28.2 million in airport special fund moneys to OHA pursuant to Act 304 as an operating cost of the State's airports within the meaning of 49 U.S.C.A. § 47107(b)(1).*** (Emphasis added.)

Bronster concluded that there was no failure to comply "with FAA requirements by the State of Hawaii Department of Transportation in the payment of this \$28.2 million in airport special funds to OHA."

#### **D. State Files Notice of Appeal in OHA I (1996)**

On November 12, 1996, the State filed a Notice of Appeal in *OHA I* challenging Judge Heely's October 1996 order granting OHA's motions for summary judgment and denying the State's motion for summary judgment on liability issues. Judge Heely did not issue any orders regarding the amount of damages.

#### **E. Act 329 - Fixes Interim Payments at \$15.1M for Two Years (1997)**

In the 1997 legislative session, "recognizing the potential invalidity of section 16 of Act 304" due to the findings of the USDOT report, the Hawai'i State Legislature enacted Act 329, which provided for \$15.1 million payments in 1997-1998 and 1998-1999 independent of any finding as to the validity of Act 304. *See Office of Hawaiian Affairs v. State*, 110 Hawai'i 338, 344, 133 P.3d 767, 773 (2006) ("***OHA II***"). Specifically, Act 329 codified as HRS § 10-13.3, that provided:

Notwithstanding the definition of revenue contained in this chapter and the provisions of section 10-13.5, ***and notwithstanding any claimed invalidity of Act 304, Session Laws of Hawaii 1990***, the income and proceeds from the pro rata portion of the public land trust under article XII, section 6 of the state constitution for expenditure by the office of Hawaiian affairs for the betterment of the conditions of native Hawaiians for each of fiscal year 1997-1998 and fiscal year 1998-1999 shall be ***\$15,100,000***. (Emphasis added.)

According to the court in *OHA II*, these interim payments were made to "ensure that adequate income and proceeds from a pro rata portion of the public trust continue to be available to [OHA] . . . while the contemplated process to address issues relating to the public trust is underway." *OHA II* at 344, 133 P.3d at 773. Additionally, Section 1 of Act 329 notably provided that:

[i]t is in the public interest that the relevant issues relating ... but not limited to issues currently under litigation between the state and [OHA], be addressed within and remain under the control of the executive and legislative branches of state government *as essentially political questions* within the spirit of the Supreme Court of Hawaii's opinion in [*Yamasaki*]. (Emphasis added.)

*OHA I*, 96 Hawai'i at 393, 31 P.3d at 906.

#### **F. Ed Case Letter to USDOT Asking for Expedition of FAA Opinion**

On April 22, 1997, then State Representative Ed Case sent a letter to the Secretary of the U.S. Department of Transportation and cc'd to the FAA requesting the USDOT's assistance "*in accelerating the FAA's public issuance of its response.*" Representative Case explained that, as co-chair of the House conferees in committee, the FAA's response was important to "deeply engaged [] deliberations" on a bill that "seeks to resolve all controversies and mitigate state liability." The FAA's position, according to Representative Case, "would materially affect the realistic options available to the committee." Even if the FAA was not prepared to issue a full public response, Case requested "even a bifurcated or advance oral response on the specific issue whether the FAA agrees that the state's payments to OHA are impermissible. . ." (Emphasis added.)

#### **G. FAA Memorandum - OHA Can Not Be Paid Airport Revenue (1997)**

On April 25, 1997, the Federal Aviation Administration issued a memorandum concurring with the Inspector General's Opinion that payments to OHA made out of revenues from the Honolulu International Airport were in violation of the Airport and Airway Improvement Act. The FAA concluded that the revenues payable to OHA did not constitute operating costs pursuant to an agreement between OHA and the State and as thus:

Since the 20 percent payments to OHA have not been justified as capital or operating costs of the airport and do not qualify under the grandfather provisions of 49 U.S.C. § 47107(b), **HRS § 10-13.5 would appear to conflict with 49 U.S.C. § 47107(b), as applied to HDOT's grant obligated airports.** (Emphasis added.)

As the FAA found that such a conflict made the \$28.2 million already paid to OHA "unlawful diversions" of airport revenues, the FAA demanded that "the \$28.2 million paid to the OHA trust fund plus interest should be reimbursed to the Airports account, and HDOT should ensure that no further payments of airport revenue are diverted to the OHA for services not received by the airport."

## **H. A.G. Bronster Will Not Oppose the FAA’s Position on Payments to OHA**

On August 19, 1997, Attorney General Margery Bronster’s article “Don’t Litigate On OHA” was published in the Honolulu Advertiser. In that article Bronster states that the State will not contest the FAA’s position on payment of airport revenues to OHA despite their previous position that revenues paid to OHA were an “*operating cost of the State’s airports within the meaning of 49 U.S.C.A. § 47107(b)(1).*” (Emphasis added.)

### **I. Forgiveness Act (1997)**

In October of 1997, the U.S. Congress enacted the “Forgiveness Act,” which prohibited further payment of airport revenues for “claims related to ceded lands” in exchange for declining to seek repayment of the \$28.2 million previously paid to OHA from airport revenues. The Act contains a “Clarification” provision stating:

*[n]othing in this Act shall be construed to affect any existing Federal statutes, enactments, or trust obligations created thereunder, or any statute of the several States that define the obligations of such States to Native Americans, Native Hawaiians or Alaska natives in connection with ceded lands, except to make clear that airport revenues may not be used to satisfy such obligations.*  
(Emphasis added.)

In December of 1997, Attorney General Bronster subsequently submitted the act to the Hawai‘i Supreme Court for the “Court’s use” in the pending appeal in *OHA I*.

### **J. Governor Cayetano Makes Settlement Offer (1999)**

In March of 1999, the Cayetano administration offered a global ceded lands settlement to OHA of \$251 million and approximately 365,000 acres of ceded lands in exchange for a release of all claims to ceded land revenues, release of *any* claim for title to State controlled ceded lands, and dismissal of the *HCDCH* lawsuit. On April 1, 1999, the OHA Board of Trustees rejected Governor Cayetano’s offer and countered with a release of claims that was restricted to OHA’s claims to public land trust income and proceeds for a compromised amount of \$300 million on April 1, 1999. After OHA did not receive a response from Governor Cayetano, OHA sent another counter offer on April 16, 1999. On April 27, 1999, and after OHA did not receive a response from Governor Cayetano, the OHA trustees voted 5-3 to end negotiations with the Cayetano administration. Trustees Haunani Apoliona, Frenchy DeSoto, Louis Hao, Colette Machado and Mililani Trask voted to end negotiations, with Trustees Clayton Hee, Hannah Springer and Rowena Akana voting against the motion to end negotiations with the State.

The transcripts of the April 27 meeting indicate that the Board of Trustees voted to sever negotiations because Governor Cayetano insisted on a release of Native Hawaiian claims to State controlled ceded lands and the majority of the trustees refused to relinquish that claim. Some of the testimony on this issue provides:

Trustee Machado: Thank you Madam Chair. ***The bottom line remains that if we had to accept any offer that the state is willing to pay OHA, the \$304 million dollars, it is contingent on us barring claims that we may be entitled to. That is not something that the state would be willing to remove.*** Therefore, we have no choice, absolutely no choice, but to vote against continuing the negotiation settlement discussions. . . . I believe that the Governor and his team will not back down on removing those claims for us and just take the money.

...

Trustee Trask: I want to comment on two things. The first business that [Trustee Hee] you are right, the state has offered \$251 million dollars. If we were to take that and put it in the bank we'd have \$551 million dollars and if we look at the rate of indexing, in a very short time it would be \$1.2 billion dollars. . . . ***[but] [w]e are not here for the purpose of trying to cut a deal so that we can get \$1.2 billion dollars in the bank within several months.*** The issue of compromise has been raised and I am on the negotiating team and I'm very regretful that we have not been able to bring forward a solution for our people and for this Board. But I'm asking you to take a look at what the record is. We have not heard from the state since March 31<sup>st</sup>. Two offers were sent to them that were compromise offers and we have yet to receive even the decency of a response from the Governor. I can compromise in a negotiation but I cannot compromise my integrity and ***I cannot compromise the fiduciary obligation that I have. And I cannot tolerate being at this point and having waited for months and having worked for months for a settlement I cannot tolerate now, as Trustee Machado points out, the only response we have from the Governor is a threat that there will not be a fair settlement from Heely unless we waive our right to sue and all of our people's claims to the entire ceded lands trust.***

...

Trustee DeSoto: ***We will be the only people in Hawai'i, a race of people, that will not have the right to sue. We will compromise that, we will give that up, at what cost? And I understand, I've been told, that this doesn't exclude reparations.*** (Emphasis added.)

### **K. Governor Cayetano Stops Payment of Airport Revenue to OHA**

On June 10, 1999, Governor Cayetano issued a statement of objections to Senate Bill No. 1635, which, in conjunction with Act 329, sought to provide an alternative funding mechanism due to the uncertainty surrounding Act 304 and which if enacted would appropriate \$16,060,000 to OHA. Therein, Governor Cayetano stated:

*[ T]he trustees of [OHA] have discontinued our earlier settlement efforts and asked me to veto this bill.* I understand further that the trustees prefer that the differences between the State and OHA presently pending before the Hawaii Supreme Court in [OHA I], be decided by the Court. I must assume that the trustees are aware the federal legislation precludes the State's airports system from paying for the use of public trust lands with airport revenue, and that without the \$16,060,000 appropriation this bill would make, *there will be no non-airport revenue appropriation to pay for the airport system's use.* (Emphasis added.)

Governor's Message, "Statement of Objections to Senate Bill No. 1635," in 1999 Senate Journal, at 803 (emphases added). Immediately thereafter, the State reduced payments to OHA by approximately \$6 million annually.

#### L. U.S. Supreme Court Issues Decision in *Rice v. Cayetano* (2000)

On February 23, 2000, the United States Supreme Court issued its decision in *Rice v. Cayetano*, 528 U.S. 495 (2000). On appeal, Petitioner Freddy Rice was represented by attorney John Goemans, and the State of Hawai'i was represented by future Chief Justice John Roberts. In *Rice*, the Court held that the Fifteenth Amendment's protection of a citizen's right to vote forbids Hawaiian-only voting for OHA's elections. The Court distinguished the voting restrictions in place for OHA elections from Native American tribal elections:

If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi-sovereign. The OHA elections, by contrast, are the affair of the State of Hawaii. OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations.

*Id.*, 1058-59. The Court also provided that OHA's ancestral requirement for voting was essentially a racial requirement as the Court proclaimed that "ancestry can be a proxy for race." *Id.* at 1055.

The majority did not decide whether State benefits in favor of Native Hawaiians violate the Equal Protection Clause. However, it did comment that:

If Hawaii's restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law. Among other postulates, *it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State—and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993—has determined that native Hawaiians have a status like that of Indians in organized tribes*, and that it may, and has, delegated to the State a broad authority to preserve that status.

*Id.* at 518. (Emphasis added.)

