

Committee on Beneficiary Advocacy and Empowerment

Trustee Kaleihikina Akaka, *Chair*Trustee Keola Lindsey, *Vice Chair**Members*

Trustee Leina'ala Ahu Isa, At-Large

Trustee Dan Ahuna, Kaua'i / Ni'ihau

Trustee Keli'i Akina, At-Large

Trustee Luana Alapa, Moloka'i / Lāna'i

Trustee Carmen Hulu Lindsey, Maui

Trustee Brendon Kalei'aina Lee, At-Large

Trustee John Waihe'e IV, At-Large



**STATE OF HAWAII'
OFFICE OF HAWAIIAN AFFAIRS**

**MEETING OF THE
COMMITTEE ON BENEFICIARY ADVOCACY AND EMPOWERMENT**

DATE: Tuesday, January 25, 2022**TIME:** 10:00 a.m.**PLACE:** Virtual MeetingViewable at www.oha.org/livestream OR

Listen by phone: (213) 338-8477,

Webinar ID: 898 9176 7910

Due to COVID-19, the OHA Board of Trustees and its standing committees will hold virtual meetings until further notice. Pursuant to Governor Ige's December 29, 2021 Emergency Proclamation Related to Sunshine Law In-Person Meetings, there will be no in-person location for this meeting that is open to the general public. The virtual meetings can be viewed and observed via livestream on OHA's website at www.oha.org/livestream or listen by phone: (213) 338-8477, Webinar ID: 898 9176 7910

AGENDA

- I. Call to Order
- II. Public Testimony on Items Listed on the Agenda* (Please see page 2 on how to submit written testimony or provide oral testimony online. Oral testimony by phone will **not** be accepted)
- III. Approval of Minutes
 - A. December 8, 2021
 - B. December 27, 2021
- IV. New Business
 - A. Workshop: Policies - Series 2000 – Beneficiary Support and Services: Protect Ceded Lands, OHA Water Policy and Water Backgrounder, Policy on Protecting Iwi Kupuna, International Engagement, Beneficiary Support Services, Advocacy, Collaborations with Other Agencies and Organizations, Repatriation, Housing, Wai, Iwi Kūpuna, Disaster Resourcing; and consideration of a newly drafted Military Engagement Policy.
- V. Announcements
- VI. Adjournment



**STATE OF HAWAII
OFFICE OF HAWAIIAN AFFAIRS**

If you require an auxiliary aid or accommodation due to a disability, please contact Everett Ohta at telephone number (808) 594-1988 or by email at: everetto@oha.org no later than three (3) business days prior to the date of the meeting. Meeting materials will be available to the public 72 hours prior to the meeting and posted to OHA's website at: www.oha.org/bae.

In the event that the livestream or the audiovisual connection is interrupted and cannot be restored, the meeting may continue as an audio-only meeting through the phone and Webinar ID listed at the beginning of this agenda. Meeting recordings are available upon request to BOTmeetings@oha.org until the written meeting minutes are posted to OHA's website.

†Notice: The 72 Hour rule, pursuant to OHA BOT Operations Manual, Section 49, shall be waived for distribution of new committee materials.

* Public Testimony on Items Listed on the Agenda must be limited to matters listed on the meeting agenda.

Hawai'i Revised Statutes, Chapter 92, Public Agency Meetings and Records, prohibits Board members from discussing or taking action on matters not listed on the meeting agenda.

Testimony can be provided to the OHA Board of Trustees either as: (1) *written testimony emailed at least 24 hours prior to the scheduled meeting*, (2) *written testimony mailed and received at least two business days prior to the scheduled meeting*, or (3) *live, oral testimony online during the virtual meeting*.

- (1) Persons wishing to provide **written testimony** on items listed on the agenda should submit testimony via **email** to BOTmeetings@oha.org at least **24 hours prior** to the scheduled meeting or via **postal mail** to Office of Hawaiian Affairs, Attn: Meeting Testimony, 560 N. Nimitz Hwy., Suite 200, Honolulu, HI 96817 **to be received at least two business days prior** to the scheduled meeting. Any testimony received after these deadlines will be late testimony and will be distributed to the Board members after the scheduled meeting. **Due to COVID-19 office closure and limited in-office staffing, please do not fax or hand-deliver written testimony.**
- (2) Persons wishing to provide **oral testimony online** during the virtual meeting must first register at:

https://us06web.zoom.us/webinar/register/WN_HM21hkhXRt-qMFTtwq9XAO

You need to register if you would like to orally testify. Once you have completed your registration, a confirmation email will be sent to you with a link to join the virtual meeting, along with further instructions on how to provide oral testimony during the virtual meeting. The registration page will closed once the Public Testimony or Community Concerns agenda items have concluded.

To provide oral testimony online, you will need:

- (1) a computer or mobile device to connect to the virtual meeting;**
- (2) internet access; and**
- (3) a microphone to provide oral testimony.**



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Oral testimony online will be limited to five (5) minutes.
Oral testimony by telephone/landline will not be accepted at this time.

Once your oral testimony is completed, you will be asked to disconnect from the meeting. If you do not sign off on your own, support staff will remove you from the Zoom meeting. You can continue to view the remainder of the meeting on the livestream or by telephone, as provided at the beginning of this agenda.

Please visit OHA's website for more detailed information on how to submit Public Testimony OR Community Concerns at: <https://www.oha.org/how-to-submit-testimony-for-oha-bot-meetings/>

A handwritten signature in blue ink, reading "Kaleihikina Akaka".

Trustee Kaleihikina Akaka, Chair
Committee on Beneficiary Advocacy and Empowerment

1/19/2022

Date

Committee on Beneficiary Advocacy and Empowerment

Trustee Kaleihikina Akaka, *Chair*Trustee Keola Lindsey, *Vice Chair**Members*

Trustee Leina'ala Ahu Isa, At-Large

Trustee Dan Ahuna, Kaua'i / Ni'ihau

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STATE OF HAWAII
OFFICE OF HAWAIIAN AFFAIRS
560 N. NIMITZ HIGHWAY, SUITE 200
(VIRTUAL MEETING - VIA ZOOM WEBINAR)

COMMITTEE ON BENEFICIARY ADVOCACY AND EMPOWERMENT
MINUTES

December 8, 2021 1:30 p.m.

ATTENDANCE:

Chairperson Kaleihikina Akaka
Trustee Leina'ala Ahu Isa
Trustee Dan Ahuna
Trustee Keli'i Akina
Trustee Brendon Kalei'aina Lee
Trustee C. Hulu Lindsey
Trustee Keola Lindsey
Trustee John Waihe'e, IV

EXCUSED:

Trustee Luana Alapa

BAE STAFF:

Brandon Mitsuda
Mark Watanabe

ADMINISTRATION STAFF:

Hussey, Sylvia, Ka Pouhana / CEO
Brown, Casey / COO
Hinck, Ramona / CFO
Kamali'i, Na'u / Chief Advocate
Freitas, Sharde / Public Policy Advocate
Ki, Nina / Public Policy Advocate
Gushiken, Raina, Senior Legal Counsel
Ohta, Everett, Assistant Legal Counsel
Chak, Kevin, IT
Nakama, Erin, IT

I. CALL TO ORDER

Chair **Akaka** calls the Committee on Beneficiary Advocacy and Empowerment meeting for Wednesday, October 13, 2021 to order at **1:33 p.m.**

Chair **Akaka** notes for the record that PRESENT are:

MEMBERS			AT CALL TO ORDER (1:34 p.m.)	TIME ARRIVED
CHAIR	KALEIHIKINA	AKAKA	PRESENT	
VICE-CHAIR	KEOLA	LINDSEY	PRESENT	
TRUSTEE	LEINA'ALA	AHU ISA	PRESENT	
TRUSTEE	DAN	AHUNA	PRESENT	
TRUSTEE	KELI'I	AKINA	PRESENT	
TRUSTEE	LUANA	ALAPA	EXCUSED	
TRUSTEE	BRENDON KALEI'AINA	LEE	PRESENT	
TRUSTEE	CARMEN HULU	LINDSEY	PRESENT	
TRUSTEE	JOHN	WAIHE'E, IV	PRESENT	

At the Call to Order, **EIGHT(8)** Trustees are PRESENT, thereby constituting a quorum.

II. PUBLIC TESTIMONY on Items Listed on the Agenda*

Healani Sonoda-Pale: Aloha Chair Akaka, Vice Chair Keola Lindsey and Members of the Board. Ka Lahui Hawai'i Kōmike Kālai'āina is the ad hoc committee of the Nation of Hawai'i Native Initiative for Self Governance formed by and for Native Hawaiians and their descendants AKA Kanaka Maoli without the interference of the state or federal governments or its agencies.

First, we'd like to commend the statement recently released by OHA regarding the Red Hill water issue calling for the swift and safe removal of 200,000,000 gallons of jet fuel from the US Navy tanks which sits only 100 feet above one of Oahu's major aquifers. This holiday season should be a time for families to gather and celebrate, but instead families from Hālawā to Hawai'i Kai are worrying about whether the water coming out of our faucets is safe to drink. Recent events that have unfolded show the lack of care and concern that the US military has for the welfare of the people they are supposed to be protecting as well as our environment. In fact, the military has lied and hid facts not only from the public, but from its own service men and women putting everyone, men, women, children and even pets in harm's way.

They remain silent on what happened in the most recent November jet fuel leak. One in a long history of leaks into the Red Hill Aquifer and to this day we still don't know the facts of what really happened. Today the US military is here at OHA presenting a plan to extend their leases and use of so-called ceded lands, AKA illegally seized Hawaiian Kingdom, crown and government lands. Even OHA has publicly stated multiple times that the military cannot be entrusted with Hawaiian lands and cultural resources with their long history of poor stewardship. They have bombed, polluted and destroyed lands, water, sacred sites and fragile habitats for organisms found nowhere else in the world, all in the name of national security, freedom and protecting America.

As the agency whose kuleana it is to advocate for the well being of all Kanaka Maoli and provide input in the best use of ceded lands, we implore you to take a strong and public stance against the extension of leases of stolen Hawaiian lands for the US military. As they present their master plan, we urge you to ask the hard questions in the best interests of the Kanaka Maoli people and to always keep in mind as they speak, that these are the same people who have not been forthcoming about the facts surrounding the jet fuel leaks in our water, resulting in the poisoning of hundreds, perhaps thousands of military and local families. Ola I Ka Wai, water is life. There is no substitute for fresh water. Mahalo for the opportunity to testify.

Manu Ka'īama: Aloha mai kākou 'O Manu Ka'īama mahalo nui for the opportunity to share my concerns. As you review the Hawai'i Military Land Use Master Plan, I would like for you to consider the following: Emergency alert ballistic missile threat inbound to Hawai'i, seek immediate shelter. This is not a drill. On Saturday, January 13, 2018, where were you? Maybe you were lucky and had some insider information so you were not concerned. Maybe you slept through it. As for me, not so lucky. Most of our family was able to congregate at my daughters home and we tried desperately to reach my other two sons while explaining to my grandchildren not to be afraid. One son finally reached me on the phone with only five minutes of time left before the big bang. He knew he wasn't going to make it to our location on time, so we had to say goodbye to each other on the phone. This is disgusting. This is the life we have with unbridled military installations here.

I ask you where was the military? How were they going to help us in that situation? What could they have done, nothing. We are a target of every enemy of America and there are lots of them. Especially now, since somebody decided to stop being obsessed with the Middle East and arbitrarily decided to move to the Pacific, their new combat playground. We all need to accept and embrace a new paradigm and OHA, you can be instrumental in this.

We have to stop being a target for our sake, for our mo'opuna's sake. We need to save our land and live a normal life. We do not need the military here. Because of them we are a target. We have an opportunity before us, in the late twenty 2020s a number of leases in all branches of the Armed Services are set to expire. Never were these leases intended to be extendable. We must not allow them to continue to use these lands. We know even when faced with a disaster, they will not take responsibility. Most current disaster, Red Hill or our kapu kiki. It's our opportunity to sever ties with the military once and for all. Mahalo for Chair Hulu Lindsey's latest announcement for OHA's position.

They are not going to get rid of those monster fuel tanks I bet you and do not care who it harms. You can see it unfolding in real time, how they are planning to sidestep responsibility. Even now, millions of promises never fulfilled my great grandmother and grandfather for example, promised their land back in Makua Valley. They believed in the military. They are long gone now and the land is still in the military's control, hewa. Let us not forget the military also uses and abuses lands in our residential areas. The master plan should completely delete the military's BAH program. This is the basic allowance for housing for military with local median income at 64,000 average a year and the median price of homes on Oahu at 1,000,000. No local average wage earning person, especially not a Hawaiian, could afford to buy a house and it's 8,000 square feet land to live on, no way. And yet the military subsidizes their people with monthly stipends of between 3000 to over 4500 a month. How can we compete? The military is what is causing this problem.

Also, Realtors have the audacity to encourage them to do this. Practically guaranteeing military families, eh at least a \$100,000 windfall when you sell in two to three years, and when they return to their homelands, it's deplorable, and yet they ignore the inflationary situation that they have created in our homeland. They do not care. From a century of experience, we know that the military promises that they make will not be kept. It is time to take the matter into our own hands. We need to care for our land and waters, something they do not know how to do. Mahalo nui loa, me ke aloha. Lono 'i ka makahiki, aloha.

III. APPROVAL OF MINUTES

A. November 17, 2021

Chair Akaka: Can I please get a motion to approve the November 17, 2021 BAE Committee Meeting minutes.

Vice Chair Lindsey: I move that we approve the November 17, 2021 meeting minutes.

Trustee Akina: I second

Chair Akaka: Mahalo Trustee Akina, the motion has been made by our BAE Vice Chair, Trustee Keola Lindsey and seconded by Trustee Akina. Members, are there any changes to the minutes? Seeing none, Brandon can I please have a **roll call vote** to approve the minutes.

							1:49 p.m.
TRUSTEE		1	2	'AE (YES)	A'OLE (NO)	KANALUA (ABSTAIN)	EXCUSED
LEINA'ALA	AHU ISA			X			
DAN	AHUNA					X	
KELI'I	AKINA		2	X			
LUANA	ALAPA						EXCUSED
BRENDON	LEE			X			

KALEI'ĀINA							
CARMEN HULU	LINDSEY			X			
VICE CHAIR KEOLA	LINDSEY	1		X			
JOHN	WAIHE'E, IV			X			
CHAIR KALEIHIKINA	AKAKA			X			
TOTAL VOTE COUNT				7	0	1	1

MOTION: [] UNANIMOUS [X] PASSED [] DEFERRED [] FAILED

IV. NEW BUSINESS

A. Presentation: Native Hawaiian Veterans, Reyn Kaupiko, Native Hawaiian, VA Advisory Committee on Tribal and Indian Affairs

Chair Akaka yields the floor to Ka Pouhana Hussey.

Ka Pouhana Hussey: Thank you Chair Akaka, aloha Trustees we have Reyn and we mahalo him, and his presentation is in there and we'll give him the opportunity to introduce himself as well as the topic and appreciate that he is coming to join the Trustees from the east coast. So thank you Reyn, go ahead.

Reyn Kaupiko: Alright, thank you very much Dr. Hussey, thank you very much Trustee Akaka and fellow Trustees. Thank you very much for giving your time to hear me out and make this presentation for you guys. So just a little bit about myself so you can just have an understanding of who I am and where I come from. So I am a 2003 Kamehameha Alumni, 2008 Naval Academy Alumni, former Surface Warfare Officer in the United States Navy, Navy Veteran, 2017 UH Mānoa MBA Alumni, 2020 University of San Francisco Alumni with a Masters in Public Leadership. And through this journey I really got involved in the Veteran community, and at my time at the University of San Francisco I made an emphasis on how to raise benefit awareness amongst the Native Veteran community. Kind of like starting a cookie cutter method so we could apply it as Veterans to other ethnic communities around the islands. Which leads me to my topic, Native Hawaiian military Veterans. And for my briefing, my references are the Department of Veteran Affairs, Charter of Advisory Committee on Tribal and Indian Affairs, the Federal Registrar printed 2021 May 03 notice, Department of Veteran Affairs Advisory Committee on Tribal Indian Affairs, the establishment. The Federal Register 2021 printed May 05, notice Department of Veteran Affairs, solicitation and nominations.

So the President directed down to the VA through the secretary of the VA that there will be a Committee on Tribal and Indian Affairs, and this was relatively at the start of the Presidency and the Charter was signed by the Secretary of the VA in April of 2021, and in the Charter, the objective is to form a committee that provides advice and guidance to the Secretary of the VA on all matters relating to Indian Tribes, Tribal organizations, Native Hawaiian organizations and Native American Veterans. So this is a two year appointment with two terms and every year we will meet with the Secretary of the VA in person twice. On this board there are 16 people with the Native Hawaiians having one definite seat, and there's an additional at large seat.

So what is this committee and what is its duties? So in the Charter it outlines ten of their duties starting with identifying for the department, the evolving issues of relevance to the specific community, so the Native Hawaiian organizations and Native American Veterans programs and services. Describing purpose clarification and recommendations, as well as issues that are raised. Providing forum for these entities to have discussions with the Secretary of the VA, as well as on regulations, policies and procedures. Current standing and ones and how we should they think they should be changed. Identify priorities and provide advice on strategies for consultation. Ensure pertinent issues are brought to the attention of the Native Hawaiian organization, so bringing that information that's discussed back. Talking within our community to get more ideas and present it back to the Secretary of the VA. Encouraging the Secretary to work with other Federal Agencies to help fix the issues that we're enduring related to Veterans. As well as highlight the contribution of Native American Veterans in the armed forces.

We'll also make recommendations to the consultations of policy for the department and support processes to develop an urban Indian organization confer policy. I've asked more about this one and I'll get more understanding on this, that is the item nine. And the last one is with the secretary approval, conduct other duties recommended by the committee.

Chair Akaka: Kala mai Reyn, I think it would be easier for those in attendance and watching this to see your presentation on the screen, even though we have it ahead of time. But just so we can follow exactly where you are, is it possible for you to share your screen with this?

Ka Pouhana Hussey: If it's okay Trustee Akaka, I could share it and then Reyn can focus on the presentation.

Chair Akaka: That would be great. Mahalo, Ka Pouhana.

**DESCRIPTION OF COMMITTEE
DUTIES # 9 OF 10**

Support a process to develop an urban Indian organization confer policy to ensure the Secretary confers, to the maximum extent practicable with urban Indian organizations;

**DESCRIPTION OF COMMITTEE DUTIES #
10 OF 10**

With the Secretary approval, conduct other duties recommended by the Committee.

Reyn Kaupiko: So this is the item that I was inquiring more on from the Department of Tribal Affairs within the VA to explain this. I need to get a better hold on what this is. So the first eight items were pretty self explanatory in terms of like what we should be doing for this type of committee and it came to this one and more needs to be learned.

And then item 10, so the next slide. This is the slide saying in addition to the the previous nine, whatever the secretary approves for the committee to look into those duties will be carried out.

DESCRIPTION OF COMMITTEE DUTIES

At least once a year the Advisory Committee will submit to the Sec VA and associated Congressional committees' action for legislation for the upcoming year

DESCRIPTION OF COMMITTEE DUTIES

At least every two years the Advisory Committee will submit to the Sec VA and associated Congressional committees' a report describing the activities of the Committee of the previous two years

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At least every two years, the advisory committee will submit to the Secretary of the VA and associated Congressional Committees a report describing the activities of the committee of the previous two years. So for me those two items will be big, which brings us to the plight of the Native Hawaiian military Veterans today.

THE PLIGHT OF NATIVE HAWAIIAN MILITARY VETERANS

- Data
- Benefit Awareness
- Native Hawaiian VSO

So I also sit on the State Board for Veteran Affairs and for the last two years I've been advocating for a better data study, both on the congressional scale as well as the state scale to get money so we could better understand this group. The data is currently from the 2010 Census and it's not good at all. Hopefully with the 2020 Census though shed better light and it will tell us if we need to continue advocating for a study and will show a little more direction that things need to be emphasized on.

My second point that I am pushing in this Board is benefit awareness. Through all my readings of VA publications and all my dealings with Veterans, the number one problem that the Veteran community faces is benefit awareness, so the lack of knowing what your entitlements are. And right now it's all by word of mouth. Sometimes these people will see stuff online and it might raise some curiosity, but this is what the VA struggles with and this is what I go out into the community and preach to Veterans about. Hey man, I'm not a professional VSO, but this is what I know and you might want to look into it. Or I might talk to their wives or their kids because the motivating factor necessarily isn't always the Veteran. A lot of these older Veterans have had very poor experiences with the VA and it causes disdain and an unwillingness to return. So that's a whole separate issue, but it's all related back to the lack of benefit awareness.

My third item that I'm pushing for is to get monies made available or within the state somehow us as a community finding a Native Hawaiian VSO, so somebody that is a professional Veterans Service Officer that has worked in the VA and has done this type of paperwork 'cause this type of paperwork is very tedious and a lot of people get lost along the way because they need a professional to fill this out.

What's not on here, but through my discussions recently in the community and I thought was a phenomenal idea was getting Native Hawaiian medicines approved by the VA so Native Hawaiian treatments for something like PTSD or whatever other ailments may be associated to that Veteran, that there are Native Hawaiian remedies for. So that's something I'm going to throw on this list, but those three are definitely my top three items of concern for our community.

MAHALO



With that my last slide is thank you and on this slide is the only two Native Hawaiians to ever win the Medal of Honor, which raises a question, we've been fighting in American conflicts since the War of 1812. Why is there only two Native Hawaiians that have ever won the Medal of Honor? And with that, I'll leave the floor open to questions or comments.

Chair Akaka: Mahalo, Reyn. Mahalo for all your work to present data gathered and also with spreading the message to let those that are able to or qualified that there is more benefit awareness, so important. Members are there any questions, comments?

Chair Akaka recognizes Trustee Akina

Trustee Akina: Thank you, Madam Chair. Reyn, I just want to say aloha to you. It's great to see you again and thank you for your advocacy work for Native Hawaiian Veterans, you've got a commendable background and career record behind you, and we look forward to what you're going to be doing for Native Hawaiian Veterans and the broader community in the future. Thanks for coming today. Good to see you again.

Reyn Kaupiko: Trustee Akina, thank you very much for the kind words.

Chair Akaka recognizes Vice Chair Lindsey

Vice Chair Lindsey: Thank you, Madam Chair. Aloha Reyn and thank you for joining us. I'd like to echo Trustee Akina's mahalo to you for the work that you do, and for your service. The question I have is, so in your slides it talks about Native American Veterans and Native Hawaiian organizations. Are Native Hawaiians included in the definition of Native American Veterans? And the second question is, are there examples of Native Hawaiian organizations that are engaged in Veteran advocacy? Thank you.

Reyn Kaupiko: Trustee Lindsey, thank you for such a great question, and my apologies, I meant to bring this up. The definition right now outlined is that of the federal definition of what it is to be a Native Hawaiian, and that's something that I'm gonna be advocating for change on because this affects so much more, so many more native Veterans. As well as existing organizations circling back to that, there is no one specific organization that deals in this area. There are little things that a lot of organizations might do and somewhat incorporate. For like employment, we might do like a briefing on Veterans employment, but it's nothing major that I found any organization to be dealing with. At least from the aspect of native, while other tribes in the mainland have had great success in creating their own departments within the tribes that focus on this 'cause my whole idea for this is that if we're able to bring these Veterans to whatever entitlements they have, the hopes are that this will lighten the burden of the existing NHO's that are providing services and free up funding for other avenues for us to consider.

Vice Chair Lindsey: Thank you, Reyn and I guess just a comment to your three points that you raised on your slide about issues facing Native Hawaiian Veterans and then the 4th that you mentioned about getting VA approval for traditional Hawaiian treatments. I know we can't make commitments today, but I'm hopeful there's a way OHA can partner with the VA and other organizations to address those issues that are facing those of our people who served in the US military so look forward to the path ahead, thank you.

Chair Akaka: Mahalo BAE Vice Chair Lindsey. It seems as if the native need their own committee and not just be under the Indian Affairs.

Chair Akaka recognizes Trustee Lee

Trustee Lee: Thank you, Madam Chair. Thanks for the presentation Reyn. I have a follow up question to what Trustee Keola Lindsey asked. So you said they're using the federal definition of Native Hawaiian. Well, the federal government has two different definitions for Native Hawaiian, so is it 50% or is it 25% that they're using? And I have a second part to that question. But go ahead.

Reyn Kaupiko: The 50% definition.

Trustee Lee: Okay, and then I know to what Trustee Keola Lindsey said about not promising anything today,

but what is the ask? What do you want from OHA? How can we help is a better way of putting it. How can we help?

Reyn Kaupiko: So, one thing, the biggest thing is bringing, raising awareness and through many different ways that can be done. Right now I've been so graciously given the opportunity by Dr. Hussey to write a monthly column in Ka Wai Ola on these issues, and my plan is not only for myself to put my voice in there, but to bring in resident experts, asking them hopefully to write a column that will be in my section, but as well as if they're not willing to write it, you know, can I interview you? And I put all those questions and all those answers of where people need to go and what they need to expect within that column.

Trustee Lee: So would it also then be fair to say that this would help, any intake that the Office of Hawaiian Affairs or DHHL for that matter, if having a box for them to check to say that I am a Veteran. And if they check that box, then they automatically are given literature or contact information or their information is forwarded to you guys or something of that effect. So whenever OHA or DHHL takes in information for somebody who fills out for a loan or somebody comes in for Native Hawaiian registry and they check if there's a box and they check I'm a Veteran and we forward that information to you guys so that you can contact them and make sure that they are aware of. These are all the benefits that are available to you as a Veteran.

Reyn Kaupiko: Trustee Lee, that would be massive. But may I interject that I right now, I'm working as a kind of a one man show and this is an unpaid appointment.

Trustee Lee: Yeah, I understand that you're not up and running yet. Well, I mean I'm just offering how OHA can help and how other Native Hawaiian organizations can help. So when this is established and this is up and running that all of these Native Hawaiian organizations have a box that says, I am a Native Hawaiian Veteran and then that information gets forwarded to you guys. So that way yeah, not everybody reads our Ka Wai Ola right? So this is a way that if we can't get the information to them because they don't know where to look, then if we take in information that says they're a Veteran and we give it to you guys then you can contact them.

Reyn Kaupiko: That is exactly what we need. Thank you very much, great question.

Chair Akaka: Mahalo, Trustee Lee. Maybe another thing that we can offer is when we are speaking with our State Legislators, that when they have their newsletters that go out to their different district communities that we can mention that they share this to further the benefit awareness to their constituents as well.

Chair Akaka recognizes Board Chair Hulu Lindsey

Board Chair Hulu Lindsey: I want to thank Reyn again and I want to thank you more so now that I know that you're working for free. I mean that's quite a dedication and I'm a little upset that the Native Hawaiian that you speak of is only the 50 percenters because that's only half of the Hawaiians that are present around the world. We need to be a little bit more fair and tell us how we can help move that into changing that 50%. There's so much disparity among the Hawaiians. Look at the Medal of Honor, two, give me a break. There were plenty Hawaiians that deserved Medals of Honor and you know I feel bad for you that you work in a one man show, but what can we do to get you more help?

Reyn Kaupiko: I mean, I welcome all help. I don't know how to answer that. Whether it's with somebody within or another volunteer.

Board Chair Hulu Lindsey: In your volunteering position, who do you work under? What agency?

Reyn Kaupiko: The Department of VA. I technically am an unpaid federal employee.

Board Chair Hulu Lindsey: And it's the VA department locally?

Reyn Kaupiko: Federal, so the D.C. Office.

Board Chair Hulu Lindsey: Thank you for your devotion because you're helping plenty people. We we can help more, thank you.

Reyn Kaupiko: Thank you, Trustee.

Chair Akaka: Mahalo, is there any other questions or concerns?

Ka Pouhana Hussey: Trustee Akaka, among the reasons we invited Reyn to come and voice the concerns is to the Washington D.C. Bureau, Keone Nakoa and Christy had been working with Reyn to help navigate the various Veteran as well as tribal advisory pathways and just this morning I had a call with the White House Office with Tribal Advisory and in the Tribal Summit that was held two weeks ago there were a number of commitments made by the Secretary for Veterans Affairs regarding Native Veterans. So that is one of the things that we need to connect on that and how we can get into that resourcing for support for Native Hawaiian Veterans. When language is used Native American, it includes all Natives, including Hawaiians. So I'm trying not to separate the obligations for our Veterans. But working within the systems that are there as well, so that is definitely an opportunity and among the reasons we asked Reyn to come and share is to highlight the partnership and the 'ohana that we need to work with for our constituents.

Chair Akaka recognizes Vice Chair Lindsey

Vice Chair Lindsey: Madam Chair, I just wanted to clarify one thing before we wrap up so earlier we talked about the definition of a Native Hawaiian within Native American Veteran, but any Hawaiian who served is eligible for VA benefits right? I guess there's a difference there right and I know this might be a longer conversation, but I just want to make sure that's clear that if you're 49% you get benefits. If you're 1%, you're eligible for benefits. That's correct, right Reyn?

Reyn Kaupiko: Trustee that is correct, honorable discharge in some cases, different levels of discharge might be applicable.

Vice Chair Lindsey: Thank you, Reyn.

B. Presentation: Hawaii Military Land Use Master Plan: Key Assessments & Processes, including Native Hawaiian Consultation, Coordination, Engagement or Conference with the Federal Government

Chair Akaka yields the floor to Ka Pouhana Hussey.

Ka Pouhana Hussey: Trustees, the next topic was selected in this month's Ka Wai Ola Dr. Kajihiro gave an overview of the Hawaii Military Land Use Master Plan and so we wanted to bring that to the awareness of Trustees. Kehau Watson here who's a familiar advocate, is here to provide some insights into the various processes that a company you know from EIS and other processes, and then so what we want to do is Dr. Kajihiro will give a 10 minute overview. This is not the intent to study and digest the 100 some odd pages. This is an overview as Dr. Kajihiro's article was and then Kehau is here to help us understand the various processes that are apart of such a plan, and more importantly, how does OHA and our beneficiaries, what are those advocacy and insertion points in the various processes.

And then both Syd and Ron are both from the Native Hawaiian Chamber of Commerce and have had recent contributions in their feedback to some of the processes that were there and so we just wanted to take 10 minutes for an overview, 10 minutes for a process and then 10 minutes for Sid and for Ron to share the Native Hawaiian (inaudible). All to ensure that we have a foundation for future discussion. I will share with you that I have asked Na'u our Chief advocate to help craft a policy for the Trustees to think about regarding military engagement. So those are some of the long term policy matters. But today's presentation of again a short 30 minutes is to just inform, and set context for future action and consideration by the Trustees. So I'm going to turn that over to Dr. Kajihiro and go ahead.

Dr. Kyle Kajihiro: Aloha kākou, thank you, Chair Akaka, Vice Chair Keola Lindsey and Pouhana Hussey for the invitation to share with you all. So a little bit about myself, I'm a Lecturer at the University of Hawai'i in Geography and Ethnic Studies. Before that I used to be a Program Coordinator with the American Friends Service Committee and now I'm a volunteer with Hawai'i Peace and Justice. So as a group that works for protecting Hawai'i and its people and addressing some of the impacts of military activities on the environment. What I'm gonna do today is give a brief overview of the Hawaii Military Land Use Master Plan and some of its background, and focus on a couple of issues in there. One is the the leased lands, Hawaiian Trust Lands that are leased to the military for \$1.00 for 65 years, and then also the Red Hill issue that's been the news lately.

Before I get into that, I just want to say that one of the context that we have to always keep in mind is that there was and is a broken relationship between Hawai'i and Kanaka Maoli and the US military. It goes back to the overthrow and before and the remarks by the Secretary of Navy I thought were pretty outrageous when he considered Governor Ige's order a "request." So it just shows that there's a kind of a disdain or a disrespect for the interests and the issues of people in Hawai'i and our concerns for preserving the water and it brought me back to 1872 when General John Schofield first did his surveillance of Hawai'i and reported back that he set his gaze on Pu'uloa and he said this is valueless to them, to Native Hawaiians, but more valuable than anything that Hawai'i has to give to the United States. So again, it's showing a devaluation that the marvelous local i'a and lo'i kalo and this kind of food system that was there was just dismissed and all he saw was the military utility. So this is I think an ongoing, a very deep problem in the way that Hawai'i is seen as just a tool and it can be sacrificed for the purposes of the mission. And so this is where some of the contradiction arises.

Hawai'i Military Land Use Issues in Hawai'i
Presentation to the Office of Hawaiian Affairs
Committee on Beneficiary Advocacy and
Empowerment

12/8/2021
By Kyle Kajihiro

Origin of the Hawaii Military Land Use Master Plan (HMLUMP)

- 1992 CINCPAC Adm. Larson begins joint land use review.
Key issues: DHHL lands, leases of trust land
 - Joint Service Executive Steering Committee
 - Joint Hawaii Land Use Affairs Board (JH-LUAB) - military, congressional, state, county officials, OHA, Chamber of Commerce.

So just a little background on the Hawaii Military Land Use Master Plan or HMLUMP as they called it. In 1992, prior to that the military branches did their land use planning separately. Each branch did their own planning, but in 1992 the Commander in Chief of the Pacific Command Admiral Larson decided that he was going to do a joint planning effort and to bring the different branches together. He created a Joint Service Executive Steering Committee and then a Joint Hawaii Land Use Affairs Board, which included government officials, federal, state and county, as well as the Office of Hawaiian Affairs and the Chamber of Commerce, and so they went about this process for several years.

Kaho'olawe Aloha 'Āina



- 1976 Protect Kaho'olawe 'Ōhana - stop the bombing campaign
- 1990 Protect Kaho'olawe 'Ōhana succeeds in stopping bombing of Kaho'olawe
- 1994 title transferred to the State of Hawai'i

Other Context for the HMLUMP

- End of the Cold War — Base Realignment And Closure (BRAC)
- 1993 'Onipa'a centennial observance of the 100th anniversary of the overthrow; increased calls for return of Hawaiian trust lands
- 1992 Rep. Abercrombie introduces bill to reevaluate military use of Bellows AFB

The other context that's happening is 1976 of course, the Protect Kaho'olawe 'Ōhana began their campaign to stop the bombing, but in 1990 they succeeded in stopping the bombing, and in 1994 title was transferred from the Navy to the state of Hawai'i. So these were alarming to the military that they felt that they were losing control of their land use in Hawai'i.

Some other contextual events, the end of the Cold War happened, and so the Congress was looking at Base Realignment and Closure. Barbers Point was one such site that was closed under BRAC, and then the centennial of the overthrow was a kind of a high point in Hawaiian organizing where the Hawaiian Trust Lands were again in people's sights. In 1992, Congressman Abercrombie introduced a bill to reevaluate the military's need for Bellows Air Force Base, and this is also Hawaiian Trust Lands that you know, I think Hawaiian communities there were advocating for its return, but it was not the Pacific Command and other political leaders felt that that was not advisable.

Origin of the HMLUMP

- Sen. Inouye appropriates
 - \$750,000 for land use study completed by Charles Blackard and Associates.
 - \$1,000,000 for Bellows EIS (derails Abercrombie's efforts)
 - \$900,000 for HMLUMP
- HMLUMP aim to curtail Kanaka Maoli efforts to recover trust lands

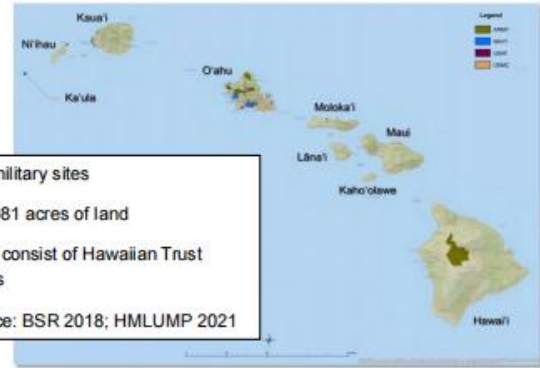
Mauna a Wākea (Pu'uhonua o Pu'uuhuluhulu)



So the Senator appropriated about \$750,000 to do a land use study and then another \$1,000,000 to do an environmental impact statement for Bellows Air Force Station and then about \$900,000 for the first Hawaii Land Use Master Plan, a Military Land Use Master Plan. The EIS for Bellows effectively derailed Abercrombie's efforts. It just prolonged the process and it allowed the military to advocate for its use, and so the Marines got a large portion of Bellows for its training after that. But I think one thing to just keep in mind is that the Military Land Use Master Plan was instituted at that time as a way to curtail these activist efforts to reclaim Hawaiian Trust Lands.

So fast forward to a few years ago we have the Mauna Kea movement, sort of a new resurgence of activism.

Mākua Valley



MILITARY LAND HOLDINGS IN HAWAII

Mākua Valley been ongoing for a long time and we've haven't had, we're looking forward to celebrating 20 years without live fire training in the valley.

This is the context in which this new Hawaii Military Land Use Master Plan is being created. I think to look at how the military can retain its lands, which goes at odds with groups that are trying to recover lands. So today there's about 142 military sites, 221,000 acres, about 68% of the military lands come from the Hawaiian Land Trust.

SERVICE	FEE	CEDED	LEASED	OTHERS*	TOTAL
Army	36,744	102,969	29,349	5,482	174,544
Navy	16,793	7,446	9,546	7,830	41,615
Air Force	409	0	474	235	1,118
Marine Corps	2,968	1,727	0	9	4,704
TOTAL ACRES	56,914	112,142	39,369	13,556	221,981

*OTHERS includes easements, government/private agreements, and other interests in real property
Source: Service Components updates in Mar 2021

Table 2 – Military Land Holdings in the State of Hawai'i

SERVICE	FEE	CEDED	LEASED	OTHERS*	TOTAL
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Source: Service Components updates in Mar 2021

Table 2 – Military Land Holdings in the State of Hawai'i

112,142 acres of Hawaiian trust land (Government and Crown Land, aka "ceded")
+ 39,369 acres of Leased Hawaiian trust land
= 151,511 acres of Hawaiian trust land
68% of military land holdings

This chart comes from the plan. You can see how much land they claim to own in fee. How much is considered ceded, leased and others include partnerships, easements and so forth. Importantly, this is the first Military Land Use Master Plan and this one are the only times that I've seen the trust lands broken out as a separate category. Usually the real estate reports treat all the military land holdings as fee, but here they recognize that the ceded lands and trust lands have a different status and different rates attached to them.

And if you look at these two columns, 112,000 acres of ceded 39,000 of leased, together that's about 68% of the overall military land holdings are the Crown and Government Lands.

Joint Priorities

1. Retaining lands from expiring 2029/2030 leases
2. Supporting MDA Homeland Defense Radar
3. Supporting Pacific Multi-Domain Training and Experimentation Capability (PMTEC) joint training at PTA and PMRF
4. Long term solution for Red Hill fuel tanks - fuel storage
5. Move munitions storage from Lualualei to West Loch
6. Identify facility and land requirements for Hawai'i related Marine Corps modernization efforts and international agreements associated with Defense Policy Review Initiative



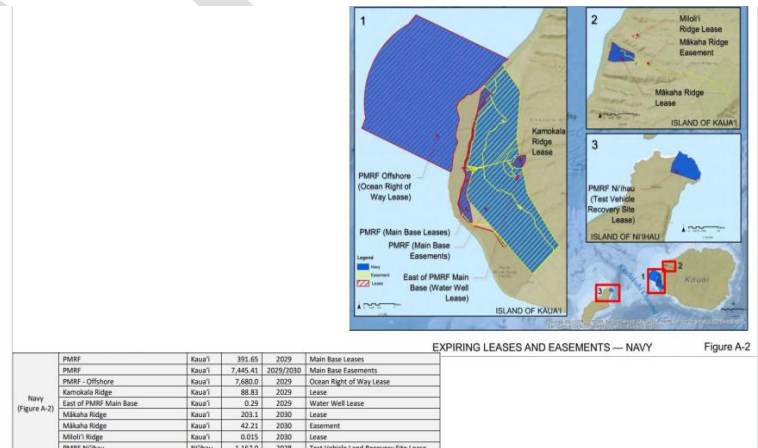
Hawai'i Military Land Use Master Plan

Service	Location	Island	Acres	Exp Year	Notes
Army* (Figure A-1)	Pōhakuloa Training Area (PTA)	Hawai'i	22,971.0	2029	Saddleback Road Lease
	Kahuku Training Area	O'ahu	1,150.0	2029	Parcel Lease
	Kawailoa Training Area (Poamoho)	O'ahu	4,390.0	2029	East Wai'anae Parcel Lease
	Mākua Military Reservation (MMR)	O'ahu	782.0	2029	Wai'anae Parcel Lease
Navy (Figure A-2)	PMRF	Kaua'i	391.65	2029	Main Base Leases
	PMRF	Kaua'i	7,445.41	2029/2030	Main Base Easements
	PMRF - Offshore	Kaua'i	7,680.0	2029	Ocean Right of Way Lease
	Kamokala Ridge	Kaua'i	88.83	2029	Lease
	East of PMRF Main Base	Kaua'i	0.29	2029	Water Well Lease
	Māhaha Ridge	Kaua'i	203.1	2030	Lease
	Māhaha Ridge	Kaua'i	42.21	2030	Easement
	Māhaha Ridge	Kaua'i	0.015	2030	Lease
Air Force (Figure A-3)	PMRF Ni'ihau	Ni'ihau	1,167.0	2028	Test Vehicle Land Recovery Site Lease
	Ka'ena Point Satellite Tracking Station	O'ahu	51.47	2029	Easement
	Ka'ena Point Satellite Tracking Station	O'ahu	51.47	2029	Easement
	Kā'ala Air Force Station	O'ahu	1.8	2028	Lease
	Kōke'e Air Force Station	Kaua'i	8.45	2030	Lease
	Remote Maui Experimental Sites	Maui	6.17	2021/2023	Leases
	Maui Space Surveillance Site	Maui	5.0	2031	Lease
			Total	46,471.1	

*Army expiring easements are not included in the table as they are small in scale, routine, and not associated to the 65-year lease.

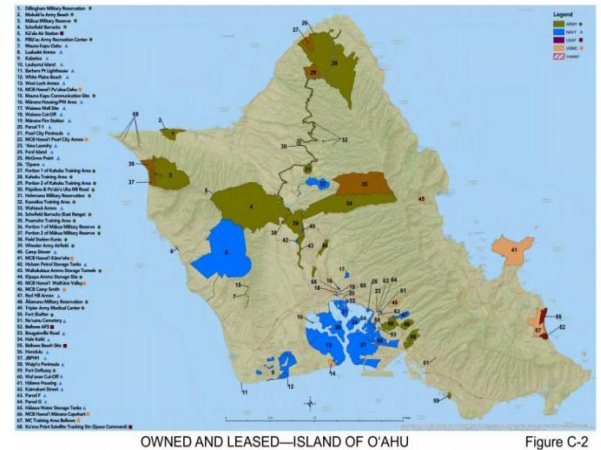
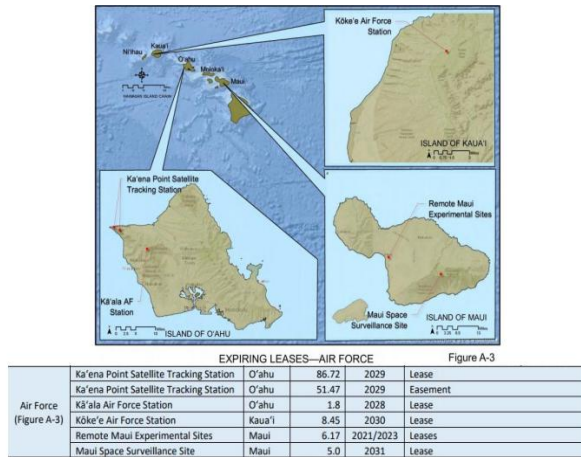
Table 1 – Expiring Leases and Easements

So in the Military Land Use Master Plan, they list six joint priorities and the top is to retain these expiring leases and I'll get to that in a minute, supporting the missile defense radar which communities in Kahuku tried to stop. Wai'anae I think stop the Ka'ena Point as a site for it and now it's probably going to be on Kaua'i, and then if you look down to #4 they're looking at retaining the Red Hill fuel tanks, finding some kind of a fix. #5 is interesting to move munitions from Lualualei to Westloch, which I think people in 'Ewa would have concerns for munitions being in their neighborhood. But it may free up lands in Lualualei, so this is something that I think folks in Wai'anae have been looking at, because that's some of the best farm lands on O'ahu.

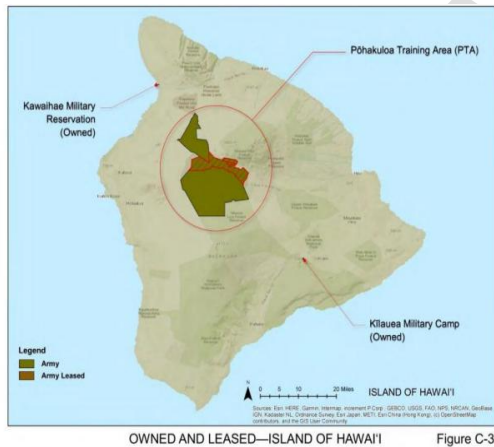


So this is the table of the expiring leases and easements. If you look at the top four, I mean I'll go through these one by one. So the top four are the army leases. About 22,000 acres on Hawai'i Island, 1100 acres at Kahuku, 4300 acres at Poamoho, Kawailoa and about 800 acres in Makua Valley. So these are the ones that are currently undergoing environmental impact statement processes, which I think Kehau will be talking about later.

These other leases that I wasn't aware of. The Navy has a number of leases and easements on Kaua'i related to the missile defense programs at PMRF. Some of these, including that yellow hatched area are easements, so those are agricultural lands where the Navy has an easement on development there, but I wasn't aware of these offshore leases and I don't have a copy of those lease documents, so I don't know what the terms are. They also have a lease on Ni'ihau, and then the Air Force has a number of leases that also expire 2029. These are smaller sites, but they're most of these radar stations that you see at Kā'ala, Ka'ena Point, one up on Haleakalā.

