

STATE OF HAWAI'I
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

EXCUSED:

Trustee Leina'ala Ahu Isa

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

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

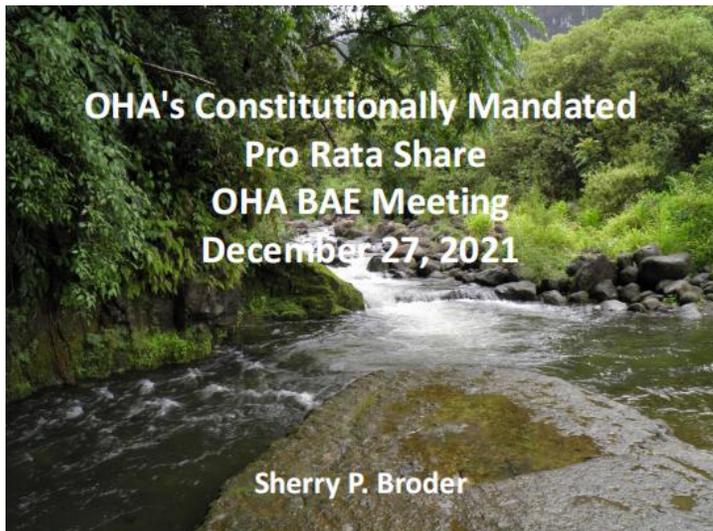
Chair Akaka: I wanted to make note that members the Committee folder was distributed within the 72 hour deadline for Board materials, thereby requiring a waiver of the 72 hour deadline for Board materials.

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.



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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).*

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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.



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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)



Honolulu Harbor



Kewalo Basin



KA'ULU RESIDENTIAL COMMUNITY

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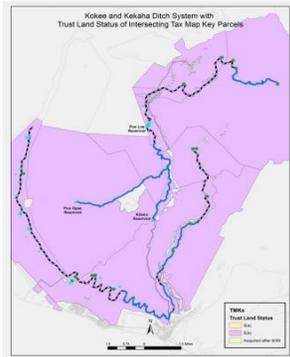
So these are just some examples of Public Land Trust, so here are the airports, reef runway which is built on submerged land it's also part of the Public Land Trust, Hilo International Airport. Harbors and housing, also part of the Public Land Trust. These are all the big revenue generators. Hawai'i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



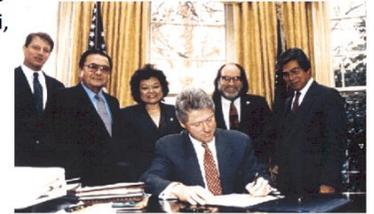
Kalepa Lands



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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.

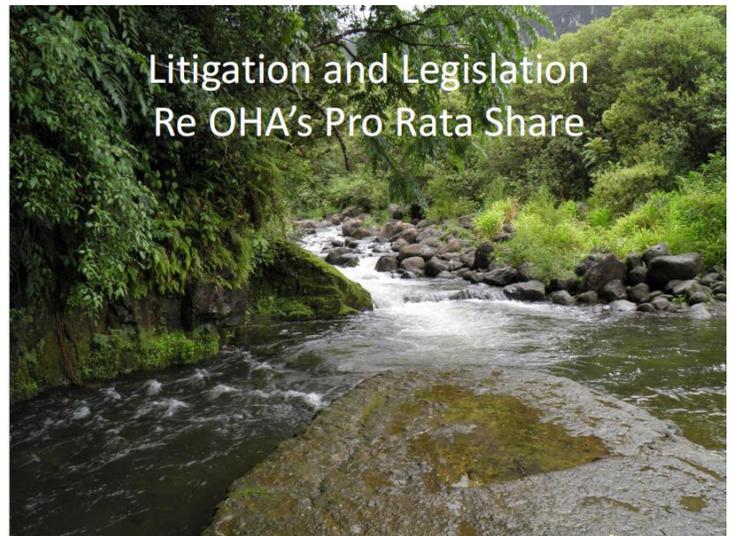
Apology Resolution, Public Law 103-150 (1993)

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 Heeley 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.

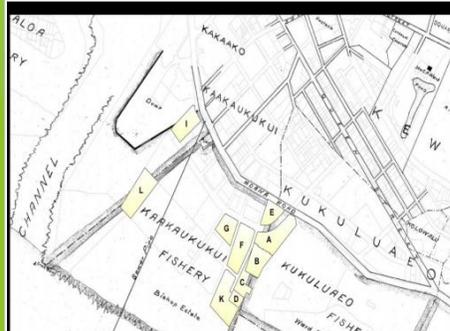
DOT-Airports Revenue Under Lingle Administration (2002-2010)

- ▶ 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

- I. 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).
- II. 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 Heely 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.

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

Sections 3 and 4
Procedures for quarterly transfers of PLT receipts and how to adjust amounts transferred to OHA



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.

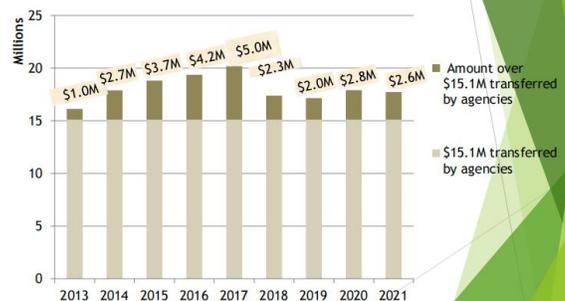
Back Due Lump Sum - \$638 Million

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.

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**.

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

11:23 a.m.

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.

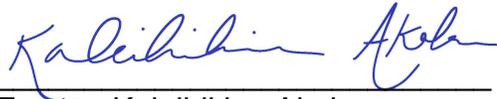
Chair Akaka adjourns the BAE meeting at **11:24 a.m.**

Respectfully submitted,

A handwritten signature in black ink that reads "Brandon R. Mitsuda". The signature is written in a cursive style with a long horizontal stroke extending to the right.

Brandon Mitsuda Trustee Aide
Committee on Beneficiary Advocacy and Empowerment

As approved by the Committee on Beneficiary Advocacy and Empowerment (BAE) on 1/25/22.

A handwritten signature in blue ink that reads "Kaleihikina Akaka". The signature is written in a cursive style with a long horizontal stroke extending to the right.

Trustee Kaleihikina Akaka
Chair
Committee on Beneficiary Advocacy and Empowerment