Justice Breyer issued a concurring opinion agreeing in the result reached by the majority, but reasoned that such a ruling should be based upon a rejection of the state's analogy of OHA "to a trust for an Indian tribe because the record makes clear that (1) there is no "trust" for native Hawaiians here, and (2) OHA's electorate, as defined in the statute, does not sufficiently resemble an Indian tribe." *Id.* at 1060. In concluding that OHA does not constitute a trust for native Hawaiians, Justice Breyer cited to the Admission Act, which states that the public land trust is to benefit "all" people of Hawai'i, include those who are native. *Id.* at 1061. Taking into account OHA's funding, which comes from sources including appropriations from the State and Federal grants, Justice Breyer concluded that OHA is "simply a special purpose department of Hawaii's state government." *Id.*

## **6. 2001-2002: OHA AFTER OHA I**

### **A. Hawai'i Supreme Court Overturns Heely *OHA I* Decision (2001)**

In September of 2001, the Supreme Court of Hawai'i issued its decision in *Office of Hawaiian Affairs v. State*, 96 Hawai'i 388, 31 P.3d 901 (2001) ("***OHA I***"). The Court ruled that, in light of the Forgiveness Act, Act 304 was repealed by section 16 of its own terms which reinstates the laws in effect at the time of *Yamasaki* in the instance a federal law conflicts with any portion of Act 304. *OHA I*, 96 Hawai'i at 401, 31 P.3d at 914.

In so deciding, the court rejected OHA's argument that the language of Act 304 which specified payment of revenues or amounts "equivalent to" OHA's pro rata share of public land trust revenues allowed payment of revenues from other sources equivalent to 20% of the applicable revenue from the airport. First, the court reasoned that the equivalence language served to authorize payment of the \$130 million settlement in 1993 out of the general obligation bond fund in satisfaction of the outstanding debt. *OHA I*, 96 Hawai'i at 398, 31 P.3d at 911. Second, the court stated that the Legislature could not intend the equivalence language to authorize payment from other sources, as (1) the legislature would thus be "abdicating its . . . duty to control the public fisc" and (2) that the poison pill provision of the Act evinces the intent that the Act itself should not be applicable when a conflict arises. *OHA I*, 96 Hawai'i at 398-99, 31 P.3d at 911-12.

Despite its ruling, the court's decision recognized important issues regarding the settlement of past due ceded land revenue payments to OHA. First, the court acknowledged "***that the State's obligation to native Hawaiians is firmly established in our constitution.***" Second, the court recognized that "***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.***" Finally, the Court promised that it "***will not hesitate to declare unconstitutional those enactments that do not comport with the mandates of the constitution.***" (Emphasis added.) Thus, despite ruling against OHA, *OHA I* provides favorable language mandating the Legislature to satisfy past due income and proceeds obligation to OHA.

## **B. Governor Cayetano Immediately Stops All Chapter 10 Payments**

In September of 2001, following the decision in *OHA I* in September of 2001, Governor Cayetano stopped all payments to OHA of its 20% pro rata share of public land trust funds.

## **C. Trial Court Releases Written Decision in *HCDCH* in Favor of the State (2002)**

On November 19, 2001, a jury waived trial began in *HCDCH* before Judge Sabrina McKenna. On December 5, 2002, Judge McKenna issued her written decision where she ruled that OHA and individual plaintiff's claims were barred by the legal theories of sovereign immunity, waiver and estoppel, and justiciability. Further, the court found that the State had the "express authority" sell ceded lands from the public land trust and cited Attorney General Bronster's AG Opinion No. 95-03 as support for that conclusion. The trial court's decision was appealed on February 3, 2003.

## **7. 2003-2006 SETTLEMENT NEGOTIATIONS WITH LINGLE ADMINISTRATION AND ACT 178**

### **A. Governor Lingle Reinstates Payments to OHA by Executive Order (2003)**

On February 11, 2003, Governor Linda Lingle issued Executive Order 03-03, reinstating the undisputed amounts of the annual public land trust payments prior to Governor Cayetano's stoppage of payments in September 2001, amounting to approximately \$9 million a year. Prior to the executive order, Attorney General Mark Bennett issued a memorandum providing that Governor Lingle's administration had the authority to reinstate the annual payments to OHA via executive order. Governor Lingle's order made good on a campaign promise to immediately reinstate OHA's annual payments.

Governor Lingle's order recognized that Article XII of the Constitution of the State of Hawai'i, specifically sections 4 and 6, and HRS § 10-13.5, which provides that twenty per cent of all "funds derived from the public land trust . . . shall be expended by OHA" is still valid following the decision in *OHA I*. The order also recognized that:

nothing in [*OHA I*] presently requires or *precludes agencies from determining on a case-by-case basis whether particular receipt for the use of land was "derived from the public land trust," and transferring twenty per cent of such receipts to the [OHA] to use to better the conditions of native Hawaiians[.]*

. . .

[T]here is no good reason not to resume the practice [DLNR] followed prior to the enactment of Act 304 providing twenty per cent of receipts derived from the public land trusts . . .

...

[T]here is likewise no good reason for other state agencies not to also resume the practice of [DLNR] and again provide twenty per cent of funds derived from public land trust land to OHA[.] (Emphasis added.)

The order directed “all departments . . . [to] accumulate and transfer on a quarterly basis, twenty per cent of all receipts they derive from the public land trust, to OHA.” While not stating the total amount to be paid explicitly, the order reinstated the pre *OHA I* annual payments less the pro rata share of the airport revenues. Governor Lingle did not resume airport landing fees payments of approximately \$6 million annually because of the prohibition in the 1997 Forgiveness Act.

### **B. OHA Investigates Past Due Revenue Claim**

In early 2003, the OHA Ad Hoc Committee on Ceded Land Revenues led by recently elected Trustee Boyd Mossman concluded that OHA should retain counsel to investigate the validity of OHA’s claim to past due revenues that OHA has not yet received. Shortly thereafter, OHA retained attorney Bill Meheula to conduct this evaluation. Meheula concluded that the State likely breached fiduciary duties owed to Hawaiians that resulted in the passage of the Forgiveness Act that caused loss of income and proceeds owed to OHA arising out of revenues generated from Waikīkī Duty Free, State hospitals, HHA/HFDC, airport landing fees and interest on said amounts.

### **C. OHA Files Complaint in *OHA II* (2003)**

On July 21, 2003, OHA filed its Complaint against the State of Hawai‘i in *Office of Hawaiian Affairs v. State*, Civil No. 03-1-1505-07 (“*OHA II*”). OHA was represented by Meheula, Robert G. Klein, Nadine Y. Ando and Christopher J. Cole. The State was represented by Deputy Attorneys General Dorothy Sellers, Charleen M. ‘Āina and Girard D. Lau. OHA alleged that the State breached fiduciary duties by:

- (1) failing to challenge the positions set forth in the FAA Memorandum; (2) resolving its dispute with the FAA by obtaining a forgiveness of the prior \$30 million payment in exchange for a promise not to make future airport revenue payments to OHA and not to appeal the positions set forth in the FAA Memorandum; (3) breaching the trust duty of impartiality by not challenging the positions set forth in the FAA Memorandum in order to use them as a sword in [ *OHA I* ] and subsequent appeal; (4) failing to timely advise OHA that the State was not going to continue to challenge the positions set forth in the FAA Memorandum or IG Report, and that it was planning to settle with the federal government, in order to provide OHA with a fair opportunity to take measures to step into the State's position to oppose the FAA; and, (5) failing to obtain instructions from the Court on how to proceed given its conflict position of

defending the State against OHA in *OHA I* and having a duty to challenge the positions set forth in the FAA Memorandum.

*OHA II*, 110 Hawai'i at 346, 133 P.3d at 775.

#### **D. Judge Chang Grants State's Motion to Dismiss in *OHA II* (2003)**

After hearings held on November 12, 15, and 25, Judge Gary Chang granted the State's Motion to Dismiss in *OHA II* filed on September 15, 2003, by written order dated December 26, 2003.

While the State asserted at least 8 separate grounds for dismissal, Judge Chang granted the motion on political question grounds:

Turning finally to the question of justiciability and the political question, [t]hat's where this court believes the crux of the fight is on this matter. I think that there is no question that the Supreme Court in *OHA I* made a determination that the dispute should go back to the Legislature for redefinition of what constitutes revenues under Chapter 10, and without that guidance the court could not address the question of damages for the judicially manageable standard by which OHA's share can be determined.

This court is of the mind that this is a different cause of action in one sense, and that is, by analogy, the court views this case in the nature of a case like a legal malpractice case, where you have a case within a case.

But be that as it may, permeating everything that has been asserted in connection with this – the case at bar, it seems to always go back to the Legislature can ultimately provide the remedy.

Even if at the legislature the OHA is faced with the comment by the legislature that oh, you lost *OHA II*, or the case at bar, it still comes down to a legislative determination, and the court simply could not get that out of its mind, notwithstanding the quality of briefing that OHA submitted.

So the court does conclude that we still have at the crux of the case at bar a political question, one that seeks to collaterally attack the ruling and the holding of *OHA I*. ***We are still left with judicially unmanageable standards or the lack of a judicially manageable standard for determining damages, notwithstanding the fine analogy of a legal malpractice case.***

Again, even in that analogy, there was still some discussion about the necessity to go back to the Legislature to clarify exactly what sums would be available to the

litigants or to OHA. So we still come back to the political arena as being the arena in which this debate should take place. (Emphasis added.)

OHA filed a notice of appeal in *OHA II* on June 8, 2004.

### **E. Past Due Public Land Trust Revenue Settlement Negotiations Begin**

On December 10, 2004, OHA and the State held the first in a series of meetings to negotiate a settlement for past due claims for public land trust revenues. The OHA Negotiation Team consisted of Chairperson Apoliona, Trustee Stender, Trustee Mossman, Trustee Carpenter, who were assisted by Administrator Clyde Nāmu‘o and Attorneys Klein and Meheula. The State negotiation team headed by Attorney General Mark Bennett varied but sometimes included Micah Kane, Charlene ‘Āina, Linda Smith, Bob Awana and Governor Linda Lingle.

Over various meetings, the negotiation teams discussed various issues regarding settlement of past due amounts. Issues discussed included:

1. Whether OHA is entitled to statutory interests on past due amounts;
2. Whether revenues generated by State hospitals and HHA/HFDC projects on public land trust lands can be considered a result of a proprietary function or a sovereign exercise, or a general public use;
3. Whether OHA is entitled to revenue from improved public land trust lands;
4. Whether OHA is entitled to revenue from University of Hawai‘i student housing, faculty housing, and parking lots on public land trust lands; and
5. Whether OHA is entitled to revenues from airport landing fees, Duty Free Shops and from the transfer of the land under the “Elliot Street Federal Detention Center” to the Department of Transportation given the Forgiveness Act.

Early in the negotiations, the State voiced a strong desire to settle OHA’s past and future claims to Chapter 10 public land trust revenues. OHA said it preferred to only settle the past due claims.

OHA’s accounting consultant, Gary Nishikawa of Deloitte & Touche, calculated that from 1980 to 2005 total past due “revenue” amounts at \$357 million without interest and \$1.2 billion with interest. However, given the demise of Act 304, OHA’s lawyers believed it was entitled to approximately \$200 million. The main problem caused by the demise of Act 304 is that it eliminated the right to interest and significantly weakened the hospital and HFDC/HHA claims.