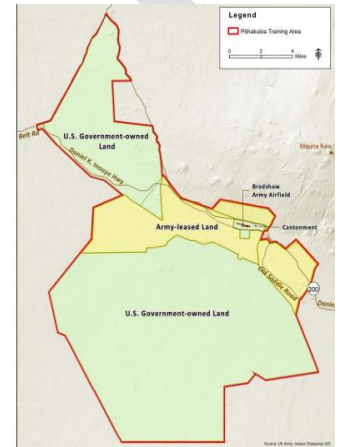


And I think the thing to keep in mind. These are the leases that are \$1.00 for 65 years, right. So there's very little benefit and the military retains a lot of control, and so we've been active in efforts to try to, you know, stop the renewal of these leases. This map just shows the lands on O'ahu.



Military Leases

- \$1 / 65 yrs until 2029
- >30,000 acres of Hawaiian trust land (aka "ceded land")
 - Pōhakuloa
 - Mākua
 - Kahuku
 - Poamoho
- Army EIS; wants to renew
- May try to condemn the land



The lands on Hawai'i island and these are the leases here where you have the yellow area of the lease lands. Now on this map they show the green portion at the bottom as U.S. Government owned. Those are also Hawaiian Trust Lands and also the ones that are most heavily impacted by live fire training. So we we have a concern there because due to the unexploded ordinance, the Army has not done adequate environmental and cultural assessments of the impact range itself. They don't know what they might be damaging in their training activities, and I should mention too that one of the concerns is that in Army presentations they have raised the issue of possibly condemning those lands in yellow there in order to acquire them for continued use, so that's something that raises a lot of concern for us.

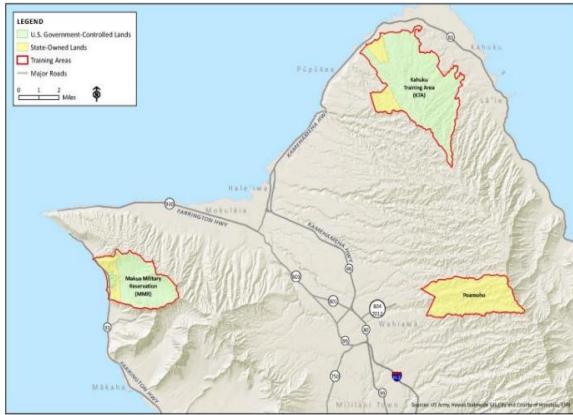


Figure 1-1: Location of KTA, Poamoho, and MMR, Island of O'ahu

ARMY TRAINING LAND RETENTION EIS

<https://home.army.mil/hawaii/index.php/OahuEIS/project-home>

SUBMIT COMMENTS ON THE CULTURAL IMPACT ASSESSMENT

Online surveys have been created for each geographic area. Individuals or organizations may complete the CIA surveys online at:

www.surveymonkey.com/r/KahukuCIA (Kahuku)

www.surveymonkey.com/r/PoamohoCIA (Poamoho)

www.surveymonkey.com/r/MakuaCIA (Mākua)

Or you may contact the CIA team at community@honuaconsulting.com or (808) 392-1617.

And here on O'ahu, these are the lands that are undergoing environmental impact statement right now.

A link to the Army site and then links to areas where you can submit comments on the cultural impact assessment under the state environmental impact process.

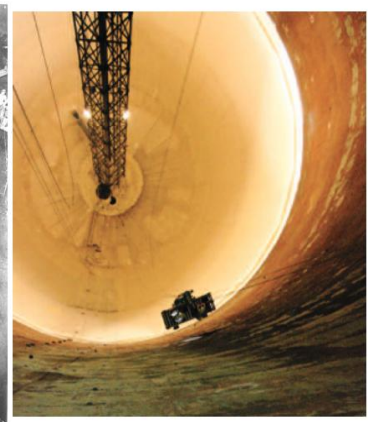
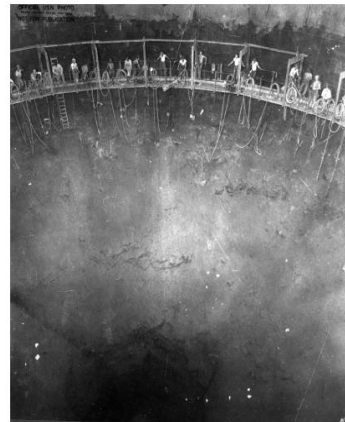
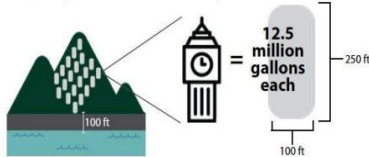


Red Hill and Impacts on Water

Kapūkaki, (aka Red Hill) is the ridge located between the ahupua'a of Hālawā and Moanalua.

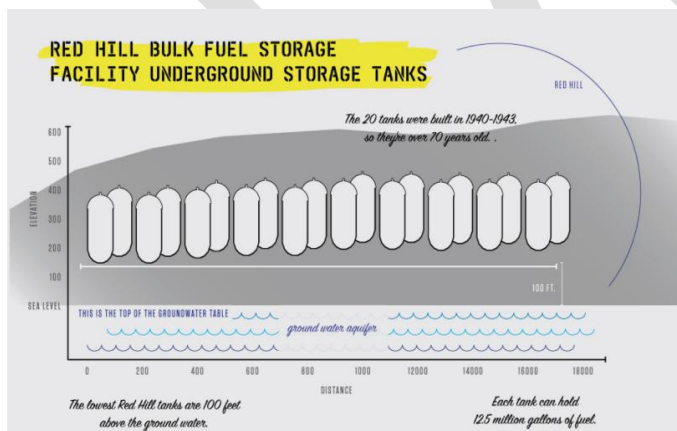
For 80 years the U.S. Navy has stored around 200 million gallons of fuel in underground storage tanks in this ridge, just 100 feet above O'ahu's primary drinking water supply.

The facility has a 96% chance of leaking up to 30,000 gallons over the next 10 years.



So now moving on to Red Hill or Kapūkaki as the Hawaiian name is, you know this is one where you have this the most important aquifer for O'ahu and these leaking deteriorating fuel tanks sitting 100 feet over this resource.

So to give you a sense of the scale of these tanks and they said 100 feet above the aquifer as I mentioned.

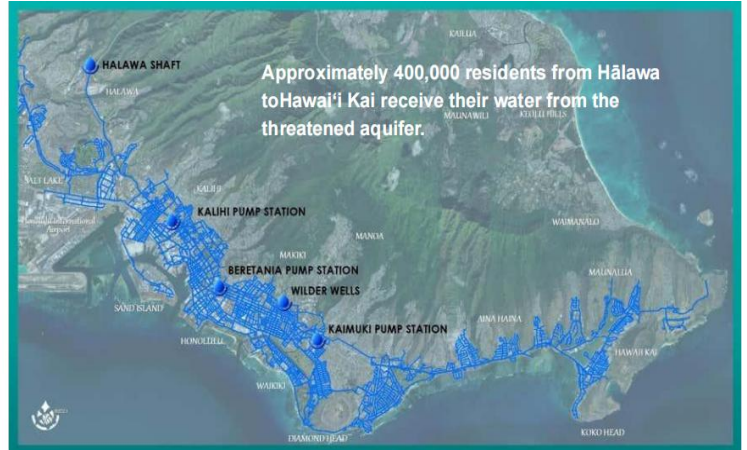


Red Hill Fuel Tanks

- In 2014, **27,000 gallons** of jet fuel leaked from Tank 5.
- In March 2020, a pipeline leaked; approximately **7,100 gallons** of fuel was collected from the surrounding environment.
- In May 2021, over **1,600 gallons** of fuel leaked from the facility due to human error after a control room operator failed to follow correct procedures.
- In July 2021, **100 gallons** of fuel was released into Pearl Harbor, possibly from a source connected to the Red Hill facility.
- In November 2021, **14,000 gallons** of fuel-water mixture leaked from a fire suppression system drain line at Red Hill. Military families began to complain of health problems from fuel contamination in their drinking water.
- More than **180,000 gallons** of fuel has leaked since construction.



There's been a number of leaks, I won't go through all of these, but the most recent was the 14,000 gallons of fuel and water mixture, which possibly contaminated the military housing and their water sources, and more than 180,000 gallons of fuel have leaked since its construction.



So this gives you an idea of where the Navy well is, where the water was pumped and fed to those military housing areas, and you can see just above that is the Board of Water Supply Halawa well. It's about 5000 feet from the tanks and so the concern is that if the Navy well stops pumping, which they did, and the Halawa shaft kept pumping, it would draw contaminants towards their well and that's why they turned it off. So the concern now is how do we get a fuel out of that area, so it's not a risk to the aquifer.

And if you live in any of these blue areas, this is who would be directly affected by any contamination in the Halawa shaft, and going beyond that, if that water was contaminated, they would have to shift the sources around and it would affect pretty much everyone on O'ahu.

O'ahu Water Protectors

Points of unity

1. Water is life. Access to clean drinking water is a basic human right.
2. The Red Hill fuel tanks are a threat to O'ahu's drinking water and must be retired as soon as possible.
3. We demand that local, state, and federal officials take urgent action to shut down the Red Hill fuel tanks in order to protect drinking water on O'ahu.

Join our efforts to protect O'ahu's drinking water by endorsing this coalition statement and helping with outreach, education, and action.

Honolulu City Council Bill 48 "RELATING TO UNDERGROUND STORAGE TANKS"

Introduced by Council member Radiant Cordero and Chair Tommy Waters

<https://hnlidoc.hawaii.gov/hnlidoc/document-download?id=12617>

May be heard as early as 12/15/2021

So a group, the O'ahu Water Protectors Coalition formed around three principles. Water is life we need to protect it as a basic human right. The tanks are a threat to the drinking water and must be retired as soon as possible, and we're calling on all levels of government to take urgent actions to protect our water and shut down those tanks.

And the City Council just recently, Councilmember Cordero and Waters introduced a bill for an ordinance to regulate the underground storage tanks at the county level. So right now there's a contested case at the Department of Health for the state level regulation. This would add another layer of regulation through the county and the federal law allows the devolution of some authority down to the local level. So we're hoping that this can be something that will pass and we'll give more control to local residents.

So that's all I have by way of presentation. I'm open to answer any questions.

Chair Akaka recognizes Board Chair Hulu Lindsey

Board Chair Hulu Lindsey: I wanted to ask Dr. Kajihiro, is it possible for us to get a copy of your PowerPoint?

Dr. Kyle Kajihiro: Yes

Board Chair Hulu Lindsey: It includes so much information for us and helpful kind too.

Dr. Kyle Kajihiro: Sure, I'll forward that, thank you.

Board Chair Hulu Lindsey: Doctor, where do you come out of, the university?

Dr. Kyle Kajihiro: Yeah, so I got my degree in geography at UH Mānoa and I teach classes there in geography and also ethnic studies as a lecturer.

Board Chair Hulu Lindsey: Thank you for presentation it was very educational.

Dr. Kyle Kajihiro: Oh good, thank you and thank you very much for your comments on the Red Hill water issue. That was that was really powerful and I think you know, this is a critical turning point so we really need to join forces to push for protecting the wai?

Board Chair Hulu Lindsey: Yes, yes definitely, thank you.

Chair Akaka: Any other questions, comments?

Ka Pouhana Hussey: Chair Akaka, if no questions we'll transition to Kehau to help us understand the various processes mentioned by Dr. Kajihiro and then continue and then we can always come back for additional questions for Trustees.

Dr. Kehaulani Watson: Aloha everybody, I want to say first of all, I'm very sorry I am not involved with the HMLUMP, that's I think a larger INDOPACOM initiative, and I do think you know it would be good to just have this be the start of a discussion with INDOPACOM, I'm so sorry I can't speak to that. I'm a little itty bitty fish in the little itty bitty pond that is the Army lease lands component of that. So as Kyle showed a second ago, there is 2 EISs that are currently moving forward. One on Pōhakuloa and then a second one that is the Army lease land on O'ahu so that includes Makua, Poamoho and Kahuku. So my role in that and I certainly don't speak for the Army or any other military outfit pretty much ever is we're engaged in doing the cultural impact assessment, so this is a really unique opportunity for Hawaiians to be engaged. Thank you, Kyle for putting up the links where we are right now, so just speaking to Pōhakuloa, we started that EIS process that is being led by a prime contractor who's working with the Army and so it's gone through the notice of intent on the NEPA side and the environmental impact statement preparation notice. I have a tendency to use acronyms, so if I do and you don't know what. I'm talking about please just stop me. I also am Portuguese and will speak fast so again feel free to stop me at any point along the way.

So that process is underway, that scoping period was sort of the first opportunity for the public and the Office of Hawaiian Affairs to sort of speak to the EIS process on the CIA which is being done by my company. We really did I think almost a substantial amount of outreach specifically to the Native Hawaiian community to make sure that that process is being done well. So we put notices in the Ka Wai Ola, we actually took out ads on social media, getting that and for the entire Island of Hawai'i Island to invite Native Hawaiians or any ethnic groups who had you know, cultural practices or traditional or customary practices within the area to participate in the

CIA, and then also we looked at all of the comments that came in, so it was quite extensive. I will tell you, as Kyle pointed out, even though it's just the state lands that are being looked at, our study area was all of Pōhakuloa. So based on the scoping comments that came in, there was a lot of concern and interest from the Hawaiian community to make sure that we were looking at traditional or customary practices throughout that entire area where the Army is active, and so it's currently still under review, but I will tell you it is a very long comprehensive document. I will say with appendices in its current form, it's I think over 1000 pages, so we really have done an extensive job to look at traditional or customary practices in the historical record, including English or Hawaiian language resources to make sure we are documenting and disclosing traditional or customary practices that may have taken place throughout that entire area.

We are still underway for O'ahu, so that will I imagine also be an incredibly comprehensive document, but again, we put out notices in the Ka Wai Ola, we've again taken out ads. It's still open, so as Kyle shared there is contact information plus surveys we've put up on the web for those who want to just and anything that comes in, we're including verbatim in these documents, so we really I can only speak to the CIA process, but I do think we've done an incredibly thorough and transparent job.

What will happen next is the draft document will come out for Pōhakuloa first and then the draft EIS for the O'ahu leased lands, and again that will be opportunity for the Office of Hawaiian Affairs, the public, Native Hawaiians at large to comment on that process so we are still very early in these processes. We're just in planning, so my hope is really twofold that this is just the beginning of a larger conversation, and that from here, whether it's the BAE or the Board itself will reach out directly to the military to the Army for the Army lease lands and their leadership to engage, and perhaps have a presentation done formally by the Army on this project. I know none of you are quiet, I talk to you guys all the time, so there might be questions.

Chair Akaka recognizes Vice Chair Lindsey

Vice Chair Lindsey: Thank you, Madam Chair. I guess the question I would have for the CIA document that Dr. Watson mentioned is about the scope. So she mentioned documenting and disclosing practices, but will the document also move through phases of as the name of the document implies, talking about impacts and then I guess will it reach a conclusion if those impacts are to a scale that will it say something about the impacts I guess, just procedurally?

Dr. Kehaulani Watson: Yeah, that's an excellent question and yes is the answer, so there is as you very astutely pointed out, an impact assessment section and I will say again I was perhaps as surprised as anybody else that they would want me to write this document so it is transparent in the potential impacts identified to traditional or customary practices. So thank you, yes.

Vice Chair Lindsey: Mahalo

Dr. Kehaulani Watson: I'll also say we very clearly and explicitly asked that anything that's included is approved by those informants because we recognize that certain things are kapu and perhaps should not be shared, so that's also been taken into consideration. But again, I look forward to people seeing it because I think we have been very thorough and again, transparent. So mahalo for the question. Kalei'āina I'd be disappointed if you don't ask me a question.

Trustee Lee: I don't have questions to ask, this matter comes with the Association of Hawaiian Civic Clubs all the time so I'm ma'a and very well versed on the background of this issue because it comes before the Association all the time.

Ka Pouhana Hussey: So Trustee Akaka with that piece Kehau will be with us, I believe she has another commitment, but she'll be on as long as she can but Trustee Lee's segue for Association of Hawaiian Civic

Clubs and the Native Hawaiian Chambers and so I'm going to turn it over to both Ron and Syd to provide their context and their connections to the subject matter.

Ron Jarrett: Thank you, Sylvia. I'm actually wearing multiple hats here, but I'm also speaking for the Association of Hawaiian Civic Clubs. We have put together a joint committee with the Economic Development and the Benefits and Trust Committees to look specifically into this issue, and we are also trying to take a practical approach with the Native Hawaiian Chamber of Commerce with the Office of Hawaiian Affairs and with the Council for Native Hawaiian Advancement and other groups that we can get to join this Hui.

Our desire is actually to get a Native Hawaiians representative, most likely by OHA as the legal state agency a seat at the negotiating table to discuss what is it that Native Hawaiians should get out of these leases. We don't really believe or I don't personally believe that the military is going to leave. Maybe some of our wishes, but it's not going to happen, and so as long as their using our land, I think we should actually ask for something concrete, we should ask for money, we should ask for perhaps the state to correct some of their Kaka'ako Makai land use issues. We should think out of the box and get something for our people in exchange for us perhaps going along with the lease for another period of time. My biggest point is to get us to the table and that's all I'm trying to do here because I don't think OHA or anybody is going to be invited to that negotiating room, which is probably gonna take place behind closed doors despite all the EISs and all the cultural impact statements. I think someone needs to be there, that's what I'm here to discuss and then go ahead I'll let Syd speak for Native Hawaiian Chamber of Commerce.

Sydney Keli'ipuleole: Thank you, Ron. My name is Sydney Keli'ipuleole, I'm a Board Member for the Native Hawaiian Chamber of Commerce. Ron and I are also Committee Chairs and it's through these two committees that we've become involved in this discussion about the DOD slash military in Hawai'i. So specifically the Native Hawaiian Chamber of Commerce did submit comments to the army on the scoping step in the EIS for the Army training lands retention, O'ahu. We submitted comments for the O'ahu training lands retention EIS, not the Hawai'i Island or PTA property.

We chose not to take a position. The Board chose not to take a position on a full, modified or a minimum lease retention. What we did want to do is in our letter dated September 1st, we asked for information that we hope will be in the EIS, and culturally is one of them, and we're grateful Kehau's firm will be leading that cultural impact analysis. But we also ask for very similar information on hydrology, ecology and specific to our interest at the Chamber, economic impact. We're looking for information about the economic impact of the US Army and the DOD in Hawai'i. We think it'll be eye opening about what that impact is. So in doing so, it's a strategy to get information out to decision makers around the EIS and also to us as Native Hawaiians and the general community about the impact of the military.

As Ron said, we're not taking a position whether to boot the Army or the US military on Hawai'i. They perform a certainly a responsibility that we can all get behind. So we're looking for more information to come forward in the EIS, and that was the basis of our comments, to ask for more information on specific areas and our strong suit being economic impact.

Second thing I wanted to mention comment is this same matter, the same kind of topic, on economic development is the subject of a letter in your Ka Wai Ola December issue talking about economic impact. To echo Ron's comments, we believe it's time for the military now to support Native Hawaiians in economic development and in business.

The third thing maybe to make comment on is that it's really even less clear to us at the Chamber is that we are also members of the Military Advisory Council of the Hawaii Chamber of Commerce. So we're on the receiving end of all this information about the military presence in Hawai'i, including HMLUMP but we feel like the Native Hawaiians are getting forgotten as far as economic impact. Ron, through his company has provided a little bit of statistical analysis at one of the last MAC meetings, and his conclusion was that Native Hawaiians,

Native Hawaiian companies and businesses in Hawai'i enjoy a 6.5% share of the DOD defense in Hawai'i. I think Ron and I will agree on the other side of the microphone, on the other side of that screen, the members of the of the MAC said, wow great, we're really providing a great impact to Native Hawaiians. Ron and I said, is that it, just 6.5%?

So I think that's kind of what I wanted to say, and representing the Native Hawaiian Chamber of Commerce, our President Shannon, she could not be here. She would be more eloquent in a presentation. And last thing for me to say is that one of the Trustees asked, I believe they asked Reyn what is it that OHA can do for us? What can OHA do for the Veterans? You know, today I sat in on one of the sessions at the CNHA Convention talking about economic development. The speakers were from the visitor industry, HTA, you'll know all the names, Kalani Ka'anā'anā, from 'Āina Aloha Economic Futures, Keoni Lee, from Purple Mai'a, Donovan Kealoha and I forget the others. I give them credit, technology and the visitor industry are taking the next step forward in trying to transform the technology industry in Hawai'i and the visitors industry here in Hawai'i for the benefit of Native Hawaiians and for a next generation of the state economy. We would be super if we could get the military to see that as a role for them as they move forward with these HMLUMP plans. So that's kind of my spiel from the Chamber, thank you very much.

Ka Pouhana Hussey: Trustees, the reason again to bring this is just to tee up the topic, it's the first conversation we do want to think about a series of informative pieces. The Military Communications Officer has reached out to us regarding a formal presentation of the plan, and so we want to establish a rhythm about informing as well as a place at the table and a consistent for meaningful consultation. So I will also remind Trustees that OHA doesn't have any position until a policy is approved by the Trustees, and so Administration will work on that policy. Our brand new Chief Advocate who is very seasoned in matters of this. That's the piece that you should expect to come forward to the Trustees is a policy regarding military engagement before any positions are taken on any of the matters, whether it's lease negotiation, EIS, etc. because there will be a time when those specific positions will come back to the Board for action. So again, just an introductory overview and a planful return of policy to guide the Boards and the execution of that with the military.

Chair Akaka recognizes Vice Chair Lindsey

Vice Chair Lindsey: Thank you, Madam Chair. So on the topic of what the Army pays for leases, and I'm in no way saying that should justify anything whether they pay a lot or a little, but I guess this process to renew the leases is going to enter into the BLNR and all that kind of stuff, and they're going to move forward, but I think Dr. Kajihiro mentioned during his presentation that the Army pays a dollar a year for their, I don't know if it was Pōhakuloa or both, but I guess the question I have is, is that something that the BLNR articulated at some point why it's just a dollar and in other states when the military leases land, do other states give them the same deal I guess, thanks?

Dr. Kyle Kajihiro: So it's a dollar for 65 years and each of those different parcels have their own lease, so maybe they're paying about \$12.00 or something like that. This is a special case because of the Hawaiian Trust Lands and the transitions that were going on at the time of statehood. So there was a time period that was set aside where the military had to account for its land use and negotiated with the state right up until the deadline, and they agreed on these leases to retain these particular parcels for 65 years for a dollar nominal lease. There are certain conditions in the leases and I have at least the Army ones. I have those and I'd be happy to share any documents with folks, but the ones that the Navy and Air Force had I wasn't aware that those were also on the same terms, and I don't have all of those leases. I also don't know that there's any environmental impact study underway for renewal of those leases, so I don't know how they're making their informed decision making. So that's a whole separate matter, but this is stuff that I will be trying to look into and maybe this is something that OHA can also take a look at, thanks.

Chair Akaka: Dr. Kajihiro, could you provide some examples of what some of those certain conditions are, just so we are aware of some of them?

Dr. Kyle Kajihiro: So for example, the lease for Makua and Pōhakuloa allow for live fire training, the one in Kahuku I think doesn't and Poamoho doesn't. So there are different conditions like that. I think Pōhakuloa has a clause that allows for the removal and use of of rock minerals for construction and other things like that. So yeah, there's certain differences between them, but mostly the template is pretty similar. The term, the fee that they're paying and so forth. And there is a condition that they're supposed to take care of the land. So if you recall, there was a lawsuit where Ching and Maxine Kahaulelio sued the state for failing to uphold the terms of the lease with the army at Pōhakuloa, and the court affirmed that, yeah, the state had a duty as the Trustee, as the owner of the land to enforce those terms, including removing you know contamination and so forth that had happened. So those are some of the conditions that are in these leases, but they differ slightly between each one.

Chair Akaka: Do you also know how often it is reevaluated or reassessed these conditions. In terms of some of the conditions in terms of having live fire and the length of these conditions and so forth, and do they part way through look at if it still makes sense or if there is community concern?

Dr. Kyle Kajihiro: I'm not aware that there was any regular cycle of review and revision of it. The only revisions I'm aware of occurred at Makua where some lands were released towards the Ka'ena Point side and so small changes like that, but mostly initiated by the Army, and so this is why the lawsuit at Pōhakuloa was important because it basically found that the state had not been doing its due diligence in investigating and enforcing what was going on. They hadn't inspected in years and they're still waiting to have access to some of these sites, accompanied by the kupuna, the plaintiffs. So yeah there's not much I think they have the right to inspect but I don't know how regular that has been enacted.

Chair Akaka: Mahalo for that insight.

Chair Akaka recognizes Trustee Lee

Trustee Lee: Thank you, Madam Chair. Just some context for the question you asked. This is unprecedented times, the State of Hawai'i will be 62 years old next year. These leases were signed as a condition of Statehood. So to Trustee Keola Lindsey's question earlier, the reason why they got such a good deal was we want these lands for a dollar for 65 years or you don't get to become a state. So those leases from 1959 are coming due in three years, so that's the reason why they're having to go through all of these CIAs and EIAs and everything because they obviously want to continue with the training that they do there. So this has never happened before, ever. This is the first time this is ever gonna happen, so that's why it's so important that these people are coming to talk to us because Hawaiians were not at the seat in 1959. This is the first time we're going to get a chance to be at the seat and say, well, no. Now we understand our land and now we have a voice, we have an Office of Hawaiian Affairs which obviously didn't exist in 1959. So you want our land again? Then it's not going to be a dollar a year for 65 years.

Like Trustee Keola Lindsey said right, Camp Pendleton in San Diego. I promise you, I mean I don't know, but I can promise you they don't pay a dollar for 65 years for hundreds and hundreds and hundreds of acres in San Diego. So this is unprecedented that we have an opportunity now to either take our land back or get like what Ron them said right. Get an economic value that will be useful and valuable to Native Hawaiians so that we can further our people. Thank you, Madam Chair.

Chair Akaka recognizes Dr. Kehaulani Watson

Dr. Kehaulani Watson: Mahalo, I just wanted to point out, just make some clarification. So the lease cannot be renewed. State law requires that it terminates after 65 years, so there's it's land retention. I think

people often sort of confused, we're going to renew the lease. That's not really what's happening here. It's a mechanism of land retention and then too, to Trustee Keola Lindsey's point, we're just in planning right now. It's still NEPA and HIPA, which is the EIS process, that's a disclosure process. So at the end of it, that is not decision making, right? There's no, yes we're going to do this. No, we're not going to do this. It's just to disclose all the information that people are looking for.

It is after that process as Trustee said, this goes through an entitlement process and decision making. So again, we're very early and again it's why I would and I'm sorry I don't remember which Trustee said it. It is a good opportunity to engage directly with the Army and send forward those requests for formal discussions because I think we're not. I'm getting the sense that people think we're further along in this than we are, but there's lots of time and I believe the leases expire in 2029, so there is a number of years left for which OHA can engage in the process with the Army, thank you.

Chair Akaka recognizes Trustee Akina

Trustee Akina: Thank you, Madam Chair and thank you to our guests for joining us today, Ron and Syd and Kehaulani and Kyle, appreciated very much. My question is directed to Dr. Kajihiro. I'm looking in our electronic file for today's Board meeting at the Hawaii Military Land Use Plan. Right at the very beginning on page 3 of that document, there's a list of priorities. These are joint priorities for land activities and there are six items in priority order. One of them, #4 is a long term solution for Red Hill and Hawai'i based fuel storage. Now in light of recent events, I've got a couple of questions about this Dr. Kajihiro. First, what exactly is the status of that priority, long term solution for Red Hill and Hawai'i based fuel storage? Just in a nutshell, what is in mind there and what's the status of it and then my second question is, could we see that lifted up higher as a priority, one of the more important and maybe the first priority that should be looked at?

Dr. Kyle Kajihiro: Mahalo, Trustee Akina, those are great questions. So these are priorities that the Pacific Command, Indo-Pacific Command put together through its consultation with the service branches. So I don't know what exactly their thought process is in terms of how that moves. I'm assuming that they would probably have to move it up in terms of the urgency of the matter, but I think events have also unfolded in ways that were unexpected for them. I believe that when this was written they were still thinking that the administrative order on consent, which was the agreement that was reached between the EPA, Department of Health and the Navy about a process for addressing the spills, making sure that the tanks don't leak. I think they assumed that that was something in place, and they had plans to try to develop new technologies that would create a lining inside the tank that would hopefully meet the standards that the Department of Health had.

At this point, I think lots of people have lost confidence that those tanks can be repaired in a way that would be safe and this is why there's been calls to, you know, the relocation option is really the only long term solution to protect our water and how we get there. In the short term, the emergency of making sure that there's no fuel in the tanks while they're figuring out what went wrong in these recent events, and so if that requires a temporary removal to tankers or somewhere else. This is what some of the other Board of Water and some other folks are advocating for. So yeah, I think it should move up as a priority, but maybe not for the same reason that this land use document is prepared right. They're looking at how they're going to retain it and what ways they can preserve its continued use, but I think at this point events have changed and maybe we have to look at decommissioning these tanks permanently.

Trustee Akina: Thank you, Kyle.

Chair Akaka: Members are there any other questions or comments? Seeing none, I want to mahalo our presenters for all the information they just shared with us, we look forward to continuing this conversation to see how we can collaborate and as you said Dr. Kajihiro, join forces, so mahalo.

Trustee Ahu Isa: I was at a dinner with an engineer with the Navy 10-15 years ago and he said he's very familiar with that whole Red Hill thing, and he said they should have shut it down then. They should have shut it down like 10 years ago and you folks know who he is because he's the CEO of Kuilei, our consultant. I was at a dinner with him and he's an engineer. He said this Navy thing. I can say it because he did say it to me in public so I don't think it's any secret, but they're just dragging us along and now they're gonna not listen to our Governor about an order and they're saying it's a request. So that's another indication that they're not going to do anything. Mahalo, Chair.

C. Action Item BAE #21-06: 2022 OHA Legislative Bill Package

Chair Akaka yields the floor to Ka Pouhana Hussey.

Ka Pouhana Hussey: Thank you, Chair Akaka. We'll go ahead and ask Chief Operating Officer Casey Brown and Na'u Kamali'i, our Chief Advocate to navigate the Trustees through this topic, and then we have our Public Policy Advocates Sharde Freitas on as well as Nina Ki.

COO Brown: Mahalo, Sylvia, mahalo, Chair Akaka. Yeah, this is going to go straight to Na'u who's going to walk you guys through the package, and you folks have gotten two prior presentations on the package. There is a new change to it which we will cover, but Na'u them have their approach and ready to present so straight over to you Na'u.

Chief Advocate Kamali'i: Alright, thank you very much. Aloha Trustees, again. For the audience, Na'u Kamali'i the Chief Advocate, also presenting our Advocate Sharde Freitas and Nina Ki. Before we present, I want to mahalo the community who have stepped forward on some of these measures, particularly the Building Back Pono and the coordinated advocacy. The part of advocacy that is so important is that it doesn't come or rise to the level of, you know, the Trustees unless our people participate in that, and that's what some of these efforts are and they are tied closely to the discussion, at least the Building Back Pono that we just had about the military and how important it is for our EIS statements, particularly when it addresses cultural impact to also address the socioeconomic disparities.

Trustee Akaka, I'd like to move to action item two and four because our advocates will be speaking to that and then perhaps the action item number one, which may include a brief pause by the Board if they wish to go into Executive Session. So I'm just going to move on to get through the agenda. Action item number two is OHA-2, Building Back Pono. There has been much discussion and education on this, including a leadership education on what that is. However, I'd like to turn this over to Sharde to provide the Board with any updates and also to answer any questions. We have prepared slides for your quick reference, those slides are also contained at the end of the package, so if you wish to peruse that electronically you may do that as well. So Sharde would you like to speak to your OHA-2.

OHA-2

ATTACHMENT C

Building Back Pono: Addressing socioeconomic disparities in the post-COVID-19 era

- **Goal:** To ensure that future developments do not exacerbate socioeconomic divides in Hawai'i as we build back smarter beyond the pandemic
- **Issue:**
 - Environmental review process considers impacts to social welfare, economic welfare, and cultural practices – but the current process does not include a specific analysis of whether an action will exacerbate existing socioeconomic disparities
 - Neglecting the real impacts on socioeconomic disparities can result in community distrust and pushback
 - Impacts on vulnerable communities may be overlooked by decisionmakers as we build back from COVID-19

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OHA-2 (continued)

ATTACHMENT C

- **Legislation:** Amend HRS § 343 to explicitly require environmental review processes to consider the socioeconomic disparities, in addition to economic, social, and cultural impacts, of certain proposed actions
 - The extra layer for socioeconomic disparities aims to provide additional analysis on the impacts to education, income, and the correlation to health
 - Will help identify & mitigate/prevent further environmental injustices (see Waimānalo Gulch; PVT solid waste landfill relocation proposal; Kahuku windmills)
- **Notes:**
 - Aimed at justice – environmental, climate, social
 - Can also facilitate achieving State of Hawai'i goals/priorities
 - Builds upon OHA's prior advocacy, which added social determinants of health to the Hawai'i State Planning Act

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Public Policy Advocate Freides: Aloha Trustees, mahalo Na'u for that introduction and yes, just adding to what has already been said, this is indeed a legislative policy idea that came from our outreach efforts as has been presented to you before. You know this has been quite an extensive effort to reach out into the community and also across our different paia internally to come up with different ideas and that's what brought us to today with the Building Back Pono. I'd also like to mahalo those who came before us and the kahua that we stand upon as we bring forth this measure. It's my great honor and I just speak on behalf of our Public Policy team.

So from start of my time, started along Wayne Tanaka and Leimomi Fisher, thank them for their leadership, as they were part of this effort as well. Ultimately, as Na'u had mentioned as well, you know the prior presentations before and we also tee up nicely what we're about to talk about with this measure, and ultimately it comes down to self determination. As the title of this measure describes, this is aimed at environmental justice, and what this means for the lāhui.

Starting from our cultural foundation, we have long known as 'ōiwi and research affirms that our mauiola is influenced by our environment. Moreover, we have long known that the health of the land is indicative of the health of its people. We have also long experienced impacts of our communities being historically excluded and systemically under resourced. The lāhui along with other disenfranchised communities have experienced environmental injustices with various projects and developments continuing to be sited in the same communities. This measure aims to mitigate or prevent further environmental injustices by adding a socioeconomic disparities analysis to the environmental review process, and when I say mitigate or prevent further environments injustices, we believe that adding a socioeconomic disparities analysis to an EA or EIS will provide decision makers and community with opportunity to take a hard look at socioeconomic, environmental and cultural impacts of a proposed project and action and render decisions regarding such proposals with fuller knowledge of their potential costs and benefits. I would like to emphasize that this added layer of analysis, that of socioeconomic disparities, provides community to provide input as well. From the perspective of decision makers, this provides them with critical information that should be considered as we build back pono. Example projects that could have provided more information on the socioeconomic impacts as this proposed bill entails include Waimānalo Gulch, PVT, Kahuku windmills, and chemical and industrial fuel storage such as Red Hill.

In light of federal legislation and funding coming down, such as the infrastructure bill, the community is cited for various projects with no benefit to those communities. In other words, we do not want these developments built on the back of Native Hawaiians. And so again, the goal of this measure is to ensure that future developments do not exacerbate socioeconomic divides in Hawai'i as we build back smarter beyond the pandemic. This is

page 210 in case folks are following along in the meeting folder and there's also draft language of what the actual bill would look and the one pager as requested at the last BAE workshop.

The proposed legislation amends HRS343 to include socioeconomic disparities and this is all review at this point and so if there are any questions I will be here, I will hand it off to Nina for our Coordinated Advocacy.

ATTACHMENT F

1. Coordinated Advocacy - Kāko'o Pa'ahao

In collaboration with YWCA and criminal justice advocates - Kāko'o Pa'ahao

- **Goal:** Ensure former Native Hawaiian pa'ahao are best prepared to reenter society & reduce recidivism
- **Legislation under consideration:**
 - "Clean slate" measure
 - Resolution or Bill calling for a performance audit of the PSD's Comprehensive Offender Reentry Program and its Reentry Coordination Office
- **Notes:**
 - OHA's 2021 Package measure on expungement

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ATTACHMENT F

2. Coordinated Advocacy - Kaiapuni seat on the Board of Education

'Aha Kauleo – Native Hawaiian medium / immersion / Kaiapuni seat on the Board of Education

- **Goal:** to require at least one "at-large" member of the BOE to be a practitioner or scholar in Hawaiian studies and language
- **Legislation under consideration:**
 - Amend HRS Section 302A-121(a)
 - Exact language still being decided with 'Aha Kauleo input
- **Notes:**
 - Representative Patrick Branco's office is drafting & coordinating

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Public Policy Advocate Ki: Aloha Chair, aloha Board Members. So as you all know, Coordinated Advocacy is different from our package measures and our pieces of legislation that we're working on with various community members. You guys have been briefed on this before, but I'll briefly recap what we've been doing with our criminal justice coordination. We've been working with the Hawai'i State Oversight Commission, the ACLU, and YWCA. Focusing on helping pa'ahao transition from life behind bars, back into becoming functioning members of society. So what is still in consideration is looking at a clean slate legislation that numerous other states have passed and adopted and it's very similar to our pa'ahao bill in our package last year and also a resolution. So this is mainly for the Board's information. We're just continuing to coordinate with these initiatives and I'll be here for further questions as well and I'm gonna go ahead and turn it back to Sharde to talk about our 'Aha Kauleo Coordinated Advocacy, mahalo.

Public Policy Advocate Freides: Mahalo, no updates since the last time this was presented. I continue to meet and work with 'Aha Kauleo as they further define the exact measures that they want to pursue this coming legislative session. But just as a review, one measure that they are considering is originally from Representative Branco that would create a Native Hawaiian medium or emergent seat on the Board of Education.

ATTACHMENT F

3. Coordinated Advocacy – Kumu Kaiapuni Pathways

'Aha Kauleo – Kumu Kaiapuni Pathways

- **Goal:** to equitably distribute and allocate resources to incentivize creation of and fund more kumu kaiapuni to combat kumu shortage
- **Legislation under consideration:**
 - Grow Our Own (GOO) – as model or to better prioritize existing funds to create more kumu kaiapuni (currently low numbers)
 - Special Education as a model
- **Notes:**
 - Funding implication justification – OHA has invested over \$30 million into Hawaiian medium education schools (2010-2018 Lāhui Impact Report)

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The second measure is related to Kumu Kaiapuni Pathways, and this would be to equitably distribute and allocate resources to incentivize creation of and fund more Kumu Kaiapuni to combat Kuma shortage. There's two pieces of legislation that they are considering to use as a potential model. One is the Grow Our Own and the second is a special education, and that's it. Back to you Na'u, mahalo.

Chair Akaka recognizes Trustee Akina

Trustee Akina: Thank you and thank you Sharde, Na'u and Nina. I appreciate your hard work in advocacy when OHA-2 was introduced to us as Trustees, I raised a couple of questions and I realized that all of you were not here. I think Wayne introduced it at that time. My question had to do with the impact that adding another level of analysis and regulation would have on the supply of housing for Native Hawaiians, so right now in some of the communities that that even were mentioned, as well as many neighbor island communities in particular, a lot of Native Hawaiians have a very difficult time getting homes. That includes housing, affordable housing. Many developments are roadblocked in addition to affordable housing developments. Commercial housing has just gone through the roof in terms of affordability, and so I asked the question when this was introduced, what impact would the increased regulation have on the supply and the cost of housing for Native Hawaiians? I'm wondering if there were any responses to that?

Chief Advocate Kamali'i: The socioeconomic impact amendment is to beg the question you are asking. So if we don't have that in the definition of what are the impacts, then they can't assess the impacts, so the nature of the change is actually to beg the question. What is the cultural impact? What is the socioeconomic impact and what are the disparities? So your concern if this language were not placed in the measure or not changed, that question would never be asked, and so you are raising precisely the reason why this rises in the community and the request for the change is being made.

Trustee Akina: Thank you, I understand the concern and I do share that concern. When I look at what is required already, the social welfare impact, the economic welfare impact and the cultural welfare impact. I'm assuming that these are categories that can be used to address the socioeconomic disparity. Is there a reason why we couldn't use those existing categories to address socioeconomic disparity?

Chief Advocate Kamali'i: Well, one might argue that that's the art of the drafting, or that is the art that allows some of these important questions that you're asking to be excluded. So if it is included, then we're assured that those concerns that you raised are being addressed. If it is excluded, well, I think we have example of what happens when it's excluded because we have communities that are referenced by Sharde who've been deeply hurt or pained or disrespected, all of the dis words because those studies did not include those types of concerns. So I hope that answers your question.

Trustee Akina: Are there means other than an amendment to the actual law itself to ensure that the questions are addressed in the existing categories?

Chief Advocate Kamali'i: Well, I think from a social or a policy standpoint, this is what it reflects. Other means, oh yes, there's protests. There are other ways in which it might be addressed, but we're here as social advocates to introduce this type of change, which addresses it, which is which hasn't been there. Sharde, do you wish to address that as well?

Public Policy Advocate Freides: Yes, I'd like to address all three questions if that's okay, and thank you I appreciate your patience as I understand that you did ask these questions the last time on the workshop. So for the first one, affordable housing is actually a statutory exclusion and so an EA or EIS would not be required for affordable housing and then the second one with regards to social welfare and economic welfare and cultural impacts already in statute. We feel that the socioeconomic disparities is a term of art, and so just by definition of what socioeconomic disparities are, it's already a different level of analysis.

Looking at existing EAs and EISs. Sometimes they do use the term socioeconomic impacts or even you know just that term socioeconomic, but the level of analysis varies and so kind of going into that third question, we have seen this pattern and trend that applicants who need to provide in EA or EIS they will not do anything more than the bare minimum of what's required, and so that's why the statutory changes are needed. Additionally from the statutory change, there can also be guidance as to what we want in this type of socioeconomic disparities analysis, as was done with the cultural impacts analysis, thank you.

Trustee Akina: I do appreciate that Sharde and Na'u very much and your concern is very much on my heart. I just need to make it clear to my fellow Trustees that I'm very passionate about seeing that Native Hawaiians have housing available and affordable, and I'm very cautious about anything that could put further roadblocks to seeing that happen. I won't oppose this, but when it comes time to vote I'll ask for bifurcation and abstain from this, but thank you. Just for the record, want to make that clear.

Chief Advocate Kamali'i: Thank you, Trustee Akina for making that record and asking those very important questions. If the questions can be asked internally by the Trustees, certainly there will be questions that are going to be maybe anticipated to be asked as this bill makes its way through the Legislature, so I appreciate that.

Trustee Akina: Thank you, I appreciate your spirit.

Chair Akaka recognizes Trustee Lee

Trustee Lee: Can I make a point of clarification please?

Chair Akaka: Yes

Trustee Lee: If Trustee Akina can clarify why he's gonna bifurcate this out. He said that his concern was about affordable housing, but public policy just made it crystal clear that affordable housing projects are exempt. This would not apply to affordable housing projects. So can Trustee Akina please clarify why the bifurcation of this out if this measure has no impact whatsoever on affordable housing, because I want to better understand.

Trustee Akina: Very good, Madam Chair, I'll respond to Trustee Lee. Trustee Lee's question is a good question. Thank you for allowing me to clarify. You are correct, absolutely that the our policy team has explained that this will not apply to affordable housing. I had actually mentioned three categories. The two other categories beyond affordable housing are housing that is affordable and actually that's what I was referring to, commercial level housing that is affordable both in terms of the supply that could be impacted and the cost that could be impacted. So while I don't challenge what they say about the exclusion of affordable housing, I still have concerns over the supply of commercial housing and the exorbitant cost of commercial housing as well, so thanks for letting me clarify that, you were on point there.

Trustee Lee: Madam Chair if we could get further clarification from public policy. Would this impact housing inventory of new housing whether it be affordable housing or housing that is affordable. I understand the difference between the two that Trustee Akina is making, but can Public Policy speak to that. Is there an impact that this measure will have on inventory of new housing being built?

Chief Advocate Kamali'i: Sharde, if you could speak to that.

Public Policy Advocate Freides: Sure, so I'll just kind of start at the 3000 foot level. There are nine triggers that trigger when an EA or EIS are required, and so if the housing, not talking about affordable housing, because that's in exclusion. But if the housing project is on state or county lands, then that is one of the triggers. I mean, that's just kind of the main category that I would think captures a lot of what's being

asked. Just kind of stepping back a little, you know the whole intent of this measure is to provide this needed information, you know, going back to kind of what I said to frame and open up this measure at the beginning.

Trustee Lee: Sharde, I completely understand the reason for the measure. What I'm trying to ascertain, because Trustee Akina's intent is to separate this out from the whole package and for us to vote separately on it. And I'm trying to understand why. So what I'm seeking from Public Policy is, because Trustee Akina's justification for that is he is saying that he is concerned that this added measure to an EIS will impact or could impact, sorry Trustee Akina I should say that correctly, could impact the inventory of housing being built, which could further raise the cost of living and the cost of housing in Hawai'i. So I'm asking, is there a potential for this to do that? I'm just trying to see justification for the bifurcation of this matter. Of us taking separate votes on this. Because that will bring up different debates.

Chair Akaka: I believe that there's no bifurcation that is needed as each item is an action by itself, but maybe our Ka Pouhana or Corporation Counsel can weigh in on this for clarification.

Trustee Akina: Madam Chair, excuse me. If we're voting separately on these items, no bifurcation would be needed, so I wouldn't call for that. I was under the impression and I could be mistaken that these parts.

Trustee Lee: No, as was I Trustee Akina.

Chair Akaka recognizes Ka Pouhana Hussey.

Ka Pouhana Hussey: Thank you, Chair Akaka, as pointed out in the action item. There are four actions related to and each package item is a standalone motion for action by the Board. So correct, no bifurcation needed, each trustee can vote on each of the action items independently.

Chair Akaka: Mahalo for the clarification.

Trustee Lee: Thank you, Ka Pouhana.

Chair Akaka: Any other questions or comments members?

Trustee Akina: If I may have the forbearance of the Trustees, Madam Chair, I'll make one brief comment.

