

# THE PUBLIC LAND TRUST

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## I. Introduction: The State's Duty

‘Āina or land is at the very core of Kānaka Maoli or Native Hawaiian culture. Indeed, Native Hawaiians trace their ancestry to the ‘Āina, to the natural forces of the world, and to kalo, the staple food of the Hawaiian people. All are related in a deep and profound way that is expressed in every aspect of Kānaka Maoli life. The public land trust embodies the spiritual and physical connection of the Native Hawaiian people to the land.

The State's fiduciary duty in relation to the former Government and Crown Lands of the Hawaiian Kingdom, now held by the State as the "public land trust," is deeply rooted in Hawai'i law. As the Hawai'i Supreme Court has stated, State officials are obligated "to use reasonable skill and care in managing the public lands trust" and the State's conduct should be judged "by the most exacting fiduciary standards."<sup>1</sup> Thus, the State's well-established commitment to reconciliation with the Native Hawaiian community includes the preservation of the trust lands to the greatest extent possible, until the unrelinquished claims of the Native Hawaiian community to the trust lands are resolved.

## II. Background: A Brief History

In the 1848 Māhele process that led to fee simple title in Hawai'i, King Kamehameha III set aside the Government Lands for the benefit of the chiefs and people. He reserved the Crown Lands as his own property, providing a source of income and support to the crown. The Crown Lands, in turn, became a resource for the Native Hawaiian people. After the illegal overthrow of the Hawaiian Kingdom in 1893 and the establishment of the Republic of Hawai'i in 1894, the Republic claimed the Crown Lands and merged the Government and Crown Lands into the "public lands" through the 1895 Land Act.

In 1898, the Republic of Hawai'i transferred nearly 1.8 million acres of Government and Crown Lands to the United States under the Joint Resolution for Annexation. In the Joint Resolution, the U.S. Congress recognized the special nature of the Government and Crown Lands, stating that their revenues and proceeds should be used "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."<sup>2</sup> Although both the Joint Resolution and the 1900 Organic Act, which established a government structure for the Territory of Hawai'i, implicitly recognized the trust nature of the Government and Crown Lands, large tracts of these lands were set aside by the federal government for military and other purposes during the territorial period and continue under federal control today.

The unique status of the Government and Crown Lands, as well as the special relationship between the federal government and Native Hawaiians, has been recognized in multiple ways, including the enactment of the 1921 Hawaiian Homes Commission Act (HHCA).<sup>3</sup> The HHCA set aside over 203,500 acres of public land, primarily Crown Lands, to be leased to

Native Hawaiians at a nominal fee for ninety-nine years.<sup>4</sup> In the HHCA, a Native Hawaiian beneficiary was defined as “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.”<sup>5</sup>

When Hawai‘i became a state in 1959, the majority of the Government and Crown Lands, including the HHCA trust lands, were transferred to the State of Hawai‘i. The United States, however, retained use and control of almost 375,000 acres of land.<sup>6</sup>

### III. Applicable Constitutional Provisions, Statutes, Cases, and Rules

#### A. The Admission Act

The 1959 Admission Act articulates the State’s trust responsibility. **Section 4** requires the State to adopt the HHCA as a part of its constitution. **Section 5(b)** provides that “the United States grants to the State of Hawaii . . . the United States’ title to all the public lands and other public property . . . within the boundaries of the State of Hawaii, title to which is held by the United States[.]”<sup>7</sup> Thus, the Admission Act transferred to the State of Hawai‘i most of the public lands previously transferred by the Republic of Hawai‘i to the United States.

**Section 5(f)** of the Admission Act also affirms the State of Hawai‘i’s public trust responsibilities:

The lands granted to the State of Hawaii by subsection (b) . . . *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.<sup>8</sup>

This section also provides that these lands, proceeds, and income shall be managed and disposed of for one or more of the five trust purposes “in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.” Most significantly, Congress recognized Native Hawaiians, as defined in the HHCA, as beneficiaries of the public land trust.