On September 26, 2005, the State, through Attorney General Mark Bennett, made its initial offer to settle past due claims for **\$85 million**. This offer was well below OHA's settlement expectations. OHA graphically analyzed the State's offer as follows:

	9/26/05 offer	05Excluding <u>Interest</u>	05Including <u>Interest</u>
<b>Uncontested Items</b>			
All Agencies			
Health Systems	\$4,855,177	4,283,000	9,312,000
UH	\$2,734,311	14,429,000	30,375,000
Airport	\$18,100,000	42,557,000	66,236,000
		61,269,000	105,923,000
<b>Contested - Heely Decision Items</b>			
Hilo Hospital	\$0	136,540,000	499,145,000
HHA/HFDC	\$628,000	37,958,000	138,762,000
WDF <sup>2</sup>	\$56,882,512	136,814,000	500,146,000
Total		311,312,000	1,138,053,000
Total Uncontested and Contested		372,581,000	1,243,976,000
Elliott St.	\$1,800,000	1,800,000	3,858,800
Act 178	<b>\$85,000,000</b>	374,381,000	1,247,834,800
		-17,500,000	-17,500,000
		<b>356,881,000</b>	<b>1,230,334,800</b>
		42,557,000	airport
		136,814,000	WDF
		1,800,000	Elliott
		14,429,000	UH
		<b>\$195,600,000</b>	sub-total

While AG Bennett's offer was well below OHA's settlement expectations, OHA observed that the components of State's offer justified an increase in the annual amounts OHA was receiving at that time. Attorney General Bennett and the State agreed to work towards increasing OHA's annual payment above the then current annual amount of \$9 million for passage in the 2006 legislative session and thereafter attempt to negotiate the past due claim for presentation to the 2007 Legislature.

<sup>2</sup> The State's offer did not include any amount in satisfaction for past revenue generated by Waikiki Duty Free after 2003 because since 2003 Duty Free Shops had stopped any use of public land trust lands at Honolulu International Airport.

## **F. Act 178 Enacted (2006)**

On January 26, 2006, OHA and the State agreed to annual payments of \$15.1 million in satisfaction of the HRS Chapter 10 requirement that OHA be paid 20% of the funds from the public land trust. OHA and the State also agree to a \$17.5 million lump sum. Taking into account the payments by the Lingle administration as required by the March 2003 executive order, the \$17.5 million lump sum was intended to make up the short fall in satisfying \$15.1 million payments retroactive to 2001. In accepting \$15.1 million annually, OHA did not waive any rights to pursue amounts not. This agreement was documented in proposed legislation that became Senate Bill 2948 and was enacted by the Legislature as Act 178. The purposes of the Act by its own terms are to:

- (1) Provide interim measures to ensure that an adequate amount of income and proceeds is made available to the office of Hawaiian affairs from the pro rata portion of the public land trust, for the betterment of the conditions of native Hawaiians; and
- (2) Identify revenue-generating public trust lands and the amounts derived from those lands by requiring that the department of land and natural resources provide an annual accounting to the legislature.

To satisfy the first purpose of the Act, the Act provided that \$15.1 million be paid directly to OHA by quarterly payments from each department that collects receipts for the use of public trust lands. The payments to OHA are interim, to be paid “until further action is taken by the legislature for [the betterment of the conditions of native Hawaiians].” The Act also appropriated out of the general revenues \$17.5 million to pay to OHA for amounts under paid from July 1, 2001 to June 30, 2005.

In addition to retroactive and interim payments, the Act also required that DLNR “shall provide an accounting of all receipts from lands described in section 5(f) of the Admission Act for the prior fiscal year.” \$250,000 was appropriated out of the general fund to be expended for the accounting, and OHA was required to provide additional funding up to \$250,000 if needed by DLNR.

Under Section 7 of Act 178, OHA did not waive or settle any claims in agreeing to the terms of the Act. Section 7 states, in pertinent part: “Nothing in [Act 178] shall resolve or settle, or be deemed to acknowledge the existence of, the claims of native Hawaiians to the income and proceeds of a pro rata portion of the public land trust under article XII, section 6, of the state constitution.”

In his written testimony in support of the State and OHA’s agreement to 15.1 million in annual payments and a \$17.5 million lump sump payment, Attorney General Mark Bennett stated that:

*[i]t is important ‘to give effect to the constitutional rights of native Hawaiians’* by providing OHA with a share of those ceded land receipts, at least to the extent that a receipt is indisputably from the sale or use of improved or unimproved parcels of ceded land, or the sale of resources or materials like wood, sand, or gravel that occur naturally on ceded lands. (Emphasis added.)

### **G. First Amended Complaint in *Day v. Apoliona* Filed**

On March 10, 2006, Plaintiffs Virgil E. Day, Mel Ho‘omanawanui, Josiah L. Ho‘ohuli, Patrick L. Kahawaiola‘a, and Samuel L. Kealoha, Jr. filed their First Amended Complaint against Haunani Apoliona, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiian Affairs; and Rowena Akana; Dante Carpenter; Donald Cataluna; Linda Keawe'ehu Dela Cruz; Colette Y. Pi‘ipi‘i Machado; Boyd P. Mossman; Oswald Stender; and John D. Waihe‘e IV, individually and in their official capacity as Trustees of the Office of Hawaiian Affairs. The Complaint also named past trustees Clayton Hee and Charles Ota (the claims against whom were dismissed twice, in February and July of 2006). The Plaintiff’s First Amended Complaint stated that the Defendants:

1) violated their rights under the Admission Act and the Equal Protection Clause of the Fourteenth Amendment, to the extent those rights are enforceable under 42 U.S.C. § 1983, by expending public trust funds “without regard to the blood quantum contained in the definition of native Hawaiians in HHCA” (Counts I and II); and (2) “breached their duty under the common law of the State of Hawaii and H.R.S. § 10-16(c) of fidelity owed to Plaintiffs as ‘native Hawaiian’ beneficiaries” (Count III).

*See Day v. Apoliona*, 2008 WL 2511198 (D. Hawai‘i 2008). Count IV of the complaint prayed for the following declaratory relief:

the extent that ... judicial decisions and statutory and constitutional provisions do not clearly establish that all land, income and proceeds therefrom, received by OHA defendants directly or indirectly from the § 5(f) trust must be expended by OHA Defendants for the betterment of the conditions of native Hawaiians, Plaintiffs are entitled to a declaratory judgment holding that all land, income and proceeds received by OHA Defendants directly or indirectly from the § 5(f) trust must be expended by OHA defendants for the betterment of the conditions of native Hawaiians as defined in the [HHCA].

*Id.* The Plaintiffs identified four instances in which OHA allegedly used public trust funds for purposes not limited to the betterment of the conditions of native Hawaiians: (1) the “Akaka Bill,” (2) the Native Hawaiian Legal Corporation; (3) the Nā Pua No‘eau Education Program; and (4) Alu Like. *Id.*

## **H. OHA II Decision (2006)**

On April 28, 2006, the Supreme Court of Hawai‘i issued its decision in *OHA II*. The court rejected Judge Chang’s political question analysis but upheld the trial court’s dismissal of OHA’s claims on statute of limitation grounds. The court held that OHA should have filed its complaint on or before July 9, 2001: “[i]nasmuch as the legislature did not override the governor's veto [issued on 6/10/99], the plaintiffs-having themselves requested that Governor Cayetano veto Senate Bill No. 1635-should have discovered their injury, i.e., the loss of payments for the airport's use of ceded lands from the airport revenues or from any other source, as early as July 9, 1999.” *OHA II*, 110 Hawai‘i at 363, 133 P.3d at 792.

However, the court also recognized that OHA stated a claim for breach of fiduciary duties arising out of the State’s conduct in failing to oppose the FAA’s determination that payment of OHA’s pro rata share of airport revenues violated federal law and grant requirements. First, the decision in *OHA II* recognized that “[a]rticle XII, § 4 imposes a fiduciary duty on Hawaii's officials to hold ceded lands in accordance with the § 5(f) trust provisions.” *OHA II*, 110 Hawai‘i at 355, 133 P.3d at 784. Applicable in this instance regarding public trusts lands, the court recognized that the State owes a duty of impartiality and duty to communicate to OHA and Hawaiians as beneficiaries of the public trust lands. *Id.* Accordingly, the court held that OHA stated a claim for breach of fiduciary duty by alleging that the State failed to inform OHA of its actions in refraining from opposing the FAA’s position and that OHA’s beneficiaries lost the right to receive ceded land revenues. *Id.*

Additionally, the court recognized its responsibility to ensure that the State uphold its fiduciary duties. *OHA II*, 110 Hawai‘i at 366, 133 P.3d at 795. The court also agreed with Senator Inouye’s statement that “the removal of the Airport Revenue Fund for use by the State of Hawai‘i as a source of compensating [OHA] for use of ceded lands upon which the airports sit, *should not equate to a like reduction in the State’s obligation to OHA under state law.*” *Id.* Finally, the court also reiterated its proclamation in *OHA I* that “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.” *Id.* (Emphasis added.) Therefore, despite dismissing OHA’s claims, *OHA II* recognized OHA’s claim against the State for breach of fiduciary duty arising out of the management of and payment of revenues from public trust lands and OHA’s entitlement to its pro rata share of revenues under State law imposed a duty on the Hawai‘i Legislature to resolve public land trust revenue disputes via legislative action.

## **8. 2006-2008 CONTINUED SETTLEMENT NEGOTIATIONS**

### **A. Mediation between the State and OHA**

After the negotiations of interim future payments were complete with the passage of Act 178, OHA and the State resumed negotiations of past due revenue payment. On October 3,

2006, OHA and the State entered into mediation with Keith Hunter as the agreed upon mediator. As it became clear throughout negotiations that an agreement could not be reached by the end of the 2007 session, both parties proposed supporting a resolution encouraging settlement, however, such resolution never passed.

**B. \$200 Million Settlement for Past Due Claims**

During mediation, in January 2008, both sides agreed to settle OHA’s past claims to public land trust revenues for \$200 million. A memo by Bill Meheula summarizes how OHA and the State arrived at the \$200 million amount for past due public land trust revenue payments. The memorandum states in pertinent part:

From 12/03 to 12/07, OHA and the Lingle administration negotiated on issues relating to trust revenues that OHA has not yet been paid. In 1/08, the parties agreed that a payment of \$200 million would settle OHA’s right to trust revenue that have not yet been paid for the period 1978 to 2008.

The primary trust revenue amounts that led to the \$200 million settlement are:

*AG’s perceived position w/o interest:*

WDF	\$136 m
<b>Airport</b>	<b>\$ 21 m</b>
Health	\$ 5 m
Elliot St.	\$ 2 m
<b><u>UH</u></b>	<b><u>\$ 3 m</u></b>
	\$ 167 m
less:	
<u>Act 178</u>	<u>\$ 17.5m</u>
	<b>\$149.5m</b>

*OHA’s position w/o interest:*

WDF	\$136 m
<b>Airport</b>	<b>\$ 42 m</b>
Health	\$ 5 m
Elliot St.	\$ 2 m
<b><u>UH</u></b>	<b><u>\$ 14 m</u></b>
	\$ 199 m
less:	
<u>Act 178</u>	<u>\$ 17.5m</u>
	<b>\$ 181.5m</b>

Airport Dispute:

The Airport difference between \$21m and \$42m arises from the following differences: This airport figure is comprised of four categories of revenues:

airfield, concession, terminal rental and ground rental. OHA took the position it was entitled to all four categories. The AG took the position that OHA was entitled to only concession because the other categories constitute air transportation uses that satisfied the “public use” purpose under section 5(f) of the Admission Act.

UH Dispute:

The UH difference between \$14m and \$3m arises from the following differences: The UH figures are comprised of revenues from parking, student housing, and faculty housing. OHA took the position it was entitled to all three categories. The AG took the position that OHA was entitled to only parking because the other categories went toward the “public education” purpose under section 5(f).