Chair Akaka: Yes, Trustee Akina

Trustee Akina: Thank you, Trustee Lee did raise a very important point and that is he correctly recognized that I am concerned that adding another layer of application and regulation could possibly impact the supply of available housing and its cost. Part of that comes from the very purpose of the measure in attachment E of the action item, which would be page 215 of our packet. One of the rationale mentioned is to provide another basis to object to a proposed project or action in their neighborhood or community. Now I don't question the justification of objecting to building projects in communities and I'm glad that our people have the capacity to do that. But that objection to building, if successful, definitely affects supply. All I'm saying is that in our commitment to giving the best opportunity to Hawaiians to have homes, we need to balance our advocacy with this strategic game of ours at OHA to provide housing. That's all I'm saying, thank you.

Board Chair Hulu Lindsey: Madam Chair, would you please put the action items up on the board please?

Chair Akaka: Yes, mahalo, Board Chair.

Trustee Lee: Are we voting now Madam Chair? I didn't think Public Policy was done with their presentation yet.

Chief Advocate Kamali'i: We aren't done, that's correct.

Chair Akaka: Are there any other questions or comments? Alright then, can we please have the motion put up.

Chief Advocate Kamali'i: Chair, to interject. We're not done with the presentation if I could proceed.

Chair Akaka: Okay, thank you.

Chief Advocate Kamali'i: Thank you very much. Alright, as indicated earlier this is action item number 2, action item number 4. Action item number 3 is drafting and editing our standard drafting and editing clause, which makes it available to policy to make those appropriate technical, ministerial, non substantive edits. Now going back to action item number one, that involves a Public Land Trust. This has been before the Board before. I deliberately intended that this be last because I understand that the issues that are raised in it of itself are not old, but it may cause or bring cause for the Board to go into Executive Session if that is necessary, not to say that this is the time to do it, but this is why I took things out of order. If not, then we'll proceed.

All right, so action item number one is to approve the approve the policy to proceed with drafting and submitting a Public Land Trust focused bill. The bill is not before the Board today, there are a number of issues to continue to flush out and this was the way in which we perceived we'd be able to continue to do that work, and also allow the Board to weigh in on that, i.e., the focus of the bill as indicated there are the three or four or five areas that we've all been familiar with that deal with the current amount of 15.1 million. The existing amount of what is the carry forward trust holding account as well as the projected difference between the interim PLT and the 15 million. OHA has been through this before, so the focus and the weight in which this bill is going to proceed in the drafting and going forward to the Legislature. The gist of the the action is to allow Administration and allow policy to continue to work with the Committee and the Board in drafting the important bill. And if I'm misstating that, I look back to you, Sylvia if I'm stating that correctly.

Ka Pouhana Hussey: Yes

Chair Akaka: Trustee Lee, do you have a question?

Trustee Lee: I do, Madam Chair. If Administration can explain to the Trustees why the change? The last time when we voted on and approved the legislative package, Administration had put forward to the Trustees that they felt the strategy for PLT was best if OHA took a supporting role and that others brought the matter forward. What has changed?

Ka Pouhana Hussey: So I will ask Na'u to help as well. If you also recall Trustee that there were a number of questions by the Trustees regarding a Public Land Trust bill and we said at the time that we are looking at all of those pieces and will bring back to the Trustees and in those intervening weeks between the workshops as well as the draft action item, discussions about all of the different pieces. The time and the confluence of situation that we are in now and wanted to bring forward this to the Trustees because of that. You'll also notice that there is one of the measures is not there and I'll ask Na'u to follow up on that as to why, because there is a remedy in an alternate to address that issue of the adoption and the descendant issue as well.

Trustee Lee: Madam Chair if I may, unless a Trustee asks for that, that's not what my question was. I was just simply asking what happened for Administration to change the recommendation to the Board, that's all I was asking.

Ka Pouhana Hussey: The recommendation is because in between those two workshop pieces.

Trustee Lee: No, yeah you answered, that's all I was asking. I didn't ask about what's not here, that's all I was asking and my question was answered so we can move on. Thank you, Madam Chair.

Chair Akaka recognizes Vice Chair Lindsey.

Vice Chair Lindsey: Thank you, Madam Chair. Just a question, so if action one passes, just so I'm clear at least, will the Trustees see a draft bill sometime between now and I guess January is when or end of, or does this action just authorize the bill to be finalized and sent in? Thank you, Madam Chair.

Ka Pouhana Hussey: So Madam Chair if I could address a Trustee Keola's question.

Chair Akaka: Yes, please do.

Ka Pouhana Hussey: So action three if you'll notice the last bullet for the last measure, provide a final copy of the measure to the Trustees prior to submission. The deadline that we are working with is December 30th for all packaged bills to go through. So we hope to have a draft of the measure soon so that Trustees and internal can vet these key points that are there but the target is to submit by the 30th as well. And I open for Na'u and Casey too, because these are the advocacy folks who are doing the drafting and so you can imagine OHA has had a number of various facets of Public Land Trust from record keeping. We've also had measures in our packages in the past regarding record keeping and other kinds of measures, so it's that kind of effort that is needed. But again, I'll turn it over if it's okay Trustee Akaka to Casey as well as Na'u to provide additional insights as to the work before filing on the 30th.

COO Brown: Aloha Trustees, I would first want to hear what Trustee Lee's question might be first, if that's okay.

Chair Akaka recognizes Trustee Lee

Trustee Lee: Thank you, Madam Chair. This is speaking to action one and I guess action three where they're asking for permission to do what they've been doing this whole time with minuscule changes. But this is a big, big topic and to Trustee Keola Lindsey's point, after tomorrow. Should this pass the BAE tomorrow and should it pass the Board tomorrow, the Board is done. The Board has no more business for the rest of 2021. So the Trustees will not see, have input in, other than one on one if we want it, but there's no way for the Board to weigh in on any of this measure before it's due at the Legislature on December 30th. After tomorrow the Board is done and I think that's kind of what Trustee Keola Lindsey was asking. If they're going to draft a bill, a major bill like this, because this addresses several different major PLT issues, not just one. The Board and Committee won't have another opportunity to weigh in on this until after it's been submitted to the Legislature, at which point it doesn't belong to us anymore. Yeah, that that.

COO Brown: I'll mention something here, that's a fair point Trustee Lee and the thinking was because this surfaced sort of later in the game and the package development that we're throwing whatever thinking and you know, hustling around that we can do to put together a bill that would make sense, and the thought was we would provide a draft to the Trustees outside of a meeting and I don't know if that's something that would please the Trustees. If it's something that you folks deem you want a meeting to deliberate further over that, then that's absolutely a fair point and it's at your guys request and your call to make. But our thought was we would submit the draft, you know, electronically, outside of holding an official meeting and we wouldn't move forward with submitting anything without the Trustees final nod.

Trustee Lee: Point of order, Madam Chair. Those words Madam Chair are concerning to me. The Trustees cannot give a nod of any kind outside of an agenda. I know you know Chair, but I'll yield to you Chair if that's the point that you're going to bring up, right. We cannot give our nod to anything outside of an agendized meeting. That's a violation of sunshine law.

Board Chair Hulu Lindsey: Yes, yes and naturally I was going to propose that we could have a meeting on the 29th or 30th or both. BAE 29 or BAE, BOT, 29 morning, 29 afternoon. I'm willing to do that to just go over this bill because it's very, very important to us. It's going to be the central concentration for the Office of Hawaiian Affairs this year. So I'm willing to do that, especially since we can do it virtually. We're not inconveniencing people to come out of their houses. We can all go on our computers and look at this bill prior. It can be sent to us ahead of time and we look at it and we can digest it. If that is your desire?

Trustee Lee: Well, it's not my, but I would think that for a matter this important Trustee Hulu Lindsey, I would think that we would need to do that right.

Board Chair Hulu Lindsey: Yes

Trustee Lee: I mean if we want the whole Board to be able to weigh in on a matter of this importance. If this is going to be the concentration of OHA's efforts at the Legislature this year, then yeah I think we should. I think the Committee, I mean I don't have that say, it's up to the Committee Chair but the Committee and the Board is going to have to take this matter up before I would say before the 30th Madam Chair, if the deadline is the 30th. I would think we'd have to meet on the 28th and the 29th, which is the Tuesday and Wednesday.

Chair Akaka recognizes Trustee Ahu Isa

Trustee Ahu Isa: Kala mai, I just want to let you folks know that I have a hearing that I have to go to at DCCA. So I'm going to have to leave you in like 5 minutes so I can't vote on this. If it was that important, we shouldn't have had all these presentations prior to this because our meeting went on for over two hours now and so I'm not going to be here so I cannot. I'm going to be with my grandkids and I'm in a hotel where I can't even get Wi-Fi sometimes, so I just can't vote on it just to let you know, mahalo.

Chair Akaka: Is there any more to the presentation? If not, then we can vote now.

Board Chair Hulu Lindsey: I'd like to propose that we have meetings on the 29th and 30th or both on the 29th. I'm coming back from my vacation with my grandson who's giving me my great grandbaby for the first time. So I'm traveling on the 28th and I'm available 29, 30, you know at everybody's convenience.

Chair Akaka: Mahalo, Board Chair. Is there a motion?

Trustee Lee: We don't need a motion, Madam Chair, you're the Chair of the Committee. You call meetings whenever you want to call meetings or five Trustees can call a meeting. But you don't need a motion in the meeting, Madam Chair. Send out a 6 day notice to the public that we're having a meeting and we have a meeting.

Chair Akaka: Kala mai, I was talking about the action item, but yes, going back to what the Board Chair had said then just to make sure that everyone is on the same page is that this action item would not be taken up, this meaning it would be on the 29th rather.

Trustee Lee: No, Madam Chair, we're taking it up. Administration is asking our permission to draft a bill on this. If we don't pass this action item, they're not going to draft.

Chair Akaka: That's what I was asking to put a motion on for this here so that Trustee Ahu Isa can vote on this as well if presentation is finished. So yes, we can still have the meeting for the 29th.

Chief Advocate Kamali'i: Thank you Trustee, the presentation is finished. Thank you, so the action would be to approve actions 1, 2, 3 and four. Thank you.

Chair Akaka: Mahalo, is there a motion?

Trustee Ahu Isa: I so move, Chair.

Chair Akaka: Mahalo, it's been moved by our Board Vice Chair Ahu Isa, is there a second?

Vice Chair Lindsey: I'll second, Madam Chair.

Chair Akaka: Mahalo, it has been seconded by BAE Vice Chair Keola Lindsey. Can we please have the action item on the screen to be read.

BAE Staff Brandon: Chair, we're trying to get it up now.

Trustee Ahu Isa excused from the meeting at **3:49 p.m.**

Action Item BAE #21-06: 2022 OHA Legislative Bill Package

I. Proposed Actions

Action 1: OHA-1 Public Land Trust

Approve the drafting and submission of a Public Land Trust focused bill to the 2022 Legislature, that addresses the: 1) Current interim amount of \$15.1MM; 2) Existing amount of approximately \$29MM in the carry-forward trust holding account (as of Q1, 9/30/2021); 3) Projected accumulation (since 2012) of the difference between the interim PLT amount of \$15.1MM and the OHA's 20% pro-rata share of ceded land revenues; 4) Titling of the measure for strategic and clarifying reasons; and 5) Labeling of the measure as OHA-1 for tracking purposes.

Action 2: OHA-2 Building Back Pono

Approve the measure entitled *OHA-2 Building Back Pono: Addressing Socioeconomic Disparities in the Post-COVID Era*, to be included in the 2022 OHA Legislative Package as detailed in Attachment D with additional supports at Attachments C and E.

Action 3: Drafting and Editing

Approve drafting and editing measures, to: 1) Make, appropriate, technical, ministerial, non-substantive edits for style, clarity, consistency, and accuracy of the final measures; 2) Add preamble language in the measures for framing and editorial purposes; 3) Title the measures for strategic and clarifying reasons; 4) Label the measures for ease of tracking; and 5) Provide a final copy of the measures to the Trustees prior to submission.

Action 4: Coordinated Advocacy

Approve OHA's participation in the coordinated advocacy efforts as detailed in Attachment F.

Chair Akaka: It looks like Trustee Ahu Isa is no longer on.

Board Chair Hulu Lindsey: Madam Chair, are we going to take the actions one at a time?

Trustee Lee: No

Chair Akaka: I want to have clarification from Council here.

Trustee Lee: A motion was made and seconded.

Board Chair Hulu Lindsey: Yeah, but it didn't say what the motion was.

Trustee Lee: They moved to approve action 1, 2, 3 and 4 and it was seconded.

Board Chair Hulu Lindsey: I didn't hear the 1, 2, 3 and 4.

Chair Akaka: I just wanted to clarify it being that the Trustee that made the original motion is no longer on, are we still good to continue?

Trustee Lee: Yes

Chair Akaka: Great, thank you.

Trustee Akina: Madam Chair, is there discussion?

Chair Akaka: Yes

Trustee Akina: First, since I don't have the screen, since I can't see the motion on the screen, just for clarification. Is OHA-2 the second item listed out of four?

Chair Akaka: Mark, can you please put up the motion on the screen, it keeps dropping off.

Trustee Akina: Thank you, Madam Chair I can see that. Am I correct to understand that we would be voting once for all four items? In that case, I would like to make a motion that we bifurcate item number two, OHA-2. I'd like to move that.

Chair Akaka: Is there a second?

Vice Chair Lindsey: I'll second

Chair Akaka: It has been moved and seconded. I'm just double checking on my end regarding the voting and how we will proceed on this.

Chair Akaka recognizes Board Counsel Kurt Klein

Kurt Klein: Good afternoon Chair, as a point of order here we have a pending motion that was seconded, it's sitting on the table. Then Trustee Akina I believe, advanced a second motion and believe that motion should be a motion to amend the first motion. The motion to amend would have to be voted on and approved before hand. So if the motion is one to amend, I hear it's seconded and I believe it's seconded by Trustee Keola Lindsey, is that correct? Okay, so then there should be a vote on the amended motion.

Chair Akaka: Alright, then we'll take a roll call vote on the amended motion.

Kurt Klein: Thank you.

Trustee Lee: Madam Chair, we are not voting on the amended motion we are voting on the amendment. The motion has not yet been amended.

Chair Akaka: Mahalo for that clarification. Can we please have a vote on the amendment?

Trustee Akina: Just to clarify, I just want to make sure I know what we're voting on now. Could we have the statement of this amendment?

Chair Akaka: Would it help if we had it on the screen?

Trustee Akina: Yes, it would help.

Trustee Lee: Madam Chair, that is not what the amendment was. If we remove action item two from the action item, that means it will no longer come to the Board for a vote. We have removed it from the package. The motion was to bifurcate.

Chair Akaka: Mahalo, Kurt Klein if you could please help us with the language here.

Kurt Klein: Okay, motion to bifurcate action item BAE 21-06: 2022 OHA Legislative Package. I would rephrase that as motion to bifurcate Action Item 2 from Action Item BAE #21-06: 2022. Now I believe this was Trustee Akina's initial motion to bifurcate and so if that is what Trustee Akina's intention was, I think he should be the Trustee to confirm.

Trustee Akina: Madam Chair, I confirm that my intention in making this motion was to bifurcate Action Item 2 from Action Item BAE #21-06: 2022 in the OHA Legislative Bill Package.

Chair Akaka: Alright, so to restate, it's been moved by Trustee Akina and seconded by BAE Vice Chair Lindsey. Can I please have a **roll call vote**.

							3:58 p.m.
TRUSTEE		1	2	'AE (YES)	A'OLE (NO)	KANALUA (ABSTAIN)	EXCUSED
LEINA'ALA	AHU ISA						EXCUSED
DAN	AHUNA				X		
KELI'I	AKINA	1		X			
LUANA	ALAPA						EXCUSED
BRENDON KALEI'ĀINA	LEE				X		
CARMEN HULU	LINDSEY				X		
VICE CHAIR KEOLA	LINDSEY		2	X			
JOHN	WAIHE'E, IV			X			
CHAIR KALEIHIKINA	AKAKA				X		
TOTAL VOTE COUNT				3	4	0	2

MOTION: [] UNANIMOUS [] PASSED [] DEFERRED [X] FAILED

Chair Akaka: Motion has not passed. I want to make sure we're on track here and we have this correct. So are we going then to the original motion?

Kurt Klein: The original motion Chair is pending. The motion to bifurcate has failed. The current motion now is to approve all four items listed in the 2022 Legislative Action Item that you have, and it was seconded. So it's now pending a vote.

Chair Akaka: Mahalo, we will ask now for a **roll call vote**.

							4:00 p.m.
TRUSTEE		1	2	'AE (YES)	A'OLE (NO)	KANALUA (ABSTAIN)	EXCUSED
LEINA'ALA	AHU ISA	1					EXCUSED
DAN	AHUNA			X			
KELI'I	AKINA					X	
LUANA	ALAPA						EXCUSED
BRENDON KALEI'ĀINA	LEE			X			
CARMEN HULU	LINDSEY			X			
VICE CHAIR KEOLA	LINDSEY		2	X			
JOHN	WAIHE'E, IV			X			
CHAIR KALEIHIKINA	AKAKA			X			
TOTAL VOTE COUNT				6	0	1	2

MOTION: [] UNANIMOUS [X] PASSED [] DEFERRED [] FAILED

V. EXECUTIVE SESSION±

A. Consultation with Board Counsel Robert G. Klein re: questions and issues pertaining to the Board's powers, duties, privileges, immunities, and liabilities with respect to the Public Land Trust and associated legislation, pursuant to HRS§92-5(a)(4)

Chair Akaka: My understanding is that we've talked about the matters that we would in there in open session. Therefore, we would not need executive session unless Trustees would like to move to executive session. I don't see any Trustee that is interested in doing so then we will move on to announcements.

V. ANNOUNCEMENTS

Board Chair Hulu Lindsey: There is a meeting tomorrow at 10 a.m. We will be honoring Hokulani Padilla here on Maui and the meeting will be conducted from the University of Maui Campus and we'll be doing it virtually but Hoku will be there.

VI. ADJOURNMENT

Board Chair Hulu Lindsey: I move that we adjourn.

Chair Akaka: Mahalo, is there a second?

Trustee Waihe'e: Second

Chair Akaka: It's been moved and seconded. Can I please have a **roll call vote**.

							4:02 p.m.
TRUSTEE		1	2	'AE (YES)	A'OLE (NO)	KANALUA (ABSTAIN)	EXCUSED
LEINA'ALA	AHU ISA						EXCUSED
DAN	AHUNA			X			
KELI'I	AKINA			X			
LUANA	ALAPA						EXCUSED
BRENDON KALEI'ĀINA	LEE			X			
CARMEN HULU	LINDSEY	1		X			
VICE CHAIR KEOLA	LINDSEY			X			
JOHN	WAIHE'E, IV		2	X			
CHAIR KALEIHIKINA	AKAKA			X			
TOTAL VOTE COUNT				7	0	0	2

MOTION: [] UNANIMOUS [X] PASSED [] DEFERRED [] FAILED

Chair Akaka: The meeting is now adjourned, mahalo members, all in attendance, and to all live streaming. A hui hou kākou, mālama pono.

Chair Akaka adjourns the BAE meeting at **4:03 p.m.**

Respectfully submitted,

Brandon Mitsuda Trustee Aide
Committee on Beneficiary Advocacy and Empowerment

As approved by the Committee on Beneficiary Advocacy and Empowerment (BAE) on 1/25/21.

Trustee Kaleihikina Akaka
Chair
Committee on Beneficiary Advocacy and Empowerment

Committee on Beneficiary Advocacy and Empowerment

Trustee Kaleihikina Akaka, *Chair*Trustee Keola Lindsey, *Vice Chair**Members*

Trustee Leina'ala Ahu Isa, At-Large

Trustee Dan Ahuna, Kaua'i / Ni'ihau

Trustee Keli'i Akina, At-Large

Trustee Luana Alapa, Moloka'i / Lāna'i

Trustee Carmen Hulu Lindsey, Maui

Trustee Brendon Kalei'aina Lee, At-Large

Trustee John Waihe'e IV, At-Large



**STATE OF HAWAII'
OFFICE OF HAWAIIAN AFFAIRS**

**MEETING OF THE
COMMITTEE ON BENEFICIARY ADVOCACY AND EMPOWERMENT**

DATE: Tuesday, January 25, 2022**TIME:** 10:00 a.m.**PLACE:** Virtual MeetingViewable at www.oha.org/livestream OR

Listen by phone: (213) 338-8477,

Webinar ID: 898 9176 7910

Due to COVID-19, the OHA Board of Trustees and its standing committees will hold virtual meetings until further notice. Pursuant to Governor Ige's December 29, 2021 Emergency Proclamation Related to Sunshine Law In-Person Meetings, there will be no in-person location for this meeting that is open to the general public. The virtual meetings can be viewed and observed via livestream on OHA's website at www.oha.org/livestream or listen by phone: (213) 338-8477, Webinar ID: 898 9176 7910

AGENDA

- I. Call to Order
- II. Public Testimony on Items Listed on the Agenda* (Please see page 2 on how to submit written testimony or provide oral testimony online. Oral testimony by phone will **not** be accepted)
- III. **Approval of Minutes**
 - A. December 8, 2021
 - B. December 27, 2021**
- IV. New Business
 - A. Workshop: Policies - Series 2000 – Beneficiary Support and Services: Protect Ceded Lands, OHA Water Policy and Water Backgrounder, Policy on Protecting Iwi Kupuna, International Engagement, Beneficiary Support Services, Advocacy, Collaborations with Other Agencies and Organizations, Repatriation, Housing, Wai, Iwi Kūpuna, Disaster Resourcing; and consideration of a newly drafted Military Engagement Policy.
- V. Announcements
- VI. Adjournment

STATE OF HAWAII
OFFICE OF HAWAIIAN AFFAIRS
560 N. NIMITZ HIGHWAY, SUITE 200
(VIRTUAL MEETING - VIA ZOOM WEBINAR)

COMMITTEE ON BENEFICIARY ADVOCACY AND EMPOWERMENT
MINUTES

December 27, 2021 10:00 a.m.

ATTENDANCE:

Chairperson Kaleihikina Akaka
Trustee Dan Ahuna
Trustee Keli'i Akina
Trustee Luana Alapa
Trustee Brendon Kalei'aina Lee
Trustee C. Hulu Lindsey
Trustee Keola Lindsey
Trustee John Waihe'e, IV

BAE STAFF:

Brandon Mitsuda
Mark Watanabe

ADMINISTRATION STAFF:

Hussey, Sylvia, Ka Pouhana / CEO
Brown, Casey / COO
Hinck, Ramona / CFO
Kamali'i, Na'u / Chief Advocate
Ki, Nina / Public Policy Advocate
Ohta, Everett, Interim General Counsel
Aguinaldo, Arlene, IT
Koholua, Michelle, IT
Santos, Dan, IT

EXCUSED:

Trustee Leina'ala Ahu Isa

I. CALL TO ORDER

Chair **Akaka** calls the Committee on Beneficiary Advocacy and Empowerment meeting for Monday, December 27, 2021 to order at **10:01 a.m.**

Chair **Akaka** notes for the record that PRESENT are:

MEMBERS			AT CALL TO ORDER (10:02 p.m.)	TIME ARRIVED
CHAIR	KALEIHIKINA	AKAKA	PRESENT	
VICE-CHAIR	KEOLA	LINDSEY	EXCUSED	10:12 a.m.
TRUSTEE	LEINA'ALA	AHU ISA	EXCUSED	
TRUSTEE	DAN	AHUNA	PRESENT	
TRUSTEE	KELI'I	AKINA	PRESENT	
TRUSTEE	LUANA	ALAPA	PRESENT	
TRUSTEE	BRENDON KALEI'AINA	LEE	PRESENT	
TRUSTEE	CARMEN HULU	LINDSEY	EXCUSED	10:08 a.m.
TRUSTEE	JOHN	WAIHE'E, IV	EXCUSED	10:03 a.m.

At the Call to Order, **FIVE(5)** Trustees are PRESENT, thereby constituting a quorum.

II. PUBLIC TESTIMONY on Items Listed on the Agenda*

NONE

III. NEW BUSINESS

A. Action Item BAE #21-07: Public Land Trust Bill, 2022 Legislature

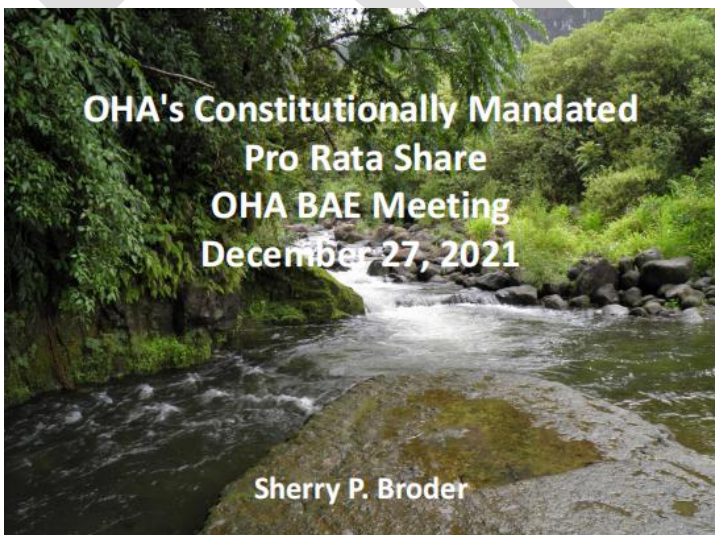
Chair Akaka: I wanted to make note that members the Committee folder was distributed within the 72 hour deadline for Board materials, thereby requiring a waiver of the 72 hour deadline for Board materials.

Chair Akaka yields the floor to Ka Pouhana Hussey.

Ka Pouhana Hussey: Good morning again Trustees, what Administration would like to do is help provide some context for the bill, and we're going to have two presentations for you beginning this morning. We've asked Sherry Broder to provide a contextual basis for the bill as well as then we will ask interim General Counsel Everett Ohta to provide us the numbers portion of the bill. We will then follow with a presentation with Chief Advocate Na'u, walking through the actual bill itself so that Trustees you can see the foundational pieces, the numeric expression and computations, and then how it is reflected in the bill and at that time once all those presentation and pieces are there then Administration asks then if you will then hold your questions, write them down, note them down, and then at the end I'll be able to have that discussion or have the discussion with Council as you would see fit. So if we can start with that Trustees, we'll go ahead and ask Sherry to share her screen and begin walking through some of the foundational pieces of the draft bill that we have before you, and that's in your packet.

Board Chair Hulu Lindsey: Trustee Akaka, I just want to let you know that I do not have visual. I only have audio. So I cannot see the screen.

Chair Akaka: Yes, I did notice the change there, thank you.



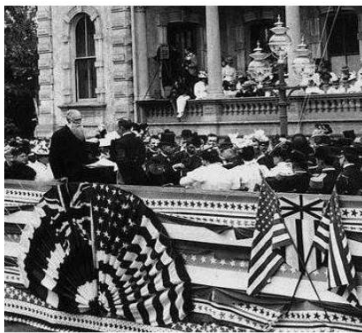
Overview

1. What are Ceded Lands? The Public Land Trust?
2. Litigation & Legislation re OHA's Pro Rata Share
3. Act 178, SLH 2006 - set current \$15.1 million cap on PLT revenues to OHA as "interim" funding



Sherry Broder: I'm going to be talking about OHA's constitutionally mandated pro rata share and basically I'm laying the groundwork for Everett's presentation, and he's going to be talking about the numbers, so I'm going to review the history and the legal and constitutional principles behind OHA's entitlement to its pro rata share. And ever since the creation of OHA, the amount of the pro rata share has been a subject for dispute between the state and OHA, so you'll get to see many different cases and many different things that happened over the years. And so I'm going to talk about what are the ceded lands, how does the ceded lands differ from the Public Land Trust and that's important because the pro rata share is computed on the Public Land Trust. I'm going to review the legislation, litigation legislation over OHA's pro rata share, and then I'm just going to remind you that ACT 178 session was Hawai'i 2006 set the current 15.1 million cap on PLT revenues and at that time it was specifically labeled as interim funding. But now here we are now I guess 16 years later, but a lot of years later.

1898
Republic of Hawai'i "ceded"
~1.8 million acres to the U.S.



Hawai'i Attorney General Opinion
03-03 (2003)

“‘Ceded lands’ are all of the lands ceded to the United States by the Republic of Hawaii under the Joint Resolution of Annexation, not otherwise disposed of by the United States prior to the lands’ transfer to the State of Hawaii pursuant to section 5(b) of the Admission Act, including the water, minerals, plants, and other things connected with the lands, and ‘every species of title inchoate or complete.’” *State v. Zimring*, 58 Haw. 106, 122-3, 566 P.2d 725, 735-6 (1977).

So in 1898, as we all know, the Republic of Hawai'i ceded 1.8 million acres to the United States of America. Then in 03-03 this is another portion of the definition of what are the ceded lands and since the PLT is a subset of the ceded lands, this same principle applies to it. So it's not just all the lands that were ceded to the United States by the Republic of Hawai'i under the joint resolution of annexation, but it also includes the water, minerals, plants, and other things connected with the lands and every species of title in quite and complete. And of course the submerged lands are also included in the ceded lands.

Admission Act Section 5(f)
Public Land Trust created

5(a) → title and control held by Territory,
transferred to State – see eg. Sand Island

5(b) → title held by U.S. but under control
of Territory, transferred from U.S. to State

5(e) → title and control held by U.S.,
transferred from U.S. to State if land no
longer needed by U.S.



Admission Act Section 5(f)
Public Land Trust

The public land trust land together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by the State as a public trust for five purposes:

- (1) Public education
- (2) **The betterment of the conditions of native Hawaiians**
- (3) The development of farm and home ownership
- (4) Public improvements, and
- (5) For public use



So the Admissions Act section 5(f) created the Public Land Trust. So when Hawai'i was admitted as a state, the 5(a) lands, those were lands held by the territory, and those were transferred directly to the state. So for instance, Sand Island, the reason OHA doesn't get any pro rata share from Sand Island is because those lands were transferred to the state at the time of statehood. 5(b) lands were titled held by the United States, but under control of the territory. Those were transferred from the United States to the state. 5(e) lands are lands titled and controlled held by the United States like Schofield Barracks or other places here in Hawai'i, the National Parks. Those will be transferred from the United States to the state if land is no longer needed by the United States.

So from the time of statehood until the 1978 Constitutional Convention, although the 5(f) lands had five different purposes, including as you can see listed on this slide, public education, betterment of conditions of Native Hawaiians, development of farm and home ownership, public improvements and public use, which is a very general broad category. All the proceeds and revenues were utilized for the purpose of public education.

1978 Hawaii Constitution
Article XII, section 4
Public Trust

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.

[Add Const Con 1978 and election Nov 7, 1978]

1978 Hawai'i Constitution, Article XII
Sections 4, 5 & 6



Created OHA "to manage all income and proceeds from that [pro rata portion](#) of the public land trust for native Hawaiians."

Clarified Admission "Act 5(b) lands shall be held by the State as a public trust for native Hawaiians and the general public."

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In 1978 the ConCon established Section 4 of Article 12, the Hawai'i State Constitution, and the reasoning behind this is because the funds were all going to public education from the Public Land Trust and so OHA wanted to clarify. I mean the Constitutional Convention wanted to clarify that those lands actually are to be held as a public trust for Native Hawaiians and the general public. So to make sure that those lands were used not only for public education, but also for the benefit of the conditions of Native Hawaiians. This section was added to the Constitution.

This is a picture of the first inauguration of OHA Trustees in 1980. So sections 4-5 and 6 were all added to the Hawai'i State Constitution and you know sections 5 and 6 really created the Office of Hawaiian Affairs created OHA quote to manage all incoming proceeds from that pro rata portion of the public interest for Native Hawaiians and also clarified as we saw earlier in Section 4 that 5(b) lands shall be held by the state as a public trust for Native Hawaiians in the general public.



Act 273, Session Laws Hawaii 1980
Hawai'i Revised Statutes § 10-13.5

Twenty percent of all funds derived from the public land trust, described in section 10-3, shall be expended by this office, as defined in section 10-2, for the purposes of this chapter.

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In 1980, the Legislature was instructed to provide legislation to implement the formation and setup of OHA and so among many bills, among many things that were done including setting up the election system and other things. The Legislature passed 10-13-5 which specifically says 20% of all funds derived from the Public Land Trust described in section 10-3 shall be expended by this office, which is the Office of Hawaiian Affairs.

Examples of Public Land Trust Airports

- Dillingham Airfield
- Hana
- Hilo
- Honolulu
- Kalaupapa
- Molokai
- Port Allen
- Upolu
- Waimea-Kohala



Honolulu International Airport



Hilo International Airport

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Examples of Public Land Trust Harbors and Housing

- DOT-Harbors
- DLNR-DOBOR
- Hawai'i Community Development Authority (HCDA)



Kewalo Basin



Honolulu Harbor



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So these are just some examples of Public Land Trust, so here are the airports, reef runway which is built on submerged land it's also part of the Public Land Trust, Hilo International Airport. Harbors and housing, also part of the Public Land Trust. These are all the big revenue generators. Hawai'i Community Development Corporation, the boating harbors because of the submerged lands.

Examples of Public Land Trust Agricultural Land and Irrigation Systems

- Department of Agriculture
- Agribusiness Development Corp.
- DLNR



Kalepa Lands



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Apology Resolution, Public Law 103-150 (1993)

Whereas, the Republic of Hawaii also ceded 1,800,000 acres of crown, government, and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government;



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Here are some examples of the Public Land Trust agricultural land and irrigation systems, and of course as we know, DLNR is one of the main stewards of the Public Land Trust.

Another very important event besides the 1978 Constitutional Convention was the passage of the apology resolution by both Houses of Congress in 1993, and in that resolution the Congress finds and admits that the Republic of Hawai'i also ceded 1800 acres of crown, government and public lands of the Kingdom of Hawai'i without the consent of or compensation to the Native Hawaiian people of Hawai'i or their sovereign government.

Apology Resolution, Public Law 103-150 (1993)

Whereas, the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum;



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Litigation and Legislation Re OHA's Pro Rata Share



The apology resolution also finds that the indigenous people, the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as the people over their national lands to the United States either through their monarchy or through a plebiscite or a referendum.

So now we're going to take a look at the litigation and legislation relating to OHA's pro rata share.

Pro rata portion of public land trust for the betterment of the conditions Native Hawaiians



Yamasaki 1987: Hawai'i Supreme Court: issues are non-justiciable and legislature must make initial policy decisions about OHA's pro rata share.

1990: OHA and State through Gov. Waihee entered into a settlement. Act 304 defined "revenue," set process to determine past due revenue, and segregated revenue from the "actual use" or disposition of trust lands into two categories - sovereign and proprietary.

OHA would not receive **sovereign revenue** - such as taxes, fines, and federal grants or subsidies - generated from the exercise of State sovereign powers.

Proprietary revenue, such as rents, leases, and licenses, would be subject to OHA's pro rata share.

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Act 304, SLH 1990

State Continues to Use to Today

OHA's pro rata share to be calculated on **proprietary revenue**, or "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, and including any penalties or levies exacted as a result of a violation of the terms of any propriety disposition"

Sovereign revenue was expressly excluded from OHA's pro rata share, including:

1. Taxes;
2. Regulatory or licensing fees;
3. Fines, penalties, or levies;
4. Registration fees;
5. Moneys received by any public educational institutions, including the University of Hawai'i, and the community college system, from educational its programs and ancillary services, such as tuition, registration fees, meals, books, grants, or scholarships;
6. Interagency and intra- agency administrative fees or assessments;
7. Moneys derived from or 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 land.

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So one of the first things that the Office of Hawaiian Affairs did was when it was formed in 1980 and came into being was to sue over the pro rata share, and this had to do with the removal of sand on Moloka'i and whether or not OHA was entitled to 20%. The Hawai'i Supreme Court ruled that the issues are non justiciable. So what it meant by that was that it's not a matter for court to decide because it doesn't have sufficient standards to make the decision, and the Legislature must make the initial policy decisions about OHA's pro rata share. So as a result of that decision, when Governor Waihe'e was elected, he set up a process to consider how to make fair the pro rata share to OHA, and so in 1990 Act 304 was passed and this was part of the settlement. It defined revenue which is an important aspect of that settlement, and you'll see in the next slide, and I'll explain why. It set the process to determine past due revenues. It segregated revenue from the actual use or disposition of trust lands into two categories, sovereign and proprietary. OHA would not receive sovereign revenues such as taxes, fines, federal grants and OHA would receive proprietary revenues such as leases, rents, licenses and those would be subject to OHA's pro rata share.

So just for your information, I thought that it would be good to include this slide, which is a little more detailed, but it gives you the list of everything that OHA agreed it would not receive revenues from. So this is part of the settlement that was arranged with Governor Waihe'e and passed by the Legislature and then even though eventually Act 304 was struck down by the Hawai'i Supreme Court because of the the federal position on the airport revenues. Nonetheless, even today the state continues to use these two definitions and there's other aspects to Act 304 that the state does continue to use. But of course, the ones that it doesn't like it doesn't use.

No Historical Agreement - Disputed Sources - Judge Heely (1996)

- ▶ 1993: State and OHA agree to revenue streams included in OHA's pro rata share, and \$135 million past due for 1980 to 1991 for certain issues. DISPUTED SOURCES REMAIN.
- ▶ 1996: Trial Judge Daniel Heely rules in OHA's favor.
- ▶ **Hospital revenue**
 - ▶ Patient services fees, cafeteria sales, and lease rent at Hilo Hospital "is clearly a proprietary rather than sovereign exercise of power which does not shield the Hilo Hospital Income from Act 304's definition of 'revenues'". Oct. 23, 1996 Heely Decision at 14.
- ▶ **Public housing developments and rent**
 - ▶ The state's activities of providing affordable housing "which are carried out by private individuals also," are proprietary in nature. Oct. 23, 1996 Heely Decision at 9.
- ▶ **Interest on investment of withheld revenue from public trust land**
 - ▶ "[T]he State is required to pay [OHA] its pro rata share of the interest income earned by the State from ceded land revenues derived from the Public Land Trust." Oct. 23, 1996 Heely Decision at 16.
- ▶ **DOT-Airports Waikiki Duty Free**
 - ▶ Subsequent to OHA I, DOT moved all Duty Free Shops operations off public trust land at HNL.

FAA and Use of Airport Revenues



The FAA viewed such use of airport revenues as contrary to the policies and conditions of grants provided under the Airport Improvement Program 1982, to prevent an airport owner or operator who receives Federal assistance from using airport revenues for expenditures unrelated to the airport.

In a 1996 report, the USDOT Inspector General [IG Report] concluded that the 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 [the FAA Authorization Act of 1994]" because OHA provided no services for the \$28.2 million and rejected the argument that the payments were for rent/use of the ceded lands.

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So OHA had filed the suit over the issues that remained from the negotiations with Governor Waihe'e. In other words, these were four items that the state did not agree with OHA on, and OHA did make claim for these four items. Judge Heely ruled that OHA was entitled to these four items in 1996. So hospital revenue, so patient service fees and you can see here what Judge Heely ruled. I quoted a sentence or two from him. So it was hospital revenue, public housing developments and rent, interests on investment of withheld revenue from Public Land Trusts and the airports, Waikiki duty free. The state had agreed that OHA would get the airport landing fee revenues, the 20% on that, but hadn't agreed on airports Waikiki duty free, but Judge Heely ruled that OHA was entitled to all these four items that had been disputed, given the language of Act 304.

Well the airline industry didn't like this Act 304 and they complained to the FAA and the Department of Transportation and so the FAA then reviewed this use of airport revenues to pay up the pro rata share and found that it was contrary to the policies and conditions of grants provided under the Airport Improvement Act 1982. To prevent an airport owner or operator who receives federal assistance from using airport revenues for expenditures unrelated to the airport. In a 1996 report, the USDOT Inspector General, the IG report concluded that the state's payments to OHA between 1992 and 1995 in the amount of 28.2 million were a diversion of airport revenue and violation of the different FAA authorization acts because OHA provided no services for the 28.2 million. Well OHA had tried very hard to argue against these different findings of the federal agencies and argued that the revenue was for the rent, use of the ceded lands, but both the FAA and the IG rejected those arguments.

Reef Runway Daniel K. Inouye International Airport



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Pro rata portion of public land trust
for the betterment of the conditions of
Native Hawaiians

- 1997: Act 329 set **"interim revenue" at \$15.1 million/yr**, established committee to address Public Land Trust issues and required inventory



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This is just the beautiful reef runway which is on submerged lands.

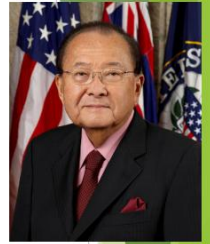
So in 1997, Act 329 sent an interim revenue in response to this finding by the FAA and the USDT at \$15.1 million a year.

DOT-Airports Revenue Under Cayetano Administration (1994-2002)



- ▶ 1996 - Judge Heely finds "the State is required to pay OHA its pro rata portion of all rents or fees collected by the State for the Duty Free concessions at the State's airports, including rents based upon gross sales generated from the Waikiki duty Free shop."
- ▶ Following USDOT opinion that transfer of Airport revenue violated federal law, State halted transfers from Airport special fund to OHA in 3rd Q 1996
- ▶ 1997 - Federal Forgiveness Act, OHA retained \$28.2 million transferred from Airport special fund
- ▶ Act 329, SLH 1997 - equivalent payment included amount for landing fees, concession, terminal and ground rent in calculation of past due revenue withheld after 3rd Q 1996

Senator Daniel K. Inouye July 29, 1997, 105th Congress Airport Forgiveness Act



However, I would like to make clear that . . . the removal of the Airport Revenue Fund for use by the State of Hawaii as a source of compensating the Office of Hawaiian Affairs 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. This forgiveness provision should not be construed as a forgiveness of the State's obligation to OHA.

The airports continue to sit on ceded lands. The State's obligation to compensate OHA for the use of the land upon which the airports sit should also continue. The only difference would now be the source the State will draw upon to satisfy its obligation.

See Forgiveness Act, § 340(d), 111 Stat. at 1448. CLARIFICATION - Nothing 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 defined 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.

So when Governor Cayetano handled this matter, as soon as he got that USDOT opinion he halted transfers from the Airport Special Fund to OHA in the third quarter of 1996. So Judge Heely had decided just prior to the USDOT opinion and just prior to Cayetano halting all payments. Then in 1997, Congress passed the Federal Forgiveness Act. This is really actually an airport revenue act, but it's called the Federal Forgiveness Act because OHA was able to retain the \$28.2 million transferred from the airport special fund. So of course we had our US Senators at the time, Senators Inouye and Akaka to thank for making sure that OHA at least got the 28.2 million to keep. Then Act 329 session laws 1997. That was the equivalent payment which I showed you up above and that was for the 15.1 million.

Senator Inouye made a speech on the floor of the US Senate when the bill was passed and he was very clear that this was not supposed to extinguish OHA's claim to the airport revenues So Senator Inouye said however, I would like to make clear that the removal of the airport revenue fund for use by the State of Hawai'i as the source of compensating the Office of Hawaiian Affairs for use of the ceded lands upon which the airports sit should not equate to a like reduction in the state's obligation to OHA under state law. This forgiveness provision should not be construed as a forgiveness of the state's obligation to OHA. Airports continue to sit on ceded land. The state's obligations to compensate OHA for the use of the land upon which the airports sit should also continue. The only difference would now be the source the state can draw upon to satisfy its obligation. Then if you take a look at the Forgiveness Act itself, Section 340, subsection D, there's a clarification. This is directly from the Act. Nothing in this Act shall be construed to affect any existing federal statutes, trust obligations created there under 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.

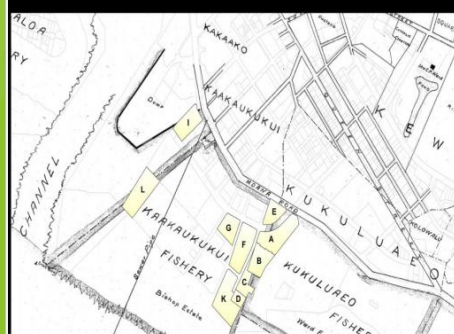
DOT-Airports Revenue Under Lingle Administration (2002-2010)

- ▶ Act 34, SLH 2003 - appropriated back payment for pro rata share transfers halted from 2001-2003
- ▶ 2003 - EO 03-03 - resumed pro rata share payments, but no equivalent Airport revenue transferred
- ▶ Act 178, SLH 2006 - pro rata share temporarily set at \$15.1 M; calculation included equivalent payments for "ancillary receipts" from DOT-Airports
- ▶ Act 178 - appropriated \$17.5M for underpayments under EO 03-03



Act 15, SLH 2012

- Settlement addressed **past due** revenue, through June 30, 2012 including unresolved issues from Act 304 settlement in 1993



OHA received 10 parcels in Kakaako Makai

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So when Governor Lingle got elected Governor she immediately pursued restoring some version of the pro rata share to OHA, so she issued her own Executive Order 03-03, which resumed pro rata payments. Because remember, Cayetano had stopped all prorated payments and then Act 334 was also passed and that appropriated back payments for the pro rata share transfers halted from 2001, 2003. Act 178 was passed in her administration, and that's the current law and the one which OHA is looking to update to be more current with, and also to include the Heely decision sources of revenue. And then ACT 178 also appropriates 17.5 million for under payments under Executive Order 03-03.

I just put this slide up to remind you that it doesn't have to be cash that OHA needs to receive for the purposes of a settlement. So this was the land settlement. Whether or not it was the perfect settlement or a good settlement or anything I don't comment on that, but I just show you this to suggest that there are other ways of satisfying OHA's obligation besides cash.

Mahalo nui loa for this opportunity to present the PowerPoint and let me know if anybody has any questions.

Ka Pouhana Hussey: Chair Akaka, if it's alright we'll go ahead and have Everett begin his section.

Chair Akaka: That sounds great, thank you.



2022 PLT bill - An overview

- Annual Payments Due (Section 2)** - Increase the amount of the state's annual transfer of PLT revenue to OHA to \$78.9 million, from its current amount of \$15.1 million.
 - Processes to transfer PLT receipts (Sections 3 and 4).
- Obligation re Past-Due Monies to OHA (Section 5)** - A \$638 million payment for back due amounts of underpaid PLT revenue that have accrued from July 1, 2012 to June 30, 2022 (ten fiscal years).