#### B. Constitutional Provisions

**Article XII, Section 4**, of the Hawai‘i Constitution confirms the State’s trust responsibilities by providing: “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 HHCA lands] . . . shall be held by the State as a public trust for native Hawaiians and the general public.”<sup>9</sup> Furthermore, **Article XII, Section 5**, of the Constitution establishes the Office of Hawaiian Affairs (OHA) and provides that OHA “shall hold title to all the real and personal property now or hereafter set aside or conveyed to it, which shall be held in trust for native Hawaiians and Hawaiians.”<sup>10</sup>

Significantly, **Article XII, Section 6**, of the Constitution requires the OHA Trustees to manage and administer income and proceeds from a variety of sources, including a “pro rata portion” of the public land trust.<sup>11</sup> The Constitution does not define what percentage of the public land trust income and proceeds OHA should receive; that determination was left to the legislature.

**Article XVI, Section 7**, of the Constitution also provides that “any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII.”<sup>12</sup>

### C. Statutes and Cases

#### Implementing Art. XII, § 6, of the Constitution – Income and Proceeds to OHA:

In 1980, the Hawai‘i State Legislature passed legislation, codified at **Hawai‘i Revised Statutes (HRS) Section 10-13.5**, that required OHA to receive “[t]wenty per cent of all funds derived from the public land trust[.]” Despite this language, the Hawai‘i Supreme Court in the 1987 **Trustees v. Yamasaki** case held that a literal interpretation of HRS Section 10-13.5 “would be at odds with [other] legislative commitments.”<sup>13</sup> The court did not determine what OHA’s share of the public land trust income and proceeds should be, but left the issue for legislative determination.

In 1990, the legislature passed **Act 304**, defining the trust corpus and trust revenues from which OHA’s twenty per cent share would derive.<sup>14</sup> Nevertheless, there were still categories of trust revenue that were in dispute between OHA and the State. In 2001, the Hawai‘i Supreme Court in **OHA v. State** invalidated Act 304 because it appeared to obligate the State to pay airport revenues to OHA, which conflicted with federal law.<sup>15</sup> Although it invalidated Act 304, the court acknowledged that the State’s obligation is firmly established in the state constitution and concluded, “it is incumbent upon the legislature to enact legislation that gives effect to the rights of native Hawaiians to benefit from the ceded lands trust.”<sup>16</sup>

After the **OHA v. State** decision, payments to OHA were suspended and then temporarily reinstated in 2003. Finally, in 2006, the legislature passed **Act 178**, which transferred to OHA a one-time payment of \$17.5 million for previous underpayments of trust revenues and established the interim revenue to be transferred to OHA from the public land trust as \$15.1 million.<sup>17</sup> Act 178 also tasked the Department of Land & Natural Resources (DLNR) with providing an annual accounting of all receipts from lands described in section 5(f) of the Admission Act for the prior fiscal year. Subsequently, **Governor’s Executive Order 06-06** established specific procedures for State entities to follow in reporting public land trust revenues.<sup>18</sup>

In 2012, OHA and the State reached a settlement to resolve back revenue claims. The settlement, which was approved and enacted as **Act 15**,<sup>19</sup> conveyed ten parcels of mostly

waterfront property in Kaka'ako to OHA. The property is valued at approximately \$200 million, and the conveyance settled all claims for back revenues from the date of OHA's creation in 1978 through June 30, 2012. Pursuant to **Act 178**, passed in 2006, OHA continues to receive \$15.1 million annually in revenue from the public land trust.

### **Inventory of Trust Lands:**

Since the late 1970s, there have been a number of efforts to create an accurate inventory of trust lands. In September 1981, DLNR completed an initial inventory, listing approximately 1,271,652 acres.<sup>20</sup> The department itself conceded that its inventory was not complete and also did not include lands under the jurisdiction of other state agencies.<sup>21</sup> In 1982, the Legislative Auditor was directed to complete the inventory of trust lands and to study the legal issues relating to trust land revenues.<sup>22</sup> The Legislative Auditor's 1986 final report on the public land trust detailed the numerous problems, such as survey and title search expenses, involved in compiling a completely accurate and comprehensive inventory. Although the Legislative Auditor was not able to complete an inventory, he did identify the legal issues surrounding the trust lands.