Hospital Claim:

The Health category is comprised of Hawaii Health System Corporation figures relating to cafeteria sales and rental revenues that both sides agreed to. This should not be confused with the Hospital claim that was made in the OHA I case. The Hospital claim without interest amounted to \$126m based primarily on patient service fees from three of the Hawai‘i Health Systems Corporation’s hospitals, Hilo, Kula, and Samuel Mahelona Hospitals, that are situated in whole or in part on public land trust lands on Hawai‘i, Maui, and Kaua‘i. The AG rejected this claim on the grounds that patient service fees from providing health and medical services is a “public use” of ceded land which ought to qualify as a rent-free public trust use just as public office building and public school uses qualify as a rent-free public trust use under section 5(f). Given the demise of Act 304 (1990) that eliminated OHA’s proprietary function argument that was the basis of Judge Heely’s 1996 order, OHA could not persuade the AG to change his position.

HHA/HFDC Claim:

The above figures also do not include the HHA/HFDC claim that was asserted by OHA in the OHA I case. This claim without interest amounted to \$36m based receipts from affordable housing programs. The AG took the position that use of ceded land for its public housing projects is consistent with one of section 5(f)’s five purposes, i.e., “public use.” Again, given the demise of Act 304 that eliminated OHA’s proprietary function argument, OHA could not persuade the AG to change his position regarding the HHA/HFDC claim.

Even if Act 304 had not been invalidated in OHA I, the State has a good argument that the legislature in passing Act 304 never intended that OHA would receive revenues from patient service fees and affordable housing programs, and the Yamasaki and OHA I cases held that legislative intent controls.

Interest Claim:

The above figures also do not include interest. Act 304 provided that past due public land trust revenues should include the payment of interest. Again, given the demise of Act 304 that eliminated OHA's right to interest that was the basis of Judge Heely's 1996 order, OHA could not persuade the AG to include payment of interest because there is no right to interest against the State until judgment is entered by a Court of law.

Based on this comparative analysis, the mediator got the parties to agree to \$200m to settle OHA's outstanding claims for income and proceeds from the public land trust for the period 1978 to 2008. OHA perceived that the AG agreed to go up to \$200m in part because the State would be receiving a complete release for this time period and to give some recognition to the Hospital, HHA/HFDC and interest claims even though Act 304 is no longer law.

### C. Land Selection Process

In July of 2007, subsequent to agreeing that \$200 million is a fair settlement amount for OHA's past due claims to public land trust revenue, the State and OHA began selecting what lands could be conveyed in partial satisfaction of the agreed upon past due amount.

In anticipation of the alternative of taking land in lieu of cash as a means of satisfying any agreed upon past due debt, in late 2006, OHA retained real estate investment consultant Dr. Stephen Roulac. By August 2007, Roulac and OHA developed a land policy and criteria, and a data base of State lands against which the policy and criteria could be applied. In late August 2007, based on that analysis, OHA first proposed the following properties to the State as acceptable for transfer:

Property Description	Address	Parcel Size
<b>Aloha Stadium Total</b>		98.19
<b>Aloha Tower Total</b>		28.01
<b>Campbell Feed Lot</b>	91-319 Olai St.	110.10
<b>DAGS Baseyard - Surplus</b>	729 Kakoi St.	7.89
<b>DOH - Kīna'u Hale</b>	1250 Punchbowl St.	3.52
<b>DOT Bldg.</b>	530 Halekauwila St.	2.22
<b>Hālawā Quarantine</b>	99-951 Hālawā Valley St.	26.20
<b>Kaheawa Wind Farm</b>	Ukumehame	1,387.71
<b>Kaka'ako Makai Total</b>		31.33
<b>Kamāmalu Bldg.</b>	250 S. King St.	0.34
<b>Kapālama Military Reservation Total</b>	Auiki St.	98.08
<b>Manoa Innovation Center</b>	2800 Woodlawn Dr.	2.68
<b>Matson/DOT Makai Storage</b>	Sand Island Access Rd.	22.25
<b>Maui High Tech Park</b>	590 Lipoa Pkwy	5.15
<b>No.1 Capitol District</b>	250 S. Hotel St.	2.00
<b>OCCC</b>	2109 Kamehameha Hwy	16.46
<b>Sand Island Business Park Total</b>	Sand Island Access Rd.	59.43
<b>Westridge Shopping Center</b>	98-150 Kaonohi St.	3.69
<b>Total</b>		<b>1,905.24</b>

On November 6, 2007, Attorney General Bennett responded by making the following unofficial land package offer to OHA valued at \$99 million, with the balance of \$101,000 million to be paid in cash:

<b>Property Description</b>	<b>Address</b>	<b>Parcel Size</b>	<b>Land Value</b>	<b>Building Value</b>	<b>Tax Assessed Value</b>
<b>Aloha Beach Hotel</b>	Kūhiō Hwy	8.59	4,601,800	9,058,000	13,659,800
<b>Bayview Banyan Corp</b>	Banyan Dr.	1.09	570,300	2,372,600	2,942,900
<b>Country Club Condo Hotel</b>	Banyan Dr.	1.17	863,400	-	863,400
<b>Hāpuna Beach Park</b>	Puako Rd.	476.62	14,047,400	604,800	14,652,200
<b>Hilo Hawaiian Hotel</b>	Banyan Dr.	5.00	2,613,600	10,770,500	13,384,100
<b>Kaho‘olawe Island</b>	Various	28,792.20	26,821,600	-	26,821,600
<b>Naniloa Hotel &amp; Golf Course</b>	Banyan Dr.	69.88	4,489,300	7,360,800	11,850,100
<b>Reed's Bay Resort Hotel</b>	Banyan Dr.	1.19	622,000	1,259,400	1,881,400
<b>Wailua River State Park</b>	Various	1,361.26	8,697,400	876,400	9,573,800
<b>Uncle Billy's Hilo Bay Hotel Inc.</b>	Banyan Dr.	2.07	887,800	2,766,900	3,654,700
<b>Total</b>					<u>99,284,000</u>

The above offer demonstrated to OHA Attorney General Bennett’s willingness to satisfy a large portion of the \$200 million past due amount with a cash payment. However, OHA was hesitant to accept the Hāpuna beach parcel included in Bennett’s offer because of possible development restrictions on the makai portion of the property. OHA also refused to accept Kaho‘olawe Island as part of the settlement as Kaho‘olawe would have essentially zero value to OHA and would spark controversy as Kaho‘olawe is held in trust for the Native Hawaiian Governing Entity (“NHGE”) upon its creation.

In early December, the OHA trustees and negotiating team considered the following land package where land values of parcels located on public land trust lands were reduced by 20%, as OHA may be entitled to 20% of proceeds from those lands under 5(f) of the Admission Act, Article XII of the State Constitution and HRS § 10-13.6. In addition, OHA did not include building values as part of the settlement values because the lessees generally owned the improvements.

<b>Property Description</b>	<b>Parcel Size</b>	<b>Land Value</b>	<b>Building Value</b>	<b>2007 Tax Assessed Value</b>	<b>OHA Value (20% Discount on 5(b) Lands)</b>
<b>DOH - Kīna‘u Hale</b>	3.520	15,316,200	1,859,800	17,176,000	15,316,200
<b>Aloha Beach Hotel</b>	10.360	6,760,600	9,058,000	15,818,600	5,408,480
<b>Bayview Banyan Corp</b>	1.091	712,900	2,372,600	3,085,500	570,320
<b>Country Club Condo Hotel</b>	1.166	863,400	-	863,400	690,720
<b>Hilo Hawaiian Hotel</b>	5.000	3,267,000	11,496,200	14,763,200	2,613,600
<b>Naniloa Hotel &amp; Golf Course</b>	69.877	5,174,100	7,818,300	12,992,400	4,155,120
<b>Reed's Bay Resort Hotel</b>	1.190	777,500	1,259,400	2,036,900	622,000
<b>Uncle Billy's Hilo Bay Hotel Inc.</b>	2.073	1,097,100	2,766,900	3,864,000	877,680
<b>Kaka'ako Makai</b>	29.745	163,511,130	6,978,600	170,489,730	163,505,730
<b>Subtotal</b>	<b>124.022</b>	<b>197,479,930</b>	<b>43,609,800</b>	<b>241,089,730</b>	<b>193,759,850</b>
<b>Cash Settlement</b>					<b>16,240,150</b>
<b>TOTAL</b>					<b>210,000,000</b>

However, Bennett would not agree to a 20% discount on public trust lands conveyed in settlement. As Bennett mentioned that he would consider transferring lands at Kaka‘ako Makai, which had an approximate tax assessed value of \$92 million, OHA decided to focus a settlement package around the Kaka‘ako parcels. However, in order to satisfy the remaining \$108 million in settlement, OHA stated they would additionally consider the following properties as acceptable in payment:

Nāhiku Tract (Maui)  
Banyan Drive properties

Maui High Tech Park  
Mānoa Innovation Center  
Kaheawa Wind Farm  
Kamāmalu Building  
Hāpuna Beach Park (with no deed restriction)  
Hālawa Quarantine Station  
Kalaeloā Makai

Issues surrounding some of the listed properties made transfer difficult or undesirable. Concerns over the long term viability the Kaheawa Wind Farm made the property unappealing to OHA. Bennett then expressed that the State may be open to considering transferring land at Kalaeloā Makai and the “Kamāmalu Building” on South King Street. However, asbestos issues with the Kamāmalu building led OHA to reject the parcel. Lands at Kapālāma and Mapunapuna were proposed by OHA, but the State was unwilling to consider those lands. Land valuations on outer island parcels would take time to complete, and thus most of the Maui properties could not be considered.

OHA began considering the property at Kalaeloā Makai to be used as an industrial park, a solar power facility, a raceway or a replacement for Aloha Stadium. The property was zoned I-2 (intensive industrial) and classified urban. The land had some height restrictions due to a nearby airfield. There were some concerns as to possible ground contamination due to spot dumping, storage, and previous agricultural use.

At this time (December 2007), Attorney General Bennett communicated that, for a settlement to be approved by the Legislature in 2008, only Kalaeloa, Kaka‘ako, and the Banyan Drive properties in Hilo could be reasonably considered to be conveyed as part of a settlement package. Because of OHA’s desire to acquire a land-heavy settlement package, OHA made the following offer pursuant to what Attorney General Bennett stated that he would consider on December 20, 2007, and which Bennett agreed to in principle:

<b>Property Description</b>	<b>Parcel Size</b>	<b>Current Tax Assessed Value</b>	<b>Current Tax Assessed Land Value</b>	<b>Agreed Upon Building Value</b>	<b>Total Agreed Upon Value</b>
<b>Bayview Banyan Corp</b>	1.09	3,085,500	712,900	1,779,450	2,492,350
<b>Campbell Feed Lot (Kalaeloa Makai)</b>	110.10	59,607,000	59,429,000	178,000	59,607,000
<b>Country Club Condo Hotel</b>	1.17	863,400	863,400	-	863,400
<b>Hilo Hawaiian Hotel</b>	5.00	14,763,200	3,267,000	8,622,150	11,889,150
<b>Kaka‘ako Makai</b>	18.45	96,328,200	90,267,200	-	90,267,200
<b>Naniloa Hotel &amp; Golf Course</b>	69.88	12,992,400	5,174,100	5,863,725	11,037,825
<b>Reed's Bay Resort Hotel</b>	1.19	2,036,900	777,500	944,550	1,722,050
<b>Uncle Billy's Hilo Bay Hotel Inc.</b>	2.07	3,864,000	1,097,100	2,075,175	3,172,275
<b>Total Land Settlement</b>	<b>208.95</b>	<b>193,540,600</b>	<b>161,588,200</b>	<b>19,463,050</b>	<b>181,051,250</b>
<b>Total Cash</b>					<b>18,948,750</b>
<b>TOTAL</b>					<b>200,000,000</b>

## **9. 2008 SETTLEMENT & LEGISLATIVE SESSION**

### **A. Written Settlement Agreement Between OHA and the State**

On January 17, 2008, after almost four years of negotiations, OHA and the State entered into a written Settlement Agreement over the contested amount of past due revenues owed OHA under Chapter 10. The Settlement Agreement was conditioned upon passage of Proposed Legislation that was attached to the Settlement Agreement. The Settlement Agreement provided for \$200 million in land and cash for past due amounts from 1978 to 2008, and a minimum of \$15.1 million in annual payments going forward. Under the agreement, OHA could not sue for additional annual payments for any year that the State paid OHA at least \$15.1 million, but OHA could lobby for a payment increase. The basic terms of the Settlement Agreement provided as follows:

**Past due from 11/7/78 to 6/30/08: \$200M in land and cash**

Kaka'ako Makai - 18.5 acres ~ \$92M (07 tax assessed value)

Kalaeloa Makai - 110 acres ~ \$59M (07 tax assessed value)

Hilo Banyan Drive - 80.4 acres ~ \$34M (07 tax assessed value)

\$13M cash by 6/30/09

**Release:**

OHA waives right to further income & proceeds from public land trust under Art. XII, §4 & §6, between 11/7/78 to 6/30/08

e.g., no waiver of overthrow claim or right to ownership of ceded lands

**Other land terms:**

Kaka'ako Makai property will continue to be subject to the jurisdiction of Hawai'i Community Development Authority (HCDA)

Due diligence provisions.