Interim General Counsel Ohta: Good morning Trustees. I'll be presenting now on the basis for the numbers provided for in the bill that is being proposed as OHA's Public Land Trust measure to be introduced for the

2022 Legislative Session. This presentation will be again based off of the information that Sherry Broder has shared with you, which you know summarized a lot of the long history of Public Land Trust issues between OHA and the state. The numbers provided for in this bill draw upon that long history and seek to build on that by updating the amount that the state would transfer to OHA in satisfaction of its constitutional obligations to provide for a pro rata share of revenues from the Public Land Trust to benefit Native Hawaiians.

In summary, the bill is comprised of two major components, the first being an updating of the annual payment amount that OHA receives for the public Land Trust to the amount of \$78.9 million. Of course, this is a significant increase in what is currently provided for under Act 178 from 2006 and it's also a substantial increase from the numbers that recent OHA bills have sought to increase in terms of PLT share. So I'll be going into a little bit of detail of how we arrived at that figure. The bill also provides for, of course, the mechanisms that amount would be transferred to OHA. The other major component is a lump sum payment for the states past due obligations that really is the difference between what OHA is identified as a truer accounting of the Public Land Trust share versus what we've been receiving since the last settlement between OHA and the state in 2012 relating to the Kaka'ako Makai settlement.

Act 178 (2006) was 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 . . .”

Act 178 (2006) – accounting of receipts

- “A single accounting will provide the Legislature, OHA, the general public, and even the state administration with a clearer financial picture of the public land trust”
- SECTION 5 - DLNR, “with the cooperation of any other agency that uses or manages public lands”, shall provide “an accounting of all receipts” from lands described in Admission Act section 5(f)

As Sherry mentioned, the basis for this update that we're seeking in this measure is really that ACT 178 passed by the Legislature in 2006 was always meant to be an interim measure. That measure was to be updated over time and really we're looking now at 15 years since its passage, over 15 years actually since its passage and of course we feel that it's long overdue for revisiting and updating of that annual amount.

The way that we are going about it is really a process by which OHA and the Legislature had originally envisioned through the ACT 178 process, which was to first reestablish that amount for an annual transfer of PLT monies but then also provide for an annual accounting of receipts from what was actually generated on PLT lands. So this accounting comes to OHA through the Department of Land and Natural Resources, which assembles the reported receipts from each of the agencies and combines it into a report. That report is to provide for an accounting of all receipts from lands described under the 5(f) Public Land Trust.

OHA Financial Reviews

- Tested FY2012 and FY2016 Act 178(2006) reports for accuracy and completeness
- Investigate and identify gaps in reported receipts
- Explain methods used by agencies to determine and report gross receipts



FY16 Financial Review - Overview

- Beginning January 2017, N&K CPAs contacted agencies and provided each with an agency-specific PLT Inventory Report that lists the PLT parcels for that agency
- N&K reviewed audited financial statements and revenue schedules for revenue sources on the agency's PLT Inventory Report
- N&K reconciled audited financial statements and revenue schedules with Act 178 (2006) report info

What OHA has determined over the years is that the numbers that have been reported on by DLNR from the various agencies are not accurate and complete, and we looked at that through two financial reviews conducted by outside accounting and consulting firms that OHA has contracted to take a closer look at what the actual financials were from these agencies related to PLT lands. It was to look at the accounting gaps that were provided for under these reports and to determine how accurate and complete these various reports were.

Most recently, N&K CPAs conducted a financial review for us of the fiscal year 16 reporting from the state and found that there were significant reporting gaps both in terms of what lands were reported on from the PLT receipts as well as the completeness of those receipts that were reported by the agencies, meaning that they weren't reporting all of the receipts that were actually generated from the Public Land Trust. With this information in hand, combined with the information received from the annual DLNR reports, OHA identified those sources of revenues that were generated from Public Land Trust lands or resources and which have been historically claimed by OHA, whether through agreement with the state or through things like past litigation, which Sherry touched on in her presentation. So in looking at those numbers, we reviewed them and identify those sources, summed them up, and came up with an amount that we feel is much, much closer to a true 20% share that OHA should be receiving to benefit Native Hawaiians.

I. Annual Payments Due - \$78.9 million/yr. Section 2 (p.6)



Public Land Trust Revenue Sources

PLT Revenue Sources with:	FY2016 Act 178 gross receipts	20% of gross receipts	Cumulative Share of receipts
1. Historical Agreement			
A. Receipts that State currently transfers to OHA, per Act 178 (2006)	\$173,874,929	\$34,774,986	\$34,774,986
B. State accounting errors			
C. Inconsistent transfers (some/same agencies transfer similar revenue sources, some do not)			
D. Past Precedent (agency transferred from exact revenue sources in the past)			
2. No Historical Agreement -- "Newly" Identified Sources	\$941,291	\$188,258	\$34,963,244
3. Heeley revenue sources (hospital patient service fees, public housing revenue, interest)	\$219,505,943	\$43,901,189	\$78,864,432

That figure as provided for in this year's Public Land Trust Bill, is an amount of \$78.9 million per year. That's provided for under section two of the bill.

This amount comes from again those sources of revenue that OHA and the state have either previously agreed to, or sources of revenue, Public Land Trust revenue that OHA has previously claimed in the past. They generally can be categorized into these areas either you know those areas with historical agreements between OHA and the state as provided for or summarized in this slide or those sources that OHA has previously claimed on what we're identifying as the Heeley revenue sources, a name that comes from that 1996 decision

from the Circuit Court Judge Heely identifying certain revenue sources that OHA claimed and he ruled on were being subject to OHA's pro rata share for Native Hawaiians. The amount that we're looking at is in the bottom right corner. It's accumulative total that comes from those various sources of receipts, and it's the inclusion of those Heely revenue sources is where we see the difference into what we're looking at this year in this PLT bill, versus what we've claimed in the past where our prior bills have come out at that \$35 million amount. So again, this 78 rounded to \$78.9 million is what we're including in this year's bill.

PLT revenue comprising \$78.9 million/yr.

1. Historical Agreement revenue sources (20% = \$34,774,986)

- A. Revenue sources that State currently transfers to OHA, per Act 178 (2006) (\$18,147,098/yr)
 - E.g., Lease rents, parking meters, public school use fees.
 - Per Act 178 (2006), OHA retains only \$15,100,000 each year.

B. State accounting errors (\$50,558)

- E.g., HCDA inadvertently did not report/transfer Kaka'ako Makai rent from Parcel C

C. Inconsistent transfers (\$1,594,958)

- Some agencies transfer a revenue source, but not other, similar revenue sources (e.g., DAGS parking lots F, B, C, O, Z-2);
- Some agencies transfer a revenue source, but another agency does not transfer a similar revenue source (e.g., HHFDC transfers laundry concession receipts, HPHA does not transfer laundry receipts);
- Difference between an agency's pro rata share of reported receipts vs. actual transfers to OHA (unknown basis for not transferring all reported receipts).

PLT revenue comprising \$78.9 million/yr.

1. Historical Agreement revenue sources (continued):

D. Past Precedent (agency transferred from exact revenue sources in the past) (\$14,982,342)

1. Airports (landing fees, concessions, terminal and ground rent)
2. Non-patient hospital revenue (e.g., food sales, laundry services, employee housing rentals, clinical rent revenue)

Revenue Source	FY2016 Act 178 gross receipts	20% of gross receipts
Airports	\$73,102,955	\$14,620,591
Non-Patient Hospital Revenue	\$1,683,181	\$361,751

Just a little bit more, by way of explanation of you know the types of revenue sources that we're talking about. The first categories that we're discussing are those that have been historically agreed to by OHA and the state. Those revenue sources include things like Public Land Trust land leases, and other user charges related to PLT lands. These sources are currently transferred to OHA by the agencies and we're capped by ACT 178 in terms of the amount that we can retain under Act 178. Other areas that were identified through the financial reviews are errors by the state in terms of what should have been reported and transferred to OHA, but were not for various reasons, but they were identified during these financial reviews as being subject and should have been transferred to OHA. Another area is those revenue sources that have been inconsistently transferred by the state agencies, where one agency will transfer certain receipts to OHA but another agency will not transfer receipts that are almost, that are nearly identical onto those transferred by a sister agency, so we identified those as areas that should be transferred and would in all likelihood should be transferred if the state was just acting consistently across its agencies.

The final area where there has been a historical agreement between OHA and the state in terms of receipts really come from the airports where the state has historically transferred receipts to OHA generated from the airport lands which sit on Public Land Trust lands, and those airport receipts include receipts transferred or factored into the amount that OHA receives after the Forgiveness Act. So even after the decision that said that OHA was not able to receive monies generated directly from the airports. The state still factored into its transfers to OHA the amounts generated from the airports consistent with the language I think that Sherry referenced in her presentation or regarding the continuing obligation of the state to account for those revenues and transfer the revenues from other sources to make up for that amount that can't be directly transferred from the airports. Also included in here are non-patient hospital revenues related to more commercial activities that can be characterized as related to more commercial activities within the hospitals.

PLT revenue comprising \$78.9 million/yr.

2. No Historical Agreement - "Newly" Identified Sources (20% = \$188,258*)

- ▶ Examples:
 - ▶ Made in Hawai'i trademark (NELHA);
 - ▶ Library fees for advanced services (DOE);
 - ▶ Offshore property management fees (DLNR-DOBOR);
 - ▶ Hunting receipts (DLNR-DOFAW).

**Does not include unknown additional receipts from Dept. of Health and UH*

PLT revenue comprising \$78.9 million/yr.

3. Heeley Sources - Hospitals, Public Housing, Interest (20% = \$43,901,189)

- a. Interest on investment of public land trust revenue
- b. Hospital patient revenue
- c. Non-commercial public housing revenue

Revenue Source	FY2016 Act 178 gross receipts	20% of gross receipts
Hospital patient revenue	\$209,894,684	\$41,978,937
Non-commercial public housing revenue (HHFDC & HPHA)	\$9,468,706	\$1,893,741
Interest on investments	\$142,550	\$28,510

Through the financial review, we also identified other sources that hadn't been the subject of past agreement between OHA and the state, but we believe them to be clearly analogous to receipts otherwise transferred to OHA, and those newly identified sources through the financial reviews were also included in the calculations to arrive at what OHA is claiming under its new updated amount.

And then the final areas of revenues that OHA has identified for this year's measure are the Heeley sources, those revenues that have been generated from Public Land Trust lands related to patient services at the state hospitals that sit on Public Land Trust lands as well as public housing projects that sit on Public Land Trust lands and the interests derived from the investing of Public Land Trust revenues in various accounts. All of these categories were previously identified by OHA, and were the subject of litigation dating back from the mid 90s and these were the categories of revenues that Judge Heely determined were subject to OHA's pro rata share back in 1996. So we're now including them, and that these three sources, in particular the hospital revenues, make up the majority of what that increased amount we're looking at for this year's measure, as opposed to more recent measures that OHA has either put forward, put forth, or supported.

Public Land Trust Revenue

Historical Agreement revenue sources	
Currently transferred revenue	\$18,147,098
+ 20% of State accounting errors	\$50,588
+ 20% of inconsistent transfers	\$1,594,958
+ 20% of "Past Precedent" sources	\$14,982,342
No Historical Agreement sources	
+ 20% "Newly" identified sources	\$188,258
Heeley Revenue Sources	
+ Hospital patient revenue	\$41,978,937
+ Non-commercial public housing revenue	\$1,893,741
+ Interest on accounts	\$28,510
TOTAL	\$78,864,432*
ROUNDED TO	\$78,900,000

*Based on FY2016 Act 178 reported receipts, plus receipts from FY2016 identified in N&K Financial Review; because significant reporting gaps still exist, these figures represent OHA's minimum pro rata share

Where will the State get the funds?

- ▶ New annual amount (\$78.9 million) would mean increasing currently transferred PLT receipts by approximately \$63.8 million annually
 - ▶ Federal law prohibits transfers of airport revenues directly from airport special fund, but does not change underlying obligation of the State
 - ▶ State needs to find other sources to replace amounts attributed to pro rata share of airport revenues (20% = \$14,620,591 as of FY16)
- ▶ OHA PLT bill provides flexibility to the State to identify alternatives to direct airport payments
 - ▶ Same approach as Act 178 (2006)

This is how the figures generally breakdown in terms of their contributions to the \$78.9 million amount. You can see that it's broken down according to those categories that I previously described, but they can kind of be viewed here as in their individual or categorical contributions to that amount.

Often given the amount that we're talking about here, we do recognize that there's going to have to be a significant increase of revenue or PLT monies transferred to OHA under this measure. So there is a mechanism for the Governor to set that amount that would be necessary to identify, I mean to account for the receipts generated, particularly in the airports, but also if necessary for the Governor to set the amounts that each agency transfers to OHA and that transfer amount can be set via Executive Order, which is currently the process under Act 178.

Sections 3 and 4

Procedures for quarterly transfers of PLT receipts and how to adjust amounts transferred to OHA

II. Back Due Lump Sum - \$638 Million
Section 5 (p. 9)



The next sections of the bills, Section 3 and 4 provide for the transfer procedures about how those receipts would be transferred to OHA under this new amount. It largely follows the procedures set forth in Act 178 from 2006, as well as the Executive Order 06-06 which operationalizes those transfers from the State Executive Branch to OHA.

And then moving on, the next major component of the 2022 PLT bill as proposed would be to provide for a lump sum payment to OHA in the amount of \$638 million.

Back Due Lump Sum - \$638 Million

Back due PLT amounts = New annual amount minus \$15.1M, multiplied by years since FY13 (i.e., 10 years)

Back due calculations based on FY16 sources:

$\$78,900,000 - \$15,100,000 = \$63,800,000 \times 10 =$

\$ 638MM

Includes transfer of funds in the PLT Trust Holding Account
-\$29,060,008 as of first quarter, FY22

OHA returned funds to trust holding account in Fiscal Years 2013 - 2021



This amount is calculated from the difference between the \$78.9 million amount against what OHA has been receiving as \$15.1 million each year, the difference being \$63.8 million multiplied by the number of fiscal years since the last OHA and state settlement related to Kaka'ako Makai. That is 10 years or 10 fiscal years since that settlement, resulting in a \$638 million amount for a back due payment. As Sherry noted in her presentation, past bills or past Legislative Acts that have updated the amount that OHA has received as a PLT share have almost always included a lump sum payment to account for these differences in what OHA has been receiving and what the new annual amount is so we are also including a similar measure here to account for what OHA should have been paid in this interim period. The last thing to note is that amount would include the amount, the monies held in that carry forward trust holding account amounting to approximately \$29 million that's held as a result of this, transfer procedures set up by executive order 06-06.

Those amounts have accumulated in the carryforward trust holding account since approximately fiscal year 2013, when we have consistently seen the transfers to OHA from the various agencies exceeding that set forth in Act 178. So we're looking to receive those monies as a clear source of PLT funds that the state has recognized or subject to OHA's pro rata share. But for Act 178, procedures were limited in how much of that money we can actually retain. So this overage has gone into the carryforward trust holding account and sits there unutilized when it is otherwise PLT monies.

Reporting of PLT receipts -
Continuing obligation under Act 178 (2006)

- Continues requirement that all agencies that collect receipts from lands in the public land trust report all such receipts by January 1 of each year.

Mahalo Nui Loa



The final thing that we'd note for this bill is that the reporting obligations of the agencies would continue under Act 178 from 2006 where these reporting requirements are not expressly changed under this measure, we were only looking to update the amounts that OHA receives annually, as well as providing for an additional lump sum payment as previously described.

That concludes my presentation, but I will along with Sherry and the other members of Administration be available for for the discussion and questions, thank you.

Ka Pouhana Hussey: Chair Akaka, we now like Chief Advocate Na'u Kamali'i and Nina to walk Trustees through the actual bill based on these contextual pieces that have been shared.

Chief Advocate Kamali'i: Thank you very much Chair Akaka, Chair Lindsey, Members of the Board of Trustees, present on the Committee and as well as my fellow Administrative cohorts. Thank you for the opportunity to present this bill and also just thank you very much to the Administration and the amount of work that we have put into simplifying the ask that is reflected in the bill. There's a great effort to work on clarification and also to work on simplification of the ask. So as I go through the bill, this came out of the prior BAE meeting of December 8th. We had presented generally requesting that the Board and the BAE Committee grant Administration more time to put this bill together and so here we are the bill itself is before the Committee for review. As I go through the bill, it will make for easy for others to follow along, make reference to pages and along the left hand side there are numbers and those are line numbers so that you can easily go to the various sections that I speak to. So this is related to the increasing of the payment of the Office of Hawaiian Affairs in the pro rata share. Sherry Broder has made just an amazing history to how we come to this point as well as Everett providing the figures which will be referenced in the bill.

So the question that one of the Trustees had asked is you know why now? Well, it's always appropriate to address constitutional obligations for the betterment of the conditions of Native Hawaiians and those words, they come from the law itself, and the obligation that I'm speaking of is the state's obligation, as captured in Admissions Act and the creation of OHA through the Constitution, its obligations to manage these funds for the betterment of our Native Hawaiian people. So this is really what we're talking about today. There has been history with regard to OHA's efforts to work with the state, taking us to court, taking us back again, executive orders being issued as well as acts being issued both in the state and in the congressional arena.

So we look at the very first sentence. This is about setting things right. Setting things right by the Legislature, being that if it is time to set right and fulfill the trust responsibilities to the indigenous people of Hawai'i consistent with governmental action across America to address the injustices against indigenous people. There are settings of rights that are occurring across the continent with tribes, Alaska Natives and so this is an effort to do that. Which has its origins as you read the bill from the illegal overthrow of the Kingdom of Hawai'i, and I'm not making that up, I mean it already is in Congressional Act, it's embodied in the apology bill. So

what we're seeing here is that it's incumbent upon the Legislature to enact legislation that upholds its trust responsibilities, and duty of care to Native Hawaiians. This bill is not about OHA. Yes, we are the managers. This bill is about a duty of care and responsibility to Native Hawaiians to account for all ceded lands in the Public Lands Trust inventory to account for all income and proceeds derived from the Public Land Trust and to transfer the full 20% pro rata share of income and proceeds from the Public Land Trust annually to the office of Hawaiian Affairs. And that's so that OHA can do its job to manage and to develop programs to lift Native Hawaiians up and out of poverty, out of cars, programs for education for the betterment of the condition of our Native Hawaiian people.

Section 1 includes the genesis and the source of the state Public Land Trust. Sherry has done an amazing excellent job of putting that together for you and a PowerPoint presentation as she remarks to us she could spend days talking about the history with regard to the ceded lands and a ceded lands trust obligation. But we don't have time for that and the task of the bill which is just to put all of that together as simply as we could to capture our unique historical, legal and political context as a basis for the ask. For the monies that are due to the Native Hawaiian people. The conditions, the lands that they are, how they were granted under the 5(f) provision, Sherry has laid out more simply and more clearly the other provisions of the Admissions Act, which addressed stresses the character of lands, the ceded lands where they went, and how title is held. But these 5(f) provisions for the betterment of the condition of Native Hawaiians as defined in the Native Hawaiian Homes Commission Act of 1920 and is further addressed by state law is what we're talking about here. We're talking about the income and the proceeds generated from those lands.

And in her presentation, Sherry has distinguished those other types of income and proceeds within the sovereign rights, they're sovereign character to the state of Hawai'i. Those are distinct and distinguished from the income and the proceeds that we're talking about. So here in 78, establishment of OHA, going very quickly through the history, which Sherry has already gone through. Not to belabor that, but as you read the bill, it goes through that history very quickly to provide the legal, political and historical context for what we're talking about in this bill.

So I'll move you to page 6 very quickly, line 9. The Legislature, in upholding its constitutional trust obligation and duty to the indigenous people of Hawai'i. We get to what is the purpose of the Act is to establish 78.9 million as the Office of Hawaiian Affairs annual share of the income and proceeds of the Public Land Trust beginning in fiscal year 2022 and 23. In Everett's presentation he laid out for the committee how we get there, and certainly we can revisit that in questions that follow the explanation of the bill.

The second is to transfer the past due amount, the sum of \$638 million for income and proceeds due from the use of the Public Land Trust between July 1, 2012. Now that is the marker of the last settlement. Which in kind brought us Kaka'ako Makai. From that time of 2012 to 2022, we are again looking at money, income and proceeds that are miss allocated or underreported, certainly underpaid to the Office Hawaiian Affairs. Now this doesn't alter what the responsibility or the obligation of the state to require continued annual accounting of all receipts from lands described in section 5(f) of the Admissions Act. Now, the way we address it very simply is to make reference to Act 178, but I'll get get to that as well.

So Section 2, the annual payment due, page 6, line 20. You'll note that there is a bracket there and that is to just to help guide you along that will be removed when the bill is actually submitted. So notwithstanding, the provisions of Act 178, session laws, State of Hawai'i 2006, except for Section 5 of Act 178, which this actually states without substantive change. Now that's a lot of cross reference and mentions of acts and sections in 178, but that was done intentionally so that it doesn't confuse the act that are the bill that we're trying to introduce, and it also doesn't change what we already know. That we are operating under in Act 178, it makes reference to it so that it's easier to read the legislation, and so the ask in Section 1 at the end of the page 7, line 7, is as we have stated, consistently is now an increase from 15.1 million to 78.9 million annually. And that is because reiterating, the obligation of the State of Hawai'i, as managed by the Office of Hawaiian Affairs to the Native Hawaiian people is not extinguished, it still exists and it's for us too to have the courage

and the constitutional affirmation of what is due even if there are or maybe other discussions that result from this bill. Regarding disputed sums, we must ask for what is due and that's what that figure represents, what is due. Based on our work, as Everett reminded us. Our work produced a report and that's what we're relying on. It's not a figure pulled out of the sky. It was a concerted effort by the Office of Hawaiian Affairs in 2015-16 to actually figure out what is due and that's what it's based on, so I would shift the burden back to the state and say, well if we got it wrong, show us what's right. That doesn't change the obligation. That rests in the first transfer from the, first transfer of title to lands from the United States of America to the State of Hawai'i. This is, we're talking about income. We're talking about income and proceeds. The obligation is well seated and settled in our law.

Alright, that having been said, how is it being paid? We have worked with the Administration to receive quarterly payments and of the 15.1 million. But the methodology, we don't dispute the methodology. The quarterly payments due. That would increase to a total of 19.725 million. So our quarterly payments would increase because our annual payment due has increased, makes sense.

Then we'll go to page 8, Section 4, line 6, the quarterly payments holding account. We're familiar with this. It would try to resolve the circumstances that administration i.e. the State of Hawai'i might face if there were not enough money to pay for the quarterly amount i.e. subsection one, and in the case if there's more than enough money, i.e. subsection 2, and what we have experienced since the onset is that there have been more than enough money. Even in the instance where they may have been misallocation, underreporting, and sums not paid and that has brought us to the CFTHA account and the CFTHA account is addressed in the obligation regarding past due monies to OHA.

Section 4 simply speaks to this CFTHA account and how that is arrived at, and then finally Section 5. The obligation regarding past due monies to OHA, page 9, line 11. When we add all of that up for 10 years of underpayments, based upon our reports, not even saying that that's the total amount, it probably is quite a bit more. But that sum is in the amount of 638 million and it does include the Trust Funds transferred to the Carry Forward Trust Account and I spoke of earlier of about \$29 million.

So again, that is the past due amount. So the bill speaks simply to the annual sum. How it's going to be paid and how much quarterly and the obligation of past due monies to OHA and we tried to write it as simply as possible. Making cross references to the law that already exists regarding our working with the state and DLRN regarding receipts etc.

And Section 6 that's on page 10. Any funds transferred pursuant to the Act shall be deemed income and proceeds from the Public Land Trust, just as if the funds have been paid out of the incoming proceeds from the Public Land Trust pursuant to Article 7, Section 6 of the State Constitution. So we start with the genesis of the obligation and we end with the obligation under the Constitution. So simply to the Committee, this is the bill. And you know, again, I want to thank everybody that had worked so hard and everybody did. I think we've all come to know each other a little bit better because of this and I want to thank our CEO and our CEO for their patience in bringing us to something that I think is something that our people can support. That our people can rise up for and some of those are monies that are part of the 43 million. You know one of the other questions that arises is with regard to the hospitals and monies, we'd be taking money from the hospital. We'd be taking money from other programs that Native Hawaiians benefit from. Well, those monies can be paid for and covered by the general fund and those are obligations of the State of Hawai'i to its citizens. If our monies were used to cover those obligations which are already obligations by the by the State of Hawai'i, then we would be allowing a misallocation and that's not the obligation. It doesn't reflect the obligation. If it did, it would expressly say i.e. written that it would be okay to misallocate or to reallocate funds for other purposes. But it doesn't say that. It doesn't say that, it says these monies are to be used for the betterment of the Native Hawaiians and that's why it should continue to be allocated appropriately to support programs that lift our Native Hawaiian people out of poverty. That allow our businesses which are struggling to get a lift up so that they thrive so that our people are not continuing to cycle and these programs that are the state's responsibility

programs that you might refer to as safety net programs. It is not OHA's responsibility to support safety net programs. It is the state's responsibility to do that.

So with that I want to end the discussion with regard to the bill and I will return it back to our CEO. My understanding is that if there are any questions which require our attorneys to weigh in if those may be done in Executive Session, thank you.

Ka Pouhana Hussey: Thank you, Na'u. Chair Akaka, that ends Administration's presentation one of the constitutional foundation that Sherry provided to the numerical computations of the basis for the numbers based on studies done by OHA and the agreements and calculations and then reflected in the actual bill itself, which Na'u just walked the Trustees through. So Administration opens it up Chair Akaka to Trustees' questions and or comments.

Chair Akaka: Yes, members is there any discussion? I also saw that.

Chair Akaka recognizes Trustee Lee.

Trustee Lee: Thank you, Trustee Akaka. I just have two questions. I tried to raise my hand when Na'u was on this part on page 7, line 7 where it talks about the amount that we're seeking now, the 78.9 million or present real value. If Na'u could speak to what that means.

Chief Advocate Kamali'i: 78.9 million or present real value. What that means?

Trustee Lee: Well we're giving the legislation an either or. Right, it says shall be 78.9 million or present real value. So we're saying that value might be different than 78.9 million or are we asking for something else in lieu of 78.9?

Chief Advocate Kamali'i: Yes, present real value. Certainly our figures are lower based on a 2015, 2016 audit, present real value that would shift it to them to actually provide reliable, credible information or receipts.

Trustee Lee: Got it

Chief Advocate Kamali'i: Which certainly might be much higher.

Trustee Lee: Got it, that answers that question. Thank you, Na'u and then Chair one more question and I'm not sure if this is for Everett since this came from when he was presenting or anybody on Na'u's team who was working on this I guess could answer this. So we're asking for a lump sum settlement of \$630 million based on the 17.9 million over the last 10 fiscal years. Not if, but when the somebody in committee asked this question are we prepared to answer it when they say. Can you show that it was 78.9 million over those 10 fiscal years? Do we have that breakdown that says that during each one of those fiscal years, it was in fact 78.9? Because I find that hard to believe that every year was the same amount, that it wasn't lower 10 years ago and is higher now. I just want to make sure that when we go in to testify in committee in both the Senate and the House that we're prepared to answer that question that when, not if, when a Senator or Representative asks this question, we don't go I don't know, let's go back in, we gotta go check. I want to know that we are prepared to answer that question.

Chief Advocate Kamali'i: Trustee Lee, I had submitted, a calculation has been provided. That's how we got there.

Trustee Lee: That it was 70. I understand how we got to 78.9 for today, but we're asking for a lump sum based on that figure over the last 10 fiscal years. So we have have that computation that shows that every single one

of those fiscal years that computation came out to 78.9 million? That's all I'm asking because it's going to be asked in committee, you know it is.

Chief Advocate Kamali'i: Well, I would submit that the misallocation, underreporting and underpayment is reflected in the disputed sum. Shifting the burden to the state to show that we're wrong.

Trustee Lee: I'm not sure it answers my question, because to be clear I'm not disputing that we're wrong. That's not my intention, I just want to know that when those that are sitting at that table, because I'm not going to get to sit at that table. Those that are sitting at that table in front of the Legislators will be able to answer that question, and if that's going to be our answer, well then prove us wrong.

COO Brown: May I add something, it might not help the conversation, but Chair Akaka? The 78 million was based off a 20% calculation from the total receipts that was looked at in 2016, so Trustee Lee does have a point because we picked a point in time or N&K study picked a point in time to conduct their math, that point in time was 2016, which the 78 million is a result of. Based on if we were to do that calculation every year, the gross receipts by the state would probably fluctuate, but we're choosing a number that probably represents, you know, some kind of baseline because it likely goes up right, even though the years fluctuate, over time those amounts like they go up due to inflation.

Trustee Lee: Perfect, perfect Casey. That's the answer I'm looking for. That although we cannot represent that 78.9 million represents an accurate accounting over the last 10 fiscal years, it also does not take into account that it's probably more than 78.9 million where we sit today. So we took a point in time and we're using that as an average over the last 10 fiscal years. Now if the Legislature wants to have DAGS go and figure that out you probably might come up with a higher number. You might come up with a lower number, but for OHA's purposes where we're sitting here today, we took the snapshot in time of 2016 knowing that today it's probably higher, Representative or Senator. So I just wanted to know that we're prepared. In my mind answering to a Senator or Representative that well prove us wrong, I don't see that helping our case. But that answer I think helps our case, that we took a snapshot of time in 2016 and I didn't know what it was that's why I'm asking, we took a snapshot in time in 2016. This is the figure that OHA came up with based on the facts and figures that we presented to you. If the Legislator, if this committee, whether it's in the House or the Senate would like a more accurate accounting than the state is welcome to go and do that. It'll probably be higher than that now because we did not take into account inflation and everything else of where we sit here in 2022. So thank you, it did help. Thank you, Casey.

Chief Advocate Kamali'i: I apologize Trustee Lee. The calculation was presented in Everett's presentation. Back due calculations based on fiscal year 16 sources 78.9 million less, 15.1 million is 63.8 million times the number of years of 10 gets you 63.8 million, so I apologize my misunderstanding.

Trustee Lee: No it's okay, that's how I came up with the question because it was taking that one figure and then multiplying it out by 10 when I know that number isn't the same for all 10 years. So I just wanted to know that we were prepared to answer that question because it's going to come up in both the House and Senate. I promise you someone is going to ask that question because I would. So thank you, Casey. I hope someone took note of that of who's going to be giving testimony that you guys are prepared to answer that question. Thank you, Madam Chair.

Chair Akaka: Members are there any other questions or concerns? Any mana'o to be shared? Ka Pouhana is there anything else that the team would like to share?

Ka Pouhana Hussey: No Trustee, the team is ready with any questions, but if the Trustees have no further questions then we turn that back over to you.

Chair Akaka: Mahalo, alright Trustees I wanted to check if you folks are interested in going into Executive Session if there are any other questions to be asked there otherwise we'll move ahead with the motion. Alright, seeing none may I please have a motion to approve Action Item BAE #21-07 Public Land Trust Bill 2022 Legislature.

Trustee Waihe'e: Madam Chair, I'd like to move to **Approve the submission of the Public Land Trust Bill (PLT) to the 2022 Legislature as OHA-1, that addresses the: 1) Federal Trust responsibilities to Indigenous People; 2) 1959 Admissions Act and the conditions of the new State of Hawai'i to hold lands in public trust; 3) Purposes of such public land trust, including the betterment of the conditions of native Hawaiians; 4) Roles and responsibilities of the Office of Hawaiian Affairs (OHA); 5) Current interim amount of \$15.1MM; 6) Existing amount of approximately \$29MM in the carry-forward trust holding account; 7) Projected accumulation (since 2012) of the difference between the interim PLT amount of \$15.1MM and the OHA's 20% pro-rata share of ceded land revenues; and 8) Accountability and reporting processes, at Attachment A.**

Vice Chair Lindsey: Second, Madam Chair.

Chair Akaka: It has been moved and seconded. Is there any discussion members?

Chair Akaka recognizes Trustee Lee.

Trustee Lee: Thank you, Madam Chair. I just need a little clarification since someone decided to make this motion so detailed. I'm trying to look forward to it, but I don't see anywhere in here it addressing the lump sum that we're seeking. I will take that number 5, the current interim amount addressing that 15.1. I'll take that as a general way of saying that we're addressing it because we want more. We do address the carryforward trust account. I see it, I got that clarification. Thank you Madam Chair.

Chair Akaka: Any other discussion members? Seeing none, can I please have **roll call vote** Brandon.

							11:21 a.m.
TRUSTEE		1	2	'AE (YES)	A'OLE (NO)	KANALUA (ABSTAIN)	EXCUSED
LEINA'ALA	AHU ISA						EXCUSED
DAN	AHUNA			X			
KELI'I	AKINA			X			
LUANA	ALAPA			X			
BRENDON KALEI'ĀINA	LEE			X			
CARMEN HULU	LINDSEY			X			
VICE CHAIR KEOLA	LINDSEY		2	X			
JOHN	WAIHE'E, IV	1		X			
CHAIR KALEIHIKINA	AKAKA			X			
TOTAL VOTE COUNT				8	0	0	1

MOTION: [] UNANIMOUS [X] PASSED [] DEFERRED [] FAILED

V. EXECUTIVE SESSION†

A. Consultation with Board Counsel Robert G. Klein re: questions and issues pertaining to the Board's powers, duties, privileges, immunities, and liabilities with respect to the Public Land Trust and associated legislation, pursuant to HRS§92-5(a)(4)

NONE

V. ANNOUNCEMENTS

Board Chair Hulu Lindsey: There is a Board of Trustee Meeting on Wednesday at 10 a.m.

VI. ADJOURNMENT

Chair Akaka: I will have a roll call to adjourn if there is a motion.

Trustee Waihe'e: So moved, Madam Chair

Board Chair Hulu Lindsey: Second

Chair Akaka: Mahalo, Trustee Waihe'e and it's been seconded by our Board Chair Hulu Lindsey. Can I please have a **roll call vote**.

							11:23 a.m.
TRUSTEE		1	2	'AE (YES)	A'OLE (NO)	KANALUA (ABSTAIN)	EXCUSED
LEINA'ALA	AHU ISA						EXCUSED
DAN	AHUNA			X			
KELI'I	AKINA			X			
LUANA	ALAPA			X			
BRENDON KALEI'ĀINA	LEE			X			
CARMEN HULU	LINDSEY		2	X			
VICE CHAIR KEOLA	LINDSEY			X			
JOHN	WAIHE'E, IV	1		X			
CHAIR KALEIHIKINA	AKAKA			X			
TOTAL VOTE COUNT				8	0	0	1

MOTION: [] UNANIMOUS [X] PASSED [] DEFERRED [] FAILED

Chair Akaka: The meeting is now adjourned, mahalo members, all in attendance, and to all live streaming. A hui hou kākou, mālama pono.

Chair Akaka adjourns the BAE meeting at **11:24 p.m.**

Respectfully submitted,

Brandon Mitsuda Trustee Aide
Committee on Beneficiary Advocacy and Empowerment

As approved by the Committee on Beneficiary Advocacy and Empowerment (BAE) on 1/25/21.

Trustee Kaleihikina Akaka
Chair
Committee on Beneficiary Advocacy and Empowerment

Committee on Beneficiary Advocacy and Empowerment

Trustee Kaleihikina Akaka, *Chair*Trustee Keola Lindsey, *Vice Chair**Members*

Trustee Leina'ala Ahu Isa, At-Large

Trustee Dan Ahuna, Kaua'i / Ni'ihau

Trustee Keli'i Akina, At-Large

Trustee Luana Alapa, Moloka'i / Lāna'i

Trustee Carmen Hulu Lindsey, Maui

Trustee Brendon Kalei'aina Lee, At-Large

Trustee John Waihe'e IV, At-Large



**STATE OF HAWAII'
OFFICE OF HAWAIIAN AFFAIRS**

**MEETING OF THE
COMMITTEE ON BENEFICIARY ADVOCACY AND EMPOWERMENT**

DATE: Tuesday, January 25, 2022**TIME:** 10:00 a.m.**PLACE:** Virtual MeetingViewable at www.oha.org/livestream OR

Listen by phone: (213) 338-8477,

Webinar ID: 898 9176 7910

Due to COVID-19, the OHA Board of Trustees and its standing committees will hold virtual meetings until further notice. Pursuant to Governor Ige's December 29, 2021 Emergency Proclamation Related to Sunshine Law In-Person Meetings, there will be no in-person location for this meeting that is open to the general public. The virtual meetings can be viewed and observed via livestream on OHA's website at www.oha.org/livestream or listen by phone: (213) 338-8477, Webinar ID: 898 9176 7910

AGENDA

- I. Call to Order
- II. Public Testimony on Items Listed on the Agenda* (Please see page 2 on how to submit written testimony or provide oral testimony online. Oral testimony by phone will **not** be accepted)
- III. Approval of Minutes
 - A. December 8, 2021
 - B. December 27, 2021
- IV. New Business**
 - A. Workshop: Policies - Series 2000 – Beneficiary Support and Services: Protect Ceded Lands, OHA Water Policy and Water Backgrounder, Policy on Protecting Iwi Kupuna, International Engagement, Beneficiary Support Services, Advocacy, Collaborations with Other Agencies and Organizations, Repatriation, Housing, Wai, Iwi Kūpuna, Disaster Resourcing; and consideration of a newly drafted Military Engagement Policy.**
- V. Announcements
- VI. Adjournment



OFFICE OF HAWAIIAN AFFAIRS

Interoffice Memorandum

Date: January 20, 2022

To:

Ke Kauhuhu Carmen Hulu Lindsey
Ke Kua Leina‘ala Ahu Isa
Ke Kua Dan Ahuna
Ke Kua Kaleihikina Akaka
Ke Kua Keli‘i Akina

Ke Kua Luana Alapa
Ke Kua Brendon Kalei`āina Lee
Ke Kua Keola Lindsey
Ke Kua John Waihe‘e IV

From: Sylvia M. Hussey, Ed.D., Chief Executive Officer 

cc: CEO Team

Subject: Executive Policy Manual Series 2000 Beneficiary Support and Services and Newly Drafted Military Engagement Policy

Attachments: (1) – Action Item BAE #13-02 New Board of Trustees Executive Policy on Protecting the Ceded Lands Corpus, February 6, 2013; (2) – Action Item BAE #15-06 Adoption of an OHA Water Policy and a Water Backgrounder Appendix, October 21, 2015; (3) - Action Item BAE #15-07 New Board of Trustees Executive Policy on Protecting Iwi Kupuna, October 21, 2015; (4) – Action Item BAE #16-01 To approve an OHA Board of Trustee Executive Policy on International Engagement; (5) – Executive Policy Manual Series 2000 Beneficiary Support and Services; (6) - Draft Military Engagement Policy; and (7) – Advisory Council on Historic Preservation, Consultation with Native Hawaiian Organizations in the Section 106 Review Process: A Handbook

The purpose of this memo, and its related attachments, is to: A) Set context for the breadth of beneficiary related policy work; B) Identify policies¹; C) Share a newly drafted military engagement policy, including related exhibit; and D) Provide policy prompts for discussion in the workshop.

¹ **1a:** prudence or wisdom in the management of affairs; **b:** management or procedure based primarily on material interest; **2a:** a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions; **b:** a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body, <https://www.merriam-webster.com/dictionary/policy?src=search-dict-box>, retrieved January 20, 2022.

A. Setting Context

- 1. OHA's Role and Responsibilities.** Established by Hawai'i state's Constitution,² OHA is a semi-autonomous agency of the State of Hawai'i mandated to better the conditions of Native Hawaiians. Guided by a board of nine publicly elected trustees, all of whom are currently Native Hawaiian, OHA fulfills its mandate through advocacy, research, community engagement, land management, and the funding of community programs.

Hawai'i state law recognizes OHA as the principal public agency in the state responsible for the performance, development, and coordination of programs and activities relating to Native Hawaiians.³ Furthermore, state law directs OHA to advocate on behalf of Native Hawaiians;⁴ to advise and inform federal officials about Native Hawaiian programs; and to coordinate federal activities relating to Native Hawaiians.⁵

- 2. The Federal Trust Responsibility to Native Hawaiians.** Native Hawaiians are owed the same trust responsibility as any other Native American group. To meet this obligation, Congress enacted programs and policies to promote education, health, housing, and a variety of other federal programs that support Native Hawaiian self-determination. Similar to American Indians and Alaska Natives, Native Hawaiians have never relinquished the right to self-determination despite the United States' involvement in the illegal overthrow of Queen Lili'uokalani in 1893 and the dismantling of the government.

Over 150 Acts of Congress consistently and expressly acknowledge or recognize a special political and trust relationship to Native Hawaiians based on status as the Indigenous, once-sovereign people of Hawai'i. Among these laws specifically benefitting Native Hawaiians are the Hawaiian Homes Commission Act, 1920, 42 Stat. 108 (1921); the Native Hawaiian Education Act, 20 U.S.C. § 7511; the Native Hawaiian Health Care Improvement Act, 42 U.S.C. ch. 122; and the Hawaiian Homelands Homeownership Act codified in the Native American Housing Assistance and Self Determination Act, Title VIII, 25 U.S.C. § 4221.

- 3. Native Hawaiian Self-Determination.** Congress has consistently and expressly acknowledged or recognized a special political and trust relationship to Native Hawaiians based on our status as the Indigenous, once-sovereign people of Hawai'i. Although the Native Hawaiian community has not yet reorganized a government, Native Hawaiians benefit from many federal programs and services—similar to American Indians and Alaska Natives. In lieu of a central Native Hawaiian government, Congress utilized a patchwork of programs administered through federally funded Native Hawaiian-serving organizations to deliver and coordinate many services to Native Hawaiian communities.

² HAW. CONST., art. XII, §5 (1978).

³ Haw. Rev. Stat. § 10-3(3).

⁴ Haw. Rev. Stat. § 10-3(4).

⁵ Haw. Rev. Stat. § 10-6(a)(4).

4. **Native Hawaiian Organizations and Communities.** Generally, and in the case of public emergencies and other crises, Native Hawaiian-serving organizations should be utilized as an effective service-delivery system to the extent possible. In some instances, organizations cannot fulfill the role of Tribal governments, like in providing law enforcement or fire and rescue services. In these situations, federal funding should be allocated to the State and County entities in Hawai'i that do provide these services to communities. However, experience is that when Native Hawaiians are not specifically identified, or funding is not set aside, the needs of communities may be overlooked by State and County agencies. Thus, it is critical for federal funding to flow to these entities and for the trust responsibility to Native Hawaiians to be specifically identified and addressed in those allocations.
5. **Consultation w Native Communities, Climate Change.** In the cases of foreseeable large-scale crises like climate change, the trust responsibility requires the federal government to consult with Native communities to better understand unique impacts and to best implement federal policy. The federal government must work with the Native American community to incorporate Native wisdom and stewardship principles in its plans to address climate change. Although climate change is a global, existential problem, it must be addressed, in part, through place-based, traditional conservation and agricultural practices to restore environmental health, which then aggregate to large scale mitigation. Similarly, when other large-scale crises occur, Congress has been called upon to work on solutions that support Indigenous-led programs and practices that have proven successful. Native communities hold a wealth of traditional knowledge that can be utilized to address many crises that this country will face.
6. **Consultation, Conference, Coordination, and Engagement with Native Hawaiian Community.** While the federal trust responsibility has many facets, one of the most critical safeguards of effective self-determination is the ability to consult with the federal government. Under President Clinton's Executive Order 13175, and subsequent memoranda from the Bush, Obama, and now Biden Administrations, the U.S. Government recognizes the right to sovereignty and self-determination of this nation's Native people. While this is a step in the right direction, the omission of Native Hawaiians from federal consultation requirements has stifled and limited Native Hawaiian voices from being able to comment upon and inform federal projects and programs for the past two decades. Despite our exclusion from these executive orders, Congress's thoughtful inclusion of Native Hawaiians in key legislation like the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. § 3001) and the National Historic Preservation Act (NHPA) (16 U.S.C. § 470 et seq.) have demonstrated that Native Hawaiians can be effectively included in consultation now, with representation through Native Hawaiian organizations. Indeed, Congress expressly established the Office of Native Hawaiian Relations (ONHR) within the Department of the Interior to implement the special legal relationship between the federal government and Native Hawaiians and to specifically integrate meaningful, regular, and appropriate

consultation with the Native Hawaiian community on issues significantly affecting our resources, rights, and lands.

Moreover, OHA is already actively involved with federal consultations. OHA receives and reviews approximately 240 requests for federal consultations each year, including Section 106 NHPA and NAGPRA reviews. The federal government takes many more actions affecting the Native Hawaiian community than are covered by these two statutes without ever giving Native Hawaiians an opportunity to consult. This must change.

Ensuring Native Hawaiians are informed of all proposed federal actions and allowed to voice their comments and perspectives on them will help to correct this country's historic wrongs against Native Hawaiians. Moreover, this will also improve the quality of federal undertakings and projects. Federal consultation with entities that serve Native Hawaiians such as OHA, the Department of Hawaiian Home Lands, the Native Hawaiian Education Council, Papa Ola Lōkahi, and the Native Hawaiian Health Care Systems, among others, enables Native Hawaiians to access this basic tenet of self-determination—having a meaningful say in its own governance.

B. Crosswalk of Policies

The Executive Policy Manual (EPM), as depicted at right, was revised by the Board of Trustees in February 2012. Subsequent policy changes (via action item) were tracked by Corporate Counsel (“CC”); who also reviewed new policies developed since 2012; and the application of policy to various organization actions. CC has since incorporated all EPM impacted policy changes into one new EPM document and will issue an updated document to the BOT.

As the OHA Policy Framework was approved⁶, Administration is in the process of: mapping, crosswalking and proposing migration of policies and/or policy language from the EPM to the new Policy Framework, eventually sunseting the EPM document itself. Administration is also in the process of creating and populating a new electronic policy framework location, accessible to internal and external stakeholders.