In 1997, the legislature appropriated funds through **Act 329** to convert DLNR's Land Division records into a database to assist in managing all public lands.<sup>23</sup> The result was the State Land Information Management System (SLIMS), which became operational in the fall of 2000. SLIMS integrates information about state lands including the inventory, into one system that identifies property and tracks information such as lease renewal dates and lease receipts.<sup>24</sup> According to information in the SLIMS system as of 2003, the DLNR's land inventory was 1,302,515 acres, excluding the approximately 203,500 acres of HHCA lands.<sup>25</sup> This inventory does not include all lands held by other state entities; it also includes lands that have been acquired and are not part of the trust lands. In recognition of the fact that SLIMS does not include all trust lands and that the trust status of some lands is not clearly delineated, the 2011 legislature passed **Act 54** to further study and clarify the trust status of lands, particularly those to which state agencies other than the DLNR hold title.<sup>26</sup>

### **Transfer of Trust Lands:**

Until 1993, State and Federal law appeared to allow the sale, transfer, or alienation of trust lands as long as the proceeds were utilized for one or more of the trust purposes. At least one federal court had found a breach of trust in the transfer of submerged lands (which are part of the public land trust) to a private entity without compensation to the State.<sup>27</sup> The adoption of the Apology Resolution by the U.S. Congress in 1993 and the passage by the State Legislature of analogous legislation, however, led OHA and others to file a lawsuit challenging a pending transfer of public trust lands.

In the Apology Resolution, Congress apologized to the Native Hawaiian people for the overthrow of the Hawaiian Kingdom with the participation of agents and citizens of the United States. Congress also expressed its "commitment to acknowledge the ramifications of the overthrow . . . in order to provide a proper foundation for reconciliation between the United

States and the Native Hawaiian people.” Congress specifically recognized that the Government and Crown Lands were taken without the consent of or compensation to the Native Hawaiian people or their sovereign government, and that “the indigenous Hawaiian people never directly relinquished their claims . . . over their national lands to the United States.”<sup>28</sup>

In a 2008 unanimous opinion, the Hawai‘i Supreme Court placed a moratorium on the sale of public trust lands until Native Hawaiian claims to the lands were resolved. In **OHA v. Housing and Community Development Corporation of Hawai‘i**, the court reasoned that the Apology Resolution and analogous State laws implicated the State’s trust duty to preserve the trust lands until resolution of Native Hawaiian claims. This duty, the court believed, was consistent with the high fiduciary standards required of a trustee.<sup>29</sup>

In summing up, the court found it significant that:

Congress, the Hawai‘i state legislature, the parties, and the trial court all recognize (1) the cultural importance of the land to native Hawaiians, (2) that the ceded lands were illegally taken from the native Hawaiian monarchy, (3) that future reconciliation between the state and the native Hawaiian people is contemplated, and (4) once any ceded lands are alienated from the public land trust, they will be gone forever.<sup>30</sup>

In 2009, the United States Supreme Court, in **Hawaii v. OHA**, reversed.<sup>31</sup> The Court held that the Apology Resolution was conciliatory and did not substantively alter the State’s authority to alienate the public trust lands. The Court also held, however, that while the Hawai‘i Supreme Court improperly relied upon the federal Apology Resolution, the case should be sent back to the Hawai‘i Supreme Court to determine whether state law alone would support a moratorium.

After the U.S. Supreme Court decision, OHA and three other plaintiffs reached a settlement with the State. **Act 176**, passed in 2009, affirmed the settlement by restricting the transfer of public trust lands; **Act 169**, passed in 2011, provided additional safeguards.<sup>32</sup> Now, a public trust land sale or gift requires a two-thirds majority legislative approval for the permanent alienation of trust lands. **Act 146**, signed into law in June 2014, requires a simple majority approval for an exchange of public lands for private lands.<sup>33</sup> Additionally, the relevant State agency must determine whether the lands are part of the public land trust, explain how that determination was made, and provide a detailed summary of any development plans for the parcel. Moreover, for a sale or gift of land, the agency must hold an informational meeting in the community affected. Finally, OHA must be notified at least 3 months prior to the legislative session in which the land sale, gift, or exchange will come up for consideration.