**Going Forward: minimum \$15.1M annually from 7/1/08**

**Release:**

Cannot sue for more as long as \$15.1M per year is paid but can lobby for more

Repeal HRS 10-13.5 (20%) and replace with \$15.1M minimum provision in HRS Chapter 10

**B. Initial Reaction to Settlement Proposal**

On January 18, 2008, OHA briefed Hawaiian community leaders on the proposed settlement package. Calvin Say and the House generally seemed to support the settlement and Speaker Say directed House attorney Rich Dvonch to work with OHA's lawyers and the Attorney General to make amendments to the proposed legislation that were agreeable to the House, OHA and the State. On the other hand, the Senate seemed less supportive or prepared at that time to openly support the settlement.

On January 19, 2008, the proposed legislation was introduced as HB 2701 and SB 2733. On January 22, Senate Bill 2733 passed first reading and was referred to the Committees on

Water and Land, Agriculture and Hawaiian Affairs, Ways and Means, and Judiciary and Labor. House Bill 2701 was introduced on January 22 and passed first reading.

On January 22, 2008, OHA sponsored an hour-long television program on KITV on the settlement and proposed legislation. The program started with Jon Van Dyke, Davianna McGregor and Melody MacKenzie providing background on the ceded lands issues. In the second half of the program, Brickwood Galuteria moderated a panel of Chairperson Apoliona, Jonathan Scheuer and Bill Meheula that explained and discussed the settlement.

### **C. Hawai‘i Supreme Court Grants Injunction in *HCDCH***

On January 31, 2008, the Supreme Court of Hawai‘i released its decision in *HCDCH*, unanimously reversing the trial court’s decision denying OHA’s request for a preliminary injunction. *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai‘i* (“*HCDCH*”), 117 Hawai‘i 174, 177 P.3d 884 (2008). In part, the court concluded that “the Apology Resolution and related state legislation, give rise to the State’s fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved.” *HCDCH*, 117 Hawai‘i at 217, 117 P.3d at 927.

In reversing the trial court’s decision, the court first ruled that the plaintiffs showed “success on the merits” of their claim in satisfaction of the first prong of a request for injunctive relief:

having held that the Apology Resolution and related state legislation give rise to the State’s fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved, we believe the plaintiffs, as a matter of law, have succeeded on the merits of their claim inasmuch as any future transfer of ceded lands by the State would be a breach of the State’s fiduciary duty to preserve the trust res.

*HCDCH*, 117 Hawai‘i at 212, 117 P.3d at 922. Second, in considering the importance of Hawai‘i lands to Hawaiian cultural identity, the court held that disposition of those lands will result in irreparable damage. *See HCDCH*, 117 Hawai‘i at 213-15, 117 P.3d at 924-26. Finally, the court held that the legislative pronouncement contained in Act 329, declaring that a “lasting reconciliation [is] desired by all people of Hawai‘i,” 1997 Haw. Sess. L. Act. 329 § 1 at 956, supported the conclusion that “the public interest supports granting an injunction.” *HCDCH*, 117 Hawai‘i at 216, 117 P.3d at 926. Accordingly, the court remanded the case to the trial court with “instructions to issue an order granting the plaintiffs’ request for an injunction against the defendants from selling or otherwise transferring to third parties (1) the Leiali‘i parcel and (2) any other ceded lands from the public lands trust until the claims of the native Hawaiians to the ceded lands have been resolved.”

#### **D. Further Legislative History**

On February 1, 2008, Senator Hanabusa offered and on February 5, 2008, the Legislature adopted SCR 49 that requested that OHA and the Attorney General conduct statewide informational meetings to outline the terms and conditions of, and solicit public input and recommendations regarding, the Settlement Agreement and the legislation they proposed to implement the Agreement. OHA and the Attorney General were directed to hold meetings on O‘ahu, Kaua‘i, Maui, and Hawai‘i, and in close proximity to Hawaiian Home Lands communities on Moloka‘i, and at Waimānalo, and Nānākuli or Wai‘anae. The resolution further requested that OHA and the Attorney General provide a report of findings and recommendations to the Legislature by March 26, 2008. The resolution stated that these meetings and report would be used by the Legislature in determining whether or not to approve the Settlement.

Between January 18, 2008 and March 20, 2008, OHA and/or the Attorney General convened or participated in forty-five community meetings or briefings on the Settlement Agreement and proposed legislation. Approximately 1,400 persons attended these meetings and briefings. *See* March 26, 2008, *Report To The 2008 Legislature On SCR 49 Concerning Public Outreach & Communication Efforts On The Settlement Agreement And Proposed Legislation Regarding The Income And Proceeds From The Public Land Trust.*<sup>34</sup>

On February 9, 2008, a joint hearing of the Senate Committees on Agriculture and Hawaiian Affairs, Water and Land, and Judiciary and Labor on the Senate and House bills regarding the settlement was held. On February 12, 2008, Attorney General Mark Bennett and OHA Administrator Clyde Nāmu‘o held an online discussion regarding the settlement on the Honolulu Advertiser Website.

In mid-February 2008, Senate Committees on Water and Land, Agriculture and Hawaiian Affairs, Judiciary, and Ways and Means passed SB 2733 with amendments. On February 13, the Committee on Judiciary and Labor passed the bill as follows: 3 Ayes: Senators Taniguchi, Gabbard, Nishihara; 1 Aye with reservations: Senator Slom; and 2 Excused: Senators Hee, Kokubun. On February 14, the Committee on Agriculture and Hawaiian Affairs passed the bill as follows: 2 Ayes: Senators Tokuda, Kokubun; 3 Ayes with reservations: Senators Gabbard, Hee, Slom; and 1 Excused: Senator English. On February 14, the Committee on Water and Land passed the bill as follows: 4 Ayes: Senators Kokubun, Fukunaga, Tokuda, Whalen; 1 Aye with reservations: Senator Hee.

On February 15, SB 2733 passed second reading and was referred to Ways and Means, where, on February 21, the Committee voted to pass the bill as follows: 11 Ayes: Senators Baker, Chun Oakland, Fukunaga, Hooser, Inouye, Kim, Menor, Tokuda, Hemmings; 2 Ayes with reservations: Senators Tsutsui, Whalen ; and 1 Excused: Senator English.

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<sup>3</sup> This report summarizes testimony in support and in opposition to the settlement and proposed legislation.

<sup>4</sup> OHA intended to conduct community meetings on the settlement in the fall of 2007. However, negotiations on selection of the land parcels took longer than anticipated and the settlement was not executed until the start of the 2008 legislative session.

On February 23, 2008, State House committees held a legislative hearing on a new version of the settlement legislation, HB 266, which would allow the Legislature to adjust the \$15.1 million annual payment upwards over time.

#### **E. DHHL Funding Request**

By letter dated February 27, 2008, Micah Kane, Chairman of the Hawaiian Homes Commission, at the urging of the Department of Hawaiian Home Lands (“*DHHL*”) beneficiaries, requested OHA’s “consideration of an opportunity to work together to accelerate our delivery of much-needed affordable housing to beneficiaries of the Hawaiian Homes Commission Act.” The request notified OHA that DHHL’s then current projects were funded by general leases and commercial development, but the revenue generated by those projects were “insufficient to support the demand for affordable housing throughout the State.” DHHL informed OHA of its search for \$35 million in upfront financing to build infrastructure for 600 new homes. While DHHL was “entertaining proposals” for commercial development in order to finance the infrastructure for homestead communities, “[b]eneficiaries have urged DHHL to seek alternative means of raising the money—with assistance from OHA topping the list.”

#### **F. HB 266 in House Committees**

On February 27, 2008, the House Committees on Finance, Water, Land, Ocean Resources and Hawaiian Affairs, and Judiciary passed HB 266 with amendments. The Committee on Water, Land, Ocean Resources and Hawaiian Affairs voted as follows: 6 Ayes: Representatives Ito, Karamatsu, Carroll, Magaoay, Sagum, Thielen; and 2 Excused: Representatives Morita, Saiki. The Committee on Finance voted as follows: 13 Ayes: Representatives M. Oshiro, Lee, Awana, Belatti, Brower, Carroll, Hanohano, Karamatsu, Magaoay, Manahan, Mizuno, Sagum, Tokioka, Ward; 1 Aye with reservations: Representative Rhoads; and 4 Excused: Representatives Har, Nakasone, Meyer, Pine. The Committee on Judiciary voted as follows: 9 Ayes: Representatives Waters, B. Oshiro, Green, Ito, Souki, Yamane, Yamashita, Marumoto, Thielen; 1 Ayes with reservations: Representative Tsuji; 1 No: Representative Luke; and 5 Excused: Representatives Evans, McKelvey, Morita, Sonson, Pine.

Representative Ken Ito, who chairs the Committee on Water, Land, Ocean Resources and Hawaiian Affairs, stated that “The significance of the (House) bill is that it sets the stage for a settlement agreement to go forward.”

#### **G. February 2008 Omnibus Poll**

OHA commissioned a poll in February 2008 to determine overall community and beneficiary support for the settlement. Omnibus poll results returned in February showed a majority approval of public land trust settlement by Hawaiians. The State-wide sample size of 504 included 100 Hawaiians. The margin of error for the poll is +/- 4.4%; for the Hawaiian respondents it is +/- 9% because of the smaller sample size. Key questions from the poll were as follows:

**After years of negotiations, OHA and the State reached agreement to resolve the disputed ceded land revenues. These revenues come from retail sales and fees generated by businesses using ceded land. The proposed settlement calls for the state to pay OHA \$13 million in cash, plus \$187 million in state-owned land, for a total of \$200 million. This one-time-payment settles the dispute.**

**Which of these most closely describes your thinking about the agreement on disputed revenues from the public land trust:**

**Total   Hawaiian**

*The state can't afford to pay more than \$13 million, so giving OHA land that can generate some revenues is a good settlement.*

**28%      27%**

*The cash-and-land value of \$200 million is too little for what is owed OHA to cover the years since it was established in 1978.*

**34%      62%**

*The proposed settlement is too much.*

**22 %      4%**

*Don't know*

**16%      8%**

**Do you believe the Legislature should approve this proposed settlement?**

**Total   Hawaiian**

*Yes*

**55%   72%**

*No*

**26%   20%**

*Don't know*

**19%   9%**

## **H. Early March – Bills Cross Over**

On February 29 and March 2, 2008, HB 266 passed Second and Third Readings in the house respectively and was received by the Senate on March 6, 2008. On March 4, 2008, the State Senate approved Senate Bill 2733, with Senator Sam Slom voting against and Senator Kalani English excused. The Bill was received by the House on March 4 where it passed first reading on March 6.