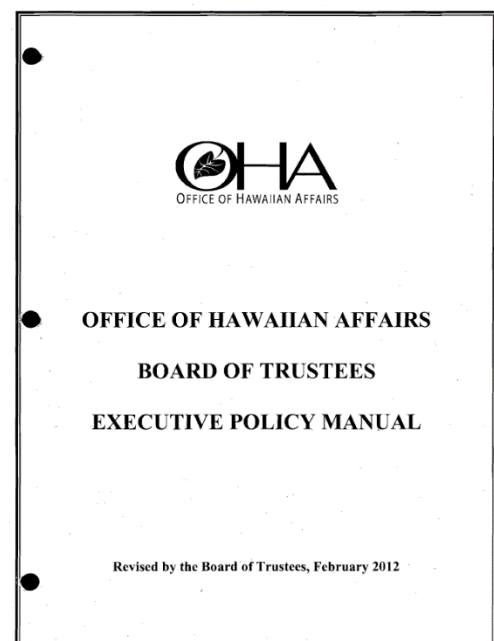


Figure 1: Executive Policy Manual

⁶ Action Item #21-18, Approve and Implement the OHA Policy Framework, December 9, 2021 (1st reading), December 29, 2021 (2nd reading)

In addition to the policies at Attachments 1 to 4, the EPM, Series 2000 Beneficiary Support and Services (Attachment 5) indicate policies related to Advocacy (2010), Grants (2020), Ka Wai Ola (2030), Repatriation (2040), Housing (2050), Collaboration with Other Agencies and Organizations (2060). The work of mapping, crosswalking and proposing policies in the EPM will include the Series 2000 Beneficiary Support and Services.

C. Draft Military Engagement Policy

Mention or reference “Kaho’olawe”, “Makua”, “Pohakuloa”, “Barking Sands”, and Hawaiians have visceral reactions in mind, body and spirit because of land, ‘āina, the very essence of being Hawaiian. In April 2021, the Hawai’i Military Land Use Master Plan (HMLUMP) was finalized and shared publicly, Table 1 on page 9 of the HMLUMP is detailed below, noting these are expiring leases and easements (vs. renewal options).

Service	Location	Island	Acres	Exp Year	Notes
Army* (Figure A-1)	Pōhakuloa Training Area (PTA)	Hawai’i	22,971.0	2029	Saddleback Road Lease
	Kahuku Training Area	O’ahu	1,150.0	2029	Parcel Lease
	Kawailoa Training Area (Poamoho)	O’ahu	4,390.0	2029	East Wahiawā Parcel Lease
	Mākua Military Reservation (MMR)	O’ahu	782.0	2029	Wai’anae Parcel Lease
Navy (Figure A-2)	PMRF	Kaua’i	391.65	2029	Main Base Leases
	PMRF	Kaua’i	7,445.41	2029/2030	Main Base Easements
	PMRF - Offshore	Kaua’i	7,680.0	2029	Ocean Right of Way Lease
	Kamokala Ridge	Kaua’i	88.83	2029	Lease
	East of PMRF Main Base	Kaua’i	0.29	2029	Water Well Lease
	Mākaha Ridge	Kaua’i	203.1	2030	Lease
	Mākaha Ridge	Kaua’i	42.21	2030	Easement
	Miloli’i Ridge	Kaua’i	0.015	2030	Lease
Air Force (Figure A-3)	PMRF Ni’ihau	Ni’ihau	1,167.0	2028	Test Vehicle Land Recovery Site Lease
	Ka’ena Point Satellite Tracking Station	O’ahu	86.72	2029	Lease
	Ka’ena Point Satellite Tracking Station	O’ahu	51.47	2029	Easement
	Kā’ala Air Force Station	O’ahu	1.8	2028	Lease
	Kōke’e Air Force Station	Kaua’i	8.45	2030	Lease
	Remote Maui Experimental Sites	Maui	6.17	2021/2023	Leases
Total			46,471.1		

*Army expiring easements are not included in the table as they are small in scale, routine, and not associated to the 65-year lease.

Table 1 – Expiring Leases and Easements

A November 2021 leak of 14,000 gallons of jet fuel at the long-troubled Red Hill underground fuel-storage facility contaminated a Navy-operated well, sickening scores of people and driving about 3,500 military families from their homes.⁷ Because of the troubling response by the Navy, the justified community outrage of the Red Hill

⁷ <https://www.washingtonpost.com/national-security/2021/12/28/red-hill-order-navy/>, retrieved January 20, 2022.

situation, plus the HMLUMP lease expirations, the historic antagonistic interactions with the military as a whole (e.g., Kaho’olawe) and the relative immediacy of the lease expirations (i.e., 7 years), Administration recommends Trustees consider a military engagement policy.

Attachment 6 provides a draft policy to: facilitate, bridge and advance meaningful consultation, conference, coordination and engagement with the United States Department of Defense (DoD), Military in: recognition of the federal trust responsibility to; and in exercising self-determination rights of, Native Hawaiians. Further, any Military engagement outcome is to ensure, that any policies, processes, positions, places, decisions, actions, and/or activities, strengthen ‘ohana, mo‘omeheu and ‘āina, toward the overall mission of bettering the conditions of Native Hawaiians.

Attachment 7 provides the Advisory Council on Historic Preservation, Consultation with Native Hawaiian Organizations in the Section 106 Review Process: A Handbook, as an exemplar of consultation process.

D. Discussion Prompts for the Workshop

Administration provides a few discussion prompts, that we ask Trustees to think about, and share mana’o at the workshop:

- In understanding OHA’s roles and responsibilities, and in reviewing the materials provided thus far, are there any “policy gaps” (i.e., missing policies)?
- Are there any consolidations of policies that can improve clarity of policy positions?
- Are there any suggestions or recommendations that can make OHA’s policy positions clearer to beneficiaries and/or communities at large?

After receiving feedback from the BOT, beneficiaries and stakeholders at large, Administration will bring forward for the Committee on Beneficiary Advocacy and Empowerment’s consideration, and two readings of the policy(ies) by the Board, a single stand-alone policy or a complement of policies for further discussion and action.

E. Follow Up

Please feel free to contact Administration with any questions, comments or follow up items.

ATTACHMENT 1



Action Item

Committee on Beneficiary Advocacy and Empowerment

February 6, 2013

BAE #13-02

Action Item Issue: New Board of Trustees Executive Policy on Protecting the Ceded Lands Corpus.

Prepared by:

Sterling Wong, Public Policy Manager

1/31/2013

Date

Reviewed by:

John James McMahon
Counsel for Policy and Compliance Services

1/31/2013

Date

Reviewed by:

Breann Nu'uhiwa, Chief Advocate

2/1/13

Date

Reviewed by:

Ernest M. Kimoto
Corporate Counsel

2-1-13

Date

Reviewed by:

Kamana'opono M. Crabbe, Ph.D.
Ka Pouhana, Chief Executive Officer

2/1/13

Date

Reviewed by:

Trustee John D. Waihe'e IV
Chair, Committee on Beneficiary Advocacy and
Empowerment (BAE)

2/1/13

Date

I. Proposed Action

Adopt a BOT policy to be included in the *OHA BOT Executive Policy Manual* as a new subsection entitled “Ceded Lands” within Section 2012, Advocacy:

Ceded Lands

2.1.f OHA reaffirms its policy to protect the ceded lands corpus until the unrelinquished claims of Native Hawaiians are resolved, and OHA shall oppose the alienation of any ceded lands by the State of Hawai‘i, except in the following limited situations:

1. OHA shall not oppose a resolution submitted to the Hawai‘i State Legislature pursuant to Act 176 (2009) and Act 169 (2011) for the sale of the fee simple interest of apartments, townhouses, and houses for home ownership, where [1] there is already an agreement in an existing contract with the state agency allowing the homeowner to purchase the fee simple interest for home ownership, [2] there have been prior sales in the same development to the extent that the units have previously been substantially sold, or [3] sales of the fee simple interest were approved by the responsible state housing agency prior to the filing of the lawsuit *OHA v. Hawaii Finance and Development Corporation*, Civil No. 94-4207-11, First Circuit Court, State of Hawai‘i, November 4, 1994.
2. OHA shall not oppose the sale or transfer of remnants by the Department of Land and Natural Resources, State of Hawai‘i, so long as OHA determines that the land proposed by DLNR as a remnant meets OHA’s understanding of the definition of remnant or that the land does not have competing, more important values to the Native Hawaiian community.
3. By not opposing the sales of any ceded lands, OHA does not waive any right or claim that it has to a pro rata share of the proceeds of the sale.
4. By not opposing the sales of any ceded lands, OHA does not directly or indirectly release or limit the claims of the Native Hawaiian people or a Native Hawaiian governing entity.

II. Issue

Whether the BOT should adopt a policy to be included in the *OHA BOT Executive Policy Manual* to reaffirm the position of OHA to protect the ceded lands corpus until the unrelinquished claims of Native Hawaiians are resolved and to oppose any alienation of lands from the ceded lands corpus by the State of Hawai‘i except in the following situations:

1. OHA shall not oppose a resolution submitted to the Hawai‘i State Legislature pursuant to Act 176 (2009) and Act 169 (2011) for the sale of the fee simple interest of apartments, townhouses, and houses for home ownership, where [1] there is already an agreement in an existing contract with the state agency allowing the homeowner to purchase the fee simple interest for home ownership, [2] there have been prior sales in the same development to the extent that the units have previously been substantially sold, or [3] sales of the fee simple interest were

approved by the responsible state housing agency prior to the filing of the lawsuit *OHA v. Hawaii Finance and Development Corporation*, Civil No. 94-4207-11, First Circuit Court, State of Hawai‘i, November 4, 1994, the BOT.

2. OHA shall not oppose the sale or transfer of remnants by the State of Hawai‘i and its agencies, so long as OHA determines that the land proposed by DLNR as a remnant meets OHA’s understanding of the definition of remnant or that the land does not have competing, more important values to the Native Hawaiian community.
3. By not opposing the sales of any ceded lands, OHA does not waive any right or claim that it has to a pro rata share of the proceeds of the sale.
4. By not opposing the sales of any ceded lands, OHA does not directly or indirectly release or limit the claims of the Native Hawaiian people or a Native Hawaiian governing entity.

III. Discussion

It is clear that “[e]ver since the illegal overthrow and annexation, the native people of Hawaii . . . have struggled to regain their culture, recover their lands and restore their sovereign nation.”¹ Accordingly, the OHA BOT has repeatedly decided that it is the best interest of its beneficiaries to oppose inappropriate diminution of the ceded lands corpus until the unrelinquished claims of Native Hawaiians are resolved. Land in Hawai‘i is limited, unique, and irreplaceable, and “the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land[.]” It has been OHA’s unequivocal and consistent position that the state should protect the “ceded” lands corpus and the resources it contains, and that the disposal of land from the ceded lands corpus is inconsistent with the State’s established fiduciary duty as trustee to maintain and protect the corpus. Native Hawaiians unquestionably have a continuing interest and claim to the ceded lands and their struggle to regain their culture, recover their lands and restore their sovereign nation will be futile if the ceded lands have been dissipated. The Hawai‘i Supreme Court has agreed with this principle and previously reasoned that any further diminishment of the ceded lands corpus will negatively impact reconciliation efforts between Native Hawaiians and the State and the ability to achieve a comprehensive, just, and lasting resolution of these historic injustices.

On November 4, 1994, OHA filed a lawsuit, *OHA v. Hawaii Finance and Development Corporation* [later renamed *OHA v. Housing and Community Development Corporation of Hawai‘i (HCDCH)*], to seek a moratorium on the sale of ceded lands by the State of Hawai‘i in order to implement its policy to protect the ceded lands corpus until the unrelinquished claims of Native Hawaiians are resolved.

In 2008, in *OHA v. HCDCH*, the Hawai‘i Supreme Court granted OHA’s request for a moratorium on the sale of ceded lands. The Court specifically recognized that Native Hawaiians have “unrelinquished claims to the ceded lands,” that “the Apology Resolution acknowledges only that unrelinquished claims exist and plainly contemplates future reconciliation with the

¹ Jon M. Van Dyke & Melody K. MacKenzie, *An Introduction to the Rights of Native Hawaiian People*, 10-JUL Haw. B.J. 63, 63 (2006).

United States and the State with regard to those claims,” and that the Apology Resolution and the related state legislation “give rise to the State’s fiduciary duty to preserve the corpus of the public trust lands, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved.”

In *OHA v. HCDCH*, the Hawai‘i Supreme Court clearly recognized these historic injustices and the imperative of the restoration of lands to Native Hawaiians. The court reaffirmed that “Congress, the Hawaii 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 lands trust, they will be gone forever” and (5) that “the health and well-being of the native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land.”

Then-Governor Lingle’s administration petitioned the U.S. Supreme Court for a writ of certiorari and the Court accepted review. The U.S. Supreme Court reversed on the ground that the 1993 U.S. Apology Resolution itself did not provide a legal basis for enjoining the State from alienating ceded lands. The Court, however, acknowledged that it did not have jurisdiction to decide whether an adequate state law basis existed to enjoin the State from selling ceded lands. The U.S. Supreme Court explained that it has “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.”

After the U.S. Supreme Court decision, OHA and the State of Hawai‘i settled the litigation and agreed to dismiss the lawsuit without prejudice conditioned on the passage of special legislation requiring a two-thirds majority vote by both legislative chambers before ceded lands could be sold or transferred. Act 176 was passed in 2009 and the case was thus settled.

Act 169 (2011) further required that state agencies wishing to sell or exchange state lands draft a resolution including the specific information identifying the land to be sold or exchanged, indicating its value, and stating whether the land was classified as government or crown land previous to August 15, 1895. These draft resolutions must be adopted by a two thirds majority of the legislature during a regular legislative session and are required to be submitted to OHA at least three months prior to the convening of that session so that OHA may review and corroborate the ceded land status of the land proposed for sale and make a determination on its position on the proposed alienation.

OHA has continued to find that it is in the best interests of its beneficiaries to oppose the alienation of any ceded lands. However, a special circumstance may arise when a state agency seeks to sell the fee simple interest in an apartment, townhouse, or house for home ownership to its current leasehold tenant.

OHA has received draft resolutions for submission in the 2013 legislative session proposing sales of this sort from the Hawai‘i Housing and Finance Development Corporation:

- Sale of a single family home within the Kau Hale Aupuni o Kuliouou project (TMK 1-3-8-10-35; appraised at \$171,500 by Harlin Young & Co, Ltd. on August, 1, 2012) to its current leasehold owner pursuant to the contractual right to purchase inherent in the

original lease agreement. This parcel was determined not to be ceded land by a title search performed by Title Guaranty on July 31, 2012.

- Sale of a single family home within the Nahoa Apartments condominium (TMK 1-9-4-5-34-0011; appraised at \$34,600 by Harlin Young & Co, Ltd. on August 1, 2012) to its current leasehold owner. This parcel was determined not to be ceded land by a title search performed by Title Guaranty on July 31, 2012.

Since Native Hawaiians are one of the primary groups who benefit from the sale of apartments, townhouses, and houses for home ownership in these state-sponsored affordable housing projects, further research was performed upon the inventory of affordable housing projects and units currently on state land. This research revealed that in some cases a contractual right or option to purchase was inherent in the original lease agreement. In other situations administrative action was taken prior to the filing of the *OHA v. HCDCH* lawsuit to allow for an option to purchase. In these cases, the lessee may have relied upon this option when mortgaging and otherwise improving upon their homes and saved for years to achieve full ownership. Moreover, in several housing developments, a substantial number of units have already been sold prior to the passage of Act 176, leaving few left in leasehold, and clouding the state's ability to physically segregate the portion of land in which it maintains fee simple title. In each of these special circumstances described above, the BOT may prudently opt not to oppose the sale of state lands in order to better serve the important interests of increased homeownership among its beneficiary population, even though others may receive a collateral benefit.

As part of the settlement between OHA and the State of Hawai'i of the lawsuit *OHA v. HCDCH*, OHA agreed that the sale or transfer of remnants² by the State of Hawai'i and its agencies did not need to be subject to the two-thirds affirmative vote of both houses of the state legislature and agreed to the language in Act 176 (2009). Thus the procedure of submitting requests to the Board of Land and Natural Resources for direct approval of disposition of remnants remained the same. OHA continues to have the right to object to any dispositions of lands so designated by the DLNR. OHA has carefully monitored the recommendations of the DLNR on lands designated as remnants to make sure that OHA agrees in specific cases that the land in fact meets the definition of a remnant and that the land does not have competing, more important values to the Native Hawaiian community.

In light of the above discussion, the following new material including all headings, numberings, and text, is proposed for insertion in a new subsection entitled "Ceded Lands" included in Section 2012, Advocacy of the *OHA BOT Executive Policy Manual*:

Ceded Lands

2.1.f OHA reaffirms its policy to protect the ceded lands corpus until the unrelinquished claims of Native Hawaiians are resolved, and OHA shall oppose the alienation of any ceded lands by the State of Hawai'i, except in the following limited situations:

² Remnants are defined pursuant to HRS §171-52 as parcels of land economically or physically unsuitable or undesirable for development or utilization as a separate unit by reason of location, size, shape, or other characteristics.

1. OHA shall not oppose a resolution submitted to the Hawai'i State Legislature pursuant to Act 176 (2009) and Act 169 (2011) for the sale of the fee simple interest of apartments, townhouses, and houses for home ownership, where [1] there is already an agreement in an existing contract with the state agency allowing the homeowner to purchase the fee simple interest for home ownership, [2] there have been prior sales in the same development to the extent that the units have previously been substantially sold, or [3] sales of the fee simple interest were approved by the responsible state housing agency prior to the filing of the lawsuit *OHA v. Hawaii Finance and Development Corporation*, Civil No. 94-4207-11, First Circuit Court, State of Hawai'i, November 4, 1994.
2. OHA shall not oppose the sale or transfer of remnants by the Department of Land and Natural Resources, State of Hawai'i, so long as OHA determines that the land proposed by DLNR as a remnant meets OHA's understanding of the definition of remnant or that the land does not have competing, more important values to the Native Hawaiian community.
3. By not opposing the sales of any ceded lands, OHA does not waive any right or claim that it has to a pro rata share of the proceeds of the sale.
4. By not opposing the sales of any ceded lands, OHA does not directly or indirectly release or limit the claims of the Native Hawaiian people or a Native Hawaiian governing entity.

IV. Alternative Actions:

- A. Approve, adopt, and ratify new BOT executive policy as proposed in this Action Item.
- B. Decline to approve, adopt, and ratify new BOT executive policy as described in this Action Item.

V. Recommended Action:

Approve, adopt, and ratify a BOT Policy to be included in the BOT Executive Policy Manual as described in this Action Item.

VI. Timeframe:

Immediate action is recommended. Additions to the OHA BOT Executive Policy manual will take effect immediately upon approval by the BOT after second reading.

VII. Funding:

No funding is required.

Office of Hawaiian Affairs
Committee on Beneficiary Advocacy and Empowerment (BAE)

Committee Report

February 6, 2013

The Honorable Colette Y. Machado, Chairperson
Board of Trustees
Office of Hawaiian Affairs

Madame Chair Machado,

Your Committee on Beneficiary Advocacy and Empowerment, having met on February 6, 2013 and after full and free discussion, recommends approval of the following action to the Board of Trustees:

Adopt a BOT policy to be included in the *OHA BOT Executive Policy Manual* as a new subsection entitled “Ceded Lands” within Section 2012, Advocacy:

Ceded Lands

2.1.f OHA reaffirms its policy to protect the ceded lands corpus until the unrelinquished claims of Native Hawaiians are resolved, and OHA shall oppose the alienation of any ceded lands by the State of Hawai‘i, except in the following limited situations:

- 1. OHA shall not oppose a resolution submitted to the Hawai‘i State Legislature pursuant to Act 176 (2009) and Act 169 (2011) for the sale of the fee simple interest of apartments, townhouses, and houses for home ownership, where [1] there is already an agreement in an existing contract with the state agency allowing the homeowner to purchase the fee simple interest for home ownership, [2] there have been prior sales in the same development to the extent that the units have previously been substantially sold, or [3] sales of the fee simple interest were approved by the responsible state housing agency prior to the filing of the lawsuit *OHA v. Hawaii Finance and Development Corporation*, Civil No. 94-4207-11, First Circuit Court, State of Hawai‘i, November 4, 1994.**
- 2. OHA shall not oppose the sale or transfer of remnants by the Department of Land and Natural Resources, State of Hawai‘i, so long as OHA determines that the land proposed by DLNR as a remnant meets OHA’s understanding of the definition of remnant or that the land does not have competing, more important values to the Native Hawaiian community.**
- 3. By not opposing the sales of any ceded lands, OHA does not waive any right or claim that it has to a pro rata share of the proceeds of the sale.**
- 4. By not opposing the sales of any ceded lands, OHA does not directly or indirectly release or limit the claims of the Native Hawaiian people or a Native Hawaiian governing entity.**

Relevant attachments are included for your information and reference.

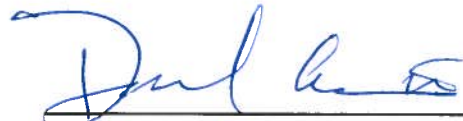
Attachments:

- 1) BAE Roll Call Vote Sheet
- 2) BAE 13-02 New Board of Trustees Executive Policy on Protecting the Ceded Lands Corpus

Respectfully submitted:

SIGNATURE NOT AVAILABLE

Trustee John Waihe'e, IV, Chair



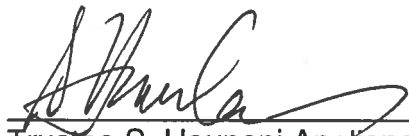
Trustee Dan Ahuna, Vice-Chair

EXCUSED

Trustee Rowena Akana, Member



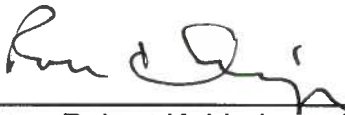
Trustee Peter Apo, Member



Trustee S. Haunani Apollona, Member



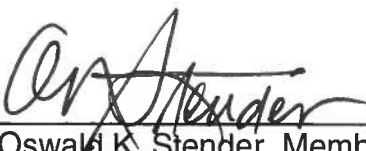
Trustee Carmen Hulu Lindsey, Member



Trustee Robert K. Lindsey, Jr., Member



Trustee Colette Y. Machado, Member



Trustee Oswald K. Stender, Member

Office of Hawaiian Affairs
711 Kapi`olani Boulevard, Suite 500
Honolulu, HI 96813
Roll Call Vote Sheet

COMMITTEE ON BENEFICIARY ADVOCACY AND EMPOWERMENT (BAE)	DATE: February 6, 2013 Start: 1:33 p.m. Motion: 1:44 p.m. Vote: 1:48 p.m.
AGENDA ITEM: <div style="margin-left: 40px;"> V. New Business B. BAE 13-02 Board of Trustees Executive Policy on Protecting the Ceded Lands </div>	
MOTION: Adopt a BOT policy to be included in the <i>OHA BOT Executive Policy Manual</i> as a new subsection entitled "Ceded Lands" within Section 2012, Advocacy: <div style="margin-left: 20px;"> <i>Ceded Lands</i> 2.1.f OHA reaffirms its policy to protect the ceded lands corpus until the unrelinquished claims of Native Hawaiians are resolved, and OHA shall oppose the alienation of any ceded lands by the State of Hawai'i, except in the following limited situations: <ol style="list-style-type: none"> 1. OHA shall not oppose a resolution submitted to the Hawai'i State Legislature pursuant to Act 176 (2009) and Act 169 (2011) for the sale of the fee simple interest of apartments, townhouses, and houses for home ownership, where [1] there is already an agreement in an existing contract with the state agency allowing the homeowner to purchase the fee simple interest for home ownership, [2] there have been prior sales in the same development to the extent that the units have previously been substantially sold, or [3] sales of the fee simple interest were approved by the responsible state housing agency prior to the filing of the lawsuit <i>OHA v. Hawaii Finance and Development Corporation</i>, Civil No. 94-4207-11, First Circuit Court, State of Hawai'i, November 4, 1994. 2. OHA shall not oppose the sale or transfer of remnants by the Department of Land and Natural Resources, State of Hawai'i, so long as OHA determines that the land proposed by DLNR as a remnant meets OHA's understanding of the definition of remnant or that the land does not have competing, more important values to the Native Hawaiian community. 3. By not opposing the sales of any ceded lands, OHA does not waive any right or claim that it has to a pro rata share of the proceeds of the sale. 4. By not opposing the sales of any ceded lands, OHA does not directly or indirectly release or limit the claims of the Native Hawaiian people or a Native Hawaiian governing entity. </div>	
AMENDMENT:	

MEANS OF FINANCING:

TRUSTEE		1	2	'AE (YES)	A'OLE (NO)	KANALUA (ABSTAIN)	EXCUSED
VICE DAN	AHUNA	1		X			
ROWENA	AKANA						EXCUSED
PETER	APO			X			
HAUNANI	APOLIONA			X			
HULU	LINDSEY			X			
ROBERT	LINDSEY		2	X			
COLETTE	MACHADO			X			
OSWALD	STENDER			X			
CHAIR JOHN	WAIHE`E			X			
TOTAL VOTE COUNT				8	0	0	1

MOTION: [X] UNANIMOUS [] PASSED [] DEFERRED [] FAILED

DISCUSSION:

ATTACHMENT 2



Attachment 2B

Beneficiary Advocacy and Empowerment Committee
October 21, 2015

BAE #15-06

Action Item Issue: Adoption of an OHA Water Policy and a Water Backgrounder Appendix to be included in the Executive Board Policy Manual

Prepared by:


Sterling Wong
Pou Kāko'o Kulekele Aupuni, Public Policy Manager

Date

10/13/15

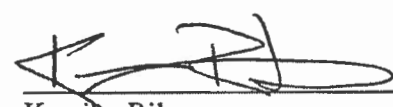
Reviewed by:


John James McMahon
Pōhaku Kihi Paia Kū, Counsel for Policy and Compliance Services

Date

10/13/15

Reviewed by:


Kawika Riley
Pou Kihi Kū, Chief Advocate

Date

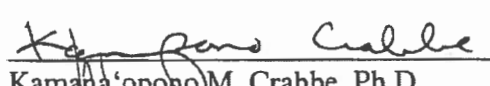
10/13/15

Reviewed by:

not available for signature
Ernie Kimoto
Ka Paepae Pōhaku, Executive Counsel

Date

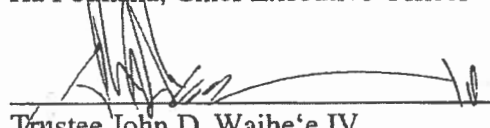
Reviewed by:


Kamana'opono M. Crabbe, Ph.D.
Ka Pōhāna, Chief Executive Officer

Date

10/13/15

Reviewed by:


Trustee John D. Waihe'e IV
Luna Ho'omalū o ke Kōmike BAE
Chair, Committee on Beneficiary Advocacy and Empowerment (BAE)

Date

10/13/15

I. Action

To approve the adoption of a Board of Trustees (“BOT”) policy to be included in the OHA BOT Executive Policy Manual (“Manual”) as a new section entitled “2070 Wai,” within Series 2000, Beneficiary Support and Services, to read as follows:

2070 Wai

Wai Vision and Mission

2.7.a. OHA’s vision is that Hawai‘i will be a 21st-century model for protection and stewardship of wai, based on Native Hawaiian culture, best practices, and the public trust. OHA will continue to maintain and improve upon its kuleana as a leader in protecting Hawai‘i’s wai resources, redressing ongoing injustices, promoting a living and thriving Native Hawaiian culture and nation, and setting an example in pono management practices.

OHA’s wai efforts and mission will advance in four major areas: Research, Advocacy, Community Engagement, and Asset Management. Through focus on these roles and in collaboration with our community, OHA will advocate for, promote, and demonstrate appropriate, responsible, and just wai stewardship practices and values throughout Ka Pae ‘Āina o Hawai‘i, allowing the ‘āina and wai and the interdependent Native Hawaiian culture and people to thrive, and mutually empowering OHA and communities to ‘auamo (carry) the shared responsibility of protecting and ensuring the proper management of our water resources.

Basic Principles of Wai

2.7.b. OHA’s basic principles of wai shall be:

- Begin with the fundamental truth that wai gives life ma ka honua nei.
- Revere wai as a kinolau of Akua Kāne.
- Respect wai in all its individual forms (including clouds, rains, mist, fog drip, rainbows, rivers, streams, aquifers, springs, and coastal seeps), and as a unified whole and natural, living cycle.
- Recognize that wai is central to the Native Hawaiian worldview and who we are as a people, connecting past, present, and future generations.
- Understand that wai is critical to ho‘oululāhui and to provide for our nation’s lands, people, and culture.
- Acknowledge the vital importance of wai to all people, yet also its unique significance to Native Hawaiians, including pre-existing Native Hawaiian rights to wai.
- Value the law of wai in Hawai‘i as a living legacy from ka wā kahiko, including ancestral traditions and sovereign prerogatives.
- Uphold the principle of water as a public trust, which never can be reduced to private property or a commodity.

- Advance Native Hawaiians' fundamental needs and rights to water for all lands (including but not limited to homesteads, kuleana, and a land base for the lāhui) as well as for robust traditional and customary practices throughout Ka Pae 'Āina o Hawai'i.
- Promote "ahupua'a" principles of place-based stewardship, sustainability, and self-sufficiency.
- Embrace OHA's kuleana, its rights and responsibilities, including its fiduciary obligations under the public trust with respect to wai.
- Support mo'omeheu, 'āina, ea, ho'okahua waiwai, ho'ona'auao, and mauli ola for OHA's beneficiaries and the lāhui by protecting and restoring wai.
- Evaluate and develop necessary capacity on wai in OHA's various divisions and recognize that effective coordination between divisions is necessary to fulfill OHA's wai mission and constitutional and statutory mandates.

Research Policies on Wai

2.7.c. OHA's research policies as they relate to wai shall be:

- Understand and proactively plan for the beneficiaries' and lāhui's fresh water needs, including reasonable access to wai, water quantity (supply and allocation), and water quality.
- Support research efforts strategically to enhance the body of information and understanding related to wai, including but not limited to hydrology, biology, agronomy, economics, engineering, management, and law, all grounded in Native Hawaiian culture and history. (See, e.g., USGS kalo water needs study; Ola I Ka Wai water primer.)
- Build and maintain strategic alliances and partnerships, leverage resources, and pursue other opportunities to maximize the existence and availability of essential research and data.
- Gather, develop, and deploy the best information to inform advocacy and asset management, co-power (mutually empower) communities to mutually and collaboratively mālama Hawai'i's natural and cultural resources ā mau loa, and educate OHA beneficiaries and the general public.
- Recognize that research is not an end in itself, but part of a larger obligation to fulfill public trust responsibilities based on the best available information and the precautionary principle.

Advocacy Policies on Wai

2.7.d. OHA's advocacy policies as they relate to wai shall be:

- Take the lead initiative to protect, restore, and ensure the proactive management of wai for OHA beneficiaries and the lāhui.
- 'Auamo (shoulder) OHA's kuleana to mālama Hawai'i's wai as a public trust for present and future generations, by supporting the restoration of rivers and streams wherever practicable, the protection of ground water resources for the long term, the restoration of functional watersheds, and utilization of all practicable mitigation and alternative sources.

- Uphold and defend Hawai‘i’s constitution, Water Code, and public trust doctrine, especially with regard to protections for water resources and traditional and customary Native Hawaiian practices and rights.
- Invest in and support community efforts to protect and restore wai, including advocacy and litigation before the State Commission on Water Resource Management and other agencies, and in the courts.
- Build and maintain an active presence and working relationship with the Commission on Water Resource Management, serving as a “go-to” source for consultation especially on Native Hawaiian issues, and providing resources and support where appropriate, to promote intergovernmental synergies and help maximize the Commission’s effectiveness.
- Further develop in-house scientific, cultural, and legal capacity and expertise to support OHA and community advocacy work.
- Proactively consult with experts and community leaders to identify potential legislative, policy, litigation, or other actions necessary to effectuate this water policy or otherwise improve conditions for Native Hawaiians with respect to wai.
- Align the positions and work of other OHA divisions on both individual and larger policy issues.
- Build and maintain strategic alliances and partnerships to maximize the potential for protection, restoration, and proactive management of wai.
- Acknowledge that effective advocacy is necessary to fulfill OHA’s constitutional mandates, including those imposed by the public trust and precautionary principle.
- Integrate into OHA’s advocacy an understanding of our responsibility to steward wai to meet the needs and preserve the rights of a future Native Hawaiian governing entity.

Community Engagement Policies on Wai

2.7.e. OHA’s community engagement policies as they relate to wai shall be:

- Partner with and mobilize communities to protect and restore wai, especially those resources necessary to perpetuate traditional and customary Native Hawaiian rights and practices.
- Provide strategic support and resources to enable beneficiaries to protect, restore, or more proactively manage their wai.
- Work with Advocacy to ensure that its policies, positions, and initiatives reflect region-specific, community-based Native Hawaiian knowledge and practices.
- Inform communities about research, community engagement, advocacy, and resource management efforts to leverage resources, promote buy-in, and mobilize beneficiaries and the general public around wai.
- Cultivate and invest in relationships with grassroots community leaders on wai across Ka Pae ‘Āina o Hawai‘i, and in communities engaged in wai issues.
- Provide strategic counsel, as needed, on OHA actions regarding wai regarding potential impacts on communities, media, or other relevant stakeholder groups.
- Recognize the value of partnerships and opportunities for OHA and communities to co-power (mutually empower) each other, in maximizing the strength and durability of campaigns.

Resource Management Policies on Wai

2.7.f. OHA's resource management policies as they relate to wai shall be:

- Lead the way in utilizing culturally appropriate, cutting-edge technology to minimize demand for wai and maximize the use of practicable mitigation and alternatives on OHA's lands or in developments with which it is associated.
- Ensure that water use on OHA land respects Native Hawaiian traditional and customary rights and practices, instream uses, and ecological needs of streams, aquifers, and watersheds.
- Pursue LEED or similar certification for water efficiency for all new construction or major renovations.
- Combine and coordinate Resource Management and Advocacy efforts in actively seeking ways to disseminate and establish best practices for managing, conserving, and protecting wai and its sources among Native Hawaiian and other managers and users of wai.
- Consult with Native Hawaiian-serving trusts, including the Department of Hawaiian Home Lands, to coordinate efforts, share information, and develop and refine best practices for managing wai.
- Support projects and programs that explore or promote the appropriate management of wai consistent with the values and priorities in this policy.

II. Issue

Should OHA adopt a Water Policy to be incorporated as a new section, "2070 Wai," in the Manual, and a Water Backgrounder as an appendix to the Manual?

III. Discussion

Since time immemorial, water has and continues to remain a foundation of life in Hawai'i nei, as embodied in the 'ōlelo no' eau, "Ola i ka wai." Accordingly, and consistent with the cultural understanding of wai as a kinolau of Kāne, traditional water sharing and management approaches reflect the role of water as a public trust resource, to be used and distributed in a manner that best provides for present and future generations as well as the land that sustains them. Indeed, wai and the traditional kōnawai that developed around the use, sharing, and management of wai undoubtedly enabled the abundant and thriving society that inhabited these islands, prior to Western contact.

Unfortunately, the Western corporate interests and models underlying the rise of industrial agriculture, as well as the engineering of massive ditch systems designed to disrupt and divert streams throughout Hawai'i, led to the long-standing and continuing monopolization of our water resources for private interests. Notwithstanding laws intended to uphold the public trust in water, and the rights of Native Hawaiians to access water for their needs and practices, corporate interests continue to control and use massive amounts of water for their industrial agriculture and, more recently, developmental endeavors, to the detriment of Native Hawaiians and the general public.

Consequently, throughout its existence, OHA has invested substantially in ensuring that the public trust in water is upheld, and in vindicating the rights and interests of its beneficiaries in the restoration and protection of our water resources for domestic uses, traditional and customary

Native Hawaiian practices, ecological services and other public trust purposes. Given the ongoing diversion of substantial amounts of our water resources by private interests; the continuous demand for public trust water as a necessary resource for a number of profit-seeking endeavors; the growing need for water by an increasing island population in the face of reduced rainfall and other impacts of climate change; and the growing public awareness with regard to the public trust in water; upholding the public trust in water and ensuring appropriate water use and management should be a clear priority for all relevant agencies and stakeholders invested in the future of our islands.

Due to the broad range of issues, circumstances, and strategic approaches involved in advocating for the public trust in water on behalf of its beneficiaries -- coupled with the fact that OHA, with its landholdings, now has the opportunity to act as a role model for other landowners in water use and management principles -- there is a need to ensure consistency and intra-agency coordination in OHA's actions around wai. The instant proposed Wai Policy and Water Backgrounder, grounded in a cultural understanding of wai, the legal authorities and rights concerning its management and use, and OHA's historic advocacy around wai issues, would better ensure such consistency and coordination going forward.

It should be noted that the proposed documents were initially developed by OHA contractors and recognized Hawai'i water law experts D. Kapua'ala Sproat and Isaac Moriwake, in coordination with Public Policy staff. Drafts of the documents were also reviewed by the Water Working Group, consisting of representatives from the executive offices as well as the various Paia, as well as by other relevant staff. Staff comments and recommendations were incorporated into the final versions before you today.

In light of the above discussion, the new material described in the Action section above, including all headings, numberings, and text, is proposed for insertion in a new subsection entitled "2070 Wai" within Series 2000, Beneficiary Support and Services, of the Manual; and the new material in Attachment A, Water Backgrounder, is proposed for inclusion as an appendix to the Manual.

IV. Recommendation

To approve the adoption of the BOT wai policy described in this action item, to be included in the OHA BOT Executive Policy Manual as a new section entitled "2070 Wai," within Series 2000, Beneficiary Support and Services, and to incorporate a Water Backgrounder as an appendix to the Manual.

V. Alternatives

- A. To disapprove the adoption of a BOT policy on wai in the Manual and the incorporation of a Water Backgrounder as an appendix to the Manual.

VI. Funding

No funding is required.

VII. Timeframe

Immediate action is recommended. Additions to the OHA BOT Executive Policy manual will take effect immediately upon approval by the BOT after second reading.

VIII. Attachments

- A. New "Water Backgrounder," proposed for inclusion as an appendix to the Executive Board Policy Manual

Attachment A: Proposed Water Backgrounder Appendix

WATER BACKGROUNDER: BUILDING PONO WATER MANAGEMENT IN HAWAI'I NEI

I. INTRODUCTION

Ola i ka wai: water is life. In 'Ōlelo Hawai'i, the mother tongue of the Hawaiian Islands, wai is water, waiwai means values or wealth, and kānāwai is the law. It is no coincidence that, in this island community, both wealth and the law were and continue to be defined by access to fresh water resources. For Kānaka Maoli (Native Hawaiians), appropriately managing wai is a true kuleana: both a privilege and a responsibility.

This summary highlights the basic principles of foundational Hawai'i water law that affect Kānaka Maoli, overviews the legal authorities protecting those rights and practices, and describes the practical effects of those directives, especially as they apply to government decisionmakers. For those decisionmakers, managing water resources for the benefit of the public and the resource itself is not only a tremendous kuleana, but also a constitutional mandate.

II. CULTURAL CONTEXT FOR WATER USE AND MANAGEMENT IN HAWAI'I NEI

Before the documented arrival of Westerners in 1778, water was the source of all life in Hawai'i. Continuous ma uka to ma kai (from the mountains to the ocean) stream flow provided fresh water for drinking, supported traditional agriculture and aquaculture, recharged ground water levels, fed punawai (freshwater springs) and wetlands, and sustained productive estuaries and fisheries by both bringing nutrients from the uplands to the sea and providing a travel corridor so that native stream animals could migrate between the streams and ocean and complete their life cycles. Water was also revered as a kinolau (physical manifestation) of Kāne, one of the Hawaiian pantheon's four principal akua (gods, ancestors). Traditional mo'olelo (stories or history) explain that Kāne brought forth fresh water from the earth and traveled throughout the archipelago with Kanaloa (another principal akua), creating springs and streams, many of which

continue to flow today. Kānaka Maoli relied on streams and springs to satisfy many needs. One principal need was to ensure sufficient flow of fresh water to cultivate the staple crop kalo (*Colocasia esculenta* or taro). Other needs included sustaining natural systems and fisheries, as well as enabling cultural, religious, and other practices based upon free-flowing water resources.

Given these important purposes, much of traditional Kānaka Maoli law or kāmāwai developed around the management and use of fresh water. Water was a public trust resource and could not be commodified or reduced to physical ownership, which means that no one – not even ali‘i (leaders) – could own water. Instead, ali‘i managed water resources for the benefit of present and future generations through engineering and management that ensured maximum benefits without compromising the long-term health of the resources. Under the ali‘i nui, konohiki (resource managers) stewarded ahupua‘a (loosely defined as watersheds) or smaller land divisions including ‘ili or kū. Konohiki appointed kahuwai (water stewards or superintendents) to manage water distribution within and between land divisions.

The management of water resources changed dramatically with the establishment and expansion of plantation agriculture, including sugar and pineapple. Massive ditch systems were constructed on most of the major islands to transport water from wet Windward communities to drier Central and Leeward plains, and ground water wells were developed to supplement surface water systems. Despite early written Kingdom laws that formalized and translated Hawaiian custom and tradition, including Kānaka Maoli concepts of the public trust, large agricultural plantations increased their influence and soon controlled a large portion of Hawai‘i’s resources. The law itself was also subject to Western influence over time, and cases during Hawai‘i’s Kingdom and territorial periods also began to reflect increasingly Western approaches to water use and

management. Conflict ensued between and among Kānaka Maoli and others, especially plantation interests.

After about a century of plantation agriculture's monopoly over Hawai'i's ground and surface water resources, a movement resurfaced in the 1960s and 1970s to return water use to public management and control. A series of cases in both the state and federal court systems ultimately reaffirmed that Hawai'i's water resources are held in trust and should be managed for the benefit of present and future generations. See McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973). These cases also highlighted the need for a more comprehensive and equitable management system. The 1978 Hawai'i State Constitution was instrumental in this regard and established a new legal regime for water resource management.

III. HAWAI'I'S LEGAL REGIME FOR WATER RESOURCE MANAGEMENT

Today, Hawai'i law relating to water use and management is grounded in the Constitution, the State Water Code (Hawai'i Revised Statutes Chapter 174C), administrative rules for the Commission on Water Resource Management (Hawai'i Administrative Rules §§ 13-167 to 13-171), and court decisions interpreting these and other relevant laws.

A. Hawai'i Constitution

Article XI, section 1 of Hawai'i's Constitution establishes that "all public natural resources are held in trust by the State for the benefit of the people," and Article XI, section 7 of Hawai'i's Constitution specifically references water and includes the directive "to protect, control, and regulate the use of Hawai'i's water resources for the benefit of its people." Article XI, section 7 also establishes the State Commission on Water Resource Management ("Water Commission"), which is currently housed within the Department of Land and Natural Resources. Although other county, state, and federal

agencies may have overlapping jurisdiction in some areas, the Water Commission has primary authority over water use and management in Hawai‘i.

The Commission is tasked with many duties including establishing water conservation, quality, and use policies, defining reasonable-beneficial uses, protecting ground and surface waters, and regulating Hawai‘i’s water resources while assuring appurtenant rights¹ and existing riparian and correlative uses.² In addition to the kuleana it places on the Water Commission, the constitutional public trust imposes independent mandates on government decisionmakers to conserve and protect Hawai‘i’s water resources, which is discussed in more detail in Part IV, below.

B. Hawai‘i’s Water Code, Hawai‘i Revised Statutes chapter 174C

Today, the use of fresh water in Hawai‘i is managed largely through the State Water Code, Hawai‘i Revised Statutes chapter 174C. The Code also details the responsibilities and composition of the Water Commission. The Chairperson of the Department of Land and Natural Resources presides as the Commission’s Chair, and the Director of the Department of Health also sits as a voting member; in addition, five members are appointed to the Commission, each of whom must have “substantial experience in the area of water resource management,” and at least one of whom must have “substantial experience or expertise in traditional Hawaiian water resource management techniques and in traditional Hawaiian riparian usage such as those preserved by 174C-101.” HAW. REV. STAT. § 174C-7(b).

¹ Appurtenant rights attach to land that used water, usually to cultivate the traditional staple kalo, at the time of the Māhele of 1848. See Reppun v. Board of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982).

² Riparian rights entitle landowners along streams to the reasonable use of that stream water. See Reppun, 65 Haw. 531, 656 P.2d 57 (1982). Correlative rights are analogous rights of landowners above a ground water source or aquifer to reasonable use of the underlying water. See City Mill Co. v. Honolulu Sewer & Water Comm’n, 30 Haw. 912 (1929). Hawai‘i’s constitution protects Riparian and correlative “uses” only (as opposed to unexercised rights). See In re Waiāhole Combined Contested Case Hr’g, 94 Hawai‘i 97, 179, 9 P.3d 409, 491 (2000).

The Water Commission has a dual mandate to protect the resources and promote maximum reasonable-beneficial use (which also includes resource protection as a “use”). The Code provides various tools to fulfill this mandate, including instream flow standards (“IFSs”) to set minimum required flow levels for rivers and streams, and water use permitting to regulate consumptive water uses.

IFSs, which include “interim” and more-“permanent” standards, are the “primary mechanism” to fulfill the Commission’s “duty to protect and promote the entire range of public trust purposes dependent upon instream flows.” In re Waiāhole Combined Contested Case Hr’g (“Waiāhole I”), 94 Hawai‘i 97, 148, 9 P.3d 409, 460 (2000). After the enactment of the Water Code, the Commission established general “status quo” IFSs that effectively rubber-stamped the then-existing diversions. Id. at 150, 9 P.3d at 462. The Commission, however, is mandated to restore instream flows to the extent practicable, notwithstanding existing diversions. Id. at 149-50, 9 P.3d at 461-62. As of 2015, the Commission has established interim IFSs based on actual information for only the Windward O‘ahu streams in the Waiāhole case, Nā Wai ‘Ehā, Maui, and some East Maui streams, and it has yet to establish even a single permanent IFS. Various petitions to amend interim IFSs are pending, including for East Maui streams and the Waimea River on Kaua‘i.