#### **IV. Practical Application and Impact on Native Hawaiian Culture**

As the discussion above shows, three significant issues involving the public land trust are relevant for Hawai‘i’s councils, boards, commissions, and law makers: public land trust revenues, the public land trust inventory, and public land trust transfers.

The first practical issue that may affect the State's decision-makers involves the public land trust revenues. OHA currently receives \$15.1 million annually in trust revenue, an amount set by the Legislature but not necessarily reflective of a "pro rata share" of the income and proceeds from the public land trust as required by the State Constitution. In 2012, the Legislature approved an agreement to satisfy all claims related to trust revenues for the period from November 7, 1978, to June 30, 2012, by transferring land in Kaka'ako to OHA. This agreement gave OHA a significant resource for the Hawaiian people and represents an important reconciliation effort between the State and Native Hawaiians over past-due public land trust revenues. The agreement, however, does not address OHA's pro rata share of public land trust revenues going forward.

In fulfilling its trust responsibilities, State entities should make every effort to accurately report revenue from the public land trust as required by Act 178 and Executive Order 06-06. Only by having the best and most accurate information available can OHA, the Executive, and the Legislature make informed and wise decisions about the "pro rata share" of the public land trust revenues to be transferred to OHA for the benefit of the Native Hawaiian community.

Intertwined with the issue of revenue, is the concern that there is no fully accurate inventory of trust lands and resources. There have been good-faith efforts by the State, led by DLNR, to compile an inventory. This effort is on-going, and should be continued and expanded as directed in Act 54, with a renewed commitment by State agencies to provide the information necessary to determine the true contours of the public trust lands. Indeed, it is difficult to appropriately manage trust resources and comply with fiduciary responsibilities without knowing which lands are within the public land trust.

The last issue that confronts councils, boards, commissions, and decision-makers relates to the transfer or alienation of the public trust lands. As discussed above, this issue has been addressed by legislation that requires more notice and openness in the process. This legislation may help to maintain the corpus of the trust lands and ensure that the lands will be a resource for Native Hawaiians and the general public in the future. Thus, it is vital that all decision-makers truly understand their kuleana in making sure that any proposed transfer of the trust lands follows the procedures set out in the law. Moreover, decision-makers should closely examine whether the detrimental impact on the Native Hawaiian community that results from alienating trust lands outweighs any potential benefit.

‘Āina is essential to the life of the Native Hawaiian community. As Hawaiian scholar and kumu hula, Pualani Kanaka'ole Kanahale, has stated, "[W]e need land to live on. That is -- that is our foundation. And for the native Hawaiian, more than the family, land is their foundation. Land is their identity."<sup>34</sup>

The State has committed itself to reconciliation with the Native Hawaiian people. Indeed, the Hawai'i Supreme Court recognized that "[a] lasting reconciliation [is] desired by all people of Hawai'i."<sup>35</sup> To fulfill this reconciliation commitment, however, decision-makers must understand their kuleana and responsibilities in relation to the public trust lands and must discharge their duties according to the high standards required of a trustee.

## Notes

<sup>1</sup> Office of Hawaiian Affairs v. Housing Community and Development Corporation of Hawai'i, 117 Hawai'i 174, 195, 177 P.3d 884, 905 (2008) (OHA v. HCDCH) (*citing* Ahuna v. Hawaiian Homes Comm., 64 Haw. 327, 339, 640 P.2d 1161, 1169 (1981)).

<sup>2</sup> Joint Resolution of Annexation, July 7, 1898, 30 Stat. 750 (1898).

<sup>3</sup> Hawaiian Homes Commission Act of 1921, Pub. L. No. 34, 42 Stat. 108 (1921) (HHCA). The HHCA is set out in full as amended in 1 HAW. REV. STAT. (2013).

<sup>4</sup> *Id.* §§ 203, 207, 208. Note that HHCA § 208 (2) extends the ninety-nine year period for a total of one hundred and ninety-nine years.