### **I. OHA and State Agree to Amend Waiver Language**

Due to concerns by several Native Hawaiians as to the scope of the release of claims in the settlement agreement, OHA persuaded Attorney General Bennett change the release language. The original language and edited release language are as follows:

#### **ORIGINAL WAIVER LANGUAGE**

OHA releases, waives, and forever discharges any and all claims of any kind concerning, relating to, or arising out of controversies at law and in equity, known or unknown, now existing or hereafter arising, established, or inchoate, arising out of or in any way related to any right OHA or any other person or entity may have to income, proceeds, or any other tangible right, item, or benefit, from the public land trust lands under sections 4 and 6 of Article XII of the Constitution or any statute or act.

#### **AMENDMENTS\* – CHANGES MARKED**

OHA releases, waives, and forever discharges any and all claims of any kind concerning, relating to, or arising out of controversies at law and in equity, known or unknown, now existing or hereafter arising, established, or inchoate, arising out of or in any way related to any right OHA or any other person or entity may have to income; and ~~proceeds, or any other tangible right, item, or benefit,~~ of any kind or nature whatsoever, or the equivalents of such income and proceeds of any kind or nature whatsoever, from the lands held by the State as a public land trust lands ~~lands~~ under sections 4 and 6 of Article XII of the Constitution or any statute or act.

#### **AMENDMENTS\* – CLEAN**

OHA releases, waives, and forever discharges any and all claims of any kind concerning, relating to, or arising out of controversies at law and in equity, known or unknown, now existing or hereafter arising, established, or inchoate, arising out of or in any way related to any right OHA or any other person or entity may have to income and proceeds of any kind or nature whatsoever, or the equivalents of such income and proceeds of any kind or nature whatsoever, from the lands held by the State as a public trust under sections 4 and 6 of Article XII of the Constitution or any statute or act.

\* The proposed amendments would be applied throughout the Settlement Agreement wherever the original waiver language is referenced.

### **J. SCHHA Opposes Settlement Bill**

On March 16, 2008, the Sovereign Council of the Hawaiian Homes Assembly (“SCHHA”) publicly opposed HB 266 due to: a “lack of a ceded lands inventory and revenue report”; a “lack of participation in the agreement by the Hawaiian Homes Commission and the beneficiaries of the Hawaiian Home Land Trust”; and an “unacceptable list of waivers which were approved by Governor Lingle and OHA.”

### **K. Senate Committees Hold HB 266**

On March 17, 2008, the Senate Committees on Agriculture and Hawaiian Affairs, Water and Land, and Judiciary held a joint hearing on HB 266. Over 100 SCHHA members and supporters testified in opposition of the house bill, including Kamaki Kanahale, Agnes Cope, Mike Kahikina and Kali Watson. Senate Committee on Agriculture and Hawaiian Affairs voted to hold HB 266 as follows: 4 Ayes: Senators Tokuda, Gabbard, Hee, Kokubun; and Senators English and Slom excused. The Committee on Water and Land voted to hold the bill as follows: 3 Ayes: Hee, Kokubun, Tokuda; and Senators Fukunaga and Whalen excused. The Committee on Judiciary voted to hold the bill as follows: 3 Ayes: Hee, Gabbard, Kokobun; 1 Aye with reservation: Taniguchi; and Nishihara and Slom excused.

## **10. FOLLOWING SENATE’S HOLDING OF HB 266**

On March 23, 2008, the Honolulu Advertiser published a letter to the editor by Attorney General Mark Bennett and OHA Chairperson Haunani Apoliana which stated in part:

**The Senate president introduced a resolution, adopted by the Legislature, requesting that OHA and the attorney general conduct statewide informational meetings, solicit input, and provide a report to the Legislature by March 26, 2008.** We took this very seriously and spent many hours listening and discussing this matter at more than 40 meetings throughout Hawai‘i.

**The Senate's three committees, however, did not even wait for our report to be filed before making their March 17 decision.**

While many comments were received from the more than 1,400 attendees at these meetings, not a single person who spoke suggested that Hawaiians were due nothing from the state for these past amounts.

**Some felt the waiver language was too broad.** OHA and the state, however, did not negotiate or resolve any issue other than the disputed amount of the income and proceeds from the ceded lands from 1978 to the present to be paid OHA, and the amount going forward no other historic grievances of Hawaiians and nothing

relating to the 1893 overthrow or to the state's ability to sell ceded lands to third parties. **To make this absolutely clear and respond to concerns, the waiver language has been revised.**

Some have said that there are unresolved questions. **However, during the March 17 hearing, not one senator asked a question of any witness, nor offered any plan or resolution. If there is a Senate plan, it is a secret.** (Emphasis added.)

As noted above, as mandated by SCR 49, on March 26, 2008, OHA issued its *Report To The 2008 Legislature On SCR 49 Concerning Public Outreach & Communication Efforts On The Settlement Agreement And Proposed Legislation Regarding The Income And Proceeds From The Public Land Trust.*

#### **A. OHA Environmental Issues on Settlement Properties Memorandum**

On March 28, 2008, Director of OHA Land Management Hale Jonathan Likeke Scheuer, Ph.D., released a memorandum reviewing the status of OHA's review of existing environmental documents on the proposed settlement properties and memorializing "the decisions made in relationship to our limited knowledge of the issues and the manner in which risk associated with that limited knowledge was addressed."

##### *Kalaeloa Makai*

The Memorandum first discussed a Phase I environmental assessment performed on Kalaeloa Makai for DLNR in July 2007. According to the Memorandum, "the Phase I assessment did not identify the presence of any releases of hazardous substances or petroleum products exceeding reportable quantities at the site." The Phase I assessment did identify issues related to the prior use of the site, which included:

- 1) Potential presence of petroleum and/or metal-related contaminants associated with stockpiled debris, three 55-gallon drums, and abandoned structures currently on-site;
- 2) Potential presence of petroleum contaminants and pesticide residue associated with historical use of the site for the (un-permitted) stockpiling of petroleum contaminated soils for bioremediation and sugar cane cultivation, respectively; and
- 3) Potential petroleum contaminant migration from off-site and adjacent properties – including the neighboring refinery, the Kalaeloa Slaughterhouse and Rendering Plant, and others.

Based on the findings of the assessment, the Memorandum concluded that, as no evidence of hazardous substances released on site were identified, any possible contamination would be small in concentration, and any contamination caused by off site contamination could be

addressed through existing “regulatory compliance mechanisms.” Thus, the Memorandum concluded that *“it is not believed that the environmental conditions related to hazardous substance contamination exist such that economic use of the property consistent with the current zoning will be prohibited. Certainly, the characterization of the area as a ‘toxic waste dump’ during hearings is inaccurate and misleading.”*

#### *Kaka’ako Makai*

The Memorandum reports that Phase I environmental assessments as well as “some Phase II studies” were conducted on the Kaka’ako Makai parcels in 1997 “as part of a U.S. Environmental Protection Agency Brownfields Project with the Hawai’i Community Development Authority and the Hawai’i Department of Health.

The Phase I assessments found “potential contaminant sources” in all six parcels, and “the presence of metal, petroleum and volatile organic compounds were confirmed in localized areas in the soil and ground water within these parcels during the Phase II investigations in 1999.” The Memorandum suggested that “remediation alternatives range from capping in place to excavation and off-site disposal.” Despite the need for remediation, the Memorandum concluded that the contaminants in the ground water “are believed to have minimal human exposure and ecological impacts given the current usage of Kewalo Basin as an active harbor.” The Memorandum concluded that, *“[a]s with Kalaeloa Makai, in sum, it is not believed that the environmental conditions related to hazardous substance contamination exist in Kaka’ako Makai such that economic use of the property consistent with the current zoning will be prohibited.”*

#### *Hilo Banyan Drive*

The Memorandum briefly noted that the Hilo properties had no prior environmental reporting completed. The Memorandum also concluded that, “as the properties are fully leased, some of the risk associated with any issues would be borne by the Lessee, not the Lessor (the State or OHA as it may be).

#### *Review of Due Diligence Timing Issues*

The Memorandum also explains the reasons that the proposed settlement legislation provided for due diligence to be performed after acquisition of the settlement properties. The Memorandum reasons that delay of performance of due diligence is necessary as following:

Firstly, the final decision on what properties were to be conveyed in the proposed Settlement was not finalized until January 17. Until that point any attempt to conduct due diligence on all of the properties OHA proposed for transfer from the State to OHA would have been logistically impossible, expensive, and unproductive. Secondly, even after a proposed Settlement was executed on January 17 between the State and OHA, we knew that passage of the Settlement by the Legislature was uncertain. Because of that, it would not be prudent to expend significant funds on due diligence for properties which might remain under other agencies. In sum, it would have been inadvisable and imprudent to

conduct research on an outcome which was uncertain, especially when the degree of uncertainty was unknown and unknowable.

Because of these concerns, the Memorandum identified three key provisions of the proposed legislation that helps to protect OHA in the event the settlement was approved:

A “buy back provision” . . . wherein if post-transfer OHA identified environmental issues which reduced the fair market value of any of the three areas by 75%, the State would either pay a portion of the costs to correct the issues or accept the properties back and transfer to OHA 75% of the value in cash.

Access to all information the State has on the properties in order to be able to fully investigate the known history of the properties and review any already completed assessments; and

Significantly, an indemnification from the State on environmental issues should the properties be transferred back to the State from OHA. This key provision protects OHA from being in the chain of title for a period, which would without the indemnification expose OHA to environmental risks which it was not responsible for.

#### **B. Micah Kane Request to OHA for Funding to DHHL**

In late March 2008, Hawaiian Homes Commission Chair Micah Kane again requested that OHA pay debt service of \$2+ million annual to support a \$30 million bond issuance to DHHL.

#### **C. OHA Meeting with Senate President Hanabusa**

On April 3, 2008, Senate President Colleen Hanabusa informed OHA that one of her concerns with HB 266 was the interest of Hawaiian Homestead beneficiaries, and she viewed the going forward release of HB 266 as impacting native Hawaiian claims and their interests under the Admission Act, and such an effect requires prior consultation before a settlement could be released. President Hanabusa supported the concept of dropping the going forward portion of the settlement and proceeding with the \$200 million settlement for the past due obligations.

Despite Senator Hanabusa’s support for this approach, the House refused to agree to submit HB 1201 CD1 to conference.

#### **D. Supplemental Appropriations Bill**

On April 29, 2008, HB 2500, the House Bill version of the then proposed FY09 Executive Supplemental budget passed final reading in both the Senate and the House. The bill included a proviso which provided that OHA and the State Attorney General shall resume

negotiations on past due ceded land revenues. The bill enacted as Act 158 on June 10, 2008, states:

SECTION 211.4. Provided that for legal services (ATG 100), *the attorney general and the office of Hawaiian affairs shall resume negotiations on the payment to be made by the State to the office of Hawaiian affairs to resolve the dispute concerning the amount and proceeds from the pro rata share portion of the public trust that the office should have received from November 7, 1978, to June 30, 2008, pursuant to article XII, sections 4 and 6 of the state constitution;* and provided further that the attorney general and the office of Hawaiian affairs shall attempt to reach an agreement prior to the convening of the 2009 regular session and submit implementing legislation to the president of the senate and to the speaker of the house of representatives before the bill introduction deadline for that session."