The Commission’s water use permitting authority applies in areas the Commission has designated a surface or ground water management area (“WMA”). Otherwise, “water rights in non-designated areas are governed by the common law.” Waiāhole I, 94 Hawai‘i at 178, 9 P.3d at 490; see also notes 1-2 (explaining common law water rights). The Water Code requires designation when a resource is or may be threatened with degradation. HAW. REV. STAT. § 174C-41(a). As of 2014, all of O‘ahu except Wai‘anae, the island of Moloka‘i, and the ‘Īao aquifer on Maui have been

designated ground WMAs. Currently there are no ground WMAs on Kaua‘i, Lāna‘i, Ni‘ihau, or Hawai‘i island, although a petition is currently pending to designate the Keauhou Aquifer System on Hawai‘i Island a ground WMA. Also, as of 2015 there is only one designated surface WMA, in Nā Wai ‘Ehā, Maui.

The Water Code also affirms Kānaka Maoli rights and practices. In addition to the protections set forth in Article XII, section 7 of Hawai‘i’s Constitution,³ the Code specifically provides that the “traditional and customary rights of ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter.” HAW. REV. STAT. § 174C-101(c). The Code makes clear that such rights include but are not limited to the cultivation of kalo on one’s own kuleana, as well as the ability to gather various resources for subsistence, cultural, and religious purposes, including: hīhīwai (or wī), ‘ōpae, ‘o‘opu, limu, thatch, kī, aho cord, and medicinal plants. *Id.* Additionally, the Code also protects appurtenant rights and allows the Department of Hawaiian Home Lands to reserve water for the current and foreseeable development of its lands as set forth in the Hawaiian Homes Commission Act. *Id.* §§ 174C-101(d, a).

IV. THE PUBLIC TRUST DUTY TO PROTECT WATER RESOURCES APPLIES TO GOVERNMENT DECISIONMAKERS INCLUDING STATE AND COUNTY AGENCIES

Although the Water Commission has the primary kuleana under state law to protect Hawai‘i’s water resources, other government decisionmakers, including state and county agencies, have an independent duty to conserve natural resources, including water. *See* HAW. CONST. art. XI, § 1; Kelly v. 1250 Oceanside Partners, 111 Hawai‘i

³ HAW. CONST. art. XII, § 7 (“The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778.”); *see Ka Pa‘akai O Ka ‘Aina v. Land Use Comm’n*, 94 Hawai‘i 31, 46-47, 7 P.3d 1068, 1083-84 (2000) (establishing the independent duty of agencies such as the Commission to consider the effects of their actions on Kānaka Maoli traditions and practices and make specific findings and conclusions on the existence of Maoli rights, the extent of their impairment, and feasible action to protect them).

205, 225, 140 P.3d 985, 1005 (2006). In Hawai‘i, we trace the origin of the public trust to Indigenous custom and tradition, which firmly established that natural resources, including water, were not private property, but were held by the government for the benefit of the people. Today, “the people of [Hawai‘i] have elevated the public trust doctrine to the level of a constitutional mandate.” Waiāhole I, 94 Hawai‘i at 131, 9 P.3d at 443. Pursuant to the Constitution, Water Code, and common law, the “state water resources trust” applies to “all water resources without exception or distinction.” Id. at 133, 9 P.3d at 445.

The Hawai‘i Supreme Court examined applicable Constitutional provisions and the Water Code in a series of cases, which clarified an agency’s kuleana in upholding the public trust. The public trust imposes “a dual mandate of 1) protection and 2) maximum reasonable and beneficial use.” Id. at 139, 9 P.3d at 451. This establishes an “affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.” Id. at 141, 9 P.3d at 453. The Court has identified a handful of public trust purposes: environmental protection; traditional and customary Native Hawaiian rights; appurtenant rights; domestic water uses; and reservations for the Department of Hawaiian Home Lands. Id. at 137-39, 9 P.3d at 449-51; In re Wai ‘ola o Moloka‘i, 103 Hawai‘i 401, 431, 83 P.3d 664, 694 (2004). Public trust purposes have priority over private commercial uses, which do not enjoy the same protection. The public trust dictates that “any balancing between public and private purposes must begin with a presumption in favor of public use, access, and enjoyment” and “establishes use consistent with trust purposes as the norm or ‘default’ condition.” Waiāhole I, 94 Hawai‘i at 142, 9 P.3d at 454. After all, “Under the public trust, the state has both the authority and duty to preserve the rights of present and future generations in the waters of the state.” Id. at 141, 9 P.3d at 453.

The public trust also prescribes a higher level of scrutiny for private commercial uses. Id. at 142, 9 P.3d at 454. Hawai‘i decisionmakers must, therefore, closely examine requests to use public resources for private gain to ensure that the public’s interest in the resource is fully protected. See id. Moreover, “permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource.” Id. at 160, 9 P.3d at 472. Agencies “may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.” Id. at 143, 9 P.3d at 455. After all, “[t]he duties imposed upon the state [and counties] are the duties of a trustee and not simply the duties of a good business manager.” Id. For example, the Hawai‘i Supreme Court ruled that the public trust requires that agencies do more than simply impose requirements and conditions; they also have an obligation “to ensure that the prescribed measures are actually being implemented after a thorough assessment of the possible adverse impacts . . . on the State’s natural resources.” Kelly, 111 Hawai‘i at 231, 140 P.3d at 1011.

In addition to the public trust, the Hawai‘i Supreme Court also adopted the “precautionary principle,” ruling that “the lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation” and that “where [scientific] uncertainty exists, a trustee’s duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.” Waiāhole I, 94 Hawai‘i at 154, 9 P.3d at 466. Although the Court recognized that the principle must vary according to the situation, it agreed with what it considered the principle’s quintessential form – that “at minimum, the absence of firm scientific proof should not tie the Commission’s hands in adopting reasonable measures designed to further the public interest.” Id. at 155, 9 P.3d at 467. Based on the Commission’s duties as trustee and the interest in precaution,

the Court held that “the Commission should consider providing reasonable ‘margins of safety’ for instream trust purposes when establishing instream flow standards.” Id. at 156, 9 P.3d at 468.

Issues for Hawai‘i decisionmakers often arise in the context of permit or other applications that may impact streams, springs, groundwater, or traditional and customary Native Hawaiian practices dependent upon those resources, such as kalo cultivation or gathering practices. For example, a planning commission may receive a permit application from a water bottling company. Or, the Board of Land and Natural Resources may want to lease state land where streams are diverted. Many different scenarios emerge in which decision-makers must consider their duty to protect and conserve Hawai‘i’s precious water resources.

At bottom, the public trust provides independent authority to guide decisionmakers in fulfilling their mandates. For example, in examining the interplay between the constitutional public trust and an agency’s enabling statute, the Hawai‘i Supreme Court explained:

The Code and its implementing agency, the Commission, do not override the public trust doctrine or render it superfluous. Even with the enactment and any future development of the Code, the doctrine continues to inform the Code’s interpretation, define its permissible “outer limits,” and justify its existence. To this end, although we regard the public trust and Code as sharing similar core principles, we hold that the Code does not supplant the protections of the public trust doctrine.

Id. at 133, 9 P.3d at 445.

In addition to the guidance detailed above, the Hawai‘i Supreme Court recently highlighted six principles that agencies must apply to fulfill their mandates and appropriately consider the public trust:

- (1) “The agency’s duty and authority is to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial use”;

- (2) Agencies “must determine whether the proposed use is consistent with the trust purposes”;
- (3) Agencies need to “apply a presumption in favor of public use, access, enjoyment, and resource protection”;
- (4) Agencies must “evaluate each proposal for use on a case-by-case basis, recognizing that there can be no vested rights in the use of public water”;
- (5) “If the requested use is private or commercial, the agency should apply a high level of scrutiny”; and
- (6) Agencies must apply “a ‘reasonable and beneficial use’ standard, which requires examination of the proposed use in relation to other public and private uses.”

Kauai Springs Inc. v. Planning Comm’n, 133 Hawai‘i 141, 174, 324 P.3d 951, 984

(2014) (citations omitted). These requirements above establish “duties under the public trust independent of [any] permit requirements.” Id. at 177, 324 P.3d at 987.

The Court also underscored four affirmative showings that permit applicants must make to carry their burdens under the trust:

- (1) “[T]heir actual needs and the propriety of draining water from public streams to satisfy those needs”;
- (2) The absence of practicable alternatives, including alternate sources of water or making the proposed use more efficient;
- (3) “[N]o harm in fact” to public trust purposes “or that the requested use is nevertheless reasonable and beneficial”; and
- (4) “If the impact is found to be reasonable and beneficial, the applicant must implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes, if the proposed use is to be approved.”

Id. at 174-75, 324 P.3d at 984-85 (citations omitted). Absent these required showings, “a lack of information from the applicant is exactly the reason an agency is empowered to deny a proposed use of a public trust resource.” Id. at 174, 324 P.3d at 984. Hopefully, these guidelines will help decision makers to shoulder the responsibility and privilege of building prosperity through pono (just, balanced) management of our fresh water resources.

Office of Hawaiian Affairs
560 N. Nimitz Highway, Suite 200
Honolulu, HI 96817

Attachment 2A

Roll Call Vote Sheet

COMMITTEE ON BENEFICIARY ADVOCACY AND EMPOWERMENT (BAE)	DATE: October 21, 2015 START: 1:54 p.m. MOTION: 1:55 p.m. VOTE: 2:15 p.m.																																																																													
AGENDA ITEM: <div style="margin-left: 40px;"> IV. New Business B. BAE 15-06: Adoption of an OHA Water Policy and a Water Backgrounder Appendix to be included in the Executive Board Policy Manual </div>																																																																														
MOTION: To approve the adoption of an OHA Water Policy along with Attachment A: Water Backgrounder Appendix, where upon approval, both will be included in the Executive Board Policy Manual of the Board of Trustees, as fully stated in Action Item BAE 15-06.																																																																														
AMENDMENT:																																																																														
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MOTION: ☒ UNANIMOUS ☐ PASSED ☐ DEFERRED ☐ FAILED

DISCUSSION:

OFFICE OF HAWAIIAN AFFAIRS
Committee on Beneficiary Advocacy and Empowerment (BAE)

COMMITTEE REPORT

October 26, 2015

The Honorable Robert K. Lindsey, Jr., Chair
Board of Trustees
Office of Hawaiian Affairs

Chair Robert Lindsey,

Your Committee on Beneficiary Advocacy and Empowerment, having met on October 21, 2015, after full-and-free discussion, and where all action item motions taken received 9-0 unanimous votes, recommends approval of the following three (3) actions to the Board of Trustees in this single committee report:

ACTION 1

To approve OHA's participation in the portion of the Nā Wai 'Ehā contested case hearing regarding the adjudication of surface water use permit applications, including the recognition and quantification of appurtenant rights claims, and to authorize the CEO to utilize OHA contract #2604, as amended, with Alston Hunt Floyd and Ing, Attorneys at Law, A Law Corporation, to cover legal services rendered to OHA for water use permit applications and appurtenant rights claims, contingent upon approval of sufficient funding, estimated at \$300,000, to reside in Program Code 2300 - Corporate Counsel, Object Code 57115 - Legal Services, to cover legal fees and costs incurred for participation in the foregoing.

ACTION 2

To approve the adoption of an OHA Water Policy along with Attachment A: Water Backgrounder Appendix, where upon approval, both will be included in the Executive Board Policy Manual of the Board of Trustees, as fully stated in Action Item BAE 15-06.

ACTION 3

Adopt a Board of Trustee (BOT) policy to be included in the OHA Board of Trustees Executive Policy Manual as a new section numbered 2080 entitled “Iwi Kupuna” within the 2000 Series on Beneficiary Support and Services:

2080 Iwi Kupuna**Care, Management, and Protection of Iwi Kupuna**

2.8. a. Consistent with its advocacy regarding the Hawaiian culture, OHA shall protect and promote the reverence and cultural importance of proper care, management, and protection of ancestral Native Hawaiian remains or iwi kupuna. Recognizing that iwi is culturally “considered the most cherished possession” as defined by Mary Kawena Pukui as well as oral and written historical accounts, OHA shall ensure that in all OHA efforts and initiatives, the proper care, management, and protection of iwi kupuna is of paramount consideration. OHA also recognizes that the care and disposition of iwi kupuna is primarily an ‘ohana kuleana and shall promote the active involvement of descendants and ‘ohana in matters regarding the treatment and disposition of iwi kupuna. In furtherance of this policy objective, OHA shall:

- 1. Formulate consistent responses in the planning, consultation, and decision making regarding the care, management, and protection of iwi kupuna; and**
- 2. Ensure that all relevant OHA land management and planning documents, contractual agreements and grant agreements include an acknowledgment of a higher cultural standard of care regarding the care, management, and protection of iwi kupuna, which may exceed minimal requirements set forth in law and rule; and**
- 3. Consult with the Native Hawaiian Historic Preservation Council for guidance on iwi issues when deemed necessary by the Chief Executive Officer.**

Relevant attachments are included for your information and reference.

Attachments:

1A) BAE ROLL CALL VOTE SHEET –

BAE 15-05: Approval of OHA participation in the Appurtenant Rights and Water Use Permit Application portion of the contested case hearing regarding Nā Wai 'Ehā

1B) ACTION ITEM –

BAE 15-05: Approval of OHA participation in the Appurtenant Rights and Water Use Permit Application portion of the contested case hearing regarding Nā Wai 'Ehā

2A) BAE ROLL CALL VOTE SHEET –

BAE 15-06: Adoption of an OHA Water Policy and a Water Backgrounder Appendix to be included in the Executive Board Policy Manual

2B) ACTION ITEM - full version with Attachment A. Water Backgrounder Appendix

BAE 15-06: Adoption of an OHA Water Policy and a Water Backgrounder Appendix to be included in the Executive Board Policy Manual


3A) BAE ROLL CALL VOTE SHEET –

BAE 15-07: Adoption of an OHA Protecting Iwi Kūpuna Policy to be included in the Executive Board Policy Manual

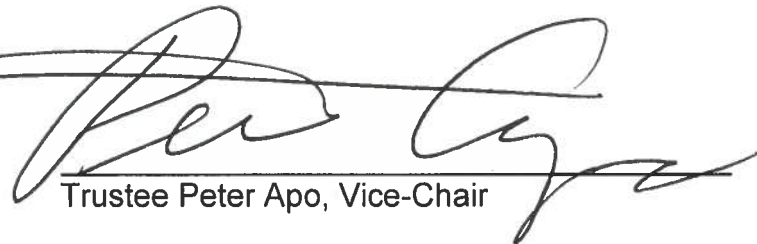
3B) ACTION ITEM –

BAE 15-07: Adoption of an OHA Protecting Iwi Kūpuna Policy to be included in the Executive Board Policy Manual

Respectfully submitted:



Trustee John Waihe'e, IV, Chair



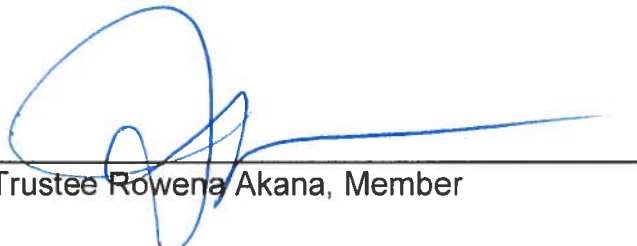
Trustee Peter Apo, Vice-Chair



Trustee Lei Ahu Isa, Member



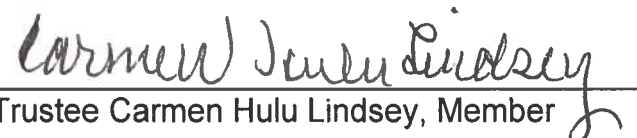
Trustee Dan Ahuna, Member



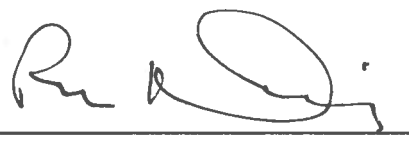
Trustee Rowena Akana, Member



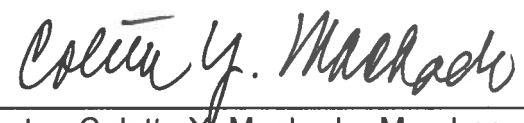
Trustee S. Haunani Apoliona, Member



Trustee Carmen Hulu Lindsey, Member



Trustee Robert K. Lindsey, Jr., Member



Trustee Colette Y. Machado, Member

ATTACHMENT 3




Attachment 3B

Beneficiary Advocacy and Empowerment Committee
October 21, 2015

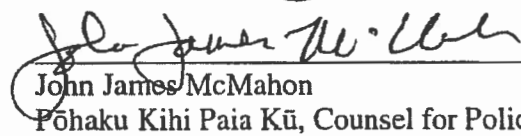
BAE #15-07

Action Item Issue: New Board of Trustees Executive Policy on Protecting Iwi Kupuna

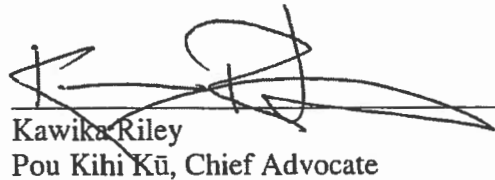
Prepared by:

 10/13/15
Sterling Wong
Pou Kāko'o Kulekele Aupuni, Public Policy Manager

Reviewed by:

 10/13/15
John James McMahon
Pōhaku Kihi Paia Kū, Counsel for Policy and Compliance Services


Reviewed by:

 10/13/15
Kawika Riley
Pou Kihi Kū, Chief Advocate

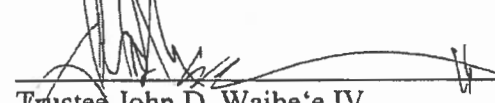
Reviewed by:

not available for signature
Ernie Kimoto
Ka Paepae Pōhaku, Executive Counsel

Reviewed by:

 10/13/15
Kamaha'opono M. Crabbe, Ph.D.
Ka Pōhaka, Chief Executive Officer

Reviewed by:

 10/13/15
Trustee John D. Waihe'e IV
Luna Ho'omalua o ke Kōmike BAE
Chair, Committee on Beneficiary Advocacy and Empowerment (BAE)

I. Action

Adopt a Board of Trustee (BOT) policy to be included in the OHA Board of Trustees Executive Policy Manual as a new section numbered 2080 entitled "Iwi Kupuna" within the 2000 Series on Beneficiary Support and Services:

2080 Iwi Kupuna

Care, Management, and Protection of Iwi Kupuna

2.8.a. Consistent with its advocacy regarding the Hawaiian culture, OHA shall protect and promote the reverence and cultural importance of proper care, management, and protection of ancestral Native Hawaiian remains or iwi kupuna. Recognizing that iwi is culturally "considered the most cherished possession" as defined by Mary Kawena Pukui as well as oral and written historical accounts, OHA shall ensure that in all OHA efforts and initiatives, the proper care, management, and protection of iwi kupuna is of paramount consideration. OHA also recognizes that the care and disposition of iwi kupuna is primarily an 'ohana kuleana and shall promote the active involvement of descendants and 'ohana in matters regarding the treatment and disposition of iwi kupuna. In furtherance of this policy objective, OHA shall:

1. Formulate consistent responses in the planning, consultation, and decision making regarding the care, management, and protection of iwi kupuna; and
2. Ensure that all relevant OHA land management and planning documents, contractual agreements and grant agreements include an acknowledgment of a higher cultural standard of care regarding the care, management, and protection of iwi kupuna, which may exceed minimal requirements set forth in law and rule; and
3. Consult with the Native Hawaiian Historic Preservation Council for guidance on iwi issues when deemed necessary by the Chief Executive Officer.

II. Issue

Whether the BOT should adopt a policy to be included in the OHA Board of Trustees Executive Policy Manual that recognizes the cultural significance of iwi kupuna and provides guidance for agency action that protects this important cultural resource. Under the policy, OHA shall:

1. Formulate consistent responses in the planning, consultation, and decision making regarding the care, management, and protection of iwi kupuna;
2. Ensure that all relevant OHA land management and planning documents, contractual agreements and grant agreements include an acknowledgment of a higher cultural standard of care regarding the care, management, and protection of iwi kupuna, which may exceed minimal requirements set forth in law and rule; and

3. Consult with the Native Hawaiian Historic Preservation Council for guidance on iwi issues when deemed necessary by the Chief Executive Officer.

III. Discussion

Hawaiian scholar Mary Kawena Pukui defined iwi as “the most cherished possession” of Native Hawaiians. Iwi contain the mana, or spiritual power, and the ‘uhane, or spirit, of the dead. As such, Native Hawaiians took special care of the iwi of their loved ones, often hiding and guarding the iwi to ensure that no one could defile, disrespect, harm, or hana ‘ino (mistreat) the iwi. The bones of chiefs were often hidden in caves, laid to rest with their favorite possessions. Iwi was also frequently buried in unmarked graves in coastal areas and sand dunes throughout the state. Traditional Native Hawaiian burials can be encountered today from the highest mountain peaks, throughout the kula plains, to the shorelines and reefs.

Today, the traditional practice of hiding bones can bring the care of iwi kupuna into direct conflict with development. Developers often encounter iwi – sometimes found in mass burials – during excavation work and during construction activities. Developers and Native Hawaiians can disagree on the most appropriate way to resolve these issues, and these conflicts frequently result in high-profile lawsuits, such as the cases in Naue, Kaua‘i, Honokahua, Maui, and Kaka‘ako and Kewalo, O‘ahu.

OHA is frequently involved in iwi issues. Most commonly, the agency’s involvement is through its Compliance Enforcement Program, which actively reviews and comments on project proposals, permit applications, environmental documents, and archaeology studies to ensure that the laws and rules protecting burials are followed. However, given that other OHA programs, such as our grants division, are also brought into iwi issues, we recommend the adoption of a policy on iwi to ensure consistency in OHA actions.

In light of the above discussion, the following new material including all headings, numberings, and text, is proposed for insertion in a section numbered 2080 entitled “Iwi Kupuna” within the 2000 Series on Beneficiary Support and Services:

2080 Iwi Kupuna

Care, Management, and Protection of Iwi Kupuna

2.8.a. Consistent with its advocacy regarding the Hawaiian culture, OHA shall protect and promote the reverence and cultural importance of proper care, management, and protection of ancestral Native Hawaiian remains or iwi kupuna. Recognizing that iwi is culturally “considered the most cherished possession” as defined by Mary Kawena Pukui as well as oral and written historical accounts, OHA shall ensure that in all OHA efforts and initiatives, the proper care, management, and protection of iwi kupuna is of paramount consideration. OHA also recognizes that the care and disposition of iwi kupuna is primarily an ‘ohana kuleana and shall promote the active involvement of descendants and ‘ohana in matters regarding the treatment and disposition of iwi kupuna. In furtherance of this policy objective, OHA shall:

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2. Ensure that all relevant OHA land management and planning documents, contractual agreements and grant agreements include an acknowledgment of a higher cultural standard of care regarding the care, management, and protection of iwi kupuna, which may exceed minimal requirements set forth in law and rule; and
3. Consult with the Native Hawaiian Historic Preservation Council for guidance on iwi issues when deemed necessary by the Chief Executive Officer.

IV. Recommended Action

- A. Approve, adopt, and ratify a BOT Policy to be included in the OHA Board of Trustees Executive Policy Manual as described in this Action Item.

V. Alternative Actions

- A. Approve, adopt, and ratify new BOT executive policy as proposed in this Action Item.
- B. Decline to approve, adopt, and ratify new BOT executive policy as described in this Action Item.

VI. Timeframe

Immediate action is recommended. Additions to the OHA BOT Executive Policy manual will take effect immediately upon approval by the BOT after second reading.

VII. Funding

No funding is required.

Office of Hawaiian Affairs
560 N. Nimitz Highway, Suite 200
Honolulu, HI 96817

Attachment 3A

Roll Call Vote Sheet

COMMITTEE ON BENEFICIARY ADVOCACY AND EMPOWERMENT (BAE)	DATE: October 21, 2015 START: 2:15 p.m. MOTION: 2:15 p.m. VOTE: 2:40 p.m.
AGENDA ITEM: <p style="text-align: center;">IV. New Business</p> <p style="text-align: center;">C. BAE 15-07: Adoption of an OHA Protecting Iwi Kūpuna Policy to be included in the Executive Board Policy Manual</p>	
MOTION: Adopt a Board of Trustee (BOT) policy to be included in the OHA Board of Trustees Executive Policy Manual as a new section numbered 2080 entitled "Iwi Kupuna" within the 2000 Series on Beneficiary Support and Services: 2080 Iwi Kupuna Care, Management, and Protection of Iwi Kupuna <p>2.8.a. Consistent with its advocacy regarding the Hawaiian culture, OHA shall protect and promote the reverence and cultural importance of proper care, management, and protection of ancestral Native Hawaiian remains or iwi kupuna. Recognizing that iwi is culturally "considered the most cherished possession" as defined by Mary Kawena Pukui as well as oral and written historical accounts, OHA shall ensure that in all OHA efforts and initiatives, the proper care, management, and protection of iwi kupuna is of paramount consideration. OHA also recognizes that the care and disposition of iwi kupuna is primarily an 'ohana kuleana and shall promote the active involvement of descendants and 'ohana in matters regarding the treatment and disposition of iwi kupuna. In furtherance of this policy objective, OHA shall:</p> <ol style="list-style-type: none"> 1. Formulate consistent responses in the planning, consultation, and decision making regarding the care, management, and protection of iwi kupuna; and 2. Ensure that all relevant OHA land management and planning documents, contractual agreements and grant agreements include an acknowledgment of a higher cultural standard of care regarding the care, management, and protection of iwi kupuna, which may exceed minimal requirements set forth in law and rule; and 3. Consult with the Native Hawaiian Historic Preservation Council for guidance on iwi issues when deemed necessary by the Chief Executive Officer. 	
AMENDMENT:	
MEANS OF FINANCING:	

TRUSTEE		1	2	'AE (YES)	A'OLE (NO)	KANALUA (ABSTAIN)	EXCUSED
LEI	AHU ISA			X			
DAN	AHUNA	1		X			
ROWENA	AKANA			X			
VICE-CHAIR PETER	APO			X			
HAUNANI	APOLIONA		2	X			
HULU	LINDSEY			X			
ROBERT	LINDSEY			X			
COLETTE	MACHADO			X			
CHAIR JOHN	WAIHE'E			X			
TOTAL VOTE COUNT				9	0	0	0

MOTION: [X] UNANIMOUS [] PASSED [] DEFERRED [] FAILED

DISCUSSION:

OFFICE OF HAWAIIAN AFFAIRS
Committee on Beneficiary Advocacy and Empowerment (BAE)

COMMITTEE REPORT

October 26, 2015

The Honorable Robert K. Lindsey, Jr., Chair
Board of Trustees
Office of Hawaiian Affairs

Chair Robert Lindsey,

Your Committee on Beneficiary Advocacy and Empowerment, having met on October 21, 2015, after full-and-free discussion, and where all action item motions taken received 9-0 unanimous votes, recommends approval of the following three (3) actions to the Board of Trustees in this single committee report:

ACTION 1

To approve OHA's participation in the portion of the Nā Wai 'Ehā contested case hearing regarding the adjudication of surface water use permit applications, including the recognition and quantification of appurtenant rights claims, and to authorize the CEO to utilize OHA contract #2604, as amended, with Alston Hunt Floyd and Ing, Attorneys at Law, A Law Corporation, to cover legal services rendered to OHA for water use permit applications and appurtenant rights claims, contingent upon approval of sufficient funding, estimated at \$300,000, to reside in Program Code 2300 - Corporate Counsel, Object Code 57115 - Legal Services, to cover legal fees and costs incurred for participation in the foregoing.

ACTION 2

To approve the adoption of an OHA Water Policy along with Attachment A: Water Backgrounder Appendix, where upon approval, both will be included in the Executive Board Policy Manual of the Board of Trustees, as fully stated in Action Item BAE 15-06.

ACTION 3

Adopt a Board of Trustee (BOT) policy to be included in the OHA Board of Trustees Executive Policy Manual as a new section numbered 2080 entitled “Iwi Kupuna” within the 2000 Series on Beneficiary Support and Services:

2080 Iwi Kupuna**Care, Management, and Protection of Iwi Kupuna**

2.8. a. Consistent with its advocacy regarding the Hawaiian culture, OHA shall protect and promote the reverence and cultural importance of proper care, management, and protection of ancestral Native Hawaiian remains or iwi kupuna. Recognizing that iwi is culturally “considered the most cherished possession” as defined by Mary Kawena Pukui as well as oral and written historical accounts, OHA shall ensure that in all OHA efforts and initiatives, the proper care, management, and protection of iwi kupuna is of paramount consideration. OHA also recognizes that the care and disposition of iwi kupuna is primarily an ‘ohana kuleana and shall promote the active involvement of descendants and ‘ohana in matters regarding the treatment and disposition of iwi kupuna. In furtherance of this policy objective, OHA shall:

- 1. Formulate consistent responses in the planning, consultation, and decision making regarding the care, management, and protection of iwi kupuna; and**
- 2. Ensure that all relevant OHA land management and planning documents, contractual agreements and grant agreements include an acknowledgment of a higher cultural standard of care regarding the care, management, and protection of iwi kupuna, which may exceed minimal requirements set forth in law and rule; and**
- 3. Consult with the Native Hawaiian Historic Preservation Council for guidance on iwi issues when deemed necessary by the Chief Executive Officer.**

Relevant attachments are included for your information and reference.

Attachments:

1A) BAE ROLL CALL VOTE SHEET –

BAE 15-05: Approval of OHA participation in the Appurtenant Rights and Water Use Permit Application portion of the contested case hearing regarding Nā Wai 'Ehā

1B) ACTION ITEM –

BAE 15-05: Approval of OHA participation in the Appurtenant Rights and Water Use Permit Application portion of the contested case hearing regarding Nā Wai 'Ehā

2A) BAE ROLL CALL VOTE SHEET –

BAE 15-06: Adoption of an OHA Water Policy and a Water Backgrounder Appendix to be included in the Executive Board Policy Manual

2B) ACTION ITEM - full version with Attachment A. Water Backgrounder Appendix

BAE 15-06: Adoption of an OHA Water Policy and a Water Backgrounder Appendix to be included in the Executive Board Policy Manual


3A) BAE ROLL CALL VOTE SHEET –

BAE 15-07: Adoption of an OHA Protecting Iwi Kūpuna Policy to be included in the Executive Board Policy Manual

3B) ACTION ITEM –

BAE 15-07: Adoption of an OHA Protecting Iwi Kūpuna Policy to be included in the Executive Board Policy Manual

Respectfully submitted:



Trustee John Waihe'e, IV, Chair



Trustee Peter Apo, Vice-Chair



Trustee Lei Ahu Isa, Member



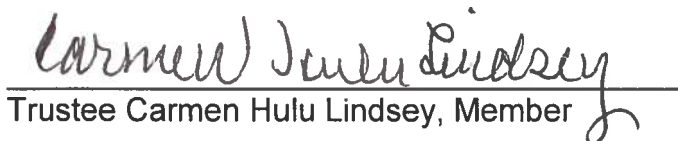
Trustee Dan Ahuna, Member



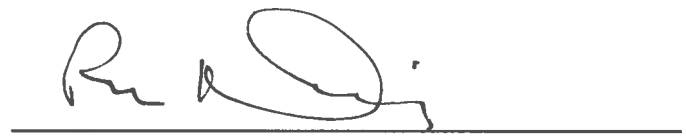
Trustee Rowena Akana, Member



Trustee S. Haunani Apoliona, Member



Trustee Carmen Hulu Lindsey, Member



Trustee Robert K. Lindsey, Jr., Member



Trustee Colette Y. Machado, Member

ATTACHMENT 4

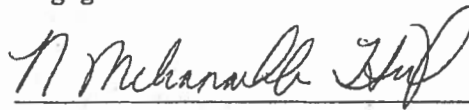
Attachment B

OFFICE OF HAWAIIAN AFFAIRS
Action ItemCommittee on Beneficiary Advocacy and Empowerment
Office of Hawaiian Affairs
January 27, 2016

BAE #16-01

Action Item Issue: To approve an OHA Board of Trustee Executive Policy on International Engagement

Prepared by:

Mehanaokalā Hind
Knowledge Based Specialist

1/20/16

Date

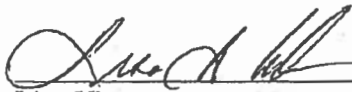
Reviewed by:

Kamana'o pono M. Crabbe
Ka Pouhana, Chief Executive Officer

1/20/16

Date

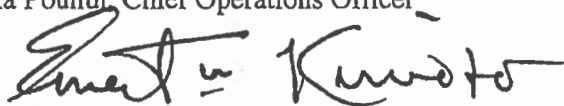
Reviewed by:

Lisa Victor
Ka Pounui, Chief Operations Officer

1/20/16

Date

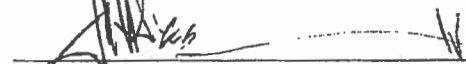
Reviewed by:

Ernest Kimoto
Ka Pāpā Pohaku, Corporate Counsel

1-20-16

Date

Reviewed by:

Trustee John Waihe'e, IV
Luna Ho'omalū o Kōmike BAE
Chairperson, Committee on Beneficiary Advocacy and Empowerment

1/21/16

Date

I. Proposed Action

To approve an OHA Board of Trustee Executive Policy on International Engagement that will align with OHA's mission:

"to mālama Hawai'i's people and environmental resources, and OHA's assets, toward ensuring the perpetuation of the culture, the enhancement of lifestyle and the protection of entitlements of

BAE #16-01
Executive Policy on International Engagement
Page 2

Native Hawaiians, while enabling the building of a strong and healthy Hawaiian people and nation, recognized nationally and internationally."

II. Action

Should the Board of Trustees adopt and codify an executive policy on international engagement?

III. Issue/Background

Historically, ka po'e ko Hawai'i pae 'āina have traversed the sea of Kanaloa to engage, learn, and bring home knowledge systems, tools, foods, and ideologies. The genealogy of our gods, our place names, our people, our political systems trace their origins throughout Polynesia and beyond. Ka Mo'i Kalākaua and Ka Mo'i Wahine Lili'uokalani were known for international relationship building as a primary objective under their leadership of the aupuni, *kingdom*. It is in this tradition of our ancestors and our enlightened mission and vision that we see value in pursuing a policy on international engagement.

IV. Discussion

As a means for OHA to respond to numerous requests for international diplomacy and relations it will be important for OHA representatives to have a policy that will guide our knowledge and experience in the critical issues facing our native Hawaiian beneficiaries and illustrate cultural competence internationally, which would allow for:

- International efforts to forward the rights of indigenous Hawaiians under international law.
- International efforts to address global environmental issues impacting Hawai'i.
- International repatriation efforts.
- International efforts to establish best practice standards relative to the strengths and needs of indigenous peoples.
- Seeking international funding sources.
- International exposure of Hawaiian perspectives on cultural practices and education.
- Strategic planning.

Alo a he alo is a saying that describes the Hawaiian value of discussing important matters face to face. Mo'olelo of our ali'i are filled with how they traveled from district to district, island to island, across the Pacific, and later to Europe and America.

V. Timeframe

Immediate action is recommended

VI. Funding

Funding is not immediately required to establish this policy.

VII. Recommended Policy Language

2070 - INTERNATIONAL ENGAGEMENT

2.7.a. The Office of Hawaiian Affairs recognizes the significance and utility of forwarding efforts to better the conditions of Native Hawaiians through international venues, organizations, and channels. These efforts may include, but not be limited to, the following types of initiatives:

- a) *International efforts to forward the rights of indigenous Hawaiians under international law.*

OHA's pursuit of the rights of Native Hawaiians as indigenous people under international law is complementary to OHA's state and federal advocacy seeking greater self-governance for Native Hawaiians. Such pursuit does not interfere or conflict with the rights of the Hawaiian Kingdom as a nation state, which may be pursued by others.

- b) *International efforts to address global environmental issues impacting Hawai'i.*

OHA's engagement in such efforts would highlight the particular situation Hawai'i faces in experiencing global environmental stresses or in implementing solutions to combat these. Spotlighting Hawai'i's context on a world stage could help to bring greater attention and energy to improving the condition of the Hawaiian Islands.

- c) *International repatriation efforts.*

A large number of Iwi kūpuna (ancestral remains), moepū (funerary objects), and mea kapu (sacred objects) were taken from Hawai'i in ways that do not afford the current possessors of those objects rightful ownership. Many such objects can be found currently in institutions outside of Hawai'i and the United States. As a matter of cultural responsibility, OHA may choose to forward efforts to have these repatriated to appropriate caretakers in Hawai'i.

- d) *International efforts to establish best practice standards relative to the strengths and needs of indigenous peoples.*

Numerous professional and indigenous focused organizations have collaborated to forward efforts to adopt and publish standards or best practices in such areas as health, education, economic development, cultural vitality, land stewardship, etc. These organizations have urged governing bodies or other leadership contexts to adopt or consider such standards and practices. OHA's engagement in such efforts could enhance the standards and practices adopted by OHA as well as enhance the collaboratively developed international documents, which may benefit from the experiences and expertise that Hawaiian/Hawai'i case studies could bring to the development of such documents.

- e) *Seeking international funding sources.*

To support OHA efforts to better the conditions of Native Hawaiians, OHA may choose to apply for grant funding or other support through international entities.

BAE #16-01
Executive Policy on International Engagement
Page 4

f) *International exposure of Hawaiian perspectives on cultural practices and education.*
To support advancements in Native Hawaiian education as a global leader in indigenous knowledge systems and to protect and perpetuate Native Hawaiian culture, OHA may choose to support initiatives by educators and cultural practitioners to participate in international mechanisms that heighten awareness and support the proliferation of Hawaiian perspectives.

g) *Strategic planning.*
OHA's implementation of its Strategic Plan should consider how international bodies, standards, opportunities, or channels could be utilized to achieve greater results.

2.7.b. Efforts to engage in international-related activities should utilize, to the highest degree possible, communication and relationship building mechanisms that do not require in-person travel. In-person travel for such efforts should be carefully considered, pertain specifically to official OHA business, be approved in advance, and comply with any and all travel policies and procedures adopted by the Office.

VIII. Recommended Action

To adopt and codify an OHA Board of Trustee Executive Policy on International Engagement that will align with OHA's mission:

“to mālama Hawai'i's people and environmental resources, and OHA's assets, toward ensuring the perpetuation of the culture, the enhancement of lifestyle and the protection of entitlements of Native Hawaiians, while enabling the building of a strong and healthy Hawaiian people and nation, recognized nationally and internationally.”

IX. Alternative Actions

To not adopt and codify an OHA Board of Trustee Executive Policy on International Engagement.

**OFFICE OF HAWAIIAN AFFAIRS
Committee on Beneficiary Advocacy and Empowerment (BAE)**

COMMITTEE REPORT

February 1, 2016

The Honorable Robert K. Lindsey, Jr., Chair
Board of Trustees
Office of Hawaiian Affairs

Chair Robert Lindsey,

Your Committee on Beneficiary Advocacy and Empowerment, having met on January 27, 2016, and after full-and-free discussion, recommends approval of the following action to the Board of Trustees:

ACTION

To approve an OHA Board of Trustees Executive Policy on International Engagement that will align with OHA's mission:

“to mālama Hawai‘i’s people and environmental resources, and OHA’s assets, toward ensuring the perpetuation of the culture, the enhancement of lifestyle and the protection of entitlements of Native Hawaiians, while enabling the building of a strong and healthy Hawaiian people and nation, recognized nationally and internationally.”

Relevant attachments are included for your information and reference.

Attachments:

A) BAE ROLL CALL VOTE SHEET –

BAE 16-01: To approve an OHA Board of Trustees Executive Policy on International Engagement

B) ACTION ITEM –

BAE 16-01: To approve an OHA Board of Trustees Executive Policy on International Engagement

Respectfully submitted:




Trustee John Waihe'e, IV, Chair



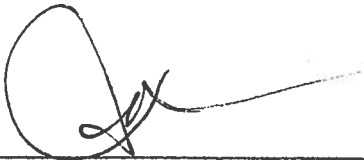
Trustee Peter Apo, Vice-Chair



Trustee Lei Ahu Isa, Member




Trustee Dan Ahuna, Member



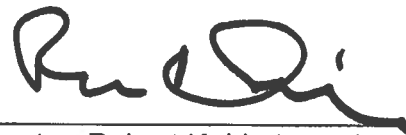
Trustee Rowena Akana, Member



Trustee S. Haunani Apolliona, Member



Trustee Carmen Hulu Lindsey, Member



Trustee Robert K. Lindsey, Jr., Member



Trustee Colette Y. Machado, Member

Office of Hawaiian Affairs
560 N. Nimitz Highway, Suite 200
Honolulu, HI 96817

Attachment A

Roll Call Vote Sheet

COMMITTEE ON BENEFICIARY ADVOCACY AND EMPOWERMENT (BAE)	DATE: January 27, 2016 START: 1:31 p.m. MOTION: 2:25 p.m. VOTE: 2:25 p.m.																																																																													
AGENDA ITEM: <div style="margin-left: 40px;"> IV. New Business A. BAE 16-01: To approve an OHA Board of Trustees Executive Policy on International Engagement </div>																																																																														
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AMENDMENT:																																																																														
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<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 20%;">TRUSTEE</th> <th style="width: 10%;">1</th> <th style="width: 10%;">2</th> <th style="width: 10%;">'AE (YES)</th> <th style="width: 10%;">A'OLE (NO)</th> <th style="width: 20%;">KANALUA (ABSTAIN)</th> <th style="width: 10%;">EXCUSED</th> </tr> </thead> <tbody> <tr> <td>LEI AHU ISA</td> <td></td> <td></td> <td style="text-align: center;">X</td> <td></td> <td></td> <td></td> </tr> <tr> <td>DAN AHUNA</td> <td></td> <td></td> <td style="text-align: center;">X</td> <td></td> <td>1=KANALUA 2='AE (YES)</td> <td></td> </tr> <tr> <td>ROWENA AKANA</td> <td></td> <td></td> <td style="text-align: center;">X</td> <td></td> <td>1=KANALUA 2='AE (YES)</td> <td></td> </tr> <tr> <td>VICE-CHAIR PETER APO</td> <td style="text-align: center;">1</td> <td></td> <td style="text-align: center;">X</td> <td></td> <td></td> <td></td> </tr> <tr> <td>HAUNANI APOLIONA</td> <td></td> <td style="text-align: center;">2</td> <td style="text-align: center;">X</td> <td></td> <td></td> <td></td> </tr> <tr> <td>HULU LINDSEY</td> <td></td> <td></td> <td style="text-align: center;">X</td> <td></td> <td></td> <td></td> </tr> <tr> <td>ROBERT LINDSEY</td> <td></td> <td></td> <td style="text-align: center;">X</td> <td></td> <td></td> <td></td> </tr> <tr> <td>COLETTE MACHADO</td> <td></td> <td></td> <td style="text-align: center;">X</td> <td></td> <td></td> <td></td> </tr> <tr> <td>CHAIR JOHN WAIHE'E</td> <td></td> <td></td> <td style="text-align: center;">X</td> <td></td> <td></td> <td></td> </tr> <tr> <td>TOTAL VOTE COUNT</td> <td></td> <td></td> <td style="text-align: center;">9</td> <td style="text-align: center;">0</td> <td style="text-align: center;">0</td> <td style="text-align: center;">0</td> </tr> </tbody> </table>	TRUSTEE	1	2	'AE (YES)	A'OLE (NO)	KANALUA (ABSTAIN)	EXCUSED	LEI AHU ISA			X				DAN AHUNA			X		1=KANALUA 2='AE (YES)		ROWENA AKANA			X		1=KANALUA 2='AE (YES)		VICE-CHAIR PETER APO	1		X				HAUNANI APOLIONA		2	X				HULU LINDSEY			X				ROBERT LINDSEY			X				COLETTE MACHADO			X				CHAIR JOHN WAIHE'E			X				TOTAL VOTE COUNT			9	0	0	0	
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DISCUSSION: SEE BAE MINUTES																																																																														

ATTACHMENT 5

2010 Advocacy

Preservation and Protection of Legal Entitlements

2.1.a. OHA shall preserve and protect full legal entitlement and enjoyable benefits of Native Hawaiians through advocacy efforts which may include provisions of advice and information, legislation, litigation, and negotiation.

Native Hawaiian Rights and Entitlements

2.1.b. OHA shall advocate for Native Hawaiian rights and entitlements including:

1. Educational opportunities, economic development services, health and human services, and housing services; and
2. The protection of and access to natural resources that are an important part of the culture and lifestyle of Native Hawaiians.

Hawaiian Culture

2.1.c. Consistent with its fiduciary responsibility, OHA shall pursue, protect, and promote:

1. The cultural practices of Native Hawaiians;
2. The integrity of the Native Hawaiian culture and cultural sites; and
3. The understanding of the Native Hawaiian culture, practices and traditions to ensure that the activities, values, beliefs, ideas, and heritage of the Native Hawaiian people continue to be preserved, promoted, and perpetuated.

2.1.d. In its endeavor to pursue, protect and promote Native Hawaiian culture, OHA shall be committed to living and practicing the values, traditions and protocols of the Native Hawaiian culture in the conduct of its operations.

Position on Certain Proposed Legislative Measures

2.1.e The Board of Trustees shall take a position of Oppose on any legislative measure that places an entity into OHA, or that requires an OHA funding allocation, without prior consultation with, and approval by, the Board of Trustees.

2020 Grants

2.2.a. OHA implements grant programs, in compliance with Section 10-17, Hawai'i Revised Statutes, as amended, to provide support and resources to organizations, and individuals working to address the needs and promote the well-being of the Native Hawaiian community as follows:

1. A for-profit subsidiary of a nonprofit organization incorporated under the law of the State;
2. A nonprofit community-based organization determined to be exempt from federal income taxation by the Internal Revenue Service;
3. A cooperative association; or
4. An individual, who in the BOT's determination, is able to provide the services or activities proposed in the application for a grant.

2.2.b. The CEO is responsible for developing procedures and guidelines for the grant programs in accordance with all applicable statutes and BOT policies.

2.2.c. Reserved.

2.2.d. The CEO is granted authority to approve Grants Program funding requests up to \$25,000. Grant requests \$25,000 and over require the concurrence of a majority (5) of all members to which the BOT is entitled. The exception is for Community Based Economic Development (CBED) Grants, for which the CEO can approve grant requests up to \$50,000.