<sup>5</sup> *Id.* § 201(a). Note that under HHCA § 209(a), certain classes of homestead successors may be of not less than twenty-five percent Hawaiian ancestry.

<sup>6</sup> In late 1963, Congress passed a law allowing the federal government to transfer lands it had retained in 1959 to the State, with the exception of lands in national parks, monuments, and certain reservations. Lands transferred to the State are subject to the trust terms of section 5(f) of the Admission Act. Act of Dec. 23, 1963, Pub. L. No. 88-233, 77 Stat. 472. Approximately 31,000 acres of land retained by the federal government have been transferred to the State since 1964, most notably the island of Kaho'olawe.

<sup>7</sup> Admission Act (of Mar. 18, 1959), Pub. L. No. 86-3, 73 Stat. 5(b) (1959).

<sup>8</sup> Admission Act, § 5(f) (emphasis added).

<sup>9</sup> HAW. CONST., art. XII § 4 (1978).

<sup>10</sup> HAW. CONST., art. XII § 5 (1978).

<sup>11</sup> HAW. CONST., art. XII § 6 (1978).

<sup>12</sup> HAW. CONST., art. XVI § 7. This section was amended in 1978 to add, "Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII." *But see* Kahalekai v. Doi, 590 P.2d 543, 556-57 (1979) (explaining that this amendment may be one of those not validly ratified by the electorate).

<sup>13</sup> Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 175, 737 P.2d 446, 458 (1987).

<sup>14</sup> Act 304, 1990 Haw. Sess. Laws 947.

<sup>15</sup> Office of Hawaiian Affairs v. State, 96 Hawai'i 388, 31 P.3d 901 (2001).

<sup>16</sup> *Id.* at 401, 31 P.3d at 914.

<sup>17</sup> Act 178, 2006 Haw. Sess. Laws 702.

<sup>18</sup> Gov. Exec. Ord. No. 06-06 (Sept. 20, 2006).

<sup>19</sup> Act 15, 2012 Haw. Sess. Laws 24.

<sup>20</sup> LEGISLATIVE AUDITOR, FINAL REPORT ON THE PUBLIC LAND TRUST 29 (Audit Report No. 86-17, 1986).

<sup>21</sup> *Id.* at 17-18, 36-41.

<sup>22</sup> Act 121, 1982 Haw. Sess. Laws 180.

<sup>23</sup> Act 329, 1997 Haw. Sess. Laws 956.

<sup>24</sup> DEP'T OF LAND & NATURAL RES., REPORT TO THE TWENTY-FIRST LEGISLATURE, REGULAR SESSION OF 2001, ON THE PROGRESS TOWARDS THE COMPLETION OF THE STATE LAND INFORMATION MANAGEMENT SYSTEM 1 (Nov. 2000).

<sup>25</sup> The inventory file contains lands under the jurisdiction of the DLNR. The Department of Agriculture, the Housing Community Development Corporation of Hawai'i, the University of Hawai'i, and the Hawai'i Community Development Authority also have been participating in the inventory process.

<sup>26</sup> Act 54, 2011 Haw. Sess. Laws 131.

<sup>27</sup> Napeahi v. Paty, 987 F. Supp. 1288 (D. Haw. 1996).

<sup>28</sup> P.L. 103-150, 107 Stat. 1510 (Nov. 23, 1993).

<sup>29</sup> OHA v. HCDCH, 117 Hawai'i 174, 177 P.3d 884 (2008).

<sup>30</sup> *Id.* at 213, 177 P.3d at 213.

<sup>31</sup> Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009).

<sup>32</sup> Act 176, 2009 Haw. Sess. Laws 705; Act 169, 2011 Haw. Sess. Laws 579 (codified as HRS §§ 171-50(c), 171-64.7 (2013)).

<sup>33</sup> Act 146, 2014 Haw. Sess. Laws 559 (codified at HRS § 171-50(c)).

<sup>34</sup> OHA v. HCDCH, 171 Hawai'i 174, 215, 177 P.3d 884, 925 (2008).

<sup>35</sup> *Id.* at 216, 177 P.3d at 926.