#### **E. A.G. Bennett files USSC Petition for Writ of Certiorari in HCDCH**

On April 29, 2008, Attorney General Mark Bennett filed a petition for Writ of Certiorari with the United States Supreme Court in *HCDCH*. The State's petition made three arguments to support the granting of Supreme Court review. First, the State argued that the Hawai'i Supreme Court's decision "bars the State from prudently managing, for the benefit of all citizens of Hawaii, more than 1.2 million acres of State-owned land—29 per cent of the total land area of the State and almost all the land owned by the State." The State also argues that the court's interpretation of the Apology Resolution "raises serious federalism concerns." Third, the State argued that, "by basing its decision primarily on federal law, the Hawaii Supreme Court improperly insulated its decision from any state-level political check."

#### **F. OHA and DHHL Partnership**

On June 5, 2008, OHA's Board of Trustees unanimously approved a long discussed partnership with the Department of Hawaiian Home Lands in which OHA agreed to give DHHL \$3 million a year for thirty years to pay debt service on a \$41 million revenue bond to help for necessary infrastructure to build homestead subdivisions in the State. The bonds were projected to fund the preparation of up to 500 residential lots for DHHL beneficiaries.

#### **G. Judge Mollway Dismisses *Day v. Apoliona* in Favor of OHA**

On June 20, 2008, Judge Susan Oki Mollway granted summary judgment in favor of the OHA trustees on Plaintiff's § 1983, Declaratory and Injunctive Relief claims. *See Day v. Apoliona*, 2008 WL 2511198 (D. Hawai'i 2008). Judge Mollway previously dismissed Plaintiffs' §1983 claims in light of a the U.S. Supreme Court's ruling in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), but her ruling was overturned by the Ninth Circuit Court of Appeals on appeal on December 19, 2007, where "[t]he Ninth Circuit held that, as alleged beneficiaries of the public trust, the *native Hawaiian Plaintiffs have "an individual right to have the trust terms complied with, and therefore can sue under § 1983 for violation of that right."* (Emphasis

added.) On remand, Judge Mollway again dismissed Plaintiffs' claims, quoting the Ninth Circuit's decision on appeal:

we note for the sake of example and clarity that the common law of trusts offers guidance on two of the issues that Day's claims present: (1) how a court should determine whether activities funded by the trust funds are "for the betterment" of Native Hawaiians, and (2) whether trust funds can be spent in a way that serves Native Hawaiians, but also, incidentally, benefits other individuals. **One treatise suggests: To the extent to which the trustee has discretion, the court will not control his exercise of it as long as he does not exceed the limits of the discretion conferred upon him.... Even where the trustee has discretion, however, the court will not permit him to abuse the discretion.** This ordinarily means that so long as he acts not only in good faith and from proper motives, but also within the bounds of a reasonable judgment, the court will not interfere; but the court will interfere when he acts outside the bounds of a reasonable judgment. (Emphasis added.)

Accordingly, Judge Mollway concluded that "[n]othing in section 5(f) of the Admission Act prohibits the use of trust funds that, while bettering the condition of native Hawaiians, also benefits the conditions of others." Judge Mollway likened Defendants' arguments to the following extreme scenario:

As a final illustration, the court considers whether Plaintiffs would challenge a program in which OHA offered to pay all medical expenses relating to the birth of any native Hawaiian child. These expenses would naturally include the cost of prenatal care for the birth mother. But suppose the birth mother was Hawaiian, with a 25 percent blood quantum, while the birth father was native Hawaiian, with a 75 percent blood quantum. The child would be native Hawaiian, but treatment during the pregnancy would benefit not only the native Hawaiian child, but also the Hawaiian mother. Would Plaintiffs object to the benefits flowing to the Hawaiian mother?

#### **H. Kalaeloa Makai No Longer Available for Transfer**

On August 29, 2008, Attorney General Bennett notified OHA that the Kalaeloa Makai property was no longer available to be included in the settlement because DLNR wanted to develop the property as an industrial subdivision.

At the Attorney General's request, in the fall of 2008, OHA submitted the following additional list of properties for the State to consider transferring to OHA as a replacement for the Kalaeloa Makai property:

1. Kanoelehua Industrial Subdivision, Hilo
2. Aloha Beach Hotel, Kaua'i

3. Wailua River State Park. Kaua'i
4. Maui High Tech Park
5. Mokulele Hwy Quarry
6. Ala Wai Yacht Basin
7. Hilton Hawaiian Pier
8. Kapālama Military Reservation
9. Certain parcels on Lagoon Dr.
10. Mānoa Innovation Center
11. Non-Sand Island Business Park Assets
12. Olomana Golf Course
13. Ualena St. Ind. Lots
14. Westridge Shopping Center

The State did not respond to this proposed list of properties.

#### **I. USSC Grants State's Petition for Certiorari in HCDCH**

On October 1, 2008, the United States Supreme Court granted the State's Petition for Writ of Certiorari in *HCDCH*.

#### **J. Due Diligence Necessary for Kaka'ako**

After an OHA Negotiation Team meeting on January 7, 2009, it became apparent that due diligence on Kaka'ako could not be completed by the end of the 2009 legislative session. Further due diligence was deemed necessary by OHA to investigate unresolved title and subsurface contamination issues.

Considering these issues, it became clear to OHA in early January 2009 that due diligence on Kaka'ako would take at least six months and cost close to \$0.5 million. Accordingly, OHA felt that a due diligence provision allowing for rejection of the Kaka'ako parcels was a necessary component of any legislation effecting the transfer of Kaka'ako.

## **11. 2009 SETTLEMENT LEGISLATION**

### **A. OHA Trustees Approve Proposed Past Due Legislation for 2009 Session**

On January 15, 2009, the OHA Board of Trustees voted to approve proposed legislation effecting settlement for past due revenue payments to OHA from the public land trust. In a press release issued the same day, OHA clarified that, “[t]o address concerns raised by the community, this 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.”

The proposed legislation provided for a two-step conveyance of assets in satisfaction of the \$200 million settlement amount. The first stage provided that the State transfers to OHA fee simple interest in Kaka‘ako Makai, tax assessed value of \$92,719,415 and in the Hilo Banyan Drive parcels, tax assessed value of \$34,483,725, combined at \$127,203,140. The second stage requires that “the legislature in 2010 will pass an act that conveys to OHA resources totaling \$72,796,860 in value, in the form of conveyance of real property in fee simple.” As to the amount going forward, the proposal provided:

the legislature finds that the public interest is best served by the legislature deferring temporarily a re-examination of what amount of income and proceeds from the lands in the public trust referred to in article XII, section 4, of the Hawaii Constitution should be provided to OHA annually beginning on July 1, 2008. In this light, the annual amount will, for the time being, continue to be set by Act 178 . . . .

#### **OHA proposed legislation**

#### **Past due from 11/7/78 to 7/1/08: \$200M in land**

##### **1. Phase 1: Kaka‘ako Makai and Hilo Banyan Drive Properties**

Kaka‘ako Makai - \$92,719,415 (tax assessed value).

Hilo Properties- \$34,483,725 (tax assessed value).

##### **Due Diligence Provision**

provided that if OHA, in its “sole and absolute discretion[, finds] that there exists any condition with respect to any of the property to be conveyed to the office pursuant to this Act that makes the property unsuitable for the intended uses of the property by the office of Hawaiian affairs, the office may reject any or all of the property to be conveyed to it pursuant to this Act.”

## **2. Phase 2: balance in 2010**

The remaining \$72,796,860 is to be paid “in the form of conveyance of real property in fee simple” through legislative Act in 2010.

### **Future Payments:**

The bill provided that “the annual amount will, for the time being, continue to be set by Act 178” which fixed interim annual payments at \$15.1 million a year.

## **B. HB 901**

On January 26, 2009, OHA’s proposed legislation was introduced in the House as HB 901 by House Speaker Calvin Say and passed first reading. The Committee on Hawaiian Affairs scheduled hearings on the bill on O’ahu, Maui, Kona and Hilo, and Kaua’i in early February. On February 11, 2009, at a legislative hearing held in Hilo concerning HB 901, many attendees objected to the acquisition of the Banyan Drive properties because the lands are located in a tsunami zone and concern that the Banyan Drive properties were over-valued.

On February 18, 2009, the Committee of Hawaiian Affairs passed the measure as follows: 7 Ayes: Representatives Carroll, Shimabukuro, Belatti, Bertram, Mizuno, Nishimoto, Yamane; 1 Ayes with reservations: Representative Ward; and 1 Excused: Representative Brower. HB 901 HD 1, filed on February 19, amended the initial proposal by OHA to remove the Hilo properties. HD 1 still provided for a two part conveyance of assets to OHA, with Kaka’ako Makai valued at \$92,719,415 and the remaining \$107,280,585 to be satisfied by property in fee simple by the legislature in 2010.

On February 20, HB 901 passed second reading at the House as amended in HD 1 and was referred to the Committee on Finance with Representatives Bertram, McKelvey, Takai, Takumi and Tokioka excused.

On March 4, the Committee on Finance passed HB901 as follows: 15 Ayes: Representatives M. Oshiro, M. Lee, Aquino, Awana, Brower, Choy, Coffman, Har, Keith-Agaran, C. Lee, Nishimoto, Sagum, Tokioka, Wooley, Yamashita; and 2 Ayes with reservations: Representatives Pine, Ward.

## **C. SB 995**

On January 26, 2009, OHA’s proposed legislation was introduced in the Senate as SB 995 by Senate President Hanabusa. The Committee on Water and Land passed the bill with amendments on February 13. The Committee on Ways and Means (“WAM”) voted to pass the bill on February 27. The votes in WAM were as follows: 8 Ayes: Senators Kim, Chun Oakland, English, Fukunaga, Hee, Hooser, Kidani, Tokuda; and 4 Excused: Senatos: Tsutsui, Galuteria, Kokubun, Hemmings.

**D. SB 995 Amended by Senate Committee on Water, Land, Agriculture, and Hawaiian Affairs**

On February 13, 2009, the Senate Committee on Water, Land, Agriculture, and Hawaiian Affairs recommended passage of SB 995 with amendments. On February 20, 2009, the SB 995 SD 1 was issued by the committee to include a list of lands to be conveyed to OHA at OHA's discretion. SB 995 SD1 provided:

Subject to the rights of the office of Hawaiian affairs . . . right to inspect and reject any or all of the properties described in this section, all right, title, and interest in the following parcels of land with the existing improvements thereon, including submerged land, accreted land, or any land makai of the shoreline, shall be conveyed in accordance with section 8 of this Act in fee simple to the office of Hawaiian affairs:

(1) Kakaako Makai: (Lots 2, 3, 4, 5, and 9 as identified on the final Kakaako park subdivision map dated October 15, 2007, and approved by the city and county of Honolulu department of planning and permitting on November 9, 2007); except the TMK: 2-1-058:41 and 2-1-058:110;

(2) Kahana Valley and Beach Park: (TMK: 5-2-01:1, 5-2-02: all, and 5-2-5:1 and 21 as described in Act 5, Sessions Laws of Hawaii 1987) and (TMK: 5-2-05:3);

(3) La Mariana and submerged lands: (TMK: 1-2-23:52);

(4) Accreted peninsula bordered by Kalihi Stream and Moanalua Stream: (TMK: 1-1-3:3);

(5) Heeia wetlands or fishpond: (TMK: 4-6-05:01);

(6) Mauna Kea: Mauna Kea Scientific Reserve: (TMK: 3-4-4-015: 9 and 12); Mauna Kea Ice Age Natural Area Reserve: a 143.5 acre square parcel around Puu Pohaku, located to the west of the summit area and a 3,750 acre triangular-shaped parcel extends from approximately 10,070 ft (3,069 m) up to 13,230 ft (4,033 m) at the upper tip of the parcel; and

(7) State-owned fishponds statewide: as identified in the Hawaiian Fishponds: Fishpond Database developed pursuant to a grant/cooperative agreement from the National Oceanic and Atmospheric Administration, Project No. R/AQ-60 (sponsored by the University of Hawaii Sea Grant College Program, SOEST, under Institutional Grant No. NA36RG0507 Year 31 from NOAA Office of Sea Grant, Department of Commerce).

Attorney General Mark Bennett subsequently submitted written testimony opposing SB 995 SD1 as amended by the Committee. First, Bennett notes that the properties in the bill “have been determined by one senate committee without any appropriate study, evaluation or consultation.” Bennett also took issue with the unilateral listing of property in Mauna Kea. According to his written testimony, Bennett believed that “the inclusion of Mauna Kea is objectionable. The control and use of Mauna Kea must remain with the State.” Bennett reasoned that an evaluation of the transfer’s effect on international interests “should have been conducted before proposing such a transfer.”

#### **E. HB 901 and SB 995 Cross Over**

On March 10, 2009, the HB 901 passed Third Reading with Representative Berg voting no (and Representative Takai excused), and was transmitted to the Senate.

On March 10, 2009, SB995 passed Third Reading in the senate, with 23 Ayes and Senators Hemmings and Slom opposed, and was transmitted to the House.

After being passed to the Senate, HB 901 passed first reading on March 12. The Committee on Water and Land passed the Bill as follows: 4 Ayes: Senators Hee, Tokuda, Fukunaga, Kokubun; and 3 Excused: Senators Bunda, Takamine, Hemmings.

#### **F. House Amends SB995**

After passing First Reading in the House on March 12, the Committee on Hawaiian Affairs passed SB 995 with amendments as follows: 7 Ayes: Representatives Carroll, Shimabukuro, Belatti, Bertram, Brower, Nishimoto; Ayes with reservations: Representative Ward; and 2 Excused: Representatives Mizuno, Yamane.

On March 19, SB 995 was amended from the Senate Committee on Water, Land, Agriculture, and Hawaiian Affairs’ proposed draft to a form similar to that of HB 901 prior to its transmittal to the Senate, providing for a two stage transfer of assets to OHA, the first stage conveying Kaka’ako Makai, and the second conveying resources totaling \$107,280,585 in the form of real property in fee simple.

On March 20, the Senate Committee on Water, Land, Agriculture, and Hawaiian Affairs voted to pass HB 901 with amendments as follows: 4 Ayes: Senators Hee, Tokuda, Fukunaga, Kokubun; and 3 Excused: Senators Bunda, Takamine, Hemmings.

On March 20, SB 995 passed second reading in the House with no Representatives voting no and Representatives Chang, McKelvey, Morita, Takai, Thielen excused.

On March 23, SB 995 passed the Committee on Water and Land. The votes were as follows: 10 Ayes: Representatives Ito, Har, Cabanilla, Chang, Coffman, Herkes, C. Lee, Morita, Ching, Thielen; and 3 Excused: Representatives Chong, Luke, Sagum.

On the same day, SB995 passed the Committee on Judiciary. The votes were as follows: 8 Ayes: Representatives Karamatsu, Ito, Cabanilla, Herkes, Mizuno, Morita, Tsuji, Thielen; 1 Ayes with reservations: Representative Marumoto; and 7 Excused: Representatives Belatti, Carroll, Luke, McKelvey, B. Oshiro, Souki, Wakai.

On March 25, HB 901 was re-referred to the Senate Committees on Water, Land, Agriculture, and Hawaiian Affairs and Ways and Means.

### **G. Senate Committee Amends HB 901**

HB 901 passed Second Reading on March 27, 2009, where it was referred to the Committee on Ways and Means. At this time, HB 901 was amended by the Senate as HB 901 HD 2 SD1, to provide OHA with two options for settlement. The first option, under Part I of HB 901 SD 1, provides OHA with the following:

(1) Payment by the State of \$251,000,000 to the office of Hawaiian affairs pursuant to a payment plan agreed to by the office of Hawaiian affairs and the State and in accordance with sections 4 and 5;

(2) The suspension of the \$15,100,000 annual payment to the office of Hawaiian affairs commencing from the effective "agreed to" date between the State and the office of Hawaiian affairs; and

(3) Conveyance of public lands from the State to the office of Hawaiian affairs equal to twenty per cent of the approximately 1.8 million acres of public trust lands presently inventoried by the State; provided that the twenty per cent shall be measured by acreage, unless otherwise mutually agreed to between the State and the office of Hawaiian affairs.

In exchange for the above, SD 1 summarized that, upon the acceptance of the "global settlement" under Part I:

each and every claim or suit that is predicated in any way upon an act or omission that arises out of or is in any way related to any right the office of Hawaiian affairs *or any other person or entity may have* to the income, proceeds, *or any other tangible right, item, or benefit from the public land trust lands* under sections 4 and 6 of article XII of the state constitution or any related statute or act shall be forever barred and may not be brought by the office of Hawaiian affairs *or by any other person or entity*. (Emphasis added.)

Part II of SD 1 provided that, upon rejection of the settlement under Part I, OHA can receive assets totaling \$200 million either by land transfers, monetary payments, or a combination of both. Part II also listed the following properties OHA may take in satisfaction of the \$200 million settlement amount.

- (1) Kaka‘ako Makai: Lots 2, 3, 4, 5, and 9 as identified on the final Kaka‘ako park subdivision map dated October 15, 2007, and approved by the city and county of Honolulu department of planning and permitting on November 9, 2007; except TMK: 2-1-058:41 and 2-1-058:110;
- (2) Kahana Valley and Beach Park: TMK: (1) 5-2-01:1, 5-2-02: all, and 5-2-5:1 and 21 as described in Act 5, Session Laws of Hawaii 1987 and TMK: 5-2-05:3;
- (3) La Mariana and Pier 60: TMK: (1) 1-2-23:52, (1) 1-2-23:67, (1) 1-2-23:30, and (1) 1-2-23:55;
- (4) Accreted peninsula and land filled bordered by Kalihi stream and Moanalua stream: TMK: (1) 1-1-3:3;
- (5) He‘eia meadowlands: TMK: (1) 4-6-16:01 and (1) 4-6-16:02;
- (6) Mauna Kea: Mauna Kea Scientific Reserve: TMK: 3-4-4-015: 9 and 12; Mauna Kea Ice Age Natural Area Reserve: a 143.5 acre square parcel around Puu Pohaku, located to the west of the summit area and a 3,750 acre triangular-shaped parcel extends from approximately 10,070 feet (3,069 meters) up to 13,230 feet (4,033 meters) at the upper tip of the parcel;
- (7) State-owned fishponds statewide: as identified in the Hawaiian Fishponds: Fishpond Database, developed pursuant to a grant/cooperative agreement from the National Oceanic and Atmospheric Administration, Project No. R/AQ-60 (sponsored by the University of Hawaii Sea Grant College Program, SOEST, under Institutional Grant No. NA36RG0507 Year 31 from NOAA Office of Sea Grant, Department of Commerce);
- (8) Waikīkī Yacht Club: (1)-23037006;
- (9) AAFES Property: (1)-21058006; and
- (10) Kalaeloa Makai: (1)-9-1-31:1;

Following referral, HB901 HB 2 SD 1 failed to move out of the Committee on Ways and Means.

On April 7, the House Committee on Finance passed SB 995. The votes were as follows: 15 Ayes: M. Oshiro, M. Lee, Aquino, Awana, Brower, Choy, Coffman, Har, Keith-Agaran, C. Lee, Nishimoto, Tokioka, Wooley, Yamashita, Ward; and 2 Excused: Sagum, Pine.

## H. SB 995 Does Not Move Out of Conference

On April 14, the SB 995 passed third reading in the House with Representative Berg voting no and Representatives Carroll, Chang, Mizuno, Morita, Sagum, Takai, Ward excused. The bill was then transmitted to the Senate.

After the Senate disagreed with the House amendments, conferees were appointed. Co-Chairs of the House Committee were Representatives Carroll, Ito, Karamatsu, M. Oshiro, and joined by Senators Har and Ward from the House. Senator Hee was the Chair of the Senate Committee, with Senators Kim and Taniguchi as Co-Chairs, and joined by Fukunaga, Kokubun from the Senate. Conference Committee met from April 24<sup>th</sup> to May 1.

During conference, Senator Hee submitted a CD1 proposal that included the following terms:

### Proposed CDI

#### 1. Option 1: Global Settlement

\$251 million in cash

20% of public trust lands to be determined by negotiations

Suspension of \$15.1 million annual payments

Settle any claim in law or equity arising out of the right of OHA or *any other person or entity* to proceeds or any other right from the public land trust

#### 2. Option 2 Past due from 11/7/78 to 7/1/08: \$200M in land or cash

Land or Cash to be determined by OHA

Properties to be determined by OHA but include

Kaka'ako Makai

Kahana Valley and Beach Park

La Mariana and Pier 60

He'eia wetlands

land in Mauna Kea

State owned fishponds statewide

Kalaeloa Makai

Future Payments:

The bill provided that "the annual amount will, for the time being, continue to be set by Act 178" which fixed interim annual payments at \$15.1 million a year.

After “key House members” declined to support the bill, Conference did not reconvene after the final May 1 meeting.

### **I. Act 176 (2009) – Closure of HCDCH**

On March 31, 2009, the United States Supreme Court issued its decision in *Hawai‘i v. Office of Hawaiian Affairs*, --- U.S. ----, 129 S.Ct. 1436, 1445 (2009), wherein it held that the Apology Resolution could not be read to “create a retroactive ‘cloud’ on the title [of the ceded lands] that Congress granted to the State of Hawai‘i in 1959.” However, the Court stated that it “ha[d] no authority to decide questions of Hawaiian [i.e., state] law or to provide redress for past wrongs except as provided for by federal law.” *Id.* Accordingly, the Court reversed the judgment of the Hawai‘i Supreme Court and remanded the case “for further proceedings not inconsistent with [its] opinion.”

On May 3, 2009, all of the parties in the HCDCH case, except for Plaintiff Jonathan Osorio entered into a settlement agreement whereby the case would be dismissed without prejudice if legislation SB 1677 SD1 HD2 CD1 became law. On May 6, 2009, the Legislature passed SB 1677 SD1 HD2 CD1 that requires two-thirds majority vote of the Legislature to adopt a concurrent resolution to sell or give away certain public lands and requires notice to be provided to the office of Hawaiian affairs for sales, gifts, and exchanges. On July 13, 2009, Governor Lingle signed this bill into law as Act 176.

On October 27, 2009, the Hawaii Supreme Court dismissed Osorio’s claims in HCDCH on the grounds that given the enactment of Act 176 his claims are not yet ripe for adjudication. The Court stated: “it would be appropriate to first allow the legislature to exercise the power reserved to it in Act 176 before this court determines whether such exercise of power is or is not a violation of the State's fiduciary duties.”