2.2.e. Grants funding requests shall be submitted by Administration in an established Grants Action Item format and will contain all items included on the Grants Action Item Checklist as approved by the CEO. Grant Action Items shall be submitted to the Chair(s) of the Standing Committee(s) with purview over grant making for their review no less than one-week prior to formal consideration. If more than one Standing Committee is deemed to have purview over a grant related matter, a joint Standing Committee meeting shall be held to consider the issue.

2.2.f. Reserved.

2030 Ka Wai Ola

2.3.a. The *Ka Wai Ola* is the official publication of OHA. The mission of *Ka Wai Ola O OHA* is, 1) to cover issues important to Native Hawaiians so they can make informed decisions on matters that affect their lives and communities, and 2) to communicate OHA's actions, programs, and plans to its beneficiaries and constituents.

2.3.b. All material published in *Ka Wai Ola O OHA* shall be written responsibly and meet Associated Press standards of publication. All material, including but not limited to, articles, pictures, and letters to the editor shall contain a representative cross-section of topics pertaining to the Native Hawaiian community.

2.3.c. Although articles expressing the personal views of Trustees are encouraged, such articles shall avoid inflammatory attacks on the character of any individual or organization and shall not include matters that are confidential, such as items appropriate for Executive Sessions or of possible conflict with OHA's internal operating procedures and policies.

2.3.d. Editorial space of 600 words will be given to each trustee in each issue. Trustees are encouraged to focus on issues. Although differing viewpoints are to be expected, attacks on individuals, which may be construed to be libelous or defamatory must be avoided. No libelous or defamatory materials will be published. Questions on libel and/or defamation will be resolved in consultation with the editor of the *Ka Wai Ola O OHA* (Communications Program Manager), the Director of Community Relations, and OHA's in-house counsel. Trustees that do not submit an article will forfeit their space in the *Ka Wai Ola O OHA*. There shall be no sharing or assignment of space between Trustees. Each Trustee will be held to the 600 word limit. Articles that exceed the word limit will not be published unless amended to conform prior to the publishing deadline.

2.3.e. In accordance with state ethic guidelines, (Chapter 84, HRS, as amended) Trustees may not campaign in their column nor may they offer another candidate an express endorsement. Any Trustee that is running for re-election, is suspended

from publishing their regular, editorial column until the elections are complete, if there is another candidate running for the same office. Such Trustees however, may pay for advertising space as a candidate. Advertising rates for *Ka Wai Ola O OHA* will be the same for all candidates and all political advertisements will be paid at the time of space reservation. Trustees that are running unopposed may continue to publish their regular column.

2.3.f. In cases of a possible violation of this policy, the matter may be resolved by the CEO in consultation with the author of the article and the Editor. With regard to Trustee submissions, a negative resolution by the CEO may be appealed to the Chair of the BOT for a final decision.

2040 Repatriation

2.4.a. OHA believes that repatriation issues are of extreme importance to all Native Hawaiians and issues relating to the disposition and care of our iwi kupuna and cultural objects must be addressed in the most sensitive and equitable manner possible.

2.4.b. OHA is committed to encourage wider and more effective participation by Hawaiian communities, families, and individuals in repatriation matters – especially by those with a traditional attachment, lineal descendancy, and special knowledge relating to the affected iwi kupuna and/or cultural objects. Once individuals and/or organizations with a close affinity to the iwi kupuna and/or objects come forward as participants in the consultation process, OHA may ultimately step back and serve in a support role. To bring about increased awareness and understanding of these important issues and activities, OHA will publish in the *Ka Wai Ola O OHA* (whenever possible) repatriation related information to notify and inform the Hawaiian community as well as conduct educational outreach activities.

2.4.c. OHA will support and uphold the integrity and repatriation processes of the Native American Graves Protection and Repatriation Act (NAGPRA). Of utmost importance is that the process be based on respect and an understanding of Hawaiian interests and cultural values. It is essential to consult traditional sources

such as nā kūpuna as well as ethnographic research to clarify Hawaiian views concerning such complex issues as the meaning of lineal descent, funerary, and sacred objects as well as the nature and rights of our ancestors. This information must be ascertained to produce broader agreement and understanding between parties concerning culturally appropriate interpretations of the NAGPRA and repatriation process.

2.4.d. Understanding that repatriation decisions are numerous, complex, and may involve considerable time commitments, OHA will seek to facilitate the process including, but not limited to, the following:

1. Taking an active role in pursuing broader agreement and understanding amongst all parties;
2. Formulating consistent responses in the planning, consultation, and decision making regarding the care of our iwi kupuna and cultural objects; and
3. Recommending appropriate dispute resolution processes.

2.4.e. This policy does not require OHA to be involved in all repatriation matters, only that OHA will consider and respect Hawaiian interests and cultural values in planning, consultation, and decision making and see that affected Hawaiian individuals, families, and organizations are informed whenever possible.

2050 Housing

2.5.a. The purpose of OHA's Housing Policies is to provide overall guidance for the allocation of OHA fiscal and personnel resources to Housing Initiatives that will benefit Native Hawaiians.

2.5.b. To further clarify the Housing Policies, the following definitions of terms are provided:

Housing Initiatives – Housing related actions that may include Housing Assistance Programs, Housing Development Projects, advocacy, regulatory

or legislative proposals and other actions that are intended to provide better affordable housing opportunities for Native Hawaiians.

Housing Assistance Program – Programs that provide various kinds of assistance to home buyers or renters, including programs that provide home ownership training, financial literacy training, best practices for renters, rent payment assistance, down payment assistance, or assistance to prevent mortgage foreclosures.

Housing Development Projects – Site specific projects that involve the planning, design, construction, and sale or rental of residential units. OHA's role would be to provide assistance in the development process rather than to develop a project on its own.

Guiding Principles – Standards that provide guidance for courses of action. These are articulated in section 4 of the OHA Housing Plan and Strategy dated March 2009.

Maximize Benefits to Native Hawaiians – Maximize benefits to Native Hawaiians by allocating resources to Housing Initiatives that provide the greatest benefit with the lowest cost per households with at least one (1) Native Hawaiian person.

2.5.c. OHA-sponsored Housing Initiatives shall be integrated with the priorities and strategies of the OHA Strategic Plan and be guided by the overall Goal and Guiding Principles articulated in the OHA Housing Plan and Strategy dated March 2009.

2.5.d. Before OHA commits funds to a Housing Initiative, all such programs or projects shall be carefully planned and shall be analyzed in terms of costs to OHA and potential benefits to Native Hawaiians. Funding provided shall maximize benefits to Native Hawaiians.

2.5.e. The Housing Policies shall be reviewed periodically or as recommended by the Chair of the BOT. Any substantive modifications or exceptions to the OHA Housing Policies may require that due diligence analysis be conducted.

2060 Collaboration with Other Agencies and Organizations

Inter-Agency Collaboration

2.6.a. As the principal public agency for Native Hawaiians, OHA shall perform, develop, and coordinate programs and services for Native Hawaiians using among other things, memoranda of understanding or memoranda of agreement with other state, county, and private agencies where appropriate, and maintaining membership in inter-agency organizations and associations.

Inter-Agency Monitoring

2.6.b. Pursuant to Chapter 10, Hawai'i Revised Statutes, as amended, OHA shall foster good relations and collaborate with other agencies that impact Native Hawaiians.

Inventory of Native Hawaiian Programs and Services

2.6.c. OHA shall maintain an inventory of government and private programs and services for Native Hawaiians, which shall be updated biannually, and act as a clearinghouse and referral agency.

State Clearing House Program

2.6.d. OHA shall avail itself of the State Clearinghouse Program of the Office of State Planning in order to monitor the activities of other agencies and provide information and referral services for its beneficiaries.

Technical and Advisory Assistance to other Organizations Serving Hawaiians

2.6.e. OHA may provide technical or advisory assistance to any individual, government agency, or private organization for Native Hawaiian programs, and for other functions pertinent to the purpose of OHA. All requests for technical or advisory assistance shall be approved by the CEO and documented in, among other things, contracts or memoranda of understanding.

Use of Office Equipment by Other Agencies and Individuals

2.6.f. OHA shall make its equipment available to Hawaiian community organizations and individuals whenever such use would benefit Hawaiians without impeding the work of the OHA Trustees or staff. All organizations or individuals using OHA's offices or equipment shall be required to sign an agreement form consenting to the conditions of use. Noncompliance with these conditions will result in payment for damages and/or the exclusion from future use of the facilities or equipment.

ATTACHMENT 6

Military Engagement Policy

Subject: Military Engagement

Effective Date: Upon 2nd Reading/Action of the Board of Trustees

Policy Framework: T-Trustee Level Policy

Date Reviewed/Revised: Upon 2nd Reading/Action of the Board of Trustees

Responsible Office: Board of Trustees

Next Scheduled Review Date: Three (3) years from Effective Date or As Deemed Appropriate by the Policy Administrator

Policy Administrator: Chair, Beneficiary Advocacy and Engagement Committee

I. POLICY AND GENERAL STATEMENT

It is the policy of the Office of Hawaiian Affairs (“OHA” or “Office”) to facilitate, bridge and advance meaningful consultation, conference, coordination and engagement with the United States Department of Defense (DoD), Military in: recognition of the federal trust responsibility to; and in exercising self-determination rights of, Native Hawaiians. Further, any Military engagement outcome is to ensure, that any policies, processes, positions, places, decisions, actions, and/or activities, strengthen ‘ohana, mo‘omeheu and ‘āina, toward the overall mission of bettering the conditions of Native Hawaiians.

II. MO‘OKUAUHAU

A. Board Governance Framework. The five elements of OHA’s Board Governance Framework: 1) Identity; 2) Values and Mana; 3) Statutory Basis; 4) Policies; and 5) Supporting Documents and Practices (Operations).

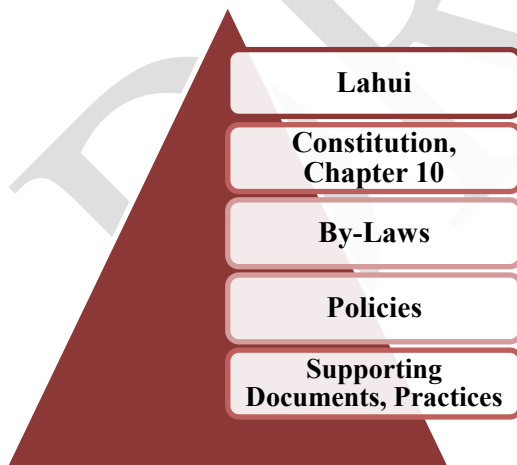


Figure 1 – Board Governance Framework

The core values articulated below and approved by the Board of Trustees (“BOT” or “Board”) in April 2019, as part of the Board Governance Framework above, provides the basis for the policy framework below and this policy itself cascaded to policy implementation procedures and processes.

Military Engagement Policy

- B. Core Values.** As part of the Board Governance Framework, the adopted core values inform and frame the policy itself and its implementation.

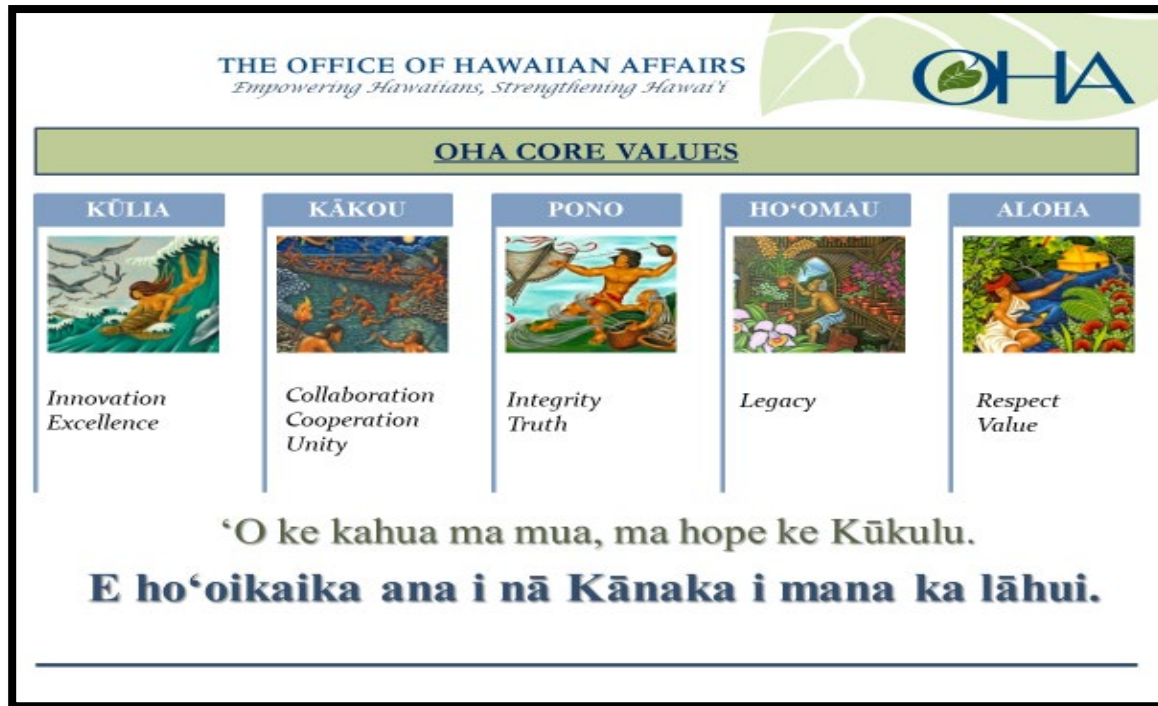
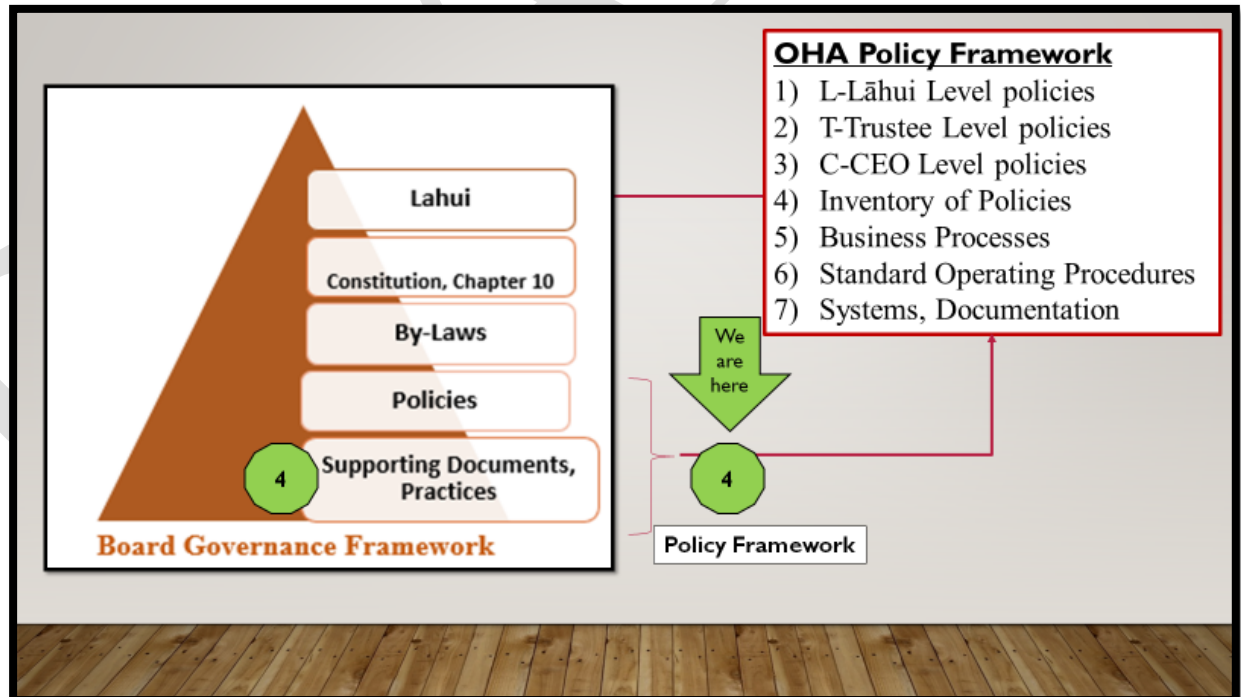


Figure 2 – OHA Core Values

Figure 3 –
Policy
Framework
(Depiction 1)



- C. Policy Framework.** The Policy Framework, approved and adopted by the Board in December 2021, provides the implementation and operationalization of this T-Trustee level policy and its associated and cascaded C-CEO level policies, processes and procedures.

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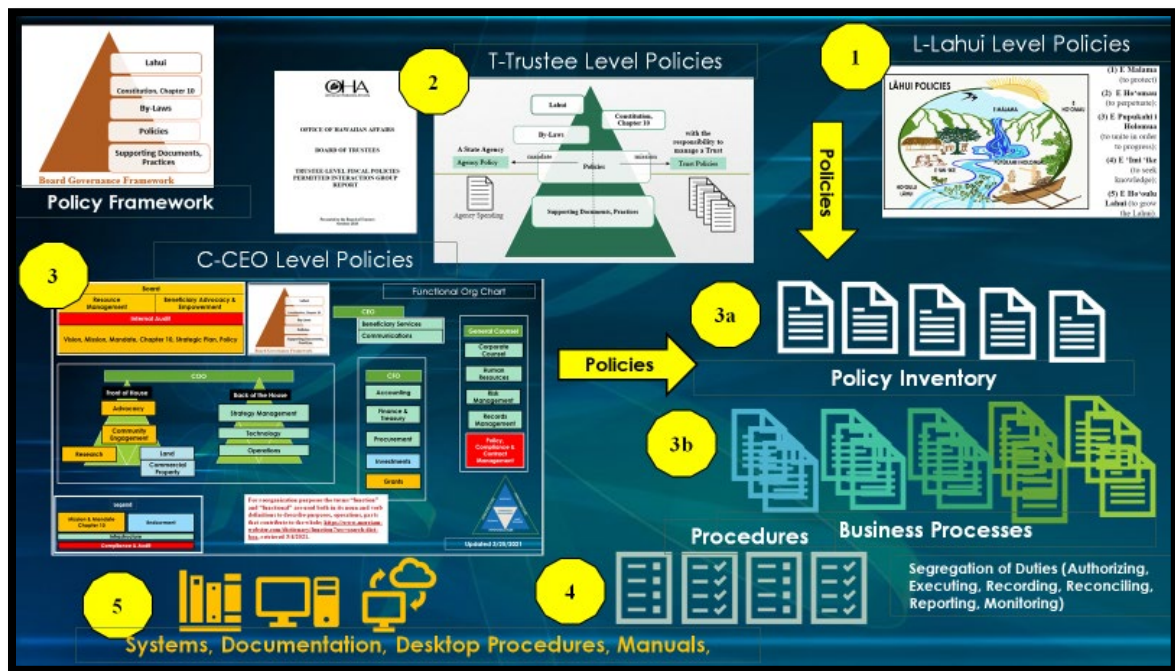
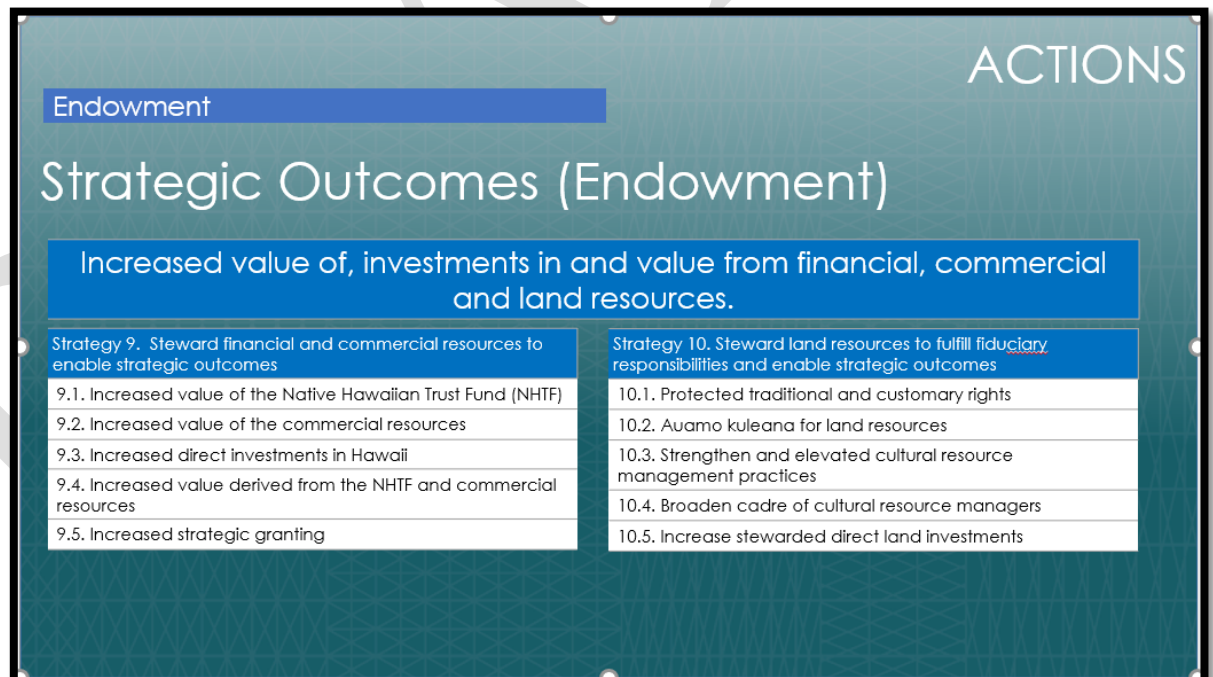


Figure 4 – Policy Framework (Depiction 2)

III. MANA I MAULI OLA ALIGNMENT

Figure 5 –
Strategic
Outcomes
(Endowment)



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IV. LEGAL, STATUTORY and/or REGULATORY POLICY BASIS

- A. Board of Trustees – Purposes of the Office [§10-3]** Hawai‘i Revised Statutes (HRS) Chapter 10 provides that OHA is meant to address the needs of the Native Hawaiian people, including: (1) The betterment of conditions of native Hawaiians; (2) The betterment of conditions of Hawaiians; (3) Serving as the principal public agency responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians; except that the Hawaiian Homes Commission Act, 1920, as amended, shall be administered by the Hawaiian homes commission; (4) Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians; (5) Applying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services; and (6) Serving as a receptacle for reparations.¹
- B. Board of Trustees – General Powers [§10-4]** (1) To adopt, amend and repeal bylaws governing the conduct of its business and the performance of the powers and duties granted to or imposed upon it by law; **BY-LAWS** (2) To acquire in any lawful manner any property, real, personal, or mixed, tangible or intangible, or any interest therein; to hold, maintain, use, and operate the same; and to sell, lease, or otherwise dispose of the same at such time, in such manner and to the extent necessary or appropriate to carry out its purpose; **REAL OR PERSONAL PROPERTY** (3) To determine the character of and the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid, subject to provisions of law specifically applicable to the office; **OBLIGATIONS AND EXPENDITURES** (4) To enter into and perform such contracts, leases, cooperative agreements, or other transactions with any agency or instrumentality of the United States, or with the State, or with any political subdivision thereof or with any person, firm, association, or corporation, as may be necessary in the conduct of its business and on such terms as it may deem appropriate; **CONTRACTS, LEASES, COOPERATIVE AGREEMENTS** (5) To execute, in accordance with its bylaws all instruments necessary or appropriate in the exercise of any of its powers; **EXECUTE INSTRUMENTS** (6) To issue revenue bonds pursuant to this chapter to finance the cost of an office project or to fund a loan program, and to provide for the security thereof, in the manner and pursuant to the procedure prescribed in part II; **REVENUE BONDS** (7) To lend or otherwise apply the proceeds of the bonds issued for an office project or a loan program either directly or through a trustee or a qualified person for use and application in the acquisition, purchase, construction, reconstruction, improvement, betterment, extension or maintenance of an office project or the establishment, funding, and administration of a loan program, or agree with the qualified person whereby any of these activities shall be undertaken or supervised by that qualified person or by a person designated by the qualified person; **REVENUE BONDS**; (8) With or without terminating a project agreement or loan agreement, as applicable, to exercise any and all rights provided by law for entry and re-entry upon or to take possession of an office project or enforce a loan agreement at any time or from time to time upon breach or default by a qualified person under a project agreement or loan agreement, including any

¹ [HRS §10-3](#); see also [HRS §10-1](#).

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action at law or in equity for the purpose of effecting its rights of entry or re-entry or obtaining possession of the project or enforcing the loan agreement or for the payments of rentals, user taxes, or charges, or any other sum due and payable by the qualified person to the office pursuant to the project agreement or loan agreement; and **PROJECT OR LOAN AGREEMENT; (9)** To take such actions as may be necessary or appropriate to carry out the powers conferred upon it by law. **ANY NECESSARY ACTION TO CARRY OUT POWERS**

C. Board of Trustees – General Powers [§10-4.5] (a)(b)(c) Authority over disbursements: (a) Except as provided in subsection (b), and notwithstanding any other law to the contrary, the office shall have and exercise the power to make all necessary and appropriate disbursements of its moneys by issuing checks in its own name by any other means. **DISBURSEMENTS/CHECK ISSUANCE** (b) The office shall have and exercise the power to deposit any of its moneys in any banking institution within or outside the State, to the extent necessary to implement subsection (a). **BANKING** The department of accounting and general services, with the approval of the office of Hawaiian affairs, may continue to perform the payroll function of the office, including the issuance of salary checks for the office's employees. **PAYROLL**

D. Department of Defense Instruction Number 4710.03, October 25, 2011, Incorporating Change 1, August 31, 2018 – Subject: Consultation with Native Hawaiian Organizations (Refer to IX. – Exhibit).

V. DEFINITIONS²

For purposes of policy formulation, articulation and implementation, working definitions are provided and remain the same for this policy and any associated policies:

- A. Armed Forces or Military:** Collective reference for any of the existing United States branches: Army, Navy, Air Force, Marine Corps, Space Force, Coast Guard and National Guard.
- B. DoD:** United States Department of Defense, an executive branch department of the federal government charged with coordinating and supervising all agencies and functions of the government directly related to national security and the United States Armed Forces.
- C. Native Hawaiian Organizations:** Organizations that serve and represent the interests of Native Hawaiians, have a primary and stated purpose of providing services to Native Hawaiians, and have expertise in Native Hawaiian affairs.

² Definitions drafted for this section were derived after looking up the word in the on-line dictionary (<https://www.merriam-webster.com/>) and choosing the appropriate context for the policy.

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VI. SCOPE AND DELEGATION OF POLICY AUTHORITY

- A. **Policy Amendment.** Trustees of the Office of Hawaiian Affairs (“Trustees”) collectively maintain the sole authority to amend this policy subsequent to a simple majority Board approval and two readings of the Board.³
- B. **Retention and Delegation of Authority.** The following table describes the delegation and retention of authority by the Board of Trustees:

Process	BOT	Administration
1. Amend Policy	Initiates Amendment	Assists in analysis(es), workshop(s), recommendation(s), including related Action Item(s) as needed
2. Approve Policy and/or Amendments	Retains the Authority to Approve	N/A
3. Retire or Replace Policy	Initiates Action	Assists in analysis(es), workshop(s), recommendation(s), including related Action Item(s) as needed
4. Create Related T-Trustee Level Policies	Initiates Amendment	Assists in analysis(es), workshop(s), recommendation(s), including related Action Item(s), as needed
5. Creation of Related C-CEO Policies to Articulate Implementation	Delegates the Authority to the Administrator	Refer to Section VI. Related C-CEO LEVEL POLICIES, if applicable

Table 1 – Retention and Delegation of Authority

³ Reference to the Executive Policy Manual (EPM) for process to be included here.

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VII. RELATED T-TRUSTEE LEVEL POLICIES

- A. **T-2022-XXXX: Protect Ceded Lands Policy** – A T-Trustee level policy which outlines [to be determined]
- B. **T-2022-XXXX: Protecting Iwi Kupuna, Including Repatriation, Policy** - A T-Trustee level policy which outlines [to be determined]
- C. **T-2022-XXXX: International Engagement Policy** - A T-Trustee level policy which outlines [to be determined]
- D. **T-2022-XXXX: Advocacy Policy** - A T-Trustee level A T-Trustee level policy which [to be determined]
- E. **T-2022-XXXX: Water Policy** - A T-Trustee level A T-Trustee level policy which [to be determined]
- F. **T-2022-XXXX: ‘Āina Policy** - A T-Trustee level A T-Trustee level policy which [to be determined]

VIII. CONTACT

The following organizational unit and position should be contacted regarding this policy and/or its implementation.

Organizational Unit	Position
Board of Trustees	Chair, Beneficiary Advocacy & Empowerment Committee

- IX. **EXHIBIT** - Department of Defense Instruction, Number 4710.03 October 25, 2011, Incorporating Change 1, August 31, 2018



Department of Defense INSTRUCTION

NUMBER 4710.03

October 25, 2011

Incorporating Change 1, August 31, 2018

USD(A&S)

SUBJECT: Consultation With Native Hawaiian Organizations (NHOs)

References: See Enclosure 1

1. PURPOSE. This Instruction:

a. Reissues Directive-Type Memorandum 11-001 (Reference (a)) as a DoD Instruction in accordance with the authority in DoD Directive 5134.01 (Reference (b)).

b. Establishes policy and assigns responsibilities for DoD consultation with NHOs when proposing actions that may affect a property or place of traditional religious and cultural importance to an NHO.

c. Provides the DoD Components in Hawaii with a framework to develop localized processes to facilitate consultation.

2. APPLICABILITY. This Instruction:

a. Applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the DoD (IG DoD), the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD with consultation responsibilities to NHOs (hereinafter referred to collectively as the "DoD Components").

b. Is intended only to improve the internal management of the DoD Components regarding their consultation responsibilities and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the DoD, its Components, officers, or any person.

3. DEFINITIONS. See Glossary.

4. POLICY. It is DoD policy that:

a. The DoD respects the traditions and cultures of all native peoples of the United States as well as the strong desire of Native Hawaiians to maintain their rich history and tradition amidst other prevalent influences in American society.

b. The DoD recognizes the special status afforded NHOs by the U.S. Government through various Federal laws, regulations, and policy. The Military Services' long presence in Hawaii has provided the DoD with a strong appreciation for the importance of consultation when proposing actions that may affect a property or place of traditional religious and cultural importance to an NHO.

c. The DoD shall conduct meaningful consultation for the purpose of avoiding or minimizing, to the extent practicable and consistent with law, the effects of DoD Component actions on a property or place of traditional religious and cultural importance to an NHO.

5. RESPONSIBILITIES. See Enclosure 2.

6. PROCEDURES. Enclosure 3 provides procedures and requirements for when, with whom, and how to consult with NHOs, including considerations for natural and cultural resources.

7. RELEASABILITY. UNLIMITED. This Instruction is approved for public release and is available on the Internet from the DoD Issuances Website at <http://www.dtic.mil/whs/directives>.

8. SUMMARY OF CHANGE 1. This change reassigns the office of primary responsibility for this Instruction to the Under Secretary of Defense for Acquisition and Sustainment in accordance with the July 13, 2018 Deputy Secretary of Defense Memorandum (Reference (c)).

9. EFFECTIVE DATE. This Instruction is effective upon its publication to the DoD Issuances Website.



Frank Kendall
Acting Under Secretary of Defense for
Acquisition, Technology, and Logistics

Enclosures

1. References

2. Responsibilities
3. Procedures
4. Compliance Measures of Merit

Glossary

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ENCLOSURE 1REFERENCES

- (a) Directive-Type Memorandum 11-001, “Consultation with Native Hawaiian Organizations,” February 3, 2011 (hereby cancelled)
- (b) DoD Directive 5134.01, “Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)),” December 9, 2005
- (c) Deputy Secretary of Defense Memorandum, “Establishment of the Office of the Under Secretary of Defense for Research and Engineering and the Office of the Under Secretary of Defense for Acquisition and Sustainment,” July 13, 2018
- (d) Sections 691-716 of title 48, United States Code (also known as “The Hawaiian Homes Commission Act, as amended”)
- (e) Public Law 86-3, “The Admission Act,” March 18, 1959
- (f) Sections 4321-4370f¹ and 2000bb-1² of title 42, United States Code
- (g) Sections 470-470x-6 of title 16, United States Code (also known as “The National Historic Preservation Act of 1966 (NHPA), as amended”)
- (h) Sections 3001-3013 of title 25, United States Code (also known as “The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), as amended”)
- (i) DoD Instruction 4710.02, “DoD Interactions with Federally-Recognized Tribes,” September 14, 2006
- (j) Public Law 103-150, “Overthrow of Hawaii,” November 23, 1993 (also known as “The Apology Resolution”)

¹ Also known as “The National Environmental Policy Act of 1969, as amended”

² Also known as “The Religious Freedom Restoration Act of 1993, as amended”

ENCLOSURE 2

RESPONSIBILITIES

1. UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY AND LOGISTICS (USD(AT&L)). The USD(AT&L) shall establish DoD policy for interactions with federally recognized tribes and requirements for DoD consultation with NHOs.

2. DEPUTY UNDER SECRETARY OF DEFENSE FOR INSTALLATIONS AND ENVIRONMENT (DUSD(I&E)). The DUSD(I&E), under the authority, direction, and control of the USD(AT&L), shall:

- a. Develop policy and guidance for interactions with federally recognized tribes and for consultation with NHOs.
- b. Designate responsibilities and provide procedures for DoD consultation with NHOs.
- c. Enhance DoD Component understanding of NHO issues and concerns through education and training programs and outreach activities.
- d. Assist the DoD Components in identifying requirements of Presidential Memorandums, Executive orders, statutes, and regulations governing DoD consultations with NHOs.
- e. Designate an NHO liaison within the Office of the DUSD(I&E) (ODUSD(I&E)) to coordinate DoD consultation activities.
- f. As requested, assist the DoD Components with consultation with NHOs.

3. HEADS OF THE DoD COMPONENTS WITH CONSULTATION RESPONSIBILITIES TO NHOs. The Heads of the DoD Components with consultation responsibilities to NHOs shall:

- a. Ensure compliance with the applicable requirements of Presidential Memorandums, Executive orders, statutes, and regulations regarding DoD consultations with NHOs, and integrate required consultation activities into mission activities in order to facilitate early and meaningful consultation.
- b. Plan, program, and budget for Presidential Memorandum, Executive order, statutory, and regulatory requirements applicable to consultation with NHOs consistent with DoD guidance and fiscal policies, and within available resources.
- c. Ensure that consultation with NHOs occurs in accordance with Enclosure 3 of this Instruction.

- d. Notify the DUSD(I&E) of NHO issues that are controversial, cannot be resolved at the DoD Component level, and have the potential to be elevated to the USD(AT&L) for resolution.
- e. Assign NHO liaison responsibilities to staff at the headquarters level to coordinate NHO consultation issues with ODUSD(I&E).
- f. Assign a point of contact in Hawaii to ensure that NHO inquiries are channeled to appropriate officials and responded to in a timely manner.
- g. Develop consultation procedures and provide cultural communications training for military and civilian personnel with consultation responsibilities.

ENCLOSURE 3

PROCEDURES

1. WHEN TO CONSULT

a. The DoD Components shall consult with NHOs:

(1) When proposing an undertaking that may affect a property or place of traditional religious and/or cultural importance to an NHO.

(2) When receiving notice of or otherwise becoming aware of an inadvertent discovery or planned activity that has resulted or may result in the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal lands or lands administered for the benefit of Native Hawaiians pursuant to sections 691-716 of title 8, United States Code (U.S.C.) (also known as “The Hawaiian Homes Commission Act, as amended”) (Reference (d)) and section 4 of Public Law 86-3 (Reference (e)).

(3) When proposing an action that may affect a long term or permanent change in NHO access to a property or place of traditional religious and cultural importance to an NHO.

(4) When proposing an action that may substantially burden a Native Hawaiian’s exercise of religion (as defined in the Glossary).

(5) When proposing an action that may affect a property or place of traditional religious and cultural importance to an NHO or subsistence practices, and for which the DoD Components have an obligation to consult pursuant to sections 4321-4370f of title 42, U.S.C. (also known as “The National Environmental Policy Act of 1969, as amended” (Reference (f))) or any other statute, regulation, or Executive order.

b. The DoD Components shall conduct their consultation activities early enough in the DoD project planning process to allow the information provided to be meaningfully considered by DoD project planners and decision makers.

c. Recognizing that consultation is most effective when conducted in the context of an ongoing relationship, the DoD Components are encouraged to, insofar as practicable, establish and maintain relationships with NHOs separate from consultations related to specific actions. As part of this effort, the DoD Components and NHOs may exchange information related to operational and mission requirements, concerns about stewardship of important cultural resources and culturally-important natural resources, procedures to streamline action-specific consultations, and long-term planning.

2. WHOM TO CONSULT

a. The DoD Components shall make a reasonable and good faith effort to contact and consult with NHOs whose members perform cultural, religious, or subsistence customs and practices in an area that may be affected by a proposed DoD Component activity in Hawaii.

b. As a State of Hawaii organization established to promote the interests of Native Hawaiians, the Office of Hawaiian Affairs (OHA) (see <http://www.oha.org/>) may provide the DoD Components with up-to-date information and recommendations for appropriate contacts relative to a particular proposed action. OHA may also assist the DoD Components with consultation through dissemination of notices and announcements of proposed DoD Component actions that may affect resources of religious and cultural importance to NHOs.

c. As a practical matter, the DoD Components may find it helpful to contact:

(1) Individual Native Hawaiians and others who may have specific knowledge about the history and culture of an area that may have the potential to be adversely affected by a proposed DoD Component action.

(2) Individual Native Hawaiians and others who live near an area that may be affected by a proposed DoD Component activity and who regularly use the area for cultural, religious, or subsistence purposes.

(3) The U.S. Department of Interior, Office of Hawaiian Relations, which maintains an NHO Notification List at <http://www.doi.gov/ohr/nativehawaiians/list.html>.

(4) The Hawaii State Historic Preservation Officer at <http://hawaii.gov/dlnr/hpd/hpgreeting.htm>.

3. HOW TO CONSULT. The DoD Components shall fully integrate, including staff officers at the installation level, the principles and practices of meaningful consultation and communication with NHOs by:

a. Providing interested NHOs an opportunity to participate in pre-decision consultation that will ensure that NHO concerns are given due consideration whenever a DoD Component proposes an action that may affect historic properties or places of traditional religious and cultural importance to an NHO as defined by sections 470-470x-6 of title 16, U.S.C. (also known and hereinafter referred to as “The National Historic Preservation Act of 1966 (NHPA), as amended” (Reference (g))).

b. Considering the advice and recommendations of OHA to facilitate effective consultation between NHOs and DoD Components, with the understanding that no single NHO is likely to represent the interests of all NHOs.

c. Consulting in good faith, whenever a DoD Component proposes an action that may adversely affect resources of traditional religious or cultural importance to NHOs, and for which the DoD Components have an obligation to consult under any Presidential Memorandum, statute, regulation, or Executive order.

d. Initiating and maintaining effective communication with NHOs using tools and techniques designed to facilitate greater understanding and participation.

e. Providing continuity by ensuring new commanders are provided, as soon as possible, information regarding existing written agreements between the installation and NHOs, points of contact, and NHO areas of special interest concerning installation activities.

f. Recognizing the importance of improving communication between the DoD Components and NHOs by establishing a process for outreach regarding DoD activities that may have an effect on a property or place of traditional religious and cultural importance to an NHO or subsistence practices on each island to foster a positive relationship between the DoD Components in Hawaii and NHOs.

g. Involving the Hawaii State Historic Preservation Officer in consultations in accordance with NHPA, and, with respect to sections 3001-3013 of title 25, U.S.C. (also known and hereinafter referred to as “The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), as amended” (Reference (h))), appropriate Burial Councils.

4. CULTURAL AND NATURAL RESOURCE CONSIDERATIONS. The DoD Components shall recognize and respect the significance that NHOs give to resources of traditional religious and cultural importance by:

a. Undertaking DoD Component actions and managing DoD lands and water resources so as to protect and preserve, to the extent practicable and consistent with the law and operational and readiness requirements, places that NHOs have identified, consistent with law, as being of particular significance to Native Hawaiian traditional religious and/or cultural practices.

b. Enhancing the ability of NHOs to help the DoD Components protect and manage a natural resource that is also a property or place of traditional religious and cultural importance to an NHO on DoD lands, through NHO participation in the development of Integrated Cultural Resource Management Plans (ICRMP).

c. Accommodating, to the extent practicable and consistent with the safety of NHO representatives, military training, security, and readiness requirements, NHO access to a property or place of traditional religious and cultural importance to an NHO for religious or cultural activities.

d. Developing written agreements to the extent practicable, appropriate, or required, among the DoD Components, the Secretary of the Interior, and NHOs to protect confidential information regarding a property or place of traditional religious and cultural importance to an NHO.

e. Developing written agreements, to the extent practicable, appropriate, or required, between the DoD Components and the Hawaii State Historic Preservation Officer, in consultation with NHOs, to address the effects of proposed DoD undertakings on a property or place of traditional religious and cultural importance to an NHO.

ENCLOSURE 4COMPLIANCE MEASURES OF MERIT

1. POLICY IMPLEMENTATION. The ODUSD(I&E) shall assess the number of DoD Components that have incorporated a process for consultation with NHOs as part of an ICRMP when a property or place of traditional religious and cultural importance to an NHO has been identified.
2. NAGPRA. The ODUSD(I&E) shall assess compliance with NAGPRA in accordance with the compliance measures of merit included in DoDI 4710.02 (Reference (i)).

GLOSSARY

PART I. ABBREVIATIONS AND ACRONYMS

DUSD(I&E)	Deputy Under Secretary of Defense for Installations and Environment
ICRMP	Integrated Cultural Resource Management Plans
NAGPRA	Native American Graves Protection and Repatriation Act of 1990
NHOs	Native Hawaiian Organizations
NHPA	National Historic Preservation Act of 1966
ODUSD(I&E)	Office of the Deputy Under Secretary of Defense for Installations and Environment
OHA	Office of Hawaiian Affairs
U.S.C.	United States Code
USD(AT&L)	Under Secretary of Defense for Acquisition, Technology and Logistics

PART II. DEFINITIONS

Unless otherwise noted, these terms and their definitions are for the purpose of this Instruction.

consultation. Seeking, discussing, and considering the views of other participants and, when feasible, seeking a mutually acceptable understanding regarding the matters at hand. As appropriate to the circumstances, consultation may include, but is not limited to, the exchange of written communications, face-to-face discussions, and telephonic or other means of exchanging information and ideas.

cultural patrimony. Defined in section 2(3)(D) of Reference (h).

culturally affiliated. Defined in section 2(2) of Reference (h).

exercise of religion. Defined in section 2000bb-1 of Reference (f) (also known as “The Religious Freedom Restoration Act of 1993, as amended”).

human remains, funerary objects, sacred objects, or objects of cultural patrimony. Defined in Reference (h).

Native Hawaiian. Defined in Public Law 103-150 (also known as “The Apology Resolution” (Reference (j))).

NHOs. Organizations that serve and represent the interests of Native Hawaiians have a primary and stated purpose of providing services to Native Hawaiians, and have expertise in Native Hawaiian affairs. Pursuant to NHPA and NAGPRA, NHOs include OHA and Hui Malama I Na Kupuna ‘O Hawai’I Nei (see <http://huimalama.tripod.com/>). The DoD Components may identify any other organization as an NHO if they determine that the organization meets the criteria in this definition.

ATTACHMENT 7



Preserving America's Heritage

Consultation with Native Hawaiian Organizations In The Section 106 Review Process: A Handbook

January 2020

The Advisory Council on Historic Preservation, an independent federal agency, promotes the preservation, enhancement, and sustainable use of the nation's diverse historic resources and advises the President and the Congress on national historic preservation policy.

Aimee Jorjani is chairman of the 24-member council, which is served by a professional staff with offices in Washington D.C. For more information about the ACHP contact:

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Consultation with Native Hawaiian Organizations in the Section 106 Review Process: A Handbook

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I. About This Handbook

Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. Section 470f, requires federal agencies to take into account the effects of their undertakings on historic properties and provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on those undertakings. The ACHP has issued the regulations implementing Section 106 (Section 106 regulations), 36 CFR Part 800, “Protection of Historic Properties.” The NHPA requires that, in carrying out the requirements of Section 106, each federal agency must consult with any Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by the agency’s undertakings.

In 2008, the ACHP adopted the [*ACHP Policy Statement on the ACHP’s Interaction with Native Hawaiian Organizations*](#). The policy is intended to set “forth actions the ACHP will take to oversee the implementation of its responsibilities under the NHPA with respect to the role afforded to Native Hawaiian organizations in the NHPA.” The policy includes three principles:

1. The ACHP acknowledges Native Hawaiian traditional cultural knowledge, beliefs and practices and recognized their value in the understanding and preservation of historic properties in Hawaii;
2. The ACHP commits to working with Native Hawaiian organizations to fully consider the preservation of historic properties of importance to them; and,
3. The ACHP acknowledges the important contributions of Native Hawaiian organizations to the national historic preservation program.

While the policy does not directly apply to other federal agencies, it serves as a model for how federal agencies should interact with Native Hawaiian organizations in meeting their Section 106 responsibilities. At the very least, it serves to inform federal agencies of the ACHP’s position regarding the role of Native Hawaiian organizations in the Section 106 process.

In fulfillment of the commitments in the policy statement, the ACHP offers this handbook as a reference for federal agency staff in Hawaii with responsibility for compliance with Section 106. Native Hawaiian organizations, State Historic Preservation Office (SHPO) staff, and other Section 106 participants may also find this handbook helpful. Readers should have a basic understanding of the Section 106 review process because this document focuses only on Section 106 consultation with Native Hawaiian organizations. It is not a source for understanding the full breadth of Section 106 responsibilities such as consulting with the SHPO or involving the public.

This handbook will be updated periodically by the ACHP when new information is obtained or laws or policies change. Agencies should also supplement this document with their own agency-specific directives, policies, and guidance pertaining to consultation with Native Hawaiian organizations.

In addition, federal agency staff may refer questions about the Section 106 review process, and the requirements to consult with Native Hawaiian organizations, to their agency’s Federal Preservation Officer (FPO).

Finally, agency staff may obtain assistance from the ACHP in understanding and interpreting the requirements of Section 106. For general information on the requirements of Section 106, access the ACHP website at <http://www.achp.gov>. For additional questions about Native Hawaiian organization consultation, contact:

Office of Native American Affairs
Advisory Council on Historic Preservation
401 F Street, NW
Suite 308
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II. Federal Government Consultation with Native Hawaiian organizations

A. Legal Requirements and Directives to Consult with Native Hawaiian organizations

1) Statutes

A number of federal statutes require federal agencies to consult with Native Hawaiian organizations¹. This section will address only those applicable to historic preservation and cultural resource protection. It is useful to be familiar with various statutory requirements not only to ensure compliance, but also to explore opportunities to maximize consultation opportunities. For instance, if a project requires compliance with both Section 106 of the NHPA and the Native American Graves Protection and Repatriation Act (NAGPRA), it may be helpful to carry out consultation in a comprehensive manner. However, consultation under another statute or regulation does not satisfy the consultation requirements under Section 106.

The following are broad summaries of key federal historic preservation and cultural resource protection statutes that require federal agencies to consult with Native Hawaiian organizations or accommodate Native Hawaiian views and practices. This is not an exhaustive list of requirements, nor does it imply that each of these statutes is applicable to each proposed project.

- Amended in 1992, the **National Historic Preservation Act of 1966 (NHPA)** is the basis for Native Hawaiian organization consultation in the Section 106 review process. The two amended sections of NHPA that have a direct bearing on the Section 106 review process are:
 - Section 101(d)(6)(A), which clarifies that properties of religious and cultural significance to Native Hawaiian organizations may be eligible for listing in the National Register of Historic Places; and
 - Section 101(d)(6)(B), which requires that federal agencies, in carrying out their Section 106 responsibilities, consult with any Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking.

The Section 106 regulations incorporate these provisions. Section 106 requires federal agencies to consider the effects of their undertakings on historic properties and to provide the ACHP an opportunity to comment. Also known as the Section 106 review process, it seeks to avoid unnecessary harm to historic properties from such undertakings. The procedure for meeting Section 106 requirements is defined in the Section 106 regulations, [36 CFR Part 800, “Protection of Historic Properties.”](#)²

The Section 106 regulations include both general direction regarding consultation with Native Hawaiian organizations and specific requirements at each stage of the review process. (Section 106 is discussed

¹ The NHPA defines a Native Hawaiian organization as “any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians. The term includes, but is not limited to, the Office of Hawaiian Affairs of the State of Hawaii and Hui Malama I Na Kupuna O Hawai’i Nei, an organization incorporated under the laws of the State of Hawaii.” 16 U.S.C. Section 470w(18). The NHPA defines Native Hawaiian as “any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.” 16 U.S.C. Section 470w(17).

² Available at <https://www.achp.gov/sites/default/files/regulations/2017-02/regs-rev04.pdf>

more fully in the next section, “Consultation with Native Hawaiian organizations under Section 106 of NHPA”).

For more information about the NHPA and the Section 106 regulations, visit www.achp.gov

Other relevant laws include:

- **The American Indian Religious Freedom Act of 1978 (AIRFA)** establishes the policy of the federal government “to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including, but not limited to, access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.” For a copy of the act, go to: http://www.nps.gov/history/local-law/FHPL_IndianRelFreAct.pdf.
- **Section 3(c) of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)** requires federal land-managing agencies to consult with Native Hawaiian organizations prior to the intentional removal or excavation of Native American human remains and other cultural items as defined in NAGPRA from federal lands. For more information, to go: <https://www.nps.gov/archeology/tools/laws/nagpra.htm>.

In instances where a proposed project that is funded or licensed by a federal agency may cross federal lands, it is the federal land managing agency that is responsible for compliance with NAGPRA. Detailed information about NAGPRA and its implementing regulations is available at the National Park Service (NPS) National NAGPRA website.³

Federal agencies should also be aware that Hawaii has state laws regarding historic preservation and the treatment of burials. For more information, go to: <http://hawaii.gov/dlnr/hpd/hphrs.htm>.

³ Available at <https://www.nps.gov/subjects/nagpra/index.htm>

III. Consultation with Native Hawaiian organizations in the Section 106 Process

Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process. (36 CFR Section 800.16 (f)).

Consultation constitutes more than simply notifying a Native Hawaiian organization about a planned undertaking. The ACHP views consultation as a process of communication that may include written correspondence, meetings, telephone conferences, site visits, and e-mails.

The requirements to consult with Native Hawaiian organizations in the Section 106 review process are derived from the specific language of Section 101(d)(6)(B) of NHPA.

While federal agencies are required to consult with Native Hawaiian organizations at specific steps in the Section 106 review process, the ACHP suggests that agencies approach consultation with flexibility and in a spirit of cooperation. In fact, in its *Policy Statement on the ACHP's Interaction with Native Hawaiian Organizations*, the ACHP states that “the NHPA and the regulations implementing Section 106 of the NHPA, 36 C.F.R. Part 800, set the minimum standards for federal agency interaction with its preservation partners.”

Carrying out the process in the spirit and intent of the NHPA can lead to less adversarial relationships and better historic preservation outcomes. In fact, many Native Hawaiians believe that it is the *kuleana* (responsibility) of federal agencies to protect historic properties. Thus, a collegial or cooperative attitude or approach to the Section 106 process builds trust and good working relationships.

Regulatory Principles and General Directions for Section 106 Native Hawaiian Consultation

The procedures for meeting Section 106 requirements are defined in the Section 106 regulations, “Protection of Historic Properties” (36 CFR Part 800).⁴ Under the NHPA, “historic properties” are defined as those properties that are listed on the National Register of Historic Places, or are eligible for such listing.

The regulations provide both overall direction as well as specific requirements regarding consultation at each step of the Section 106 review process. The Section 106 regulations at 36 CFR Section 800.2(c)(2) outline the following important principles and general directions to federal agencies regarding consultation with Native Hawaiian organizations:

- The agency shall ensure that consultation provides the Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties; advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance to it; articulate its views on the undertaking's effects on such properties; and participate in the resolution of adverse effects.
- Consultation with Native Hawaiian organizations should commence early in the planning process, in order to identify and discuss relevant preservation issues and plan how to address concerns about confidentiality of information obtained during the consultation process.
- Historic properties of religious and cultural significance to a Native Hawaiian organization may be located on ancestral or ceded lands, e.g. Hawaiian Homelands. For historical reasons, members of a Native Hawaiian organization may now be located on another Hawaiian island or other distant location far away from historic properties that still hold such significance for them. Accordingly, the

⁴ Available at <https://www.achp.gov/sites/default/files/regulations/2017-02/regs-rev04.pdf>

regulations require that agencies make a *reasonable and good-faith effort*⁵ to identify Native Hawaiian organizations that may attach religious and cultural significance to historic properties that may be affected by the undertaking, even if Native Hawaiian organizations now are located a great distance away from such properties and undertakings.

- A Native Hawaiian organization may enter into an agreement with a federal agency regarding any aspect of that organization's participation in the review process. The agreement may specify a Native Hawaiian organization's geographic area of interest, types of projects about which it wishes to be consulted, or provide the Native Hawaiian organization with additional participation or concurrence in agency decisions under Section 106 provided that no modification is made to the roles of other parties without their consent.

While the Section 106 regulations are fairly prescriptive in nature, they only direct agencies on what to do and at which stages of the process to engage in consultation. They do not direct agencies on exactly how to otherwise carry out consultation. Thus, the following questions and answers are designed to clarify the most common questions and issues regarding consultation with Native Hawaiian organizations under the Section 106 review process.

⁵ Tips on how to fulfill this requirement are provided under the heading "How do I identify Native Hawaiian organizations that must be invited to consult," on page 11 of this handbook.

IV. General Questions and Answers

The following list of questions is meant to address general issues that commonly arise in the Section 106 review process, typically before an agency begins the review process or very early in the process. Section V of this Handbook addresses questions that might arise at each step of the Section 106 review process.

When are federal agencies required to consult with Native Hawaiian organizations?

The 1992 amendments to the NHPA require federal agencies, in carrying out the Section 106 review process, to consult with Native Hawaiian organizations when a federal undertaking may affect historic properties of traditional religious and cultural significance to them. An “undertaking” means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; or those requiring a federal permit, license or approval. This requirement applies to all undertakings regardless of where they are located.

The Section 106 regulations, 36 CFR Part 800, identify the steps in the Section 106 process when consultation must take place. It is important to keep in mind that consultation should take place early in project planning when the widest possible range of alternatives still exists.

It is also important to understand that Native Hawaiian organizations are not the “general public” for purposes of the NHPA and the Section 106 process. Federal agencies have a statutory, affirmative responsibility to consult with Native Hawaiian organizations and this responsibility cannot be satisfied through public notices or public meetings. NHOs can certainly participate in public meetings but such participation is not a substitute for the consultation required under the NHPA and laid out in the Section 106 regulations.

Which Native Hawaiian organizations must be consulted?

Native Hawaiian organizations that attach religious and cultural significance to historic properties that may be affected by undertakings must be consulted. Federal agencies must make “a reasonable and good faith” effort⁶ to identify each and every such Native Hawaiian organization and invite them to be consulting parties in the Section 106 review process.

This includes Native Hawaiian organizations that live nearby as well as those that no longer reside in or near the project area but that, for example, may still have ancestral ties to that area. It is also possible that a Native Hawaiian organization attaches religious and cultural significance to a historic property on another island. For example, Mauna Kea, on the island of Hawaii, is widely regarded as a place of religious and cultural significance to many individual Native Hawaiians and Native Hawaiian organizations throughout the state of Hawaii. Accordingly, a proposed undertaking that might affect Mauna Kea could necessitate consultation with Native Hawaiian organizations throughout the state.

If a Native Hawaiian organization has not been invited by the agency to consult, that organization may request in writing to be a consulting party. The NHPA and the Section 106 regulations require that the agency grant consulting party status to any Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by the undertaking.

Must a Native Hawaiian organization demonstrate its affiliation to an area to be considered a

⁶ Tips on how to fulfill this requirement are provided under the heading “How do I identify Native Hawaiian organizations that must be invited to consult,” on page 11 of this handbook.

consulting party in the Section 106 process?

No. A Native Hawaiian organization does not have to demonstrate its cultural affiliation in order to be a consulting party in the Section 106 process. The term “cultural affiliation” is used in the Native American Graves Protection and Repatriation Act and has no relevance in the Section 106 review process. In fact, the NHPA at Section 101(d)(6)(B) states that “in carrying out its responsibilities under section 106 of this Act, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties” that are eligible for inclusion in the National Register. Therefore, **any** Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking *must* be invited by the federal agency to participate in the Section 106 consultation process.

What should a federal agency do if one NHO will not participate in the consultation process with another NHO or demands that the agency not consult with another NHO?

It is important to remember that the NHPA requires a federal agency to consult with *any* Native Hawaiian organization that attaches religious and cultural significance to a historic property. Therefore, the views of one Native Hawaiian organization regarding the participation of another Native Hawaiian organization have no bearing on a federal agency’s obligation to extend an invitation to consult.

If such conflicts arise in the Section 106 process, the federal agency should approach consultation with flexibility. For instance, it may be necessary to conduct meetings or teleconferences separately with each consulting party.

What are appropriate consultation methods for individual undertakings?

The consultation process must provide a Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties; advise on the identification and evaluation of historic properties, including those of religious and cultural significance to it; articulate views on the undertaking’s effects on such properties; and participate in the resolution of adverse effects. (See 36 CFR Section 800.2(c)(2)(ii)(A)).

Appropriate consultation can take many forms or combine more than one type of interaction and should be commensurate with the nature of the undertaking and the properties which may be affected. For instance, face-to-face meetings or on-site visits may be the most practical way to conduct consultation. However, there is no specific way in which consultation must be conducted beyond the procedural specifics provided in the Section 106 regulations. In all cases, however, consultation should be approached with flexibility that respects the Native Hawaiian organization’s role within the overall project planning process and facilitates its full participation.

Documentation of consultation is important because it allows consulting parties to more accurately track the stages of the Section 106 process. Federal agencies should document all efforts to initiate consultation with Native Hawaiian organizations, as well as documenting the consultation process once it has begun. Such documentation, in the form of correspondence, telephone logs, e-mails, etc., should be included in the agency’s official Section 106 record. Agencies should also keep notes so that the consultation record documents the *content* of consultation meetings, site visits, and phone calls in addition to information about dates and who participated. Doing so allows agencies and consulting parties to review proceedings and correct any errors or omissions, thus facilitating better overall communication. Keeping information confidential can present unique challenges (see Section V(B)(4) of this handbook).

Finally, a federal agency and a Native Hawaiian organization may enter into an agreement in accordance

with the Section 106 regulations at 36 CFR Section 800.2(c)(2)(ii)(E) regarding how Section 106 consultation will take place. These are not project-specific agreements but, instead, are meant to address Section 106 consultation more broadly. Such agreements can cover all potential agency undertakings, or apply only to a specific undertaking. They can establish protocols for carrying out consultation, including how the agency will address concerns about confidentiality of sensitive information. Such agreements can cover all aspects of the Section 106 process, provided that no modification is made to the roles of other parties to the Section 106 process without their consent. Determining the types of undertakings and the potential geographic project areas within which a Native Hawaiian organization wants to be consulted, and how that consultation will take place can lead to tremendous efficiencies for both the federal agency and the Native Hawaiian organization. Filing such agreements with both the Hawaii SHPO and the ACHP is required per 36 CFR Section 800.2(c)(2)(ii)(E), and can eliminate questions about consultation with a Native Hawaiian organization when either the SHPO or the ACHP is reviewing a proposed undertaking. For more information about these types of agreements, see Section VI on Consultation Tools.

Can a federal agency pay for expenses that facilitate consultation with Native Hawaiian organizations?

Yes. The NHPA authorizes such expenditures, at 16 U.S.C. Section 470h-2(g), and the ACHP encourages federal agencies to take the steps necessary to facilitate Native Hawaiian organization participation at all stages of the Section 106 process. These steps may range from scheduling meetings in places and at times that are convenient for Native Hawaiian organizations, to paying travel expenses for participating Native Hawaiian organization representatives. Indeed, agencies are strongly encouraged to use available resources to help overcome financial impediments to effective Native Hawaiian organization participation in the Section 106 process. However, federal agencies should not expect to pay a fee to any consulting party to provide comments or concurrence in an agency finding or determination.

Can a federal agency pay a fee to a Native Hawaiian organization for services provided in the Section 106 process?

Yes. However, it should be noted that while the ACHP encourages agencies to utilize their resources to facilitate working with Native Hawaiian organizations, the NHPA or the ACHP's regulations do not require an agency or an applicant to pay for any form of Native Hawaiian organization involvement.

However, during the identification and evaluation phase of the Section 106 process, when the agency or applicant is carrying out its duty to identify historic properties that may be significant to a Native Hawaiian organization, it might ask a Native Hawaiian organization for specific information and documentation regarding the location, nature, and condition of individual sites, or even request that a survey be conducted by the Native Hawaiian organization. In doing so, the agency or applicant is essentially asking the Native Hawaiian organization to fulfill the duties of the agency in a role similar to that of a consultant or contractor. In such cases, the Native Hawaiian organization would be justified in requesting payment for its services, just as is appropriate for any other contractor. Since Native Hawaiian organizations are a recognized source of information regarding historic properties of religious and cultural significance to them, federal agencies should reasonably expect to pay for work carried out by Native Hawaiian organizations on behalf of the agency. The agency or applicant is free to refuse just as it may refuse to pay for an archaeological consultant, but the agency still retains the responsibility for obtaining the necessary information for the identification of historic properties, the evaluation of their National Register eligibility, and the assessment of effects on those historic properties, through reasonable methods.

It should be noted that reimbursing any party, including Native Hawaiian organizations, for work they perform on behalf of the federal agency is not reimbursement for consultation. Consulting parties should

not be expected to be reimbursed for participating in the consultation process.

What specific activities might be reimbursed?

Examples of reimbursable costs may include those costs associated with expert consultants to identify and evaluate historic properties as outlined in the immediately preceding answer. This may include field visits to provide information about specific places or sites, monitoring activities, research associated with historical investigation, documentation production costs, and related travel expenses.

Can Native Hawaiian organizations, as well as federal agencies, request ACHP involvement in the Section 106 review process?

Yes. Any party, including Native Hawaiian organizations, may request that the ACHP review the substance of any federal agency's finding, determination, or decision or the adequacy of an agency's compliance with the Section 106 regulations.

A Native Hawaiian organization may request that the ACHP enter the Section 106 review process for any number of reasons, including concerns about the identification, evaluation or assessment of effects on historic properties of religious and cultural significance to it. It may also request ACHP involvement in the resolution of adverse effects or where there are questions about policy, interpretation, or precedent under Section 106. The ACHP has discretion in determining whether to become involved in the process whether upon request or its own initiative.

Does the ACHP have a policy on the treatment of Native American burials that are located on state or private lands (and thus not subject to the disinterment provisions of NAGPRA)?

Yes. On February 23, 2007, the members of the ACHP unanimously adopted its revised "Policy Statement Regarding the Treatment of Burial Sites, Human Remains and Funerary Objects." This policy is designed to guide federal agencies in making decisions about the identification and treatment of burial sites, human remains, and funerary objects encountered in the Section 106 process in various instances including those where federal or state law does not prescribe a course of action. The policy is not exclusively directed toward Native American burials, human remains or funerary objects, but those would be included under the policy. In accordance with Section 106, the policy does not recommend a specific outcome from the consultation process, but rather focuses on issues and perspectives that federal agencies ought to consider when making their Section 106 decisions. The policy is available at <https://www.achp.gov/sites/default/files/policies/2018-06/ACHPPolicyStatementRegardingTreatmentofBurialSitesHumanRemainsandFuneraryObjects0207.pdf>.

Federal agencies should be aware there is a state law in Hawaii regarding burials. For more information, go to <http://hawaii.gov/dlnr/hpd>.

V. Consultation with Native Hawaiian Organizations for Proposed Undertakings

As noted earlier in the handbook, under the NHPA, consultation with Native Hawaiian organizations is required for *all* federal undertakings, regardless of whether the undertaking's Area of Potential Effect (APE) includes federal, state, or private lands, so long as the undertaking may affect historic properties of religious and cultural significance to a Native Hawaiian organization. Consultation should begin early in project planning and continue throughout the Section 106 process when properties of religious and cultural significance to Native Hawaiian organizations may be affected.

The organization of this section of the handbook corresponds with the Section 106 review process's four steps of initiation, identification, assessment, and resolution.

A. Initiation of the Section 106 Process

1) How would I know if historic properties of traditional religious and cultural significance to Native Hawaiian organizations may be affected by the proposed undertaking?

Unless such properties have already been identified and the information is readily available, you probably will not know in advance. As with any undertaking that might affect historic properties, you must determine whether the proposed undertaking is generically the kind that might affect historic properties assuming such properties are present. Therefore, if the undertaking is the kind of action that might affect places such as archaeological sites, burial grounds, sacred landscapes or features, or ceremonial areas, then you must identify Native Hawaiian organizations that might attach significance to such places and invite them to participate in the process. Please note that this list of examples is not all-inclusive. It is through consultation with Native Hawaiian organizations themselves that such properties can be properly identified and evaluated.

2) How do I identify the Native Hawaiian organizations that must be invited to consult?

Identification of Native Hawaiian organizations that must be invited to consult could include a number of initiatives. For instance, it might be useful to check with other federal agencies and their cultural resource specialists for a list of Native Hawaiian organizations with whom they have consulted in past Section 106 reviews. The SHPO and the Office of Hawaiian Affairs might also be able to suggest which Native Hawaiian organizations to contact. Other sources for such information may include ethnographies, local histories, experts at local universities, oral accounts, and, of course, the Native Hawaiian organizations themselves. Do not hesitate to ask about others that might also be interested in participating in consultation. Finally, the Department of Interior's Office of Hawaiian Relations maintains a list of Native Hawaiian organizations at <https://www.doi.gov/hawaiian/NHOL>.

It may also be helpful to publish notices in local newspapers about the initiation of the Section 106 review process and the opportunity for Native Hawaiian organizations to participate in the consultation. For major or controversial projects, it might be advisable to work with the Office of Hawaiian Affairs to include information in its radio programs.

Keep in mind that identification of Native Hawaiian organizations with ancestral connections to an area is not a "one stop shopping" endeavor in which any single source can be depended upon to fulfill the agency's legal responsibilities. Agency officials should bear in mind that while Internet sources are convenient and can be useful, their informational content may be incomplete.

Once the agency has identified Native Hawaiian organizations that may attach religious and cultural

significance to any historic properties that may exist in the APE, the agency must invite them to consult.

Finally, it is important to remember that documentary or other sources of information that do not appear to support a Native Hawaiian organization's assertions should not be used to deny the organization the opportunity to participate in consultation. A common misunderstanding is that a Native Hawaiian organization needs to document its ties to historic properties in the area of the undertaking. Instead, the NHPA requires agencies to consult with any Native Hawaiian organization that attaches religious and cultural significance to a historic property. It stands to reason that the best source for determining what historic properties have significance for a Native Hawaiian organization would be the experts designated by the Native Hawaiian organization to determine its own interest. Such experts might include elders, traditional practitioners, or Native Hawaiian historians. The Native Hawaiian organization will designate the appropriate representative(s) to represent its interests in the Section 106 consultation process.

4) Who initiates the consultation process with a Native Hawaiian organization?

Consultation with a Native Hawaiian organization should be initiated by the agency official⁷ through a letter. It is helpful to follow up such correspondence with direct telephone communication to ensure the letter has been received.

If the agency official has correspondence from the Native Hawaiian organization designating a person or position within the organization to act on its behalf in the Section 106 process, the agency may initiate consultation accordingly. It is good practice, in this instance, to send a copy of all correspondence to the organization's leadership as well.

5) Can applicants for federal permits or contractors hired by the agency initiate and carry out Native Hawaiian organization consultation?

The Section 106 regulations at 36 CFR Section 800.2(c)(4) allow federal agencies to authorize an applicant or group of applicants to initiate consultation with the SHPO and other consulting parties. However, this is a formal authorization and requires notification from the federal agency to the SHPO. The federal agency remains responsible for all findings and determinations charged to the agency in the review process.

The Section 106 regulations allow for federal agencies to use the services of consultants or designees to prepare information, analyses, and recommendations, but not to initiate and carry out consultation.

6) What are the consultation responsibilities for undertakings that involve more than one federal agency?

The Section 106 regulations at 36 CFR Section 800.2 (a)(2) provide that, if more than one federal agency is involved in an undertaking, some or all of the agencies may designate a lead federal agency who will act on their behalf to fulfill their collective responsibilities under Section 106, including consultation with Native Hawaiian organizations. Those federal agencies that do not designate a lead agency remain individually responsible for their Section 106 compliance; thus, they each would need to initiate and carry out Section 106 consultation with Native Hawaiian organizations for the undertaking.

B. Identification of Historic Properties

⁷ As defined in Section 800.2(a) of the ACHP regulations, an agency official is one who has jurisdiction over the undertaking and takes legal and financial responsibility for Section 106 compliance.

1) Does the federal agency consult with Native Hawaiian organizations to carry out identification and evaluation of historic properties?

Yes, the agency consults with Native Hawaiian organizations to plan and carry out identification efforts and to evaluate the National Register eligibility of identified properties for proposed undertakings.

Many agencies assume that agency or contract archaeologists can identify which properties are of significance to Native Hawaiian organizations when they conduct archaeological surveys. However, unless an archeologist has been specifically authorized by a Native Hawaiian organization to speak on its behalf on the subject, it should not be assumed that the archaeologist possesses the appropriate expertise to determine what properties are or are not of significance to a Native Hawaiian organization. The appropriate individual to carry out such a determination is the representative designated by the Native Hawaiian organization for this purpose. Identification efforts may include site visits to assist in identifying these types of properties.

The Section 106 regulations state that the agency official shall acknowledge that Native Hawaiian organizations possess special expertise in assessing the National Register eligibility of historic properties that may possess religious and cultural significance to them (36 CFR § 800.4(c)(1)).

The agency must provide Native Hawaiian organizations with the same information that is provided to the SHPO during consultation, including information on buildings and other standing structures that may be affected by the proposed undertaking. A federal agency should not presume to know what is of significance to a particular Native Hawaiian organization.

2) How can I identify historic properties that may possess traditional religious and cultural significance to Native Hawaiian organizations and determine their National Register eligibility?

The identification of those historic properties that are of traditional religious and cultural significance to a Native Hawaiian organization must be made by that Native Hawaiian organization's designated representative as part of the Section 106 consultation process.

The National Register eligibility of such places is determined in the same manner as any potentially eligible property, by applying the criteria of eligibility.

3) What are Traditional Cultural Properties?

The term "Traditional Cultural Property" (TCP) is used in the National Park Services (NPS) Bulletin 38, entitled "*Guidelines for Evaluating and Documenting Traditional Cultural Properties*."⁸ That bulletin explains how to identify a property "that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that a) are rooted in that community's history, and b) are important in maintaining the continuing cultural identity of the community." For a TCP to be found eligible for the National Register, it must meet the existing National Register criteria for eligibility as a building, site, structure, object, or district. TCPs are defined only in NPS guidance and are not referenced in any statute or regulation, and **refer to places of importance to any community, not just to Native Hawaiian organizations**. Therefore, this terminology may be used when an agency is considering whether any property is eligible for the National Register.

Within the Section 106 process, the appropriate terminology for National Register listed or eligible sites of importance to Native Hawaiian organizations is "**historic property of religious and cultural**

⁸ Available at <https://www.nps.gov/subjects/nationalregister/upload/NRB38-Compleweb.pdf>

significance to Native Hawaiian organization.” Unlike the term TCP, this phrase appears in the NHPA and the Section 106 regulations. **It applies (strictly) to Native Hawaiian sites, unlike the term TCP.** Furthermore, Section 101(d)(6)(A) of the NHPA reminds agencies that properties of religious and cultural significance to Native Hawaiian organizations may be eligible for the National Register. Thus, it is not necessary to use the term TCP when considering whether a site with significance to a Native Hawaiian organization is eligible for the National Register as part of the Section 106 process. The NPS Bulletin 38 guidelines are helpful, however, in providing an overview of how National Register criteria are applied.

Another issue with the term TCP is that Bulletin 38 has sometimes been interpreted as requiring a Native Hawaiian organization to demonstrate continual use of a site in order for it to be considered a TCP in accordance with Bulletin 38. This could be problematic in that Native Hawaiian use of a historic property may be dictated by cyclical religious or cultural timeframes that do not comport with mainstream conceptions of “continuous” use; while in other cases, Native Hawaiian organizations may have been denied access to historic properties of religious and cultural significance to them. This is particularly true for historic properties located within military installations or on private property. It is important to note that under the NHPA and the Section 106 regulations, the determination of a historic property’s religious and cultural significance to a Native Hawaiian organization is **not** tied to continual or physical use of the property. Also, continual use is not a requirement for National Register eligibility.

4) What procedures should be followed if a Native Hawaiian organization does not want to divulge information to the federal agency regarding places of traditional religious and cultural significance?

Native Hawaiian organizations may have internal prohibitions against or cultural protocols about the disclosure of certain information about traditional religious and cultural properties. The ACHP’s regulations at 36 CFR Section 800.4(b)(i) state, in part, that “[t]he agency official shall take into account any confidentiality concerns raised by ... Native Hawaiian organizations during the identification process.”

The NHPA and the Section 106 regulations also provide a vehicle for protecting information that a Native Hawaiian organization has disclosed for the purpose of identification and evaluation in the Section 106 process. Section 304 of the NHPA (16 U.S.C. 470w-3(a)) and the regulations at 36 CFR Section 800.11(c)(1) provide that an agency, after consultation with the Secretary of the Interior, “*shall* withhold from disclosure to the public” information about the location, character, or ownership of a historic property when the agency and the Secretary determine that the disclosure of such information may cause a significant invasion of privacy; risk harm to the historic property; or, impede the use of a traditional religious site by practitioners. After such a determination, the Secretary of the Interior will determine who, if anyone, may have access to the information for purposes of the NHPA.

One important caveat: the Section 304 confidentiality provisions only apply to properties that have been determined eligible for the National Register. Thus, it is possible that information disclosed prior to an eligibility determination may not be protected. Therefore, the ACHP suggests that agencies and Native Hawaiian organizations contact National Register staff for guidance regarding the amount of information and detail needed to make a determination of eligibility when such information may be at risk of disclosure. It may be possible for a Native Hawaiian organization to share just enough information for the agency to identify the existence of a site and make a determination of eligibility without compromising the site or the Native Hawaiian organization’s beliefs. Such information might include general aspects of the historic property’s attributes, i.e., that an important yearly ceremony takes place in a certain general location, that quiet is required in an area where spirits reside, that visual impacts will impede the ability to properly perform a required ritual, or that important ceremonial harvesting activities must occur at a particular place, time, or under certain conditions. However, if there are questions about the adequacy of

such information in making determinations of eligibility, the National Register staff should be consulted.

Issues of confidentiality and sensitivity of information require flexibility and cooperation among the consulting parties. There may be situations where a Native Hawaiian organization is only willing to share information with the federal agency and not with the other non-federal consulting parties. This can challenge the traditional Section 106 process where the federal agency also consults with the SHPO to determine the National Register eligibility of properties. In such cases, it is recommended that the agency promptly talk with the ACHP or the National Register staff about how to resolve such a situation.

5) Is the federal agency required to verify a Native Hawaiian organization's determination of significance with archaeological or ethnographic evidence before making a National Register eligibility determination?

No. The agency is not required to verify a Native Hawaiian organization's determination that a historic property is of religious and cultural significance to it. However, the fact that a property may be of religious and cultural significance to a Native Hawaiian organization does not necessarily mean that the property is eligible for the National Register. The ACHP regulations at 36 CFR 800.4(c)(1) do state, in part, that "[t]he agency official shall acknowledge that Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them." Additionally, traditional knowledge and oral histories are sources of information which federal agencies should consider in assessing the National Register eligibility of properties. For additional guidance on making eligibility determinations, the agency should consult with the staff of the National Register.⁹

6) Does the federal agency need to obtain a Native Hawaiian organization's concurrence with the agency's determination of National Register eligibility?

No. The agency does not need to obtain a Native Hawaiian organization's concurrence with eligibility determinations. The agency only needs the concurrence of the SHPO for a determination and, absent such concurrence, the matter goes to the Keeper of the National Register for final resolution. The federal agency must acknowledge, however, that Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may be of significance to them, as required in the Section 106 regulations at 36 CFR Section 800.4(c)(1).

Also, if a Native Hawaiian organization disagrees with the federal agency's determination of eligibility, the Native Hawaiian organization may, per the Section 106 regulations at 36 CFR 800.4(c)(2), ask the ACHP to request that the federal agency obtain a formal eligibility determination from the Keeper of the National Register.

7) Once the required identification and evaluation efforts are completed, does the federal agency need to consult with a Native Hawaiian organization in reaching a finding that there are no historic properties that will be affected by the undertaking, or that there are historic properties present but the undertaking will have no effect on them?

Despite the requirements for Native Hawaiian organization consultation up to this point in the process, the agency does not have to consult with a Native Hawaiian organization in reaching a finding that there are no historic properties present, or that the proposed undertaking will not affect an identified historic property. However, the agency must provide notification and documentation supporting its finding on

⁹ Contact information for National Register headquarters in Washington, D.C., available at <https://www.nps.gov/subjects/nationalregister/index.htm>

these questions to any consulting Native Hawaiian organization.

If a consulting Native Hawaiian organization disagrees with the agency's finding, it should immediately contact the ACHP and request that the ACHP object to the finding, per 36 CFR 800.4(d)(1)(iii). If, upon the review of the finding, the ACHP also objects to the finding, the ACHP may provide its opinion to the agency official, and, if the ACHP determines the issue warrants it, to the head of the agency. The regulations stipulate that if the ACHP wants to object to a no historic properties affected finding on its own initiative (as opposed to in response to a SHPO unresolved objection), it must do so within 30 days of the agency's issuance of that finding.

C. Assessment of Adverse Effects

1) Which parties does the federal agency consult with to apply the criteria of adverse effect to historic properties within the APE?

The agency consults with the SHPO and Native Hawaiian organizations in applying the criteria of adverse effect to historic properties within the APE. Again, federal agencies must recognize the special expertise of Native Hawaiian organizations in assessing the eligibility of properties of religious and cultural significance to them per 36 CFR 800.4(c)(1), and 36 CFR 800.5(a) requires that agencies apply the criteria of adverse effect in consultation with Native Hawaiian organizations. Therefore, in assessing how a proposed undertaking might affect historic properties of religious and cultural significance to Native Hawaiian organizations, federal agencies need to consider the views of those Native Hawaiian organizations.

2) When proposing a finding of "no adverse effect," does the federal agency consult with Native Hawaiian organizations?

No. The agency consults with the SHPO in proposing a finding of "no adverse effect," but notifies consulting parties such as Native Hawaiian organizations, and provides them with documentation supporting that finding. The federal agency is encouraged, but not required, to seek the concurrence of Native Hawaiian organizations that attach religious and cultural significance to the historic property subject to the finding.

3) What happens if a Native Hawaiian organization disagrees with a finding of "no adverse effect"?

If a consulting Native Hawaiian organization disagrees with a proposed agency finding of "no adverse effect," it must specify the reasons for its objection in writing within 30 days of receipt of the agency's issuance of the proposed finding. Once a timely written objection is received, the agency must either consult with the objecting party to resolve the disagreement or request ACHP review of the "no adverse effect" finding, per 36 CFR 800.5(c)(2)(i). The agency must concurrently notify all other consulting parties that it has requested ACHP review of the finding.

Consulting Native Hawaiian organizations can make a direct request to the ACHP to review the finding, specifying, in writing and within the 30 day review period, the reasons for its objection, per 36 CFR 800.5(c)(2)(iii).

After review of the objection, the ACHP may provide its opinion to the agency official, and, if the ACHP determines the issue warrants it, to the head of the agency. The regulations stipulate that if the ACHP wants to object to a finding on its own initiative (as opposed to in response to a consulting party unresolved objection), it must do so within 30 days of receipt of the agency's issuance of that finding.

D. Resolution of Adverse Effects

1) Which parties does the federal agency consult with to develop and evaluate alternatives or modifications to the undertakings to avoid, minimize, or mitigate adverse effects?

The agency consults with the SHPO, Native Hawaiian organizations, and other consulting parties at this phase of the Section 106 process. The agency must provide project documentation to all consulting parties and invite the ACHP into consultation. Any consulting party may request ACHP participation in consultation to facilitate the resolution of adverse effects.

In fact, the Section 106 regulations at 36 CFR Section 800.2(b) stipulate that the ACHP may enter into the consultation at any point in the Section 106 process without invitation when it determines that its involvement is necessary to ensure that the purposes of Section 106 are met. As specified in Appendix A to 36 CFR Part 800, the ACHP may elect to enter the consultation if, among other things, an undertaking presents issues of concern to Native Hawaiian organizations.

2) What happens if agreement is reached on how to resolve adverse effects?

If agreement is reached, the agency, SHPO and consulting parties, including Native Hawaiian organizations, develop a Section 106 memorandum of agreement (MOA) or programmatic agreement (PA) outlining how the adverse effects will be addressed.

In order to go into effect, the agreement must be signed by the agency, SHPO, and the ACHP if it is participating in the consultation.

3) Is the federal agency obligated to invite a Native Hawaiian organization to be a signatory or a concurring party to an MOA or PA?

No. The agency may, but is not required, to invite a Native Hawaiian organization to become a signatory or concurring party. A signatory to an MOA or PA possesses the same rights with regard to seeking amendments to or terminating the agreement as all other signatories, which include the agency official, the SHPO, and the ACHP, if participating. Those that sign as a concurring party do not have such rights to amend or terminate the MOA or PA. Refusal by Native Hawaiian organization to become a signatory or concurring party to an MOA or PA, however, does not invalidate it. Certainly, agencies are encouraged to invite Native Hawaiian organizations that attach religious and cultural significance to affected historic properties to sign the agreement. If a Native Hawaiian organization is assuming review or other responsibilities under the MOA or PA, the agency should consider inviting the Native Hawaiian organization to become a signatory.

4) What happens if agreement is not reached on how to resolve adverse effects?

If agreement is not reached, the agency, the SHPO, or the ACHP (if participating), may terminate consultation. Other consulting parties, including Native Hawaiian organizations, may decline to participate, but they cannot terminate consultation. After consultation is terminated, the ACHP prepares its formal comments to the head of the agency, who must consider and respond to the ACHP's comments before reaching a final decision on the undertaking. Per the Section 106 regulations at 36 CFR Section 800.7 (c), the ACHP must provide an opportunity for the agency, all consulting parties, and the public to provide their views to the ACHP during the time in which the comments are being developed. When the ACHP issues comments, it means the ACHP membership issues the comments, not the ACHP staff. In addition to providing the comments to the head of the agency, the ACHP provides copies of those comments to each of the consulting parties. Once the head of the agency has received the ACHP's

comments, he or she is required to prepare a summary of his or her final decision regarding the proposed undertaking that contains both the rationale for its decision as well as evidence that it had considered the ACHP's comments when making that decision. In addition, the agency must provide copies of this summary to all consulting parties.

VI. Consultation Tools

While the Section 106 regulations direct agencies to consult with Native Hawaiian organizations on proposed undertakings, the regulations do not offer guidance on how to carry out such consultation. The following are some examples of ways in which consultation could be achieved and improved.

Agreements

The Section 106 regulations at 36 CFR Section 800.2(c)(2)(ii)(E) provide for agreements between federal agencies and Native Hawaiian organizations that tailor how consultation will be carried out. Such agreements are not project-specific but, instead, are more general and are focused on the relationship between an agency and a Native Hawaiian organization. An agreement can cover all aspects of the consultation process and could grant a Native Hawaiian organization additional rights to participate or concur in agency decisions in the Section 106 process beyond those specified in the regulations. The only restriction on the scope of such agreements is that the role of other parties in the process may not be modified without their consent.

Such agreements can be a means not only to ensure that consultation would be carried out to the satisfaction of both parties but also as a workload management tool. Agreements can outline the geographical areas within which a Native Hawaiian organization has an interest.

The negotiation process to develop an agreement with a Native Hawaiian organization does not require participation by any other parties outside of the agency (there may be other entities within the agency, such as the agency's office of legal counsel, that must participate). The only requirements for such agreements under the ACHP's regulations are that:

- the role of other parties is not modified without their consent; and
- the agreement is filed with both the ACHP and the SHPO.

Summits, Listening Sessions, and Meetings

Some agencies have hosted summits with Indian tribes and continue to do so on a regular basis. These meetings provide a means for agencies to share information about proposed undertakings and for Indian tribes to voice their views and talk with agency personnel. They also serve to develop trust and build relationships. Federal agencies in Hawaii could certainly host summits with Native Hawaiian organizations and change the dynamic from one of consultation on specific projects to programmatic discussions.

Listening sessions are another very useful tool for improving the relationship between agencies and Native Hawaiian organizations. The ACHP has hosted listening sessions in Hawaii and based, in part, on the feedback it received, decided that a policy regarding its interaction with Native Hawaiian organizations was called for.

Some agencies also host annual or regular meetings with Indian tribes to ensure that the consultation relationships are working and to address any outstanding issues. These gatherings are separate from Section 106 consultation meetings. They provide a forum for airing more general concerns, a means for recharging the relationship, and an opportunity to meet new agency personnel and tribal representatives. Again, these kinds of meetings would be especially helpful in Hawaii.

Guidance Materials and Training

Training is extremely useful in that it ensures that both federal agencies and Native Hawaiian organizations have a common understanding of legal requirements, organizational structures, decision-making, and other important mechanics of the consultation relationship. Training can also address cultural issues to help foster greater mutual understanding. Some agencies have hosted joint training sessions, while others require new personnel to receive training specific to their new duties. For instance, the ACHP has an internal requirement to train all staff and members regarding tribal and Native Hawaiian consultation within the Section 106 process.

VII. Principles and Tips for Successful Consultation

The key to success in any consultation relationship is building trust, having common goals, and remaining flexible. There is no “one size fits all” model for consultation with Native Hawaiian organizations. This final section of the Native Hawaiian Consultation Handbook provides helpful tips on how to put them into practice.

Respect is Essential

- Become aware of and respect Native Hawaiian conventions and protocols. Understand that they may vary from island to island. Do not take photographs without obtaining permission first.
- Behavior you may perceive as normal may be insulting or offensive to others. Consider Native Hawaiian perspectives and values. When in doubt, ask respectfully.
- Members of Native Hawaiian organizations may have many other duties and obligations. In fact, unlike their tribal counterparts, Native Hawaiians may not hold paid positions in a Native Hawaiian organization. They may have full-time jobs that make it challenging to participate in meetings held during the day, for example. Look for ways to work cooperatively, because this is your undertaking and consultation is your responsibility.
- Be sensitive to time and costs. A Native Hawaiian organization’s lack of human and financial resources may impede its representatives’ ability to respond quickly or to participate in meetings. Do not demand that everyone adhere to your schedule and deadlines. Instead, explain why your deadline exists, who set it, and why it is important. Make an effort to facilitate and support consultation with available agency resources. Above all, strive to be as flexible as possible.
- Do not voice your opinion on what is best for the Native Hawaiian organization; that is for its members to determine.
- Be mindful of the significance of history. The history of U.S. government relations with Native Hawaiian organizations may color current perceptions and attitudes and cause distrust or suspicion. Take the time to learn about the unique history of Hawaii and Native Hawaiians.

Communication is Key

- Communicate with Native Hawaiian organization representatives directly whenever possible—do not rely solely on letters. Follow up written correspondence by phone or in person. Create documentation of your communications, such as notes on the content of discussions, keep phone logs, etc.
- Provide project information and timelines for the project as early in consultation as possible. Clarify any constraints or additional requirements which may impact the Section 106 process.
- Do not expect quick answers. Native Hawaiian organization representatives may need time to consult with others in the organization. Make sure you understand their timelines for decision-making.
- Do not assume silence means concurrence; it could signal disagreement. Always verify views with the official Native Hawaiian organization representative.
- Always ask the representatives of Native Hawaiian organizations about their preferred way of doing business and any specific protocols for meetings. Be aware that their cultural norms may be different from yours.
- Be mindful of appropriate behaviors. Always show deference toward elders and allow them plenty of time to speak first. Do not interrupt or raise your voice. Learn by observation and by talking to others. Again, when in doubt, ask respectfully.

Consultation: Early and Often

- Make sure you identify and initiate consultation with Native Hawaiian organizations at the *start* of the planning process for your agency's undertaking.
- Suggest a process for consultation and discuss it with the Native Hawaiian organizations. Collaborate in a way that accommodates the protocols and schedules of Native Hawaiian organizations. The ACHP regulations at 36 CFR Section 800.2(c)(2)(ii)(E) provide for agreements with Native Hawaiian organizations that set out procedures for Section 106 consultation and can address concerns of Native Hawaiian organizations about confidentiality of information.
- Consider establishing an on-going working group that can provide continuity for future undertakings by your agency.
- Focus on partnerships rather than on project-by-project coordination.
- Remember to document all correspondence, follow-up telephone calls, consultation meetings and visits to project sites. Be sure to include the content of your communications in your documentation.
- Ask Native Hawaiian organizations representatives to keep you up-to-date on any changes to postal or email addresses and contact information for new leadership.

Effective Meetings Are A Primary Component of Successful Consultation

- Consider requests from Native Hawaiian Organizations to meet to discuss the project or address concerns. Some Native Hawaiian Organizations might request individual meetings to discuss issues privately with the federal agency.
- Offer to go on-site with traditional authorities. Some people may be uncomfortable relying solely on maps, and site visits may stimulate consideration of alternatives.
- Do not create expectations or make commitments that you are unable or unwilling to fulfill. Before entering into consultation, be certain that what you are negotiating is supported by the Office of General Counsel or Solicitor of your agency, and anyone else who will need to review and approve your position.
- Do not set your own meeting agenda or logistics without consulting with Native Hawaiian organization representatives to learn what they expect the process and substance to be. Native Hawaiian organizations may have their own ways of conducting meetings so be respectful of customs and protocols.
- Inform Native Hawaiian organization representatives in advance of the meeting's goal and what needs to be accomplished in the time you have, so that participants can stay focused. Like you, Native Hawaiian organizations representatives are there to work and accomplish results.
- Give plenty of notice beforehand so that Native Hawaiian organization representatives have adequate time to prepare. Provide participants with a list of all attendees, an agenda, and most importantly, complete project documentation.
- Speak to Native Hawaiian organization representatives by phone beforehand so that you know who will be attending the meeting. Allow Native Hawaiian organizations to send as many representatives as they wish, but explain any limitations that your agency may have with funding travel.
- Check if anyone has special needs. Some elders may need special accommodations.
- Offer the Native Hawaiian organization participants the opportunity to make an opening or welcoming statement.
- Make sure you invite Native Hawaiian organization representatives to sit at the table with you, and introduce all participants with their proper titles. Check with your Native Hawaiian organization contact beforehand so you know if certain officials or elders should be introduced and acknowledged first.
- Review your agency's mission and operations at the start of the meeting. Do not assume that everyone knows how your agency functions or is familiar with all of the programs it oversees.
- Take accurate notes during the meeting, or, ***if the Native Hawaiian organization representatives agree in advance***, arrange for meetings to be recorded (it is still advisable to take notes to avoid problems should a recording be lost or damaged). It is important to document not only that you have consulted, but the substance of the meeting and the views and concerns expressed by the Native Hawaiian organization, as well. Be sensitive to the issue of confidentiality, which may require that you switch the recorder off, or to omit certain sensitive information from your notes

if the Native Hawaiian organization representatives so request. Documenting meeting content ensures that participants can later review and correct any inaccuracies, and also provides the agency with a solid consultation record.

- Be prepared on the issues and be open to Native Hawaiian organization perspectives.

Conclusion

We hope this handbook has been helpful. If needed, you may obtain further assistance from the ACHP in understanding and interpreting the requirements of Section 106, including Native Hawaiian consultation. For general information, please visit the ACHP web site at <https://www.achp.gov